

From Bondage to Freedom:
AN ANALYSIS OF INTERNATIONAL LEGAL
REGIME ON HUMAN TRAFFICKING



Gunjan Kinnu

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Preface

International Human Trafficking has become a serious issue closely related to economic, social and demographic development for receiving and sending countries of the world. Human trafficking often quillified as modern day slavery is caused by human rights violations embedded in poverty, illiteracy, lack of access to education and means of production. Till a few years ago, trafficking was considered coterminous with prostitution or sex-trade. The fact, however, is that trafficking is carried for various other purposes too, such as domestic service, labour in small factories/establishments, begging, for the purposes of marriage, adoption, public sport, organ trade, etc. In fact, it has with the passage of time acquired altogether new dimensions in the wake of economic reforms brought forth by the process of globalization.

The growing international realization of the problem of trafficking and its ramifications has led to the coming into force of the present Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention Against Transnational Organised Crime 2000, with its wider and inclusive definition of trafficking. The definition clearly exemplies that trafficking in human beings is now not just confined to sexual exploitation but also covers other forms such as children trafficked to serve as domestic servants, or as labour in hazardous industries. Women and children, particularly those from marginalized sections and those from poor economic strata, are undoubtedly the most vulnerable.

Still there is much to be done. There is a need for a more holistic approach and cooperative actions among agencies to multiply in order to combat human trafficking and its inner complexities. The successful programmes for ending trafficking must involve both countries of origin as well as transit and destination countries, for genuine international cooperation.

From Bondage to Freedom - An Analysis of International Legal Regime on Human Trafficking covers the whole gamut of the problem of international human trafficking such as the dimension and magnitude of the problem, analysis of the conventions and protocols on human trafficking and the human rights framework required for combating it. Here I want to emphasize that human trafficking is the issue of human rights and should be dealt keeping this aspect in mind. We at the National Human Rights Commission are committed to working towards eliminating this scourge by way of direct action, research and advocacy. We hope that the Handbook would be a good reference material on the issue of trafficking from the point of view of both prevention and elimination.

Dr. Justice Shivaraj V. Patil

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First of all, I would like to express my heartfelt gratitude to Justice (Smt.) Sujata V. Manohar, the then Hon'ble Member and Focal Point on Human Rights of Women including Trafficking, NHRC under whose expert guidance this work has taken shape. The discussions I have had with her provided me with conceptual clarity and overall framework required for analysing the international legal regime on trafficking in persons. My sincere thanks to Dr. Justice A.S. Anand, Hon'ble Chairperson, NHRC and Dr. Justice Shivaraj V. Patil, Hon'ble Member and Focal Point on Trafficking in the Commission for agreeing to publish my work.

I thank Smt. S. Jalaja, the then Joint Secretary, NHRC for making my stay in the Commission very fruitful by involving me in various aspects of the working of the Commission. It is during these interactions that I developed my understanding on human rights. I would also like to thank Smt. Aruna Sharma, Joint Secretary, NHRC for taking the initiative of publishing this Handbook.

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Chapter 1

Introduction to Trafficking in Persons

A. Nature and Extent of Trafficking

Trafficking in persons especially women and children has become an important issue transcending borders, affecting countries all over the world. It is a growing phenomenon involving transnational organized crime syndicates. Women and children have been trafficked for prostitution, forced

marriage and other forms of sexual exploitation such as sex tourism, and pornography, as domestic workers,

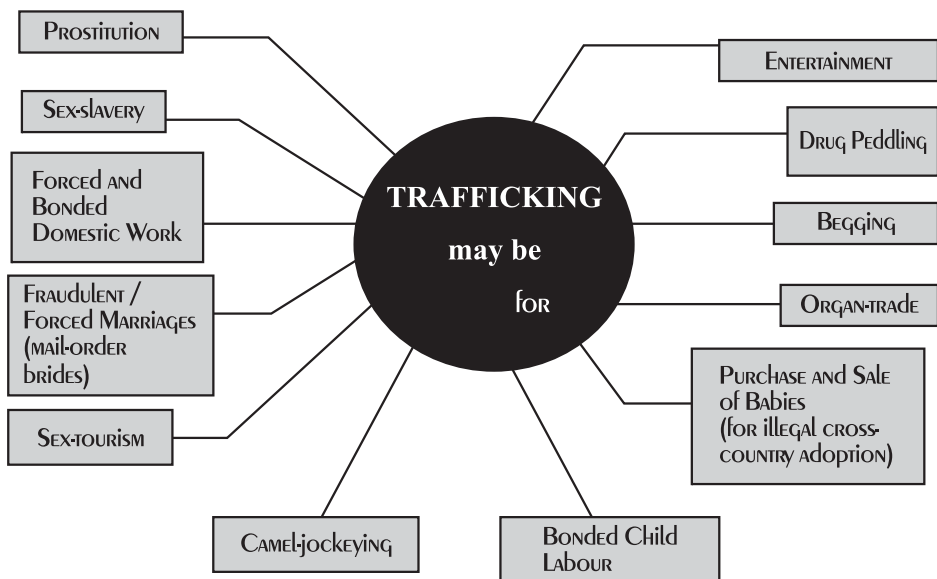
labourers in sweat shops and on construction sites, as beggars, as male order brides, as camel jockeys and for organ trade. The increasing use of new information technologies, in particular, the Internet, has altogether added a new dimension to the problem faced. Poverty and economic deprivation

– the gap between the rich and the poor within countries and between different regions has especially made women more vulnerable to trafficking. Lured by hope of an improvement in economic circumstances of them and their families, they are often unwittingly duped and coerced into exploitative slave-like situations. Trafficking, therefore, is regarded as a contemporary form of slavery and a gross violation of basic human rights of trafficked persons.

The extent of the problem can be seen in:

- its reach, all over the world,
- the increasing vulnerability of women and children to trafficking,
- the link between trafficking and migration,
- the involvement of transnational organized crime,
- the use of modern technology, particularly internet, to facilitate trafficking,
- the lopsided development programmes,
- the link between trafficking and HIV/AIDS,
- the unequal distribution of benefits of globalisation,
- the increasing number of persons trafficked particularly from Asia and Eastern Europe.

Trafficking is a highly complex process involving many actors – victims, survivors, their families, communities and other third parties that recruit, transport, harbour and use the labour of trafficked victims¹. Given its complex nature it has generally been found that trafficking is essentially a gender and age specific phenomenon affecting women and children rather than men.² There are undoubtedly instances of trafficking of men as well. However, trafficking in men in no way approximate the dimensions of trafficking in women and children. Men are generally smuggled or illegally transported, whereas women and children are trafficked. Further trafficking has to be seen as part of the process of international migration as trafficking involves movement of people. Lopsided globalization of the late twentieth century has added to the problem by freeing the movement of capital but restricting the movement of labour, by following restrictive migration policies. This has created extensive opportunities for illegal migration, networks and trafficking to flourish. Trafficking also poses a serious public health concerns. The victims of trafficking are most vulnerable to HIV / AIDS leading many organizations to address the trafficking issue while working on prevention of HIV / AIDS.



¹ Draft Asian Development Bank Report for **Regional Technical Assistance for Combating Trafficking in Women and Children in South Asia**, *Country Report of India*, March 2000, p.4.

² Jyoti Sanghera, *Trafficking of Women and Children in South Asia: Taking Stock and Moving Ahead*, project sponsored by the UNICEF and Save the Children Alliance, Delhi, 1999, p.7.

B. Trends in Trafficking

As of now, there are no reliable estimates on trafficking. The difficulty of coming up with accurate figures related to trafficking stems from two inter-related factors:

- Trafficking as a process is largely hidden and has become an organized crime.
- There is a nexus of criminal syndicates with those in power.

Nevertheless, some estimates can be made on the dimensions of the problem. The United States State Department estimates that around 1 to 2 million people are trafficked each year worldwide, 50,000 to the United States³. Trafficking affects virtually every country in the world. The largest number of victims comes from Asia, with over 2,25,000 victims each year from South East and over 1,50,000 from South Asia⁴. The former Soviet Union is now believed to be the largest new source of trafficking for prostitution and sex industry, with over 1,00,000 trafficked each year from that region. An additional 75,000 or more are trafficked from Eastern Europe. Over 1,00,000 come from Latin America and the Caribbean, and over 50,000 victims are from Africa⁵. Most of the victims are sent to Asia, the Middle East, Western Europe and North America.

Who is a Trafficker?

Primary Traffickers

- Crime syndicates.
- Master operators.
- Trafficking gangs / networks.
- Pimps and procurers.
- Brothel owners / Madams.
- Tourists and travel agencies.
- Employment agents.

Secondary Traffickers

- Parents / relatives / neighbours and friends.
- Local / influential leaders.

³ Francis T. Miko, *Trafficking in Women and Children: The US and International Response*, Congressional Research Service Report, The Library of Congress, May 2000, p1.

⁴ *Ibid.* p 1.

⁵ *Ibid.*

Regional Trends

Asia and the Pacific

An estimated 2,25,000 victims are trafficked from South East Asia annually according to the US Department of States. The growth of sex tourism in this region is one of the main contributing factors for the large-scale child prostitution that occurs in many countries. Thailand, Cambodia, and the Philippines are popular travel destinations for “sex tourism”, including pedophiles from Europe, North America, Japan and Australia.

Japan is the largest market for Asian women trafficked for sex, where some 1,50,000 non-Japanese women are involved. Half are from Philippines and 40 per cent are from Thailand⁶. There exists a racist hierarchy among the sex industry with the top being occupied by independent and well paid prostitutes who are Japanese or Western women, followed by bonded slaves of whom the best are the white women from Eastern Europe and at the bottom being women from South East Asia. Victims are also trafficked in increasing numbers to newly industrialized countries and regions, including Taiwan, Malaysia, Hong Kong and Thailand. Cross-border trafficking is prevalent in the Mekong region of Thailand, Myanmar, Laos, Cambodia, Vietnam and the Southern Yunan province of China. Vietnamese women are trafficked to China and Cambodia; women and children from Myanmar to Thailand.

Trafficking Techniques

- Local influence / contacts.
- Sale by parents, relatives, acquaintances.
- Deception of parents / girls through false promises of employment.
- Lure of money / opportunities.
- Debt Bondage by pimps / procurers after having being lured, where the trafficked is coerced to pay for the exposure in ‘kind’.
- Kidnapping / abduction.
- Fraudulent documents / passports.
- Bribery / other incentives.
- Transportation: depending upon the region, by foot, bus, trains, waterways, etc.

⁶ <http://www.uri.edu/artsci/wms/hughes/catw>

Victims from South East Asia, especially China, Myanmar, Philippines, Thailand, Cambodia and Vietnam are also sent to Western Europe, United States, Australia and the Middle East. In South Asia, the US Department of State estimates that some 1,50,000 victims are trafficked annually. Sri Lanka and India are the favoured destinations of sex tourists from other parts of the world. Bangladesh and Nepal serve as the supply zone whereas India and Pakistan serve as destination countries. Estimates of the number of Nepalese girls and young women lured or abducted to India for sexual exploitation each year ranges from 5,000 to 10,000. The total number of Nepalese working as prostitutes in India range from 40,000 to 2,00,000. More than 15,000 women and children are believed to be trafficked out of Bangladesh every year⁷. Over 4,000 women and children are trafficked from Bangladesh to Pakistan each year. Also, according to the Amnesty International, Afghan women have been sold into prostitution in Pakistan.

Some 7,000 Nepalese women and children are trafficked for prostitution to the Asia Pacific, especially Hong Kong⁸. A rough estimate shows that about 2,00,000 Bangladeshi women and children have been trafficked to the United Arab Emirates (UAE). India is a source, transit, and destination country, receiving women and children from Bangladesh, Nepal, Bhutan, Sri Lanka and Pakistan and sending them to Europe and Middle East.

Australia has been a prime source of sex tourists in Asia. The Philippines, Thailand, South Korea, Sri Lanka and Hong Kong are some of the primary Asian destinations for organized sex tours from Australia. Indonesia and Taiwan are secondary destinations⁹. To counter attack this problem, Australia has been active in review of extraterritorial legislation and public awareness campaigns aimed at travellers.¹⁰

International criminal organizations traffic hundreds of Thai women yearly to Australia¹¹. Therefore, Australia plans to introduce tougher laws including long jail terms to curb the increased trafficking of Asian women to Australia for prostitution¹².

⁷ **Police Estimates** (<http://www.webpage.com/hindu/daily/980220/03/03200004.htm>), 19 February, 1988.

⁸ *Supra note 6.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Coalition Against Trafficking in Women – Asia Pacific, **Trafficking in Women and Prostitution in Asia Pacific**. (www.catw-ap.org)

¹² Maria Moscaritolo, "Australia takes aim at Asian sex slave trade", **Reuters**, 26 May, 1998.

Europe

The former Soviet Union and Central and Eastern Europe have replaced Asia as the main source of trafficked women to Western Europe. Victims come from Russia, Ukraine, and other East European countries. With the economic and political turmoil after the collapse of the Soviet Union, trafficking from the region has escalated from a minor problem before 1991 into a major crisis. As criminal organizations have grown, especially in Russia, they have gravitated to this lucrative business. Russian organized crime groups and other including Albanian, Estonian, Chechen, Serb and Italian groups are involved in human trafficking in Europe. Russian criminal groups reportedly are also gaining control of prostitution in Israel, and other parts of United States¹³.

The largest number of victims ranging around 1,75,000 who are trafficked annually from the former Soviet Union and Eastern Europe come from Russia and Ukraine. In addition, several Central and East European countries are reported to be the source, receiving, and transit countries. The conflicts in Bosnia and Kosovo provided new opportunities for traffickers in the former Yugoslavia and the Balkans. Traffickers have targeted refugee women who fled Kosovo. According to the Women's Commission for Refugee Women and Children, Albanian traffickers have smuggled thousands of Kosovo women into Italy by boat for the sex trade¹⁴.

An estimated 70 per cent of Russian and East European victims are believed to be sent to West European countries especially Germany, Italy, France, Switzerland, the Netherlands, Greece, Austria and England. Another 15 per cent are sent to the Middle East (especially Israel and Saudi Arabia) and the Far East (especially Japan and Thailand). About 5,000 or 3 per cent are sent to United States or Canada. The remainders are sent to Central European countries, especially Poland, Hungary, the Czech Republic¹⁵. The Western European countries are also destination points for victims from other parts of the world including Africa, Ghana, Nigeria, Morocco, Latin America (Brazil, Colombia, the Dominican Republic) South East Asia (Philippines and Thailand)¹⁶.

¹³ Global Survival Network, **An Expose of the Trafficking Women for Prostitution from the Newly Independent States**, Washington, D.C., 1998, pp.5-10.

¹⁴ *Supra note 3*, p. 7.

¹⁵ *Ibid.*

¹⁶ Europe National Dates, **Trafficking of Women to the European Union: Characteristics, Trends and Policy Issues**, European Conference on Trafficking in Women, June, 1996, IOM, 7 May, 1996.

Middle East

The sexual exploitation of women and children in the Middle East involves the import of women from other regions. The exploitation of Middle Eastern women and children tends to have less of a commercial dimension¹⁷.

Women and children, mostly from Asia (Thailand, Indonesia, Bangladesh, Philippines) are trafficked as prostitutes, brides, camel jockeys, and domestic help to the Middle East. Women from the former Soviet Union are sent to Israel. According to Israel Women's Network, every year well-organized criminal groups bring several hundred to 2,000 women from Russian and the former Soviet Union to Israel.¹⁸

Latin America and the Caribbean

Estimates of the number of Latin America and Caribbean women and children trafficked for sexual exploitation each year is over 1,00,000. Impoverished children are particularly vulnerable to trafficking. The Organization of American States estimates that more than 2 million children are being sexually exploited in Latin America¹⁹.

The presence of sex tourism from Europe, North America, and Australia has significantly contributed to the trafficking of women and children. A growing number of sex tourists are going to Latin America, partly as a result of recent restrictions placed on sex tourism in Thailand, Sri Lanka, and other Asian countries.²⁰ Favoured sex tourism destinations are Brazil, the Dominican Republic, Mexico, Honduras, Costa Rica, Trinidad and Tobago, and Argentina.

Brazil has one of the worst child prostitution problems in the world.²¹ More than 50,000 women from the Dominican Republic reportedly have been trafficked abroad.

Victims from Latin America and the Caribbean are trafficked to Western Europe and the United States. The Central American countries and Mexico are also transit countries for trafficking to the United States.

¹⁷ *Supra* note 10.

¹⁸ Michael Specter, "Trafficker's New Cargo: Naïve Slavic Women", *New York Times*, 11 January, 1998.

¹⁹ *Supra* note 3, p. 7.

²⁰ www.catwinternational.org/fb/costarica.html

²¹ Social Security Network, "Brazil Spends \$1.7 Million Helping Child Prostitutes", *Reuters*, 12 June 1998.

