

Promoting Effective Legal Strategies to Combat Trafficking



Photo courtesy: The Bangkok Post

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“The problem of trafficking in women is not only a result of a complex of social, economic and political factors and a reflection of discrimination against women embedded in social and cultural roots, but it is also an act of violence against women and a crime against humanity.”¹

Trafficking in persons, the vast majority of whom are women, is most likely to occur through the process of labour migration and is often not recognized by receiving countries as a violation of human rights. Rather it is addressed as illegal migration and action is taken against trafficked persons for illegal entry. The phenomenon of trafficking in persons requires serious consideration as its incidence is likely to increase as globalization intensifies and as the development policies of poorer nations fail to provide viable and sustainable economic options for their citizens.

Women are at greater risk because of a combination of poverty and factors related to their subordinated position as women. What is fact is that trafficking takes place for a variety of reasons such as prostitution, forced labour or forced marriage. What has got to be clearly recognized however is that not all women are trafficked into prostitution and not all women who migrate for purposes of prostitution are victims of trafficking.

Legal remedies available at the national level in some countries are applicable to trafficking or to elements such as migration that are associated with trafficking or to the components of the crime involved in the process of trafficking such as kidnapping, forced prostitution and slavery, which are punishable.

Direct legal remedies to address trafficking are also available or being considered at international levels. For example, the South Asian Association for Regional Cooperation (SAARC) has a Convention on Preventing and Combating Trafficking in Women

and Children and the United Nations Commission on Crime prevention has developed a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

This paper intends to outline the essential elements of legal strategies to address the problem of trafficking. In so doing some examples and assessment of existing legal strategies will be made. The following issues are raised as a basis for discussion.

I UNDERLYING CAUSES OF TRAFFICKING: THE ISSUE OF DISCRIMINATION

Strategies to address the problem of trafficking have to be based on an understanding of the causes underlying trafficking and factors that make trafficking possible. This is essential so that holistic and long-term measures for prevention as well as short-term measures for protection of victims and penalizing of traffickers can be adopted to effectively address the problem.

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The Foundation for Women and The Global Alliance against Traffic in Women (GAATW), both based in Thailand, have mentioned the following factors and circumstances that are at the root of trafficking.

1 Causes of female labour migration women entering the sex industry	2 Factors that facilitate trafficking: vulnerable circumstances of women
<ul style="list-style-type: none"> • development of urban-centred industrial and service sectors, leaving rural sectors underdeveloped • traditional ideology and roles of women that emphasize familial responsibility for women • limited employment opportunities and gendered division of labour • demand for services in the sex industry • double standards in society that value chastity in women • violence in the family and failed marriages 	<ul style="list-style-type: none"> • lack of social support for women in difficult circumstances • difficulties of obtaining contracts through official channels for women • lack of information and understanding about the risks • complicity of government officials

The CEDAW Committee¹ views trafficking as a form of discrimination. Based on Article 1 of the CEDAW Convention that defines discrimination as any act of “restriction, exclusion or distinction” that denies women the exercise of any right, the CEDAW Committee in its General Recommendation 19, presents the view that as many rights of women are violated in the process of being trafficked that it is indeed a form of discrimination. Because of this view, it is possible to use the full range of the provisions of the CEDAW Convention, depending on the identification of the rights violated, to address the problem of trafficking holistically and provide remedies for victims.

This approach enables States Parties to determine the actions by which they can fulfil their obligations under Article 6 of the CEDAW Convention which requires them “to take measures to suppress all forms of trafficking”.

In fact, the CEDAW Committee is of the view not only that trafficking in women is a form of discrimination but also that discrimination against women generally has made women vulnerable to trafficking. So taking legal and other measures to eliminate all forms of discrimination against women would be the first step to prevent trafficking in women.

II HUMAN RIGHTS PRINCIPLES FOR ANTI-TRAFFICKING LEGISLATION

1 Focusing on protecting human rights, especially of women and children

The guiding principle of and the human rights approach to any effort to bring about a solution to this problem has to be that trafficked persons, especially women must be placed at the centre of such concern.

Any solution that is adopted should not result in further violation of their rights. Solutions must be empowering.

2 Decriminalizing the victim

The trafficked woman must be viewed as a victim and the fact that she may have violated immigration laws of the country in which she is trafficked should not be the focus of criminal law and attention. This is often the approach taken by officials in countries in which women find themselves as victims. Most foreign workers do not have legal status. When they are arrested, they are charged with illegal entry and put in a detention centre awaiting deportation.

Although many illegal migrants are victims of trafficking or they were not trafficked but had to

work in exploitative labour conditions and faced different forms of abuse and violence, there is usually no system to provide assistance and protection for them once arrested. This vulnerability to arrest and deportation just leads to greater victimization of women and makes them more vulnerable to exploitation by traffickers as the latter know that the women will not be offered protection by the policies and agents of the State.