Africa

In Africa, over 50,000 victims are believed to be trafficked annually according to the US Department of States. Although the extent of trafficking is not well documented like elsewhere, poverty and low status of women are major contributing factors. In addition, wars and civil strifes engulfing countries like Sudan and Rwanda, as well as the indifference of some government's make women and children vulnerable to trafficking²²

Trafficking in children for labour is a serious problem in Togo and Benin as well as Botswana, Zaire, Somalia, Ethiopia, Zambia, Nigeria, Algeria. Victims are trafficked to Nigeria, Gabon, Ghana and South Africa. Africans, especially women from Nigeria are trafficked to Western Europe and the Middle East.

North America

Between 45,000 to 50,000 women and children are trafficked to the United States each year²³. Most come from South East Asia and the former Soviet Union. About half are forced into sweatshop labour and domestic servitude. The rest are forced in prostitution and the sex industry. The United States and Canada are the major destinations for young children kidnapped and trafficked for adoption by childless couples unwilling to wait for legitimate child adoption procedures and agencies. The largest source country is Mexico.

American men along with Europeans are reportedly the most numerous sex tourists in Central America (Costa Rica, Honduras), South East Asia (the Philippines, Thailand) and South Asia (India, Sri Lanka). Many companies operating in a number of large cities reportedly specialize in sex tours²⁴.

²² *Supra note 3*, p. 8.

²³ Testimony of Frank E. Loy, Under Secretary of State for Global Affairs, before the sub-committee on Near Eastern and South Asian Affairs, Senate Foreign Relation Committee, 22 February, 2000 in Francis T. Miko, **Trafficking in Women and Children: The US and International Response**, Congressional Research Service Report, The Library of Congress, May 2000.

²⁴ *Supra note 3*, p.8.

C. Historical Background of Trafficking

In order to understand the phenomenon of 'trafficking in persons', and to obtain a clear and unambiguous definition it is of utmost importance to trace the historical development of the concept of 'trafficking'. The problem of trafficking can be traced back to the time of Greek City states. Its history is full of attempts on the part of the States to regulate, control and to limit certain sections of the society and certain kind of activities like prostitution. The Greek State and following it others regulated prostitution but in spite of the best efforts of the State and of other social agencies, prostitution has retained itself in large towns since the last 2,500 years proves how deep-rooted it is in human social life.

Social, economic and moral changes in society, which necessarily influence different aspects of its social life, have affected this institution as well. The Abolitionist Movement that set in at the end of the 19th Century brought with it a system of State regulation of prostitution. It was the spread of venereal diseases that the demand of its total abolition started to be heard. Apart from this, the inquiries conducted by various social organizations at the end of the 19th century revealed that women were more often than not forced into this profession and did not embrace it willingly as was the misconception hitherto. The Governments sought to introduce severe legislation and also aimed at its strict enforcement. The elusive nature of trafficking was due to the fact that the various acts for carrying it out constituted a crime, were never all committed in just one country. It involved the enticing away of girls from one country on some deceitful pretext, to another for her complete exploitation.

The earliest understanding of term "trafficking" comes from UN instruments. The term "traffic" was first used to refer to the so-called 'white slave trade' in women around 1900. The trafficking and voluntary migration of white women from Europe to Arab and Eastern States as concubines or prostitutes was of particular concern to European middle-class men, women and government. The result was the creation of an international agreement for suppression of the 'white slave trade' in 1904. At this time, traffic meant the movement of women for an immoral purpose i.e. prostitution. Initially, this definition required the crossing of country borders, but by 1910 it changed to acknowledge traffic in women could occur within national boundaries. Traffic in women was seen as related to slavery but also to be closely linked to prostitution.

The link between trafficking and prostitution solidified even more in the following decades, most clearly in the adoption of the 1949

Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others. This Convention would be analyzed in detail in Chapter 3. This early confusion of recognizing trafficking with prostitution is still seen in the anti-trafficking activism of some individuals, organizations and Governments today.

Unfortunately, Governments of some destination countries also continue to conflate trafficking with undocumented migration particularly with prostitution²⁵. These responses do not bring out the entire gamut of the problem on the contrary harm the interest of women. These Governments generally adopt stricter immigration policies particularly to combat the movement of young women; under the guise of combating 'illegal trafficking in persons'. From the foregoing account one can thus see that at different points of time in history, the then prevailing concept of trafficking has

- ignored the human rights of trafficked persons;
- been used by moralists and abolitionists to dictate to women in prostitution;
- been used by Governments to restrict the movements of women.²⁶

D. Defining Trafficking

In last two decades the most important developments in the work to address trafficking have been in obtaining clarity on these issues, and evolving a definition of "trafficking in persons" which would be in accordance with human rights principles and be globally acceptable²⁷. The development of modern definition of trafficking is necessary in order to develop strategies which would also work towards real enhancement of the rights of the people involved, and be effective in preventing trafficking. But before coming to the Human Rights Definition of Trafficking let us trace the series of events that led to the evolving of the aforementioned definition.

²⁵ Ratna Kapur, "Tricks and the Law, Legal Regulation of Trafficking, Sex Work and Migration", Technical Consultative Meeting on Anti Trafficking Programs in South Asia, Kathmandu, Nepal, September 2001.

²⁶ Global Alliance Against Trafficking in Women, **Human Rights and Trafficking in Persons**, GAATW, Bangkok, Thailand, 2001, p.27.

²⁷ Lin Chew, **Addressing Trafficking in Persons in the Human Rights Framework**, paper presented for the Technical Consultative Meeting on Anti-Trafficking Programmes in South Asia, Kathmandu, Nepal, September 2001. (The Technical Consultative Meeting was organized by Population Council, Path and UNIFEM.)

A dictionary definition of trafficking describes it as “an illegal trade in a commodity” in the case of trafficking in persons, the commodity is human beings. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949 defines trafficking within the context of prostitution as:

Article 1

The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

- (1) Procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person.

As this definition was limited to exploitation for the purpose of prostitution it was expanded by Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women 1979, to include other forms of exploitation of women such as deception of migrant women and mail-order brides or false marriages, and the new forms of sexual exploitation such as sex tourism and forced domestic labour recruited from developing countries to developed countries²⁸. This view has been further widened to include forced labour, clandestine employment and false adoption by General Assembly Resolution 48 /166²⁹.

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000, supplementing the UN Convention against Transnational Organized Crime defines Trafficking in Article 3 as:

Article 3

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of

²⁸ See General Recommendation 19 made by the Committee on the Elimination of Discrimination Against Women, paras 13-16.

²⁹ General Assembly Resolution 48/166, 94 Plenary Meeting, 23 December 1994.

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 purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in sub paragraph (a) of this article shall be irrelevant where any of the means set forth in sub paragraph (a) have been used.

The definition indicates three stages in the crime of trafficking:

1. An action consisting of recruitment, transportation, transfer, harbouring or receipt of persons.
2. By means of threat or use of force or other forms of coercion, abduction, abuse of power, or position of vulnerability.
3. For the purpose of exploitation.

While the above three stages would be critical in case of trafficking in adult persons, only the first and the third stage would be crucial in case of trafficking in children.

This definition, though, contains all the human rights elements, is essentially a “crime prevention” definition and its crime prevention focus detracts from the concern of the basic rights of the victims. Also, it fails to distinguish clearly a trafficked person from a smuggled migrant or where smuggled migration ends and trafficking begins. Therefore in order to fill these gaps a comprehensive human rights definition is required. The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, has given one such definition. In her report³⁰, she elaborated the need for new and unambiguous definition of trafficking that is based on respect and defense of the human rights of all persons.

³⁰ **Integration of the Human Rights of Women and the Gender Perspective**, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women’s Migration and Violence against Women, submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/2000/68, 29 February 2000.

She proposed a definition of trafficking, which should have following elements:

- i) the lack of consent;
- ii) the brokering of human beings;
- iii) the transport; and
- iv) the exploitative or servile conditions of the work or relationship

Thus, any definition of trafficking must capture these elements. The definition, which Coomaraswamy proposed and which was accepted by the Commission on Human Rights, is:

“Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons:

- (i) by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage, for the purpose of:
- (ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i)”

It comes out from the definition that it covers all persons involved in the trafficking chain: those at the beginning of the chain, who provide or sell the trafficked person, and those at the end of the chain, who receive or purchase the trafficked person, hold the trafficked person in forced labour and profit from that labour. Criminalizing the activities of all parties involved throughout the process of trafficking would facilitate efforts to prevent trafficking and punish traffickers.

The Global Alliance Against Trafficking in Women (GAATW), the International Human Rights Law Group and the Foundation Against Trafficking in Women, in conjunction with other NGOs worldwide, developed a definition of trafficking based on their collective experience. This definition is given in Human Rights Standards for Treatment of Trafficked Persons (HRS)³¹ in Chapter 2 as: -

³¹ Global Alliance Against Traffic in Women, Foundation Against Trafficking in Women, International Human Rights Law Group, **Human Rights Standards for the Treatment of Trafficked Persons**, Bangkok, 1999. Also available on www.globalrights.org

“All acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage”.³²

The HRS definition focuses on clearly identifiable elements of the crime, in order to distinguish cases of trafficking from other acts, such as undocumented migration. These elements are:

- i) acts or attempted acts;
- ii) recruitment;
- iii) transportation, which can be via legal or illegal channels of migration;
- iv) purchase, sale, transfer, receipt or harbouring of a person;
- v) deception, i.e. being tricked into vulnerable situations;
- vi) coercion (including the use or threat or force or the abuse of authority);
- vii) debt bondage;
- viii) servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery like conditions.
- ix) Transportation to community other than the one in which such person lived at the time of the original deception, coercion or debt bondage³³.

The above definition clearly brings out various stages involved in trafficking and at the same times differentiates trafficking from migration. A comparison of this definition with the definition given in the UN Protocol on Trafficking brings to fore the fact that all these elements

³² *Ibid.*

³³ *Supra* note 26, pp.35-37.

mentioned above are explicitly or conceptually included within the definition given in the Protocol. Hence, the Protocol definition can be taken as standard definition and human rights standards can be read into it. The definition used in the Protocol not only covers all sectors where trafficking labour is used, but also includes issues of consent and places greater responsibility on States to punish those responsible for trafficking, including consumers of trafficked labour.

E. Trafficking, Migration and Refugee Problem

Trafficking in people and smuggling of migrants have both become major topics of international government attention. As facts of transnational crime they strike at the very heart of national sovereignty, which was described as the 'dark side' of globalization. With the increase in the governments efforts to control irregular migration, a growing sophistication of trafficking and smuggling networks have been witnessed. Irregular migration is now an issue of pre-border, border and post-border control, as well as major focus of international attempts to fight organized crime syndicates³⁴.

It is because of increase in control of irregular migration and trafficking, that there are very few legal possibilities for refugees to enter a Western country, especially European Union and they are so required to attempt even more clandestine forms of entry. John Morrison therefore, contends "as international policy currently stands, if European governments were ever successful in stopping organized illegal migration at source or in transit countries, they would have ended European asylum policy as we know it³⁵.

Thus one sees that in contemporary discourse, human trafficking has come to be integrally interwoven with migration, mainly illegal, clandestine border crossing, and the smuggling of human beings that in turn has reduced options for refugees fleeing persecution. The implications of these assumptions are:

- i) Equating trafficking with migration leads to simplistic and unrealistic solutions, which generally attempts to put restrictions on movement of those who are vulnerable to trafficking. This conflation results in paternalistic approach,

³⁴ John Morrison and Beth Crosland, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy*, July, 2000, Working Paper of United Nations High Commissioner for Refugees, p.5.

³⁵ *Ibid.*

which reinforces gender biases – quite specifically, that women and girls need constant male protection from harm and therefore must not be allowed their right to movement or right to live in any manner they choose³⁶.

- ii) Curbing migration makes trafficking go more invisible and leads to exacerbation of the conditions of the victims of trafficking.
- iii) Equating migration with trafficking, also rules out voluntary migration. This logic results in viewing all consensual migrating females as trafficked³⁷.
- iv) Strict adherence to above policy leads to “*presumptive refoulement*” of smuggled and renders their right to asylum null and void.

Therefore, while viewing trafficking one must bear in mind that it does not become an offence because of movement *per se* but because of brokering, fraud, coercion and exploitative conditions of work³⁸. At the same time while dealing with irregular migration and trafficking, rights of refugees, who may take recourse to irregular migration or who may become victim of trafficking, need to be protected. Also one needs to make a clear distinction between trafficking and smuggling.

Human trafficking involves deceiving or coercing someone to move either within a country or abroad, through legal or illegal channels and enslaving him or her. Smuggling is about assisting some one for a fee to cross a border illegally.

F. Factors Contributing to Vulnerability to Trafficking

In order to tackle the problem of trafficking holistically, it is important to have a complete understanding of the factors responsible for trafficking. These factors need to be seen at global, regional and local levels also as pull or push factors. Some of these factors have been generalized below:

³⁶ *Supra note 25*, pp. 2-3.

³⁷ *Ibid.*

³⁸ *Ibid.*

1. Economic Vulnerability

With globalization, price competition is increasing thereby increasing the demand for cheap labour required for keeping the cost of production low. This has caused a rapid growth of the informal labour sectors such as street vending and of unregulated work in factories. In most instances, workers have become more vulnerable and subject to abusive working conditions, because these marginalized and unregulated areas of work are not visible and thus are not subject to labour laws and regulations. These factors are on the pull side.

On the push side, globalization results in breaking down the traditional family structure. Each member of the family has become “a separate and independent unit of labour to be plugged into the modern labour market”³⁹. Further, structural economic changes like break down of rural economy, natural disasters, agro-climatic variation and shrinking employment opportunities drive poor communities with no economic alternatives to leave for areas where their chances might be improved. These migrants are generally at high risk of being trafficked.

2. Gender Vulnerability

As the Special Rapporteur on Violence Against Women puts⁴⁰, “the root causes of migration and trafficking greatly overlap. The lack of rights afforded to women serves as the primary causative factor at the root of both woman’s migration and trafficking in women. By failing to protect and promote women’s civil, political and social rights Governments create situations in which trafficking flourishes”.

The push factors here can be seen in feminization of poverty where majority of poor women are excluded from access to resources, low status of women in society, lack of education for girls, the expectation to perform certain roles and to be solely responsible for children and the discrimination against women in political participation, sexuality, religion, customs and social practices. On the pull side can be seen the traditional sexual division of labour on the one hand, and the growing demand for reproductive services in the globalized market, whereby women and girls are increasingly being pulled as service providers. They service a vast array of personalized reproductive services in the entertainment and sex industry, domestic work and the marriage market.⁴¹

³⁹ *Supra* note 2, p.5.

⁴⁰ *Supra* note 30, p. 54.

⁴¹ *Supra* note 2, p.5.

3. Vulnerability to Migration

It is said that traffickers “fish in the stream of migration”.⁴² Therefore, the entire spectrum of migrants, involuntary resettlers, refugees, internally displaced persons, illegal migrants etc., are at high risk of being trafficked, particularly women. There is an increasing presence of women and children in contemporary migration because of unequal societal and family burden on them. With the increasing responsibility to look after their families, women move out to look for work opportunities. But, because of lack of education and job opportunities these women are pulled into sex industry, domestic work and marriage market. This leads to what is called feminization of migration.

4. Restrictive Migration Policy

Despite the growing need for all forms of migrant labour, the immigration laws of countries of destination fail to satisfy the demand. Therefore, there exists a massive contradiction between the demand for labour and its supply. This leads to situations where the migrant labourers in need of work fall into the trap of traffickers and migrant smugglers. Further, the total identification of trafficking with irregular migration has led to more stringent border control and immigration policy.

5. Development Vulnerability

Due to faulty development strategies, a divide is created between the developed and developing world, a divide that is replicated at local, regional, national and global levels. Increasing number of people from the less developed part becomes “commodity for consumption” for the developed part. The underdeveloped part serves as supply zone and developed as demand zone. Further, the promotion of sex tourism as a development strategy is also a contributing factor to trafficking for the purpose of prostitution. There is a connection between the influx of relatively wealthy foreigners seeking sex with women from developing countries and the movement of women into the sex industry to meet that demand. Therefore, trafficking in women and children is clearly both a human rights and a developmental issue.

⁴² *Supra note 1*, p.8.

6. Political Vulnerability

The political and economic backgrounds of the countries often exacerbate the vulnerability of women and children. The combination of the deteriorating economic and political situation in Myanmar spurs an outflow of trafficked women into Thailand. Thai officials eager for cheap labour or personal profit facilitate this flow⁴³. The transition from communism to capitalism in Eastern Europe has increased the trafficking of women into Western Europe. In the past, women were trafficked into Western Europe from Southern countries such as Colombia, the Dominican Republic, Ghana, Thailand, Zaire and the Philippines⁴⁴. Now the trade has turned to Eastern Europe as primary source of women⁴⁵. The economic political factors also work within a country leading to intra-country trafficking.

7. Armed Conflict Vulnerability and Insurgency

In situations of armed conflict, women and children are especially vulnerable to sexual abuse and forced domestic services by armed forces. Also, armed conflicts lead to wide scale displacement and migration. These streams of displaced people provide traffickers easy opportunity to lure, abduct or coerce people for trafficking. This can be seen in the fact that the conflicts in Bosnia and Kosovo provided opportunities for traffickers in the former Yugoslavia and the Balkans. Traffickers had targeted refugee women who fled Kosovo. Armed conflicts also lead to abduction of children for recruitment as soldiers. According to the report of the US State Department on Trafficking in Persons, the LTTE, abduct, and hold children against their will for purposes of forced labour, military conscription and in some cases sexual exploitation⁴⁶. Such patterns have been seen particularly in African countries such as Kenya, Angola, Sudan and Uganda. Generally, street children are easy targets because their disappearance is not likely to be noticed or reported by anyone⁴⁷.

⁴³ Human Rights Watch, "*Burmese Women and Girls Trafficked to Thailand*", *The Human Rights Watch Global Report on Women's Human Rights*, New York, 1995.

⁴⁴ Galina Vromen, "Dutch Seek to Curb Forced Prostitution of Foreign Women", *Reuters*, Feb 16, 1988.

⁴⁵ Louis Chiang, "*Trafficking in Women*" in *Women and International Human Rights Law*, Vol. 1, Kelly D. Askin and Dorean M. Koeing (ed.), Transnational Publishers Inc., New York, 1999, p.321.

⁴⁶ *The Hindustan Times*, June 10, 2002.

⁴⁷ *Supra note 26*, p.50.

8. Religious and Cultural Vulnerability

In some countries like India and Nepal, religious and traditional customs in the term of *devadasi* or *devki* system provide legitimization to trafficking and slavery like practices. Such violence, legal and illegal is then considered a normal private family matter and accepted by society as a normal cultural practice.

9. Information Technology Vulnerability

As a pull factor, information technology, particularly Internet, has been increasingly used to market women and children for the purposes of pornography, prostitution and matrimony. The Coalition Against Trafficking research on the use of the Internet for global sexual exploitation for women and children reveals that websites for men enjoy brisk business selling comprehensive sex related information about every country in the world. The World Wide Web includes the world sex guide, which is a virtual grocery store where men, women and girls in over 80 countries can be selected for sex tourism. These websites provide detailed information on sex tours including where to find prostitutes, hotel prices, taxi fares and the sex acts that can be bought.

The impact of Internet on the sexual exploitation of vulnerable groups is unprecedented. As Internet is a medium virtually without mediators or borders, illegal or harmful acts committed on it entail fewer risks. It is infinitely more economical, accessible to procure women and children. Men can completely objectify and classify women and children according to colour, firmness of skin and compliance to men. Through, Internet, the dehumanization of women as sexual objects has reached unimaginable levels.

10. Vulnerability to Authority Complicity

The UN Special Rapporteur on Violence Against Women, Ms. Radhika Coomaraswamy, notes trafficked women have reported high levels of government participation and complicity⁴⁸. Officials accept bribes from traffickers in return for allowing traffickers to cross-borders and also in some cases officials may be directly involved in the process. For example, there are reports of direct involvement of both Burmese and

⁴⁸ *Supra* note 30.

Thai officials in the trafficking of Burmese women to Thailand. Women reported instances of being transported into Thailand by policemen in uniform, armed and often, police and care clients of the brothels⁴⁹.

11. Vulnerability to Growth in Tourism

Tourism industry has grown worldwide and especially in developing countries, as a part and parcel of globalization. Tourists come to the developing countries from different parts of the World for easy and cheap sexual gratification especially with children. American men along with Europeans are reportedly the most numerous sex tourists in Central America (Costa Rica, Honduras), South East Asia (India, Sri Lanka)⁵⁰. Not only is it the perverse psyche that makes them use children as objects of sex, but it is also the scare of AIDS that generates a demand for virgin girls.

12. Vulnerability to Adoption

With birth rates falling in many of the developed worlds, adoption from developing countries with higher fertility rates is common. The need for children has put pressure on sending countries to respond quickly to the growing demand often without having the necessary infrastructure and mechanisms to proceed properly. This situation has led to abuses and creation of an international market for adoptable children. Trafficking of children for the purpose of adoption is continuously increasing, and in some countries it is reported that the fees charged by intermediaries to handle adoptions range from \$5,000 to \$30,000 per child⁵¹.

G. Consequences of Trafficking

Trafficking is detrimental to the individual who is trafficked as well as for the country involved, be it a sending, receiving and / or transit country. The magnitude of the consequences can be gauged by viewing trafficking as:

1. Problem of crime

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ HAQUE, *Child Trafficking in India*, HAQUE, Centre for Child Rights, New Delhi, September 2001, p.25.

2. Migration problem
3. Labour problem
4. Human Rights problem.

1. Trafficking as a Problem of Crime

There are manifold crimes committed both in the process of trafficking and in the commission of end purposes for which people are trafficked. The very definition of trafficking as given in the UN Protocol talks about crimes such as threat or use of force, coercion, abduction / kidnapping, fraud and deception being committed. Similarly, the end purposes of trafficking are generally recognized as offences by most of the countries. These include slavery and forced labour; debt bondage; forced prostitution; child sexual abuse; removal of organs and illegal adoption. Further, many crimes are committed when a trafficked person is prepared to be absorbed for the above mentioned end purposes. This process can be best elucidated by examples of women who are trafficked into forced prostitution. Such women may either be sold outright to a brothel owner or sold at an auction. After being sold, many women undergo what is known as 'breaking in' period. 'Breaking in' may be done either through physical means such as, repeated rapes, gang rapes, electric shocks, solitary confinement and beating by brothel guards. One common tactic in India involves both physical and psychological means⁵². Certain brothel staff treats the victim abusively, telling her repeatedly that she is dirty or defiled, while another staff member consoles her and tells her that she is a part of the family⁵³.

Once a woman or girl is "broken in", she is forced to work for long hours without breaks. She is not allowed to go out and refusal to service a customer tends to result in beatings or other kinds of abuse. Further, she is denied access to contraception, and has no control over her body. This has led to prevalence of sexually transmitted diseases in trafficked women particularly the fatal HIV virus⁵⁴. Thus, one finds that many crimes such as assault, battering, rape, sale of human beings, unlawful detention, total confinement, torture etc are committed when a person is initiated into a "chosen field".

⁵² Ian Cao, "Illegal Traffic in Women: A Civil Right Proposal", 96 Yale L.J. 1297, 1302.

⁵³ Human Rights Watch, "*Nepali Women and Girls Trafficked to India*", *The Human Rights Watch Global Report on Women's Human Rights*, New York, 1995.

⁵⁴ *Supra* note 43.

Also, looking at the trafficking from the perspectives of sending, receiving and transit countries, one finds that most of them have laws against these crimes. However, few traffickers are ever prosecuted or punished for any of the crimes listed above. More commonly, traffickers are punished under migration-related laws that are less serious offences, and carry less severe sentences. Additionally, traffickers who traffic women into the sex industry are prosecuted under laws relating to prostitution rather than laws relating to real and serious harm done to the victims. As a result traffickers are not deterred and carry on their work with impunity.

2. Trafficking as a Migration Problem

The conflation of trafficking with migration has brought forth many undesirable consequences. This is largely due to the fact that as a part of the globalization process, the demand for cheap and irregular labour has risen leading to increase in irregular migration, which provide traffickers with a market for services, such as fraudulent documents, transportation, aided border crossings, and accommodations. But, instead of looking at this problem holistically, the developed countries in particular have put in place immigration policies that restrict free movement of labour, particularly of those who are most vulnerable to trafficking, i.e. women and children. Thus, woman's right to migration is violated. Further, when they are thrown into the clutches of traffickers and left with no legal means to migrate, they take the help of smugglers or traffickers for transportation. The curbing of migration makes trafficking go underground, making these groups more vulnerable to abuses. Also, if the immigration officials catch them they are treated as violators of immigration laws and not as victims of crime and exploitation.

3. Trafficking as a Labour Problem

Trafficking is essentially a labour problem for it is done for placing or holding a person, whether for payment or not, in forced labour or slavery-like practices which may be in the form of forced prostitution or working in a sweat shop, in a community other than the one in which such person lived at the time of being trafficked. Most of these people have to work without pay or on a low pay in bad conditions of work, with poor health and safety measures. They have to work for long hours without breaks and generally physically confined from outside contact. Their passports are confiscated, because of the money spent by traffickers on their transportation is added on to their costs, most of them end up

being in debt bondage. Thus viewing trafficking as labour problem brings to light many gross violations of labour rights of trafficked persons.

4. Trafficking as a Human Rights Problem

When viewed from the human rights perspective, all the above three mentioned groups of violation of rights are automatically covered. Human dignity is the quintessence of human rights. Trafficking of human being is trade or commercial dealing. This makes trafficking a depraved violation of several human rights. "Treating human being as a commodity or chattel, which is a necessary incident of trafficking, the worst indignity heaved at the individual".⁵⁵ Thus, the consequences of trafficking are violation of human rights of trafficked persons. These human rights are violated not only by the traffickers but also by the State that in the first place has lent vulnerability to certain groups. Further, trafficked persons are vulnerable to arrest, detention and deportation because destination countries are unwilling to recognize they are victims of crimes. Destination countries view them as undocumented migrants who entered illegally and / or worked illegally. They often do not have the chance to lodge complaints, seek damages, assess whether it is safe to return home, collect their belongings or apply for asylum. Thus, from the perusal of the consequences of trafficking one can conclude that human rights perspective provides a bird's eye view into the problem of trafficking. Therefore, in the next section a general discussion on human rights and various human rights issues involved in the process of trafficking would be taken up.

H. Human Rights

Human rights are inalienable rights of every human being without which one cannot function as a person, having free will and intellect. These are rights necessary for being human and hence are universal, inalienable and indivisible. They are based on fundamental principles of respect for human dignity, equality and non-discrimination. Initially, there was confusion surrounding these rights around the belief that certain sets of rights, say civil and political rights have precedence over another sets of rights, say economic, social and cultural rights. The 1993 Vienna Declaration adopted by the UN World Conference on Human Rights dispelled this confusion by concluding that:

⁵⁵ Justice J.S. Verma, *NHRC Information Kit on Trafficking in Women and Children*, New Delhi, 2001, p.1.

“All human rights are universal, indivisible and inter dependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious background must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.⁵⁶

Thus universality, inalienability and indivisibility are basic principles of human rights.

Universality means that human rights belong to everyone, everywhere, and they are same for all people irrespective of age, race, class, gender, ethnicity, language, colour or castes. These need to be upheld and protected at all times.

Inalienability means all rights belong to all persons right from the time of birth. A person is born with these rights and these rights cannot be taken away from him/her.

Indivisibility means all human rights are related to each other; consequently rights are interrelated and interdependent. No sets of rights have precedence over other and they together provide wholesome existence to a person.

But, despite the declaration of above-mentioned tenets of human rights law, there exists category of groups such as women, children, ethnic minorities, etc. whose rights are violated more often than those of others. In other words they are generally deprived of their rights because they belong to particular category whose rights are not recognized. This leads us to a discussion of rights of women and children within human rights discourse for these are the groups, who are most vulnerable to trafficking.

1. Women’s Rights are Human Rights

Equality on the basis of sex is at the heart of all instruments on human rights. Article 1 of the United Nations Charter sets out three main purposes of the UN, the last of which includes “to define and protect the

⁵⁶ Richard B. Bilder, “An Overview of International Human Rights Law”, in Hurst Hannum (Ed.) **Guide to International Human Rights Practice**, 3rd Edition, Transnational Publishers Inc., New York, 1999. p 15; Vienna Declaration and Programme of Action, A / CONF. 157/23, adopted on 12 July 1993.

rights and freedoms of every individual regardless of race, sex, language or religion⁵⁷. Similarly, the Universal Declaration on Human Rights (UDHR), 1948, include the proclamation that all human rights and freedoms are to be enjoyed equally by women and men without distinction of any kind. But, despite the existence of numerous human rights instruments proclaiming principles of equality and non-discrimination, women are denied these so called “protected” rights. Therefore, over the last two decades the phrase ‘women’s right as human rights’ has been used to explore, assert and redress the gap between stated international commitment to equality for women and the actual experience of women⁵⁸. Saying ‘women’s rights are human rights’ is not claiming special rights for women. On the contrary, it is a call to recognize that women have same basic human rights as men⁵⁹. But international human rights law fails to recognize women even when they suffer the same human rights abuses as men. Also, it fails to recognize the specific gender dimension of abuse that characterizes the denial of rights to women. The public-private constitution of human rights law whereby State action is required before there is human rights violation and whereby private actors are beyond its scope has been critiqued as gendered. Research has exposed the public / private divide with regard to domestic violence, violence of war, and dowry deaths to name a few⁶⁰. A second critique has focussed on the hierarchy of rights (though removed in theory, is actually practiced) where civil and political rights enjoy a central position as violations within the human rights system⁶¹. In contrast, social, economic and cultural rights, and group rights are more difficult to enforce and less accepted as judicable minimum standards. Given that women’s advancement is clearly linked to social, economic and cultural status, the lesser the status of women in the society, the lesser is the protection given to women’s rights.

A third critique has been the denial of rights to women on the ground they will attack ‘cultural’, ‘personal’ or ‘religious’ views. The charge of cultural relativism has been leveled in an attempt to diminish state accountability⁶². Theocratic States for example have challenged the universality of human rights asserting that rights must be seen as culturally

⁵⁷ United Nations Charter, Art.1.

⁵⁸ Christine Bell, “*Women’s Rights as Human Rights : Old Agenda in New Guises*”, in Angela Hegarty and Siobhan Leonard (Ed.) *Human Rights : An Agenda for the 21st Century*, Cavendish Publishers, London, 1999, p 20.

⁵⁹ *Supra* note 26, p. 12.

⁶⁰ C.A. Mackinnon, “*On Torture: A Feminist Perspective on Human Rights*” in K. Mahoney (Ed.) *Human Rights in the Twenty First Century*, p.21.

⁶¹ *Supra* note 53, p. 21.

⁶² H. Steiner and P. Aiston, *International Human Rights in Context: Law, Politics and Morals*, Oxford University Press, London, 1996, pp. 166-255.

relative and secondly to local, customary or traditional standards. This challenge seeks to decrease the scope of normative standards generally, and is particularly undermining women's rights which so often conflict with patriarchal religious structures as is reflected in many reservations to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.

Therefore, to ensure women enjoy all rights, these above-mentioned obstacles need to be overcome. Trafficking of women and girls is directly linked to the failure of governments to accord women the same basic rights as men. Women who have been denied the right to education and legal rights are consequently denied the right to education and legal rights are consequently also denied the right to control their lives. Unskilled are unable to be economically independent, such women are especially vulnerable to trafficking⁶³.

2. Children and Human Rights

Since human rights are inalienable rights, which start at the time of birth, children are equally entitled to human rights in the same way as adults do. Children are the future; therefore, their special needs must be accommodated within the human rights discourse. Keeping this in view, on 20 November 1989, the international community extended the mantle of human rights protection to children when it adopted the United Nations Convention on the Rights of the Child. This is the first international legal instrument, which guarantees human rights for children. The Convention makes States, which accept the Convention, legally accountable for their actions towards children. The guiding spirit of the Convention is the '*best interest of the child*'.

Positive and forward-looking in its approach, the Convention calls on States, which ratify it to create the conditions in which children may take an active and creative part in the social and political life of their countries.

A child is defined in the Convention as a person under the age of eighteen, unless the national laws fix an earlier age of majority.

Encompassing the whole range of human rights - civil, political, economic, social and cultural - the Convention recognizes that the enjoyment of one right cannot be separated from the enjoyment of others.

⁶³ *Supra* note 26, p. 12.

It demonstrates that the freedom a child needs to develop his / her intellectual, moral and spiritual capacities calls for, among other things, a healthy and safe environment, access to medical care, and minimum standards of food, clothing and shelter.

The Convention charts new territory. It establishes the right of a child to be an actor in his / her own development, to express opinions and to have them taken into account in the making of decisions relating to his / her life.

In a number of other areas, some of them sensitive, the Convention goes well beyond existing legal standards and practices. These include its provisions on the right to life, survival and development; the right to a name and nationality from birth; regarding adoption; the rights of disabled and refugee children as well as those in conflict with the law. It also enlarges the legal coverage of human rights by protecting children from all forms of exploitation, by dealing with the question of children of minority and indigenous groups and by dealing with the problems of drug abuse and neglect. The Convention acknowledges the primary role of the family and parents in the care and protection of children, and the obligation of the State to help them in carrying out these duties. Finally, it brings together in one up-to-date global perspective the rights of the child expressed in many international treaties and declarations over the past 40 years.

The Convention sets up the Committee on the Rights of the Child, a Committee of ten experts which will generate a permanent dialogue involving all parties concerned with the promotion of children's rights. State Parties will submit reports to the Committee on how they are carrying out the Convention and on difficulties they face in doing so.

Conclusion

This chapter has introduced to the readers, the issue of trafficking in human beings, its extent and trends. A deep analysis of the causes and consequences of trafficking has revealed a need for a comprehensive human rights approach to tackle the problem. Only a human rights perspective can include within its realm all the dimensions of the problem. This perspective not only punishes the perpetrators of crimes but also protects the victims from human rights abuses by both State and non-State actors. It pins down responsibility on the state to protect and respect

the rights of all and especially of vulnerable groups. A further discussion on State responsibility and International Human Rights Law in the next Chapter would lay a basis for the emergence of international legal regime on traffic.

Chapter 2

Basis for International Legal Regime on Trafficking

A. International Human Rights Law

As illustrated in Chapter 1, trafficking in persons leads to violation of manifold human rights of the trafficked persons. Many of these human rights have been granted international recognition and acceptance by way of customary international law, treaty law, declarations / resolutions of international institutions or been granted the status of *jus cogens*. These constitute the body of International Human Rights Law. Interestingly, a State is liable for the breach of these laws. The international human rights movement is based on the concept that every nation has an obligation to respect the human rights of its citizens and that other nations and the international community have a right and responsibility to protest if States do not adhere to this obligation. It should, however, be emphasized that international human rights law provides only one possible weapon in the war against trafficking. Many other tools, both legal and non-legal, are required to end this menace. Before venturing on a discussion on the constituents of international human rights law, it would be appropriate here to explain the concept of State Responsibility.

State Responsibility

It is widely accepted that human rights violations are an important root cause of trafficking and that the trafficking process itself constitutes a serious violation of human rights⁶⁴. Since the State remains the primary actor in international law, it is through the State that trafficked persons may seek protection and it is against the State that those same individuals may claim reparation or redress for violations. States are also under an international obligation to respect, protect and fulfil human rights.⁶⁵ The obligation to respect rights requires the State to refrain from committing

⁶⁴ See, for example, **Vienna Declaration and Programme of Action**, World Conference on Human Rights, UN Doc. A/CONF/157/23 (1993) Pt. I, para 18 (“Gender-based violence and all forms of exploitation including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person and must be eliminated...”), and Pt. II, para. 38; See also the **Report of the Fourth World Conference on Women** held in Beijing from 4-15 September, 1995.

⁶⁵ John Cerone, **State Responsibility for the Acts of Non –State actors: The trafficking of Women for the Purpose of Sex Industry Work**, (unpublished paper) at p.1.

any act or omission that violates rights. The obligation to protect and respect rights requires the State to take active measures aimed at preventing violations whether committed by agents of the State or by non-State actors.⁶⁶ Finally, the obligation to protect rights requires the State to implement affirmative measures to enable all persons to realize their rights.

In this regard the concept of 'due diligence' is sometimes mentioned as the standard by which State responsibility for violation of human rights by non-State actors is assessed. States that have signed human rights treaties are responsible to act with due diligence or good faith to prevent investigate and punish any violation of rights recognized by those treaties.⁶⁷ They are also required to provide a mechanism to restore the rights violated and provide compensation as warranted by the damages resulting from the violation. Due diligence in the context of trafficking means State has a duty to provide protection to trafficked persons according to its obligation under international law. So the State must apply due diligence principle in ensuring effective prevention of trafficking, prompt and thorough investigation, and prosecution of traffickers and compensation for the trafficked persons.

As regards the position of non-citizens with respect to State Responsibility, it is stated that traditional international law recognizes that certain duties (either equal treatment or an international minimum standard) are owed by a host State to aliens or non-nationals within its territory.⁶⁸ A State would be held legally responsible for injury to aliens resulting from acts, which were contrary to international law.⁶⁹

However, as the individual lacked formal legal status, it was to the State of origin that such rights accrued⁷⁰ and the decision whether to extend diplomatic protection was one for that State to make. But with the development of international human rights law, greater protection to

⁶⁶ Anne Gallagher, "The International Legal Response to Human Trafficking", paper presented for the Technical Consultative Meeting on Anti-Trafficking Programs in South Asia, Kathmandu, Nepal, September 2001, p 4.

⁶⁷ **Integration of the Human Rights of Women and the Gender Perspective**, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence against Women, submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN. 4/2000/68, 29 February 2000.

⁶⁸ Ryszard Cholewinski, **Migrant Workers in International Human Rights Law**, Oxford University Press, London, 1997, pp. 40-47.

⁶⁹ *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, 1924 Permanent Court of International Justice. (series A) No. 2, 6 12 (August 30).

⁷⁰ *Supra note 5*, p.45.

aliens have been provided with the advantage of such rights being vested in the individual and not the State. Core rights, such as the prohibition on slavery, forced labour and debt bondage, which are all relevant for trafficking in persons do appear to be protected. Several of the provisions of the UDHR, and the two Covenants (International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 1966) have been interpreted as applying equally to non-nationals⁷¹. As explained above, State responsibility arises from international human rights law, the constituents of which – customary international law, treaty law, resolutions / declarations and jus cogens would be discussed next.

Customary International Law

Customary international law is international law that has been formed through the general practice of States and 'opinio juris', there is no written document to turn to as evidence of customary law, unless a treaty has codified the practice. The lack of written instruments makes it difficult to determine whether obligations fall under the rubric of customary international law, but once the State practice and opinio juris is established as evidence of customary international law, then all States are committed to upholding these obligations.⁷² For example, the UDHR though not a binding instrument, has become a part of customary international law for the States have been following the ideals of the declaration in their State practises and they act in this particular way because they feel that international law demands them to do so, therefore there is a sense of legal obligation or opinio juris present in the above State practice.

The customary international law thus indirectly helps the State to follow humanitarian standards in the treatment of trafficked persons as a victim of human rights violation.

Treaty Law

For international obligation flowing from treaty law, one must look to the written document signed and ratified by that State. Only States

⁷¹ See, for example, General Covenant No. 13 of the Committee on Economic and Cultural Rights on the Right to Education (1999) available at <http://www.unhchr.ch>.

⁷² For a detailed analysis of customary international law see Michael Akehurst, **A Modern Introduction to International Law**, Taylor and Francis Books Ltd, London, 1987, pp. 25-34.

that sign and ratify such documents are committed to upholding the obligations within those treaties and/or conventions, unless those obligations are part of customary international law. Treaties like the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the Convention on the Elimination of all Forms of Discrimination against Women, 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the Convention on the Rights of the Child, 1989 and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2000; the Slavery Convention, 1926; the International Labour Organization (ILO) Convention No. 29 on Forced Labour 1930; ILO Convention No. 105 on Abolition of Forced Labour, 1959; the ILO Convention No. 182 on the Worst Forms of Child Labour, 1999; all form the basis for the emergence of human rights regime for the prevention and punishment of acts of trafficking and protection of the rights of the trafficked persons.

Resolutions and Declaration of International Institutions

The resolutions/declarations are not legally binding per se, but can spell out to some extent existing customary rules or contribute to the rapid formation of new ones. The International Judicial Tribunals have accorded considerable weight to these resolutions as evidence of state practice underlying a customary rule⁷³. These resolutions manifest the consensus of nations on particular rules and one can see this effectively in the form that most of the present conventions like the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child have all originated from Declarations of the United Nations General Assembly. Hence, Declarations and Resolutions constitute a very important part of international law.

Jus Cogens

Lastly, the concept of 'jus cogens'⁷⁴ deserves mention. It means the body of peremptory principles or norms from which no derogation is permitted, and may therefore operate to invalidate a treaty or agreement between States to the extent of inconsistency with any such principles or norms.

⁷³ S.K. Verma, **An Introduction to Public International Law**, Prentice Hall of India Private Ltd., Delhi, 1998. p. 45.

⁷⁴ See generally on the subject, E. Suy and Others, **The Concept of Jus Cogens in International Law**, Carnegie Endowment for International Peace, Geneva, 1967.

These are the norms accepted and recognized by the international community as a whole. *Jus Cogens* has some analogy with the principles of public policy as used in Municipal Laws. The rules of *jus cogens* include the fundamental rules concerning safeguarding of peace, fundamental rules of a humanitarian nature, like prohibition of genocide, slavery and racial discrimination⁷⁵ and hence no derogation is possible and can only be modified by a subsequent norm of general international law having the same character.

Trafficking which is nothing but modern day slavery is against the rules of *jus cogens* and hence a violation of international human rights laws.⁷⁶

B. International Instruments

There are a variety of sources of State obligation in international human rights law that potentially addresses the numerous human rights violations that accompany trafficking in persons. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000 and the SAARC Convention on Preventing and Combating Trafficking in

UDHR

- All human beings are born free and equal in dignity and rights (Article 1).
- Everyone has the right to life, liberty and security of person (Article 3).
- No person shall be held in slavery or servitude (Article 4).
- No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (Article 5).
- All are equal before the law and entitled to equal protection without any discrimination. (Article 7).
- Everyone has the right to freedom of movement (Article 13).
- Everyone has the right to a nationality (Article 15).
- Everyone has the right to asylum from persecution (Article 14).
- Every person has a right to marry and find a family (Article 16).
- Everyone has the right to work; free choice of employment and without discrimination is entitled to equal pay for equal work (Article 23).

⁷⁵ J.G. Starke, *Introduction to International law*, Butterworths & Co., Delhi, 1989, p.56.

⁷⁶ On the prohibition of slavery as a norm of *jus cogens* see the judgement of International Court of Justice in the **Barcelona Traction Case** of 5 February, 1970 ICJ 3 at 32.

Women and Children for Prostitution, 2000 are the thematic instruments on the issue of trafficking and hence would be analyzed in detail in separate chapters. This section therefore will focus only on other international instruments that provide basis for the special laws on trafficking.

i) Universal Declaration of Human Rights (UDHR), 1948.

The United Nations Charter, which played a catalyst role in the human rights movement world over failed some how to define the fundamental freedoms and human rights. This task was fulfilled by the UDHR, adopted by the General Assembly on December 10, 1948⁷⁷, which elucidated the Charter provisions and defined expressly certain human rights and fundamental freedoms, which need to be protected. The Declaration is not a legally enforceable instrument, though some of the rights mentioned has become part of customary international law, "others are merely general principles of law and represent elementary consideration of humanity"⁷⁸. The rights enshrined in the Declaration in its 30 Articles are broadly divided into civil and political rights, and economic, social and cultural rights. This Declaration, along with two other human rights Covenants that were adopted by the United Nations General Assembly in 1966, have today become the backbones of human rights jurisprudence the world-over. The rights enshrined in the Declaration are set "as a common standard of achievement for all people and all nations". It is expected that States shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, both at national and international levels, to secure their universal and effective recognition and observance.

i) International Covenant on Civil and Political Rights, 1966 (ICCPR)

This Covenant elaborates the political and civil rights identified in the Universal Declaration, which include the right to life, privacy, fair trial, freedom of religion, freedom from torture and equality before the law. All these rights represent the first generation of human rights that are based on natural rights philosophy of the eighteenth century thinkers, like Rousseau. Some of the rights mentioned in the Covenant can be suspended in times of 'public emergency which threatens the life of the

⁷⁷ GA Res. 217 (III), GAOR, 3rd Sess, official Records, Part I, Resolutions, p.71.

⁷⁸ Cf. *Corfu Channel Case (Merits)* (1949) ICJ Rep., p.4 at 22.

nation', provided that the derogation will not involve discrimination on grounds of race, colour, sex, language, religion or social origin. In no circumstances, in peace or war, is derogation permitted under the Covenant from the following fundamental rights: the right to life, recognition before the law, freedom from torture and slavery, freedom of thought, conscience and religion, the right not to be imprisoned solely for inability to fulfill a contractual obligation, and the right not to be held guilty for committing a crime which did not constitute a criminal offence at the time it was committed.

Article 28 of the Covenant provides for the establishment of a Human Rights Committee, which monitors the implementation of the Covenant in a number of ways.

Two Optional Protocols elaborate on certain provisions of the Covenant on Civil and Political Rights, one provides mechanism for taking complaints from individuals, the other advocates the abolition of the death penalty.

ii) **International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)**

The Covenant on Economic, Social and Cultural Rights, represents the second generation of human rights, which were

ii) **International Covenant on Civil and Political Rights, 1966**

- No distinction based on sex. (Article 2)
- Equal rights for men and women in the enjoyment of civil and political rights. (Article 3)
- Prohibits cruel, inhuman or degrading practices. (Article 7)
- Prohibits slavery and servitude. (Article 8)
- Right to liberty and security of person; no one shall be subject to arbitrary arrest or detention. (Article 9)
- Freedom of movement. (Article 12)
- Equality before the courts and tribunals. (Article 14)
- Equal before the law, equal protection of the law. (Article 26)

International Covenant on Economic, Social and Cultural Rights, 1966

- No distinction based on sex, nation or social origin. (Article 2)
- Equal rights for men and women in the enjoyment of economic, social and cultural rights. (Article 3)
- Right to do work that one freely chooses under conditions protecting fundamental freedoms of the individual. (Article 6)
- Right to just and favourable conditions of work. (Article 7)

propagated and recognized after the advent of socialism in the twentieth century. Some of the rights recognized by this Covenant include the right to work; favourable conditions of work and equal pay for equal work; social security, an adequate standard of living including adequate food, clothing and housing. The underlined idea behind this Covenant is that, without realization of economic, social and cultural rights, even civil and political rights cannot be realized. As human rights are interdependent and indivisible, this Covenant along with the Covenant on Civil and Political Rights needs to be looked into holistically as representing two important aspects of human rights jurisprudence. The monitoring body which oversees the implementation of the ICESCR is known as the *Committee on Economic, Social and Cultural Rights*.

The ICESCR together with the ICCPR, Universal Declaration and the Optional Protocols comprise the International Bill of Human Rights.

iv) **Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW)**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly on 18 December, 1979, and entered into force on 2 September, 1981. By now there are more than 150 States Parties to this Convention. The object of the Convention is to implement equality between men

- Marriage with the consent of both parties. (Article 10)
- Right to adequate standard of living including food, clothing, housing. (Article 11)
- Right to physical and mental health. (Article 12)

CEDAW

- States must eliminate discrimination by any person, organization or enterprise and abolish discriminatory laws, regulations, customs and practices. (Article 2)
- State Parties shall take all appropriate measures including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. (Article 6)
- Marriage shall not automatically change nationality. (Article 9)
- Right to free choice of employment. (Article 11)
- Right to health care and services. (Article 12)
- Protection for women in rural areas. (Article 14)
- Equal Protection of law (Article 15)
- Right to freely choose a spouse and minimum age of marriage. (Article 16)

and women and to prevent discrimination against women, in particular such specific forms of discrimination as forced marriages, domestic violence and less access to education, health care and public life as well as discrimination at work. The Committee on the Elimination of Discrimination against Women, established under Article 17 of the Convention, considers periodic reports from States Parties regarding their compliance with the provisions of the Convention. The Committee makes general recommendations on specific Articles of the Convention, or on issues related to the Convention. In 1992, General Recommendation No. 19 was made on the issue of violence against women. The Recommendation defines gender-based violence against women to be violence as discrimination that is directed against women because she is a woman, or that affects women disproportionately. The Recommendation identifies poverty, unemployment and armed conflict as casual factors of trafficking and exploitation of prostitution of women.

The Optional Protocol to CEDAW enables individuals or groups of individuals to submit written individual complaints to CEDAW. However the complaint can only concern countries that are party to the Protocol.

v) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Torture and other cruel, inhuman or degrading treatment or punishment are particularly serious violations of human rights and, as such, are strictly condemned by international law. Based upon the recognition that such practices are outlawed, the Convention strengthens the existing prohibition by a number of supporting measures. The Convention provides for several forms of international supervision in relation to the observance by States Parties of their obligations under the Convention including the creation of an international supervisory body – the Committee against Torture – that can consider complaints from a State Party or from or on behalf of individuals.

The prohibition against torture is absolute and, according to the Convention, no exceptional circumstances whatsoever, including state of emergency or war or an order from a public authority may be invoked as a justification of torture. "Torture" is defined as:

"...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him

for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

State Parties have the obligation to prevent and punish not only acts of torture as defined in the Convention, but also other acts of cruel, inhuman or degrading treatment or punishment, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

State Parties have an obligation to take effective legislative, administrative, judicial or other measures to prevent acts of torture from occurring on their territories. Measures mentioned in the Convention include the prohibition and punish ability by appropriate penalties of all acts of torture in domestic criminal law; education and information regarding the prohibition against torture to be fully integrated into the training of law enforcement personnel, civil or military, medical personnel, public officials and others; the systematic review by State Parties of interrogation rules, instructions, methods and practices as well as of arrangements for the custody and treatment of suspects, detainees and prisoners; guarantees for the prompt and impartial investigation by competent authorities into allegations of torture; the protection of witnesses; and the possibility for victims to obtain redress and fair and adequate compensation and rehabilitation.

In addition, State parties have an obligation not to expel, return or extradite a person to another State where he or she would be in danger of being subjected to torture. An act of torture is required to be made an extraditable offence and a State Party is to take measures to establish its jurisdiction over crimes of torture committed in any part of its territory by one of its nationals and when an alleged offender is present on its territory and not extradited.

In order to monitor and review actions taken by States parties to fulfill their obligations, the Committee against Torture has certain procedures at its disposal. The first is the obligation for all State Parties to submit periodic reports to the Committee for examination, which results in the adoption of recommendations by the Committee to the State Party in question. A particular feature of the Convention is that if the Committee receives reliable information indicating that torture is being systematically

practiced in the territory of a State Party, the Committee may decide to initiate a confidential inquiry of the situation. Such inquiry would be carried out in cooperation with the State Party concerned and would include country visits. The Committee can also consider complaints from individuals who claim to be victims of a violation by a State Party to the Convention. This may be done only if the State Party concerned has declared that it recognizes the competence of the Committee to receive and examine such complaints.

The monitoring body is the Committee against Torture and the articles relevant to trafficking from the Convention are:

- Torture is an act where severe pain or suffering, physical or mental, is intentionally inflicted for purposes: intimidation of coercion; by person acting in official capacity. (Article 1).
- No expulsion or return of a person to another state if substantial grounds exist for believing that person would be in danger of torture. (Article 3)
- Alleged victims of torture have the right to complain to and have their cases promptly and impartially examined by competent authorities. Complainants and witnesses shall be protected against any consequential ill treatment or intimidation. (Article 13)
- Redress and Right to Compensation. (Article 14)

vi) Convention on the Rights of the Child (CRC), 1989

CRC⁷⁹ deals directly with trafficking in children especially girl children, under the age of 18, unless, majority is attained at an earlier age under domestic laws. State Parties are to take all appropriate natural, bilateral and multilateral measures to prevent the abduction of the sale of or traffic in children for any purpose or in any form. Children are also protected from all forms of economic exploitation, sexual exploitation and sexual abuse. While the language of the CRC on these points is strong, it has been noted that the effect of these provisions is weakened by the conventions failure to require State Parties to criminalize particular forms of conduct such as trafficking or to assume extraterritorial criminal jurisdiction in respect of such conduct. The Convention's failure to explicitly protect the child from non-State interference is also problematic.

⁷⁹ Convention on the Rights of the Child, UN.DOC A/RES/44/25, entered into force Sep. 2, 1990.

Nevertheless, the fact that Convention makes provisions for laws to be enacted in the 'best interests' of the child, it takes into account the special needs of a child.

Enforcement of the obligations set out in the CRC is mainly conducted through a reporting mechanism, similar to that for CEDAW. The State Parties report to the Monitoring Committee on the Rights of the Child. The Children's Convention broadens the possible scope of international cooperation on this Convention. The specialized agencies, particularly the United Nations Children's Fund (UNICEF) and other United Nations organizations, may be represented at the consideration of the implementation of provisions of the children's convention that fall within these organisation's mandates or they may submit reports on such implementation. The relevant provisions of the convention are:

- In all actions concerning children, the best interests of child shall be primary considerations. (Article 3)
- Every child has a right to life. (Article 6)
- Every child has a right to name and nationality. (Article 7)
- Ensure that no child is separated from his or her parents against their will except in cases where it is determined that separation is necessary for the 'best interests' of the child. (Article 9)
- Take measures to combat the illicit transfer and non-return of children abroad. (Article 11)
- Legal protection from arbitrary or unlawful interference with privacy, family home or correspondence and unlawful attacks on honour or reputation.(Article 16)
- Protection against physical or mental violence, injury, abuse, neglect or negligent maltreatment or exploitation, including sexual abuse.(Article 19)
- No child is to be deprived of his or her right to health. (Article 24)
- Every child has the right to education.(Article 28)
- Every child has the right to rest and leisure, engage in play and recreational activities.(Article 31)

- Children are to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development. (Article 32)
- Protect children from the illicit use of narcotic drugs and psychotropic substances. (Article 33)
- Protect children from all forms of sexual exploitation and sexual abuse.(Article 34)
- Protect from abduction, sale or traffic in children for any purpose or in any form. (Article 35)
- Protect against all other forms of exploitation prejudicial to child's welfare. (Article 36)
- Children are to be kept free from torture or other cruel, inhuman or degrading treatment or punishment. Further, no child is to be deprived of his or her liberty unlawfully or arbitrarily.(Article 37)
- Promote physical and psychological recovery and social reintegration of a child victim.(Article 39)

vii) Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000

The Optional Protocol to the Convention on the Rights of the Child purports to extend the reach of the Convention's provision in relation to sale of children, child prostitution and child pornography. The Protocol addresses the weaknesses of the CRC by addressing the sale of children as an international crime and requiring States Parties to criminalize and establish extraterritorial jurisdiction over the relevant acts. Some States and NGOs have argued that certain of its provisions are, in fact, weaker than those of the Convention⁸⁰

⁸⁰ **Focal Point on Sexual Exploitation of Children**, NGO Group for the Convention on the Rights of the Child, Issue No. 5, April 2000,pp 13-14.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000

- Prohibits sale of children, child prostitution and pornography.(Article 1)
- *Sale of children*: any act or transaction whereby a child is transferred by any person to another for remuneration or other consideration.(Article 2(a))
- *Child prostitution*: use of a child in sexual activities for remuneration or other consideration.(Article 2(b))
- *Child pornography*: any representation of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primary sexual purposes.(Article (2(c))
- Criminal or penal law to cover sale of children including offering, delivering or accepting a child for purposes of sexual exploitation, transfer of organs for profit, forced labour.(Article 3)
- Protect right of child victims in criminal justice process: in recognizing their special needs, especially as witnesses; providing support services; protecting privacy and identity of child; providing for their safety and that of their family where necessary and avoiding unnecessary delay in granting compensation.(Article 8(1))
- ‘Best interest of the child’ shall be a primary consideration. (Article 8(3))
- Ensure appropriate training for persons working with child victims. (Article 8(4))

Slavery Convention, 1926.

- *Slavery* is the status or condition of a person over whom any or all of the powers attached to the right of ownership are exercised. (Article 2(1))
- The *slave trade* includes all acts involved in: the capture, acquisition or disposal of a person with intent to reduce him to slavery; the acquisition of a slave with a view to selling or exchanging him; disposal by sale or exchange of a slave acquired with a view to being sold or exchanged and trade and transport of slaves. (Article 2(2))
- State parties to prevent and suppress slave trade. (Article 2)
- State parties to prevent compulsory or forced labour. (Article 3)

viii) Slavery Convention, 1926.

The 1926 Slavery Convention was the first international legal instrument to refer to the undefined practices of forced and compulsory labour. State Parties to the Convention undertook to adopt all necessary measures to prevent compulsory or forced labour from developing into condition analogous to slavery.

Under the Slavery Convention⁸¹, States Parties undertake to prevent and suppress the slave trade and to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms, including slavery-like practices including debt-bondage, serfdom, forced marriage and sale/transfer of children for labour exploitation. The Convention has no monitoring committee.

ix) Convention on Protection of the Rights of All Migrant Workers and their Families, 1990

The Migrant Workers Convention⁸² sets out comprehensive protection standards. The Convention applies to both documented (legal) and undocumented (illegal or irregular) migrant workers. It stipulates that migrant workers must not be held in slavery or servitude and that forced labour must not be demanded of them. States Parties must provide for sanctions against persons or groups.

The entry into force of the new Convention on 1 July 2003 marks advancement on the basic principles

Convention on Protection of the Rights of All Migrant Workers and their Families, 1990.

- Prohibits torture or cruel, inhuman or degrading treatment or punishment. (Article 10)
- Prohibits slavery, servitude, forced or compulsory labour. (Article 11)
- Right to liberty and security of person. (Article 16(1))
- Provides effective protection by the state against violence, physical injury, threat and intimidation, whether by public officials or by private individuals, groups or institutions. (Article 16(2))

⁸¹ Slavery Convention, 212 U.N.T.S. 17, entered into force Mar. 9, 1927, amended Convention entered into force Jul. 7, 1955.

⁸² International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 30 ILM 1517, adopted by General Assembly Resolution 45/158 of 18 December 1990 entered into force on 1 July 2003.

regarding laborers laid down in the two ILO Conventions. But the worrying point is that primarily emigration countries where migrants originate have ratified it since 1993. So far none of major host countries of migrants or immigrants has ratified the Convention. This has to be seen in the background that the number of people living and working outside their countries of origin has doubled since 1975 to a global total of 175 million representing about 3 per cent of world's population⁸³. This Convention can only be helpful if the world's host countries ratify the convention and promise to provide protection to the migrant workers.

- Minimum standards with regard to verification of identity, arrest, detention. (Article 16(3-9))
- Minimum standards with regard to the labour conditions of migrant workers, remuneration, medical care and social security. (Article 25-30)
- For documented migrants, the right to form associations and trade unions to protect their economic, social, cultural and other interests. (Article 40)

x) **ILO Convention No. 29 on Forced Labour, 1930**

The definition of forced or compulsory labour was first articulated in the 1930 ILO Forced Labour Convention⁸⁴. Under the 1930 Convention, the term refers to "all work or service that is extracted from any person under the menace of any penalty and for which the said person has not offered him voluntarily"⁸⁵. The 1930 Convention requires the criminalization of forced or compulsory labour⁸⁶ in all

ILO Convention No. 29 on Forced Labour, 1930

- States to suppress use of forced or compulsory labour within shortest possible period. (Article 1)
- Forced or compulsory labour is all work or service, which is extracted from any person under the menace of any penalty and for which the said person has not offered voluntarily (Article 2).

⁸³ **The International Migration Report, 2002**, United Nation Population Division, UN Publication, New York. Also available at www.un.org/esa/population/publications/ittmig2002/ittmigrep2002.htm-9k-

⁸⁴ The ILO definition would apply, for example, to the reference of forced labour contained in the Trafficking Protocol.

⁸⁵ ILO Convention No. 29 concerning forced or Compulsory Labour (1930) International Labour Conventions and Recommendations Vol. I, pp. 115-124, Article 2.

⁸⁶ ILO Convention No. 29 concerning forced or compulsory labour (1930), Article 25.

but a limited range of circumstances and imposes a duty on States Parties to suppress the use of such practices within the shortest possible period⁸⁷ as well as to prosecute violations⁸⁸.

- Officials shall not constrain any person to work for private individuals, companies or associations. (Article 6)

The monitoring body of all ILO Conventions is the Committee of Experts on the Application of Conventions and Recommendations.

xi) ILO Convention No. 105 on Abolition of Forced Labour, 1957.

The Convention⁸⁹ on Abolition of Forced Labour, 1957 suppresses all forms of forced labour as a means of racial, social national or religious discrimination. It calls for effective measures to secure the immediate and complete abolition of forced labour. State Parties are held accountable for the actions of corporations and private persons.

The Convention further defines “debt bondage” as “the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited or defined”⁹⁰ and also defines victim of debt bondage as a “person of servile status”⁹¹

xii) ILO Convention No. 182 on the Worst Forms of Child Labour, 1999.

The Convention⁹² acknowledges that the effective elimination of the worst forms of child labour, which includes child prostitution, and all forms of forced

ILO Convention No. 182 on the Worst Forms of Child Labour, 1999.

- Emphasizes prohibition and elimination of worst forms of child labour.(Article 1)
- Worst forms of child labour includes all forms of slavery or

⁸⁷ ILO Convention No. 29 concerning forced or compulsory labour (1930), Article 1.1.

⁸⁸ ILO Convention No. 29 concerning forced or compulsory labour (1970), Article 25.

⁸⁹ Convention (No 105) concerning the Abolition of Forced Labour, *adopted* on Jun. 25, 1957 by the General Conference of the International Labour Organisation, *entered into force* Jan. 17, 1959.

⁹⁰ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery, Article. 1(a).

⁹¹ *Ibid*, Article. 7(6).

⁹² Convention (No 182) concerning the Worst Forms of Child Labour, *adopted* on Jun. 17, 1999, by the General Conference of the International Labour Organisation.

labour for which victims of trafficking are used, require immediate and comprehensive action, taking into account the importance of free education and the need to remove children concerned from all such work and to provide for their rehabilitation and social integration while addressing the needs of their families. States Parties are required to take all necessary measures to ensure the implementation and enforcement of the Convention “including the provision and application of penal and other sanctions, as appropriate”.

practices similar to slavery including trafficking. (Article 2)

- Design and implement programmes of action to eliminate, as a priority, worst forms of child labour. (Article 6)
- Emphasizes on role of education to prevent child labour, taking into account the special situation of girls. (Article 7)
- Enhance international co-operation and or assistance including development, poverty eradication programmes and universal education. (Article 8)

xiii) UN General Assembly Declaration on Violence Against Women, 1993.

The Declaration on Violence Against Women⁹³ covers all forms of gender-based violence within the family and the general community⁹⁴ as well as violence “perpetrated or condoned by the State wherever it occurs”⁹⁵. This Declaration sets out the internationally agreed definition of violence against women as, “*any acts of gender based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life*”.

The Convention imposes an obligation on States to “exercise due diligence to prevent, investigate and punish acts of violence against women whether these are perpetrated by the State or private persons.”⁹⁶ As a resolution of the General Assembly, the Declaration does not have force of law. However, its potential capacity to contribute to the development of a customary international norm on the issue of violence against women should not be discounted.

⁹³ Declaration on Violence against Women, 1993, UN Doc. A/RES/48/104.

⁹⁴ *Ibid*, Articles 1 and 2.

⁹⁵ *Ibid*, Article 2.

⁹⁶ *Ibid*, Article 4 (c).

C. Other International Mechanism

a) United Nations

The United Nations (UN) makes comprehensive recommendations for Governments, regional and international organizations, with regard to law reform and law enforcement; measures to address the root factors that encourage trafficking in women and girls for prostitution and other forms of commercialized sex. It further provides resource allocation for programmes to heal and rehabilitate into society victims of trafficking. The UN through its agencies like UNIFEM, UNICEF, UNDP and UNESCO encourage governments to develop systematic data-collection methods and continuously update information on trafficking in persons, including the analysis of the *modus operandi* of trafficking syndicates, and to strengthen national programmes to combat this problem through sustained bilateral, regional and international cooperation. Given below are the work done by the agencies of the UN in the field of trafficking.

i) UNIFEM

The United Nations Development Fund for Women⁹⁷ (UNIFEM) provides financial support and technical assistance to innovative programmes promoting women's human rights and issues related to women's empowerment and gender equality. UNIFEM works primarily at the country level but is moving towards regional programmes in which individual country projects are linked in terms of a common focus and approach adapted to national situations and capacities. At the regional level, UNIFEM undertakes advocacy as well as sponsoring action-research in the area of trafficking in women and children.

ii) UNESCO

One of the aims of the United Nations Educational, Scientific and Cultural Organization⁹⁸ (UNESCO) is to promote human rights and fundamental freedoms. UNESCO takes action in international standard setting, in the preparation and adoption of international instruments and statutory recommendations. From time to time it convenes meetings and prepares reports revolving around issues of trafficking and slavery-like

⁹⁷ See <http://www.unifem.undp.org>.

⁹⁸ see <http://www.unesco.org>.

practices. UNESCO has official relations with about 600 NGOs worldwide, and about 1,200 NGOs cooperate with UNESCO on projects on an occasional basis.

iii) UNICEF

The United Nations Development Fund for Children⁹⁹ (UNICEF) looks at child labour and sexual exploitation of children as a gross violation of children's rights. It has regional and country-level projects on trafficking. UNICEF works closely with other UN agencies such as the OHCHR, the Committee on the Rights of the Child, ILO and the UN Special Rapporteur on the Sale of Children, Child Prostitution and Pornography in its projects on trafficking. In the areas of child labour and child sexual exploitation, UNICEF holds regular consultations with NGOs to discuss research findings, programme implementation findings and to develop complementary policies and programmes. For example, in West Africa, UNICEF has been networking regularly with NGOs on child trafficking.

iv) UNDP

The United Nations Development Programme¹⁰⁰ (UNDP) has projects on trafficking under its focus areas of gender and HIV/AIDS in some regions. For example, in South East Asia, UNDP has initiated a project between six countries "UN Inter-Agency Project on Trafficking in Women and Children in the Mekong Sub-Region"¹⁰¹ under its Gender Division. Under a UNDP HIV and Development project in South Asia, trafficking and related issues are key areas of focus. In Europe, a regional Programme to support Gender and Development also focuses on trafficking in women. In each of these programmes there is partnership with relevant NGOs in the region.

v) Commission on Human Rights.

The Commission on Human Rights falls under the OHCHR (Office of the High Commissioner of Human Rights) alongside the Sub-committee on Prevention of Discrimination and Protection of Minorities. Under the

⁹⁹ see <http://www.unicef.org>.

¹⁰⁰ see <http://www.undp.org>.

¹⁰¹ Participating countries are Thailand, Vietnam, Myanmar, Cambodia, Laos and China (Yunnan Province).

Commission, Working Groups and *Special Rapporteurs* are given mandate to investigate certain areas of human rights violation.

Special Rapporteurs are expert individuals appointed by the High Commissioner for Human Rights. They examine, monitor and publicly report on human rights situations in specific countries or territories or on specific issues of human rights violations worldwide. Special Rapporteurs produce annual reports on their theme area and submit it to the Commission on Human Rights. Three of the thematic mandated Special Rapporteurs are especially relevant to trafficking: the *Special Rapporteur on Violence Against Women*, the *Special Rapporteur on Human Rights of Migrants and the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*.¹⁰² Recently, the 60th Session of the UN Commission on Human Rights appointed a *Special Rapporteur on Trafficking in Persons, Especially Women and Children*

The Special Rapporteur on Trafficking is likely to be given a generic mandate to gather, request, receive and exchange information and communications from all relevant sources, including governments, victims of trafficking themselves and organisations, on violations of their human rights and fundamental freedoms; formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of victims of trafficking; and work in close relation with other Special Rapporteurs, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights.

vi) Commission on Crime Prevention and Criminal Justice

The Commission has reviewed the trends in the smuggling of illegal migrants in different parts of the world. The trafficking in persons has been considered within the overall context of violence against migrants. The United Nations General Assembly adopted work undertaken by the Commission on the formulation of model strategies and practical measures and the elimination of violence in the field of crime prevention and criminal justice¹⁰³ in 1997. These represent an internationally agreed upon set of strategies and measures to upgrade and insure “fair treatment” response on the part of criminal justice systems to women victims of all

¹⁰² See <http://www.unhchr.ch>

¹⁰³ Resolution 52/86 on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women.

forms of violence and additional areas of victim support and assistance, health and social services, training and research and evaluation.

b) Inter-governmental Organisations.

i) ILO

The International Labour Organisation¹⁰⁴ views with serious concern the increasing volume and complexity of trafficking in persons worldwide, especially migrant women and children. It recognizes the imperative need to address it at national, regional and global levels by promoting bilateral, regional and multilateral cooperation to combat it.

The ILO considers trafficking as a form of forced and compulsory labour, one of the worst forms of child labour, among the worst forms of exploitation of migrant workers, and lastly, as an issue involving a significant number of women workers. It recognizes that trafficking in women and children (boys and girls) exists not only in the commercial sex industry, but also in other sectors such as domestic service, work in plantations, construction sites, sweatshops and begging and soliciting.

It also considers it essential to improve the role of the labour market in increasing employment opportunities and improving working conditions for affected families in source countries, and in particular for female members. Providing everyone with full, productive and freely chosen decent work can attack the root causes of trafficking. In addition, it considers the promotion of gender equality as one of most important means to reduce trafficking since there is a strong link between women' employment status, child labour and trafficking. Indeed, gender discrimination in society and in the labour market is one of the root causes of trafficking.

Within the ILO's mandate, trafficking in persons for purposes of labour exploitation, in particular, forced and compulsory labour and other slavery-like practices, is covered by a number of ILO Conventions, which have already been covered in the earlier parts of this chapter. ILO has a well-developed supervisory system for the application of ratified conventions. All countries, which have ratified ILO Conventions, owe periodic reports on their application in law and in practice.

¹⁰⁴ See <<http://www.ilo.org>>.

ILO's major projects carried out by *the International Programme for the Elimination of Child Labour (IPEC)* to reduce labour exploitation and combating trafficking in children at regional level, include:

- South Asia (Bangladesh, Nepal and Sri Lanka).
- South East Asia (Philippines, Indonesia, Thailand, Cambodia).
- West and Central Africa (Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Gabon, Ghana, Mali, Nigeria and Togo).
- Central America (El Salvador, Nicaragua, Honduras, Costa Rica, Guatemala and the Dominican Republic).
- South America (Brazil and Paraguay).

ii) IOM

The International Organization for Migration's¹⁰⁵ activities on trafficking includes information campaigns, research programmes, capacity building for Government and other institutions, and the provision of assistance and protection, including return and reintegration of victims of trafficking. IOM is also implementing a Global Assistance Program that creates a mechanism for rapid, case-by-case assistance to women and children victims of trafficking outside their countries of origin who require immediate protection and support.

IOM sees trafficking in persons especially women and children as a part of a larger irregular migration picture. Therefore, in order to search for longer-term solutions to this phenomenon, the root causes poverty, lack of opportunities, scarce resources, low status of women in society and political and economic instability need to be addressed. IOM has traditionally focused on addressing two stages in the trafficking process:

- Firstly through prevention before victimization occurs by providing potential victims of trafficking with information about trafficking, so that they will be in a better position to make an informed decision.
- Secondly through direct assistance and support to victims of trafficking.

¹⁰⁵ See <http://www.iom.int>

In order to provide assistance and support to victims of trafficking, IOM is spreading the awareness that this group of people be primarily recognized as victims of crime and exploitation, rather than as illegal migrants.

D. Analysis of the Role of the UN System in Promoting and Protecting Human Rights.

The UN System has its limitations largely because it is an extremely large organization with headquarters at Geneva and New York, which makes inaccessible to many NGOs working at the grass roots level. However, structures within the UN such as UNIFEM are trying to alleviate this inaccessibility and promote use of international human rights machinery, particularly for women in developing countries¹⁰⁶. The operationalisation of human rights from the arena of jurisprudence to practical application is fraught with difficulties. The UN lacks an enforcement body, court and policing power to force the government to adhere to international human rights law. The UN is largely a recommendatory body that cannot force State Parties to sign a particular treaty. Further under Article 2(7) of the UN Charter, the UN cannot interfere in the domestic affairs of a country though human rights violations generally occurs within the purview of matters related to so called domestic affairs. Only in extreme cases sanctions are imposed but evidence shows that no sanctions have yet been applied to prohibit gender discriminations¹⁰⁷. The UN in its sanctioning role is prone to political and strategic pressures of its members.

Despite all its limitations, the UN system still provides the most potent force to human rights movement. The monitoring and reporting procedures can be honed further to provide them teeth in the implementation of the international human rights law. Governments still do not like to be criticized and to have their bad practices publicized and can sometimes be shamed into changing their behaviour. In the enforcement role of the UN, the International Court of Justice (ICJ) and the International Criminal Court (ICC) can play a vital role. The ICC came into existence in 2003 to prosecute and try individuals for the crime of genocide, crimes against humanity and war crimes. Included in the category of crimes against humanity is enslavement, which includes

¹⁰⁶ **International Services for Human Rights, Women Rights in the UN**, Geneva, 1995, p.35 or www.ishr.ch.

¹⁰⁷ **GAATW, Human Rights and Trafficking in Persons: A Handbook**, Global Alliance Against Trafficking in Women, Bangkok, Thailand, 2001, p.110.

trafficking, rape, sexual slavery, enforced prostitution, forced labour or any other form of sexual violence of comparable nature. But for the exercise of this jurisdiction the above acts must be committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack. This is a difficult condition to be met thereby making ICC ineffective in dealing with cases of human trafficking. Therefore, it is recommended that ICC be given specific jurisdiction to deal with human trafficking. Thus there is a need to further strengthen the UN system in its fight against trafficking.

E. Governmental Mechanisms

The regional human rights system further provides the necessary push to the operationalisation of human rights concerns for the trafficked persons. Regional mechanisms applicable to trafficking vary widely from region to region. Some of these mechanisms would be taken up here for analysis.

i) Europe

a. European Convention on Human Rights, 1950

It mainly incorporates the civil and political rights enshrined in the UDHR. All members of the Council of Europe are parties to the Convention, which is also applicable to their overseas territories.

b. European Social Charter, 1961

The Charter deals with the economic, social and cultural rights. The State Parties resolve to make every effort in common to improve the standard of living and to promote the social well-being of both their urban and rural populations by means of appropriate institutions and actions. The relevant provision of the charter provides right of migrant workers and their families to protection and assistance.

European Convention on Human Rights, 1950.

- Freedom from of torture or inhuman or degrading treatment.
- Freedom from slavery, servitude or forced labour.
- Right to liberty and security of person.

c. **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

The rights and freedoms guaranteed by the Convention are enforced by the European Commission of Human Rights, European Court on Human Rights and European Committee on Prevention of Torture.

d. **European Union**

Apart from the above mechanisms, EU citizens can bring legal cases to the European Court of Justice. Complaints calling for investigations or policy actions can be made to the relevant EU bodies. In 1997, the EU released, the Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the purpose of Sexual Exploitation.¹⁰⁸ The guidelines focus on cooperation between governments and UN agencies, and action in the field of prevention, prosecution, assistance and support at the national and European level.

ii) **North and South America.**

a. **American Convention on Human Rights (ACHR), 1969.**

- Freedom from forced labour, involuntary servitude and slavery.
- Right to work under proper conditions and reasonable remuneration

The ACHR draws upon the European Convention of Human Rights, the American Declaration of the Rights and Duties of Man, 1948 and the International Covenant on Civil and Political Rights, 1966. Only state members of the Organization of American States (OAS) have the right to become parties. Apart from this, the OAS also has the Inter American Convention for the Punishment, Eradication and Prevention of Violence against Women.

¹⁰⁸ Ministerial Conference under the Presidency of the European Union, **The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the purpose of Sexual Exploitation**, DCE/97-429.

iii) Africa

a) African Charter on Human Rights and People's Rights, 1981.

- Freedom from slavery, torture, cruel, inhuman or degrading punishment or treatment.
- Right to liberty.

The heads of the Organization of African Unity (OAU) adopted the African Charter on Human Rights on 17th June 1981. This is the first human rights document that emphasizes upon the people's rights, that is, third generation group rights. For the enforcement of

these rights and duties under the Charter, there is an absence of any judicial or quasi-judicial organ. There exists the African Commission on Human and Peoples' Rights whose function, to a large extent, is promotional, though it also has the enforcement role.

iv) Asia

No equivalent regional human rights mechanism exists in Asia. However, two sub-regional mechanisms are working on trafficking.

a) South Asian Association for Regional Cooperation (SAARC)

SAARC member countries include Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. Among these countries India, Nepal and Bangladesh face a severe problem of trafficking specially with regard to women and children. Each country serves as a demand, supply and transit zone. Therefore in order to counter the evil of trafficking in women and children, the SAARC member countries have signed a Convention on the Prevention and Combating Trafficking in Women and Children for Prostitution, 2000. This Convention emphasizes the need to strengthen regional cooperation in providing assistance, rehabilitation and repatriation to victims of trafficking for prostitution. A detailed analysis of SAARC Convention would be taken up in Chapter 5.

b) Asian Regional Initiative against Trafficking (ARIAT)

ARIAT declared a regional plan of action for 23 countries in the Asia-Pacific region at its first meeting in Manila in March 2000. The Plan of Action encourages countries to cooperate with one another and with

the civil society at all levels in the strategic areas of prevention, protection, prosecution, rehabilitation and reintegration.

Conclusion

This chapter has shown that under International Human Rights Law, a neat legal framework and monitoring mechanism exists to tackle the issue of trafficking. The concept of State responsibility ensures that the State not only respects and protects the Human Rights of persons from the agents of the State, but also from non-State actors. Infact, the State has human rights obligations not only towards its own citizens but towards non-citizens also.

A perusal of the international treaties and conventions has brought to fore that all the fundamental human rights related to trafficking are protected by these conventions and treaties. Most of the human rights treaties abolish slavery, servitude, forced labour, debt bondage and practices similar to slavery. The 1926 Slavery Convention was the first international legal instrument to refer to the practices of forced and compulsory labour. The ILO's 1957 Abolition of Forced Labour Convention goes further, obliging State Parties to take effective measures to secure immediate and complete abolition of forced or compulsory labour.

The Women's Convention, the Children Convention and the International Convention on Protection of the Rights of all Migrant Workers, all represent thematic laws and are adopted to look into the special problems faced by women, children and migrants who are the most vulnerable to trafficking. These Conventions underline the importance of principles of non-discrimination, equality, liberty, freedom of movement and dignity of human being and all these conventions have special provisions dealing with trafficking.

Apart from laws, the UN and its agencies have contributed immensely in implementation and protection of human rights. The mechanisms of the Office of High Commissioner for Human Rights (OHCHR), Commission of Crime Prevention and Criminal Justice, Special Rapporteurs, are all designed around the need to respect human rights. ILO, IOM, UNDP, UNESCO and UNICEF sponsor and carry out special programmes for the prevention of trafficking in persons. Further, regional mechanisms present in Europe, North-South America, Asia and Africa

have also strengthened and complemented the existing machinery on trafficking.

Having brought out the dimension of the problem and the human rights violations involved in trafficking in Chapter 1 and by providing the basis for the international legal regime on trafficking in Chapter 2, the scene is now set up for taking a detailed analysis of special conventions on trafficking.

Chapter 3

Critique of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949

A. Background

Trafficking in persons has always raised human rights concerns and the creation of a human rights framework has been a major approach to combating it. Early human rights instruments against trafficking reflected the concerns of their time and the issue of trafficking in persons was dealt with from the perspective of the fight against prostitution and slavery.

The first international conference on the prevention of “trafficking in women” was held in 1895 in Paris, followed by another in 1899 in London and one in Budapest. In 1904, sixteen States were represented at an international meeting in Paris, from which resulted the first International Agreement against “White Slavery”¹⁰⁹. The Convention was desirous of securing to women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as “White Slave Trade”. This Convention was limited to the compulsive forms of procurement in as far as it concerned adult women and did not address these situations where there was no apparent compulsion or abuse. Six years later, this Agreement was followed by a new Convention¹¹⁰, broadening its scope to include traffic in women within national boundaries. But, both these Conventions were limited explicitly to the process of recruitment, i.e., the process up to the moment a woman is actually handed over. Coercive conditions inside the brothels were not addressed. Therefore, in order to secure more completely the suppression of the traffic in women and children, an additional Convention was drafted in 1921¹¹¹. The most important addition in this Convention was incorporation of trafficking of children of both the sexes.

¹⁰⁹ International Agreement for the Suppression of the White Slave Trade signed in Paris, May 16, 1904.

¹¹⁰ International Convention for the Suppression of the White Slave Trade signed in Paris, May 4, 1910.

¹¹¹ International Convention for the Suppression of the Traffic in Women and Children, Geneva, Switzerland, September 30, 1921.

In 1933 a new international agreement was signed in Geneva¹¹² that expanded the end results of trafficking to include all sexual and immoral purposes – not just prostitution. Force was no longer a constitutive element of trafficking, which now included enticement, procurement and leading away. The cross-border element was removed - thereby subjecting domestic activity to the Convention's provisions. Each of these four instruments required States Parties to take measures aimed at improving information exchange on trafficking. Victim protection measures were also included. Notably, none of these four instruments directly addressed the issue of the legal status of the prostitution¹¹³.

In 1949, the various White Slavery and Trafficking Agreements were consolidated into one instrument: the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others¹¹⁴ (Trafficking Convention). It can be said to be the first comprehensive attempt by the international community to address the issue of trafficking. The Convention came into force in 1951 and up till now it has 73 countries as members who have ratified it.

B. Important Provisions of The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 1949

The Preamble to the Convention declares that prostitution and traffic in persons is "incompatible with the dignity and worth of the human person and endangers the welfare of the individual, the family and the community"¹¹⁵. The primary purpose of the 1949 Convention is to punish the trafficking and the procurement of women for the purposes of prostitution and to punish the exploitation of prostitutes, regardless of the victim's age or consent¹¹⁶. Therefore, the Convention calls for punishment of any person who keeps or manages or knowingly finances a brothel or knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.¹¹⁷ In addition to

¹¹² International Convention for the Suppression of the Traffic in Women, Geneva, Switzerland, October 11, 1933.

¹¹³ See Nina Larsen, "Slavery and Slavery-like Practices United Nations Standards and Implementation", 57 *NORDIC JOURNAL OF INTERNATIONAL LAW* (1988) 2002.

¹¹⁴ The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 1949, 96 UNTS, 271, G.A. Res. 317(IV) of 2 Dec. 1949, entered into force July 25, 1951.

¹¹⁵ *Ibid*, Preamble

¹¹⁶ *Ibid*, Art. 1 and 2.

¹¹⁷ *Ibid* Art. 2.

punishing traffickers, procurers and exploiters of prostitutes, State Parties are required to abolish any form of registration or supervision of prostitutes,¹¹⁸ take measures to prevent prostitution and rehabilitate victims of prostitution¹¹⁹, take measures in connection with immigration and emigration procedures to deal with trafficking in persons¹²⁰; repatriate victims of international traffic;¹²¹ and supervise employment agencies to prevent those seeking employment from being exposed to the dangers of prostitution¹²².

The 1949 Convention obligates the State Parties to regard offences established by the Convention as extraditable offences in any extradition treaty or otherwise¹²³. It also follows the principle of 'aut dedere aut punire' that is applied when a person is refused to be extradited. In this case, the State, which refuses to return the person must prosecute and punish the person according to its own laws¹²⁴.

Cross border cooperation is seen to be an important tool in the fight against immigrant prostitution and trafficking and the 1949 Convention contains a number of substantive and procedural provisions on this issue. Detailed guidance is also provided on the internal coordination and centralization of anti-trafficking efforts. It calls for compilation of all information calculated to facilitate the prevention and punishment of the above-mentioned offences¹²⁵.

The State Parties are obligated to take preventive measures against trafficking of women such as provisions of public and private educational, health, social, economic and other related services. State Parties are obligated to take or to encourage measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution.¹²⁶ The prevention measures also involve strengthening of immigration and emigration policies that protect immigrants or emigrants from becoming victims of trafficking¹²⁷. Arranging for public warning of the dangers of trafficking and ensuring supervision of railway stations, airports, seaports and other public places are some other measures

¹¹⁸ *Ibid* Art. 6

¹¹⁹ *Ibid* Art. 16

¹²⁰ *Ibid* Art 17.

¹²¹ *Ibid* Art. 19

¹²² *Ibid* Art. 20.

¹²³ *Ibid*, Art. 8

¹²⁴ *Ibid*, Art. 9.

¹²⁵ *Ibid*, Art. 16.

¹²⁶ *Ibid*, Art. 16.

¹²⁷ *Ibid* Art. 17.

propagated by the 1949 Convention to prevent trafficking¹²⁸. The 1949 Convention also calls for supervision of employment agencies in order to prevent persons seeking employment from being exposed to the dangers of prostitution¹²⁹.

Protection is also a central theme. Foreign victims of trafficking are to have the same rights as nationals with respect to their being party to proceedings against traffickers¹³⁰. Victims of prostitution and of traffickers are to be provided with social services for prevention of prostitution as well as for “rehabilitation and social adjustment”¹³¹. State Parties are also obliged to maintain and care for destitute trafficking victims prior to their repatriation¹³².

As for repatriation, the 1949 Convention lays down that it be done on the desire of the person to be repatriated and in conformity with law. Pending repatriation, State Parties must without prejudice to prosecution and in accordance with domestic law, make suitable provisions for the temporary care and maintenance. In the event that the victims cannot pay for the cost of repatriation, the State of residence and State of origin must share the cost¹³³.

Under the Convention, State Parties are required to annually communicate to the Secretary-General of the United Nations any laws, regulations and measures relating to the traffic of persons. This information is to be published periodically by the Secretary-General to all members and non-members of the United Nations¹³⁴.

The Final Protocol to the Convention declares that “nothing in the present convention shall be deemed to prejudice any legislation which ensures, for the enforcement of the provisions for securing the suppression of the traffic in persons and of the exploitation of others for purposes of prostitution, stricter conditions than those provided by the present Convention”¹³⁵. Thus, the 1949 Convention lays down the framework for further strengthening of laws on trafficking in persons.

¹²⁸ *Ibid* Art. 17(2-3).

¹²⁹ *Ibid* Art. 20.

¹³⁰ *Ibid*, Art. 5.

¹³¹ *Ibid*, Art. 16.

¹³² *Ibid*, Art. 19(1).

¹³³ *Ibid*. Art. 19.

¹³⁴ *Ibid*, Art. 21.

¹³⁵ *Ibid*, Final Protocol.

C. Analysis of the Trafficking Convention

The 1949 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others reads more of an anti-prostitution instrument than as an anti-trafficking one. It calls for the eradication of traffic in persons without defining it and equates trafficking with prostitution and the movement of persons into prostitution. Thus, it ignores the plethora of end purposes for which trafficking may take place. By ignoring the other purposes for which trafficking takes place, the 1949 Convention denies protection to a large group of trafficked persons; and hence becomes limited in its scope and reach.

The Convention considers prostitution an “evil”; as “incompatible with the dignity and work of the human person”. The fact that it also prohibits the “exploitation of prostitution” by others even with the consent of the person involved, confirms its real focus – the abolition of prostitution. Thus, the Convention has moralistic overtones. But even this goal is not fully realized in the Convention for despite its avowed abolitionist stance, the Convention does not, in fact, prohibit prostitution requiring State Parties only to take social and economic measures aimed at preventing prostitution.¹³⁶

The 1949 Convention, though gender neutral, predominately affects women¹³⁷. The preventive measures are designed in such a manner that they deprive women of their right to move freely within their country’s borders, right to migrate, labour rights including the right to choice of work, the right to unionize and the right to just and favourable conditions of work. This unequal treatment of women further propagates inequality, discrimination and lowering of status of women. The Convention entrenches the age-old beliefs that women need protection and cannot act as free agents having free will.

The crime control perspective of the Convention makes it an ineffective human rights instrument. The Convention lays more emphasis on controlling people’s movement than providing relief and succour to victims of trafficking. There are many provisions on prevention, State cooperation on prevention and investigation of trafficking but only a few provisions on rehabilitation of the victims. The provision on repatriation also falls short of expectations. It fails to take into account the special

¹³⁶ Anne Gallagher, “The International Legal Response to Human Trafficking” paper presented for the Technical Consultative Meeting on Anti-Trafficking Programs in South Asia, Kathmandu, Nepal, September 2001, p.8.

¹³⁷ GAATW, *Human Rights and Trafficking in Persons- A Handbook*. Global Alliance Against Trafficking in Women, Bangkok, Thailand, 2001, p.23.

needs of the victims. The Convention fails to empower meaningfully the victims of trafficking or to take a right based approach to address the issue¹³⁸. It is not surprising that many prominent human rights bodies either call for its radical reform or abolition and re-drafting. Further, under the 1949 Convention, States Parties are required only to annually communicate to the Secretary-General any laws, regulations and measures relating to the traffic of persons. In spite of the fact that the Trafficking Convention came into force in 1951, the mechanism for receiving such information was not established until the mid-seventies. One of the reasons for the inefficiency in setting up a mechanism to review these reports is the fact that there is no established body to monitor, State Parties compliance with this Convention. Without such a body there will be few resources available and scant political will to ensure adherence to 1949 Convention.

D. Conclusion

The 1949 Convention is narrow in its outlook. The adequacy or appropriateness of this Convention, therefore, to deal effectively with the modern manifestation of trafficking and the many human rights abuses associated with this practice is thus highly questionable.¹³⁹ By focussing on the elimination of prostitution instead of on the protection of human rights of trafficked persons, the 1949 Convention has emerged as ineffective human rights Convention. Up till now, it has been ratified by only 73 countries and thus has been, and will continue to be, an ineffective treaty¹⁴⁰.

It is because of the above-mentioned drawbacks that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) expands the end purposes of trafficking only from prostitution to include all forms of traffic in persons to cover trafficking for forced labour or marriages as well as prostitution¹⁴¹. Also, CEDAW's focus on exploitation of the prostitution of others rather than prostitution can be read as a tacit rejection of the explicit abolitionist stance of 1949

¹³⁸ International Movement Against All forms of Discriminations and Racism (IMADR), **"Strengthening the International Regime to Eliminate Traffic in Persons and the Exploitation of the Prostitution of Others"**, A Working Paper presented to the Working Group on Contemporary Forms of Slavery, Tokyo, Japan, May 1998, p.27.

¹³⁹ See M. Dottridge, **International Instruments Against Traffic in Persons – when the "Excellent" is the enemy of the "Good"**, 1999, p.7, as referred in John Morrison, **The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy**, a Working Paper of UNHCR's Policy Research Unit, Centre for Documentation and Research, July 2000, p.61.

¹⁴⁰ *Supra note* 25, p. 23.

¹⁴¹ Convention on the Elimination of All Forms of Discrimination Against Women, Art. 6.

Convention. All the above reasons seem to have crystallized the world's efforts in formulating the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons (Trafficking Protocol). The Trafficking Protocol looks into the entire dimension of the problem of trafficking in persons and provides an interdisciplinary, multi-sector approach. In order to gauge how the new Protocol on trafficking is an improvement on the 1949 Convention, the next chapter would analyze in detail the Trafficking Protocol along with the Convention on Transnational Organized Crime, 2000 and Protocol on Migrant Smuggling. These three instruments together represent the modern legal regime on trafficking in persons.

Chapter 4

The United Nations Convention Against Transnational Organized Crime, 2000 - The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 and the Protocol Against the Smuggling of Migrants by Land, Sea and Air, 2000

A. Introduction

The globalization of legitimate economic activities has been closely matched by the corresponding globalization of organized crime. The same developments in areas such as transportation and communication technologies, which have created enormous opportunities for human communication and economic development have also created significant new opportunities for organized crime, which has not been reluctant to exploit them¹⁴². As a result, criminal groups across the world can communicate and coordinate their activities, often in new ways, which elude the efforts of law enforcement agencies to intercept and control them. Increase in flow of commodities and information have created new opportunities for theft, diversion, smuggling and other crimes, and have provided both incentives and opportunities to treat human beings as commodities, generating enormous profits from the smuggling of migrants and trafficking in persons.

Transnational organized crime poses a major challenge for legislators, prosecutors and law enforcement officials, who are facing an increase in the range of offences committed and volume of cases reported. The existing infrastructure of international cooperation is no longer adequate to respond to these challenges. The high cost and complexity of conducting multi-national investigations and prosecution exacerbates this situation.¹⁴³

¹⁴² Jean Paul Laborde, *The United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, in UNESCAP *Resource Guide on Using Legal Instruments to Combat Trafficking in Women and Children*, Bangkok, 2003, p2.

¹⁴³ *Ibid.*

It is in this background that the International Convention Against Transnational Organized Crime¹⁴⁴ and its three protocols against: Trafficking in Persons¹⁴⁵; Smuggling of Migrants¹⁴⁶; and Illicit Manufacturing of and Trafficking in Firearms¹⁴⁷ emerged. The negotiation process started in December 1998 when the United Nations General Assembly established an inter-governmental, ad-hoc committee and charged it with developing a new international legal regime to fight transnational organized crime¹⁴⁸. In October 2000, after eleven sessions involving participation from more than 120 States, the ad-hoc committee concluded its work¹⁴⁹. The Convention along with its two protocols dealing respectively with Smuggling of Migrants and Trafficking in Persons – Especially Women and Children were adopted by the General Assembly in November, 2000¹⁵⁰ and opened for signature at a high-level inter-governmental meeting convened in Palermo, Italy, in December, 2000.

The significance of these developments should not be underestimated. The Vienna process¹⁵¹, as it has come to be known, represents the first serious attempt by the international community to invoke the weapon of international law in its battle against transnational organized crime¹⁵². It is because of the transnational character of trafficking with links with smuggling of migrants and involvement of organized crime syndicates that the Trafficking Protocol is attached to the Transnational Organized Crime Convention. The Convention along with the Trafficking Protocol and Migrant Smuggling Protocol represent the

¹⁴⁴ United Nations Convention Against Transnational Organized Crime, *opened for signature* on 12 Dec. 2000, U.N.GAOR, 55th Sess., Annex I, Agenda Item 105, at 25 UN Doc. A/55/383 (2000) (please check).

¹⁴⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/55/383(1000), Annex II.

¹⁴⁶ Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/55/383(2000), Annex III.

¹⁴⁷ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/Res. /55/255(2001).

¹⁴⁸ Transnational Organized Crime, G.A. Res. 53/111, U.N. GAOR, 53rd Sess., 85th plen. mtg., U.N. Doc. A/RES/53/111(1998).

¹⁴⁹ Report of the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, UN GAOR 55th Sess, Agenda Item 105, at 1, U.N. DOC. A/55/383(2000).

¹⁵⁰ G.A. Res. 55/25, of 15 Nov. 2000.

¹⁵¹ The Convention and the Protocols were negotiated under the auspices of the Vienna-based United Nations Commission on Crime Prevention and Criminal Justice (a functional Commission of the Economic and Social Council).

¹⁵² Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analyses* in **Human Rights Quarterly**, 23, 2001, pp. 975-1004, John Hopkins University Press.

modern day legal regime on trafficking in persons and covers all aspects of trafficking. Therefore, before going into the Trafficking Protocol one needs to know the important provisions of the Convention on the Transnational Organized Crime, 2000 and their relationship with the above mentioned two protocols. This Chapter, thus, highlights the principal provisions of the Convention against Transnational Organized Crime, gives the background and analysis of the Trafficking Protocol and also provides an overview of the Migrant Smuggling Protocol.

B. Overview of the Convention against Transnational Organized Crime

The Convention Against Transnational Organized Crime aims at promoting international cooperation to prevent and combat transnational organized crime effectively. As the first comprehensive international legal instrument for the fight against transnational crime, this Convention, together with its protocols, provides law enforcement and judicial authorities with unique tools to combat the problem. It is intended to provide greater standardization or coordination of national policy, legislative, administrative and enforcement approaches to the problem of transnational organized crime to ensure a more efficient and effective global effort to control it.

C. Provisions of the Convention

The Convention Against Transnational Organized Crime is referred to as the “parent” agreement. Its principle provisions apply, *mutatis mutandis*¹⁵³, to all its protocols. The Convention is essentially an instrument of international cooperation - its purpose being to promote inter-state cooperation in order to combat transnational organized crime more effectively¹⁵⁴. The Convention seeks to eliminate “safe havens” where organized criminal activities or the concealment of evidence or profits can take place by promoting the adoption of basic minimum measures¹⁵⁵.

The Convention standardizes terminology and concepts, creating a common basis for national crime-control frameworks. These concepts

¹⁵³ The term “*mutatis mutandis*” as used in both the Protocols means: “with such modifications as circumstances require” or “with the necessary modifications”.

¹⁵⁴ *Supra* note 3, Art. 1.

¹⁵⁵ <<http://www.odccp.org/palermo /convensumm.htm>>

include “organized criminal group”, a definition internationally agreed upon for the first time. The Convention establishes five offences, whether committed by individuals, or corporate entities¹⁵⁶ that are covered by participation in an organized criminal group, corruption, money laundering, obstruction of justice, and “serious crime”. There are, however, two principal prerequisites for application. First, the relevant offence must have some kind of transnational aspect. Second, it must involve an organized criminal group.

“Serious crime” is defined in such a way as to include all significant criminal offences. It refers to conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty¹⁵⁷. As a result, States will be able to use the Convention to address a wide range of modern criminal activities including trafficking and related exploitation as well as migrant smuggling. This is especially important in view of the fact that States may become parties to the Convention without having to ratify any or all of the protocols¹⁵⁸.

In keeping with its nature as a transnational cooperation agreement, the Convention contains specific provisions for prevention, investigation and prosecution of these offences as well as serious crimes when they are transnational in nature and involve an organized criminal group¹⁵⁹.

State parties to the Convention are obliged to adopt domestic laws and practices, which would prevent or suppress activities related to organized crime. To combat money laundering, for example, countries would require their banks to keep accurate records and make them available for inspection by domestic law enforcement officials. Under the Convention, bank secrecy cannot be used to shield criminal activities.

State parties to the Convention are also required to take appropriate action to confiscate illicitly acquired assets. The Convention foresees the possibility for an asset sharing mechanism under which State Parties are encouraged to contribute confiscated assets to bodies working for the fight against organized crime.

¹⁵⁶ *Supra* note 3, Art. 10

¹⁵⁷ *Ibid.*, Art 2 (b)

¹⁵⁸ *Ibid.*, Art 37(3)

¹⁵⁹ *Ibid.*, Art. 18.

In the area of international cooperation, the Convention includes articles of extradition¹⁶⁰, mutual legal assistance¹⁶¹ transfer of proceedings¹⁶² and law enforcement cooperation¹⁶³ while there is an implicit recognition of nationality as a traditional ground for refusal of extradition, the Convention embodies the principle *aut dedere aut judicare* when extradition is refused on this ground. The article on extradition provides that offences covered by the Convention would be deemed to be included as extraditable offences in any treaty existing between State Parties, or would be included in future treaties. State Parties can use the Convention for extradition purpose even if they make extradition conditional on a treaty. Those, which did not make extradition conditional on a treaty, will recognize the offences covered by the Convention as extraditable offences between them.

The article on mutual legal assistance is much more extensive, having been called by some a “treaty within a treaty”¹⁶⁴. The article considerably evolves the concept of mutual legal assistance, as one of the primary tools of international cooperation against transnational crime. In this way, the article speaks of the use of modern technology, such as electronic mail for the transmission of requests, or video links for the giving of testimony.

In the area of law enforcement cooperation, the Convention includes provisions on the exchange of intelligence and another operational information¹⁶⁵ and on the use of modern investigative methods with appropriate safeguards. The nature of transnational organized crime makes the protection of victims and witnesses as a matter of such importance that the Convention also requires State Parties to adopt appropriate measures to protect

Relation between the Convention and its Protocols

- The Convention Against Transnational Organized Crime is the parent agreement.
- Its principles apply, *mutatis mutandis* to its Protocols.
- States must ratify the Convention before ratifying one or any of its Protocols.

¹⁶⁰ *Ibid.*, Art 18

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Supra* note 1, p.12.

¹⁶⁵ *Supra* note 3, p.26.

witnesses from potential intimidation or retaliation¹⁶⁶. This includes physical protection, relocation, and within legal constraints, concealment of identities.

The Convention further calls on States to support the efforts of developing countries to fight transnational organized crime and assist them to implement the Convention through technical cooperation as well as financial and material assistance¹⁶⁷.

The Convention establishes a Conference of the Parties to promote and review its implementation as well as to more generally improve the capacity of State Parties to combat transnational organized crime¹⁶⁸. The Conference of Parties will have a special role in facilitating several of the cooperative measures envisaged under the Convention including: the provision of technical assistance; information exchange; and cooperation with international and non-governmental organizations¹⁶⁹. It is also responsible for periodic examination of the implementation of the Convention as well as making recommendations to improve the Convention and its implementation¹⁷⁰. The State Parties are required to provide regular reports on progress made in implementation. In addition, the Conference of Parties may itself establish additional review mechanism including "peer review". It is relevant to note that the Conference of Parties will be solely concerned with the Convention and will not have any authority in respect to the protocols, except in so far as their respective subject matters can be brought within the provisions of the Convention itself.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime

A. Origin / Background

The idea of a separate Protocol on Trafficking was first mooted at a meeting of an inter-governmental group of experts established by the General Assembly to develop a preliminary draft of the proposed Convention Against Transnational Organized Crime. On the question

¹⁶⁶ *Ibid.*, Art. 25(1).

¹⁶⁷ *Ibid.*, Art. 30.

¹⁶⁸ *Ibid.*, Art. 32(1).

¹⁶⁹ *Ibid.*, Art. 32(3a and 3c).

¹⁷⁰ *Ibid.*, Art 32 (3a and 3e)

whether specific offences should be included in the draft Convention, the group concluded that the negotiating process would be simplified if such offences were dealt with separately¹⁷¹.

The origins of the Trafficking Protocol can be traced back to Argentina's interest in the issue of trafficking in minors and its dissatisfaction with the slow progress on negotiating an additional protocol to the Convention on the Rights of the Child (CRC) to address child prostitution and child pornography. Argentina was also concerned that a purely human rights perspective to this issue would be insufficient and accordingly lobbied strongly for trafficking to be dealt with as part of the broader international attack on transnational organized crime¹⁷². Argentina's proposal for a new convention against trafficking in minors was discussed at the 1997 session of the UN Commission on Crime Prevention and Criminal Justice¹⁷³. Its timing was fortuitous. At that time a general awareness had also developed that there was a need for a holistic approach where the crime control aspects of trafficking were addressed along with traditional human rights concerns. It is in this background that the Trafficking Protocol was discussed.

B. Important Provisions of the Protocol

The Preamble to the Protocol underlines the importance of a comprehensive international approach in the countries of origin, transit and destinations, to prevent and combat trafficking. Therefore, in order to provide a universal instrument that addresses all aspects of trafficking in persons, a special Protocol dealing with Trafficking supplementing the UN Convention Against Transnational Organized Crime was adopted.

Purpose and Scope of Application

The stated purposes¹⁷⁴ of the Trafficking Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;

¹⁷¹ Report of the Meeting of the inter-sessional open-ended Inter-governmental group of experts on the elaboration of a preliminary draft of a possible comprehensive International Convention Against Organized Transnational Crime. (Warsaw, 2-6 Feb. 1998), UN Doc. E/CN.15/1985/5 at 10(b).

¹⁷² *Supra* note 11, p.982.

¹⁷³ Measures to Prevent Trafficking in Children, Report of the Secretary General, U.N. Doc. E/CN.15/1997/12(1997).

¹⁷⁴ *Supra* note 4, Art. 2.

- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among State Parties in order to meet these objectives.

The application of the Protocol is limited to situations of international trafficking involving an organized criminal group¹⁷⁵. Further, the Protocol obligates the State Parties to adopt such legislative and other measures necessary to criminalize trafficking and related conduct¹⁷⁶.

Definition

As seen in the last chapter, the 1949 Convention on Trafficking limited the definition of trafficking only for the purpose of prostitution. It did not cover the entire gamut of purposes for which trafficking could take place. Apart from conflating trafficking with prostitution, the Convention also, did not leave scope for voluntary, consensual prostitution. The tenor of the 1949 Convention was moralistic and prohibitionist. This led to the absence of an agreed definition of trafficking and the link between trafficking and prostitution. It is in this background that the definition of trafficking in the Protocol evolved. This definition represents a compromise on each of the above mentioned issue and cannot be seen as a clear victory for either side. As the debates made clear, States agreed to sacrifice their individual views on prostitution to the greater goal of maintaining the integrity of the distinction between trafficking and migrant smuggling. The travaux préparatoires indicate that the Protocol addresses the issue of prostitution only in the context of trafficking, and that these references are without prejudice to how States address this issue in their respective domestic laws.¹⁷⁷

According to the Protocol, “trafficking” consists of three separate elements:

- (i) an action, consisting of recruitment, transportation, transfer, harbouring or receipt of persons;

¹⁷⁵ *Ibid*, Art. 4.

¹⁷⁶ *Ibid*, Art 5.

¹⁷⁷ Interpretative Notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, U.N. Doc. A/55/383/Add. 1 at para 64.

- (ii) by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability¹⁷⁸, giving or receiving payments or benefits to achieve consent of a person having control over another; and
- (iii) for the purpose of exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs)¹⁷⁹.

All three elements must be present for the Convention to become operational within a given fact-situation. The only exception is for children for whom the requirements relating to means are waived. The Protocol does not define the terms slavery, forced labour, practices similar to slavery or servitude. In the absence of which it is assumed that their definitions be borrowed from ILO Conventions on Slavery, Forced Labour etc. which define these concepts in detail.

Protection of Trafficked Persons

Part two of the Protocol deals with protection provisions for the victims of trafficking in persons that are worded in non-obligatory not mandatory terms. It exhorts the State Parties to:

- (i) Protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
- (ii) Provide victims of trafficking information on relevant and administrative proceedings and assistance in Court proceedings.
- (iii) Implement measures to provide for the physical, psychological and social recovery of victims of trafficking.
- (iv) To take into account the age, gender and special needs of victims of trafficking while applying protection measures.
- (v) Endeavour to provide for the physical safety of victims of trafficking while they are within its territory.

¹⁷⁸ The travaux préparatoires indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation on which person involved has no real and acceptable alternative but submit these abuse involved. UN Doc. A/55/383/Add 1 at para. 63.

¹⁷⁹ *Supra* note 4, Art. 3.

- (vi) Ensure that its domestic legal system contains measures for providing compensation for damages suffered¹⁸⁰

Status and Repatriation

The status of the victim in the receiving State has always been a sensitive issue. It became clear during the negotiation process that States would not agree to the inclusion of some kind of right of trafficked persons to remain in the receiving country - even temporarily¹⁸¹. Destination countries were particularly concerned that the inclusion of such a right would encourage illegal migration and actually benefit traffickers¹⁸². At the same time, it was agreed that there might be a legitimate need for some victims to remain “for humanitarian purposes and to protect them from being victimized by traffickers”¹⁸³.

Therefore, as a compromise, the Protocol provided in non-obligatory terms a provision that requires each State Party to consider adopting legislative or other “appropriate measures” that permit victims of trafficking to remain in its territory. It further directs that while devising such measures, each State Party to give “appropriate consideration” to humanitarian and compassionate factors¹⁸⁴.

The related issue of repatriation dealt within a separate article was also very sensitive. The Ad-Hoc Committee did not prove receptive of the view of the UN High Commissioner for Human Rights that: “ safe and, as far as possible voluntary return must be at the core of any credible protection strategy for trafficked person”¹⁸⁵. They also rejected the Inter-Agency proposal that identification of an individual, as a trafficked person be sufficient to ensure its immediate applicability¹⁸⁶. The Ad-Hoc Committee did agree that repatriation was a burden to be shared between

¹⁸⁰ *Ibid.*, Art. 6.

¹⁸¹ Anne Gallagher, **The International Legal Response to Human Trafficking**, paper presented for the Technical Consultative Meeting on anti-Trafficking Programmes in South Asia, Kathmandu, Nepal, September 2001. p16.

¹⁸² U.N. Doc A/AC.254/4/Add.3/Rev.7 at note 27.

¹⁸³ *Ibid.*

¹⁸⁴ *Supra* note 4, Art 7.

¹⁸⁵ Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Note by the UN High Commissioner for Human Rights, the UNICEF, the UNHCR and the IOM on the draft protocols concerning migrant smuggling and trafficking in persons UN. Doc A/AC 254/27 at 8

¹⁸⁶ *Ibid.*, p 9.

the States of origin and States of destination. The final article thus provides:

- (i) The State Party of which a victim of trafficking is a national or permanent resident to facilitate and accept the return of that person without undue or unreasonable delay.
- (ii) The State of origin also has to agree to issue, at the request of the Receiving State such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.
- (iii) The Receiving State shall also take into account the safety of the victim and the status of any legal proceedings. Also, to the extent possible ensure voluntary repatriation.
- (iv) The provision also ensures that the victims are assured any rights afforded to victims of trafficking by any domestic law of the receiving State and without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in person¹⁸⁷.

Prevention and Cooperation

The Protocol contains a number of provisions aimed at preventing trafficking - all of which are phrased in the UN's best, programmatic, non-obligatory style¹⁸⁸. State Parties are required to establish comprehensive policies, programmes and other measures.

- i) to prevent and combat trafficking in persons; and
- ii) to protect victims of trafficking in persons, especially women and children from re-victimization¹⁸⁹.

State Parties are also to endeavour to undertake measures including information campaigns and social and economic activities to prevent trafficking¹⁹⁰. State Parties are also to adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including,

¹⁸⁷ *Ibid.*, Art 8.

¹⁸⁸ *Supra* note 11, p.995.

¹⁸⁹ *Supra* note 4, Art. 9.

¹⁹⁰ *Ibid.*

through bilateral and multilateral cooperation to discourage the demand that fosters all forms of exploitation of persons especially women and children, that leads to trafficking.

Law Enforcement and Border Control

Chapter III of the Protocol entitled “Prevention, Cooperation and Other Measures” contains detailed provisions relating to law enforcement and border control. In the area of law enforcement, State Parties accept a general obligation to cooperate in information exchange aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers¹⁹¹. State Parties are also to provide or strengthen, training for law enforcement, immigration, and other relevant personnel aimed at preventing trafficking as well as prosecuting traffickers and protecting the rights of victims¹⁹². Training is to include focus on methods to protect the rights of victims. It should take into account the need to consider human rights, children, and gender-sensitive issues while also encouraging cooperation with NGOs as well as other relevant organizations and elements of civil society¹⁹³.

Border controls are to be strengthened as necessary to detect and prevent trafficking. Such measures include:

(i) Legislative or other appropriate measures to prevent means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of the Protocol.

(ii) Imposing obligation on commercial carriers to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State and a non fulfillment of above mentioned obligation would give rise to occasions for imposition of sanctions.

(iii) Calls for strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication¹⁹⁴.

State Parties are also to take steps to ensure the integrity of travel

¹⁹¹ *Ibid.*, Art. 10.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, Art 11.

documents issued on their behalf and to prevent their fraudulent use¹⁹⁵. Border control is clearly at the heart of the Protocol. Following concerns expressed by the Inter Agency Group, several draft provisions were modified in order to ensure that measures taken under this part did not prejudice the free movement of persons or compromise other internationally recognized human rights. Therefore under the saving clause, the Protocol proclaims that “nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular where applicable, the 1949 Convention and the 1967 Protocol relating to the Status of Refugees and the Principle of non-refoulement as contained within these instruments”¹⁹⁶. Also, the Protocol requires that measures set forth in this Protocol be interpreted and applied in such a way that it is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of these measures must be consistent with internationally recognized principle of non-discrimination.¹⁹⁷

Settlement of Disputes

The Protocol calls for negotiations and arbitration for settlement of disputes concerning the interpretation or application of the Protocol. For those State Parties who have not objected to the provision on settlement of dispute, failure to arbitrate may lead to submission of the dispute to the International Court of Justice on the reference by any party to dispute¹⁹⁸.

Entry into Force

The Protocol was opened for signature for both States and regional economic integration organizations (like European Economic Union) from 10 to 15 December, 2000 in Palermo, Italy and thereafter at United Nations Headquarters in New York until 12 December 2002, after which it is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval be deposited with the Secretary General of the United Nations. The Protocol is also open for accession by any State or

¹⁹⁶ *Ibid.*, Art 14 (1).

¹⁹⁷ *Ibid.*, Art 14 (2).

¹⁹⁸ *Ibid.*, Art 15.

¹⁹⁹ *Ibid.*, Art 16.

regional economic integration organization¹⁹⁹. The Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention²⁰⁰.

Amendment

Any State Party can propose an amendment to the Protocol only after the expiry of five years from the entry into force of this Protocol. The Protocol calls for development of consensus on the amendment, failure of which requires the adoption of amendment by a two-thirds majority vote of the State Parties to this Protocol present and voting at the meeting of the Conference of the Parties²⁰¹. An amendment adopted is also subject to ratification, acceptance or approval by State Parties. When amendment enters into force, it shall be binding on those State Parties, which have expressed their consent to be bound by it. The other provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved would bind other States Parties.²⁰²

Denunciation

The Protocol also contains provision for denunciation that require that a State Party could denounce this Protocol by written notification to the Secretary- General of the United Nations. Such denunciation shall become effective one year after the date of receipt of notification by the Secretary General²⁰³.

C. Analysis of the Trafficking Protocol

Definition

The Protocol can, in many respects, be seen as a significant step forward in the fight against trafficking and related exploitation. One important achievement has been the securing of internationally agreed definition of trafficking. While the final definition may not be perfect, it

²⁰⁰ *Ibid.*, Art 17.

²⁰¹ *Ibid.*, Art 18(1).

²⁰² *Ibid.*, Art 18(3-5).

²⁰³ *Ibid.*, Art 19.

is certainly “good enough”. Incorporation of a common understanding of trafficking into national legislation will allow Parties to cooperate and collaborate more effectively than ever before. Common definition will also assert in the urgent tasks of developing indicators and promoting uniform data collection.

The Protocol recognizes the existence of both voluntary prostitution and forced prostitution. It intentionally does not define the phrase “exploitation of prostitution of others or other forms of sexual exploitation”²⁰⁴ because Government delegates to the negotiations could not agree on a common meaning. The travaux préparatoires indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of exploitation only in the context of trafficking in persons. Thus, the Protocol expressly permits a State to focus only on forced prostitution and other crimes involving force or coercion and does not require Government to treat all adult participation in prostitution as trafficking.

Despite the above achievements, the definition of trafficking falls short in the area of trafficking in children. The definition only says that in case of establishing trafficking in children evidence of force or coercion is not required. But it does not include an explicit acknowledgement of the fact that children have special rights under international law and in particular in the light of the Convention on the Rights of the Children; that child victims of trafficking have special needs that must be recognized and met by the States. As pointed by the informal group consisting of the Office of the UN High Commissioner for Human Rights (UNHCR), in a joint submission to the Ad-Hoc committee that in dealing with child victims of trafficking, the best interests of the child including the specific right to physical and psychological recovery and social integration are to be at all times paramount. They called for making assistance and protection provisions for children non-discretionary or otherwise dependent on the decision of national authorities. However, a proposal to include the above and to expand the list of end-purposes of trafficking

²⁰⁴ *Supra* note 40, p.17.

²⁰⁵ ILO Convention 182 identifies the **Worst Forms of Child Labour** as: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, producing or offering of a child for prostitution, for production of pornography or for performance; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking in drugs as defined in relevant international treaties; (d) work which, by its nature of the circumstances in which it is carried out is likely to harm the health, safety or morals of children.

to include what have recently been defined as worst forms of child labour has not been taken up in the Protocol.²⁰⁵

Furthermore, the definition of trafficking as given in the Protocol fails to distinguish clearly between a trafficked person and a smuggled migrant thereby leading many trafficked persons to be treated as smuggled migrants and being denied special protection and assistance as laid down in the Protocol.

Protection of Trafficked Persons

The protection provisions in Part II of the Protocol are worded in optional tone. They are restrictive and not in accordance with international human rights law, which clearly provides that, victims of human rights violation such as trafficking should be provided with access to adequate and appropriate remedies. At a minimum, States Parties should be obliged to provide information to trafficking victims on the possibility of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected.

The Protocol also, fails to protect the trafficked person from prosecution for status-related offences such as illegal migration, working without proper documentation and prostitution.

An earlier draft provision on the seizure, confiscation and disposal of gains from trafficking was deleted following agreements that the relevant article of the Convention would apply *mutatis mutandis*. However, essence of the provision was lost in this move and States Parties will now not be required to use the proceeds from seizure and confiscation to fund assistance and compensation for victims of trafficking.

Further, the weakness of the Protocol's protection provisions is likely to undermine its effectiveness as a law enforcement instrument. The identification and prosecution of traffickers rely heavily on the cooperation of trafficked persons and without providing effective protection to the victims of trafficking there cannot be effective prosecution as the fear of backlash from traffickers would keep the victims from giving evidence in the court.

Status and Repatriation

The provisions on determination of status of the victims of

trafficking and their repatriation to their country of origin are optional in nature. The Protocol only calls for adopting legislative or other measures permitting victims of trafficking to remain in the territories of States temporarily or permanently “in appropriate cases” with appropriate consideration being given to humanitarian