3 Avoiding conflating trafficking with migration

Since trafficking takes place in the process of the movement of persons from their places of origin within their countries or across borders, such migration itself is seen as the cause of trafficking. This has been the case in Nepal where the Foreign Employment Act 1985 restricts the rights of women under the age of 35 to travel abroad to work unless accompanied by a male relative or only with the consent of a guardian.

This has resulted in the restriction of the movement of women leading to the violation of women’s rights to mobility, and a reduction in their job options. It further reinforces women’s dependency on male relatives and generally increases their vulnerability.

4 Need for a clear and realistic definition of trafficking

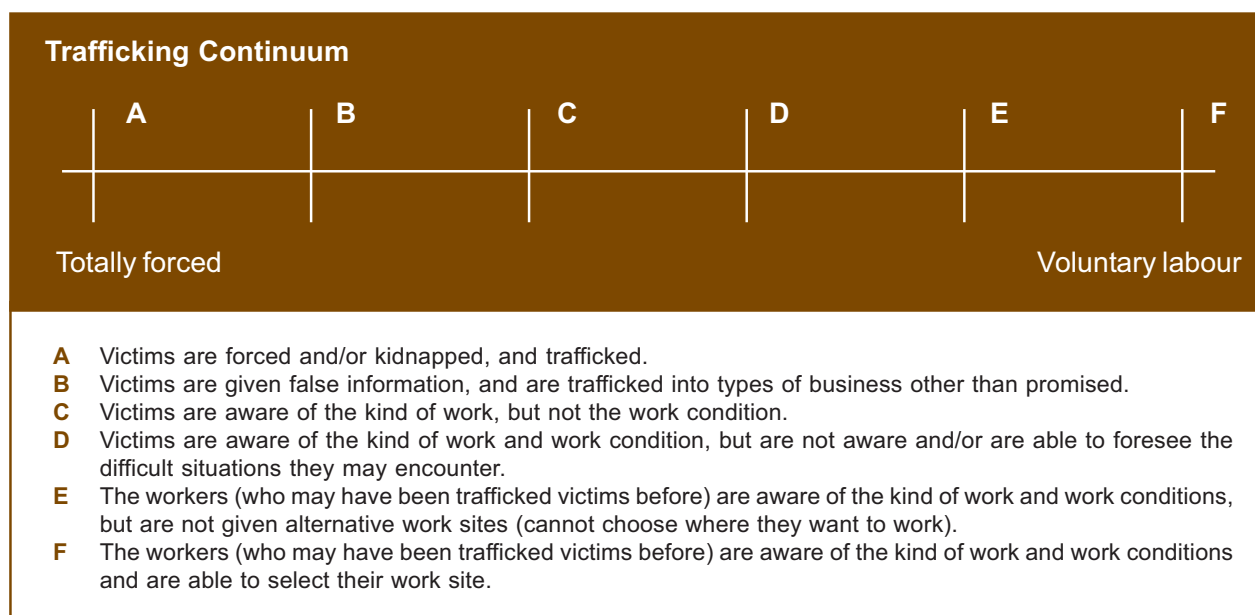
A clear and realistic definition of trafficking is important but still missing in the attempts to curb trafficking worldwide. The existing understanding of trafficking has tended to conflate trafficking with smuggling of migrants or with prostitution. The United Nations Commission on Crime Prevention has proposed a distinction between trafficking and migrant smuggling. The latter has been defined by this body to be “*the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.*”³ The first international definition of trafficking has also been produced by this body and is contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. In this protocol trafficking is defined as “*the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual ex-*

ploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁴

While this definition seems to be comprehensive and takes into consideration the actions of many parties who are responsible for transporting, harbouring or the receiving of trafficked persons, it seems to emphasize the criminalization of the process of movement of the trafficked person. The emphasis is better placed in the outcomes of trafficking when women may find themselves unwilling parties not only during the process of transportation but perhaps after they have been trafficked and placed in certain “jobs”. In fact they may have been willing parties during the process of movement and they may become victims of trafficking, their vulnerability being the result of illegal status and language difficulties, making them an easy prey for exploitation.

Women activists in Thailand have provided a different picture of the situation describing a continuum of contexts in the process of trafficking.

The context of trafficking – for different purposes – can be understood through a trafficking continuum as outlined by Dr. Kritiya Archavanitkul (1998).⁵ The continuum of contexts found below helps us cast the net wide and enable most of the affected women to benefit from the law:



5 Need for bilateral and multilateral agreements

Trafficking involves more than one country hence it is important that bilateral or multilateral agreements such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime are entered into. It is then imperative that according to Article 5 of the above protocol, domestic legislation and other measures are adopted to establish criminal offence regarding abusive brokerage practices, deception and coercion during the recruitment and transport process on the one hand, and the exploitative working and living conditions once at the destination on the other, as well as to provide protection and support to victims as committed to in the bilateral or multilateral agreements.

6 Addressing all violations comprehensively

“Trafficked women face different forms of human rights violations and discrimination at various stages and sites.

“**During the recruitment process**, there is usually a degree of deception involved: the women may not be told the truth about the kind of work they will do or the working and living conditions they will find.

“**During the process of transportation**, the women may face different forms of violence including rape. In many cases, they are given false documents to travel that make them vulnerable as illegal migrants and are subjected to prosecution under immigration laws.

“**At a transit or destination place**, the women also face different degrees of violence and exploitation. They may find themselves in a situation of debt-bondage, slavery i.e. being sold and resold, and are made to accept work in the conditions that they did not expect. In many cases, these conditions include poor and unhygienic working and living environment, confinement, long working hours and very low or no wages. In many cases, trafficked women are threatened about different

dangers that they or their family may face if they try to run away. Trafficked women are also vulnerable to sexual abuse by employers. In addition to the above conditions, for women who are forced into prostitution, most are denied rights to choose clients and conditions of selling sex as well as methods to prevent themselves from sexually transmitted diseases and HIV/AIDS.”⁶

7 Enumerating the legal obligation of receiving and sending country to protect the rights of the victim

The legal provisions in the agreements will set out different and to some extent common sets of obligations of receiving and sending countries. It would be essential for both sets of countries to have laws that criminalize brokerage practices, deception and coercion during the recruitment and transport process, as agents may be from both sides. Along with this, legal provisions should also provide for adequate victim protection and support, legal aid and information about rights. In the country of entry, provisions for various forms of social support such as ongoing income earning opportunities, housing, asylum, and potential for permanent stay is essential. The privacy of women must also have legal protection.

In countries like the Netherlands, it was reported at the CEDAW session in June 2000 that with regard to victims of trafficking in women, there were provisions for granting asylum and residence permits – possibly permanent ones on humanitarian grounds. Victims were given three months to decide whether they wished to press charges, during which time they could remain in the Netherlands and take advantage of financial, legal and other services. If the available evidence indicated that returning to the home country would be too dangerous, a permanent permit would be granted. Temporary resident permits were automatically granted within 24 hours of filing the complaint.

But there were flaws in the implementation of these laws. There is a lack of information among legal and other organizations on the types of protection available and women end up in hopeless asylum-seeking situations. The fact they are victims of trafficking is ignored or not recognized, and they do not get protection. No support is given to victims

to build a new future when investigations are on; they are in shelters but not granted work permits. Once the case is heard, they have to go home even if in danger of reprisal upon return – a condition that is difficult to prove in the courts of the Netherlands. It is hence not enough to have protective laws; the effect of the laws needs to be monitored.

Sending countries must undertake legal obligations for repatriation, and multi-sectoral programmes for reintegration into society which would include: health services, shelter, and building up of economic capability and for physical and psychological recovery. Such programmes need to be provided without coercion.

8 Giving special attention to ethnic minorities and stateless persons

Women of ethnic minorities or stateless women who fall victim to trafficking often face problems in returning home. In a detention centre in Taiwan, there were six Thai women and a child who had been there for three years. The women had been trafficked to Taiwan and forced into prostitution. The delay in their deportation was due to the fact that they were stateless, being descendants of refugees from China who had not been granted Thai citizenship. Similar situations have also been documented among Vietnamese women who are

arrested and detained in Thailand. The law must provide for special treatment for the most vulnerable groups.⁷

There must be provisions in agreements to establish co-operation between and among countries regarding sharing of information such as methods of transport of the trafficked persons, border controls and obligations placed on carriers to monitor and keep of the use of the carriers for trafficking of persons.

Finally there must also be provisions for training of all officials concerned.

9 Eliminating all forms of discrimination

Long-term and short-term measures for prevention should be a key focus. Discrimination against women in all its forms must be eliminated in countries of origin. In receiving countries, all laws and policies need to be examined to assess whether they contribute to the vulnerability of migrant women. For example, in the Netherlands, non-European Union migrants are not given permits to work legally as prostitutes, although more than half the prostitutes working in the Netherlands come from non-European Union countries. These women are more vulnerable to trafficking.

ENDNOTES

- 1 GAATW; Trafficking in Women in Thailand; Base line draft report prepared for the IRAW Asia Pacific Project – Facilitating the Fulfilment of State Obligation to Women's Equality.
- 2 The Expert UN Committee that monitors the compliance of States with their obligations under the Convention on the Elimination of All Forms of Discrimination against Women. (CEDAW Convention).
- 3 Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.
- 4 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; 2000.
- 5 GAATW; Op cit.
- 6 Ibid.
- 7 Ibid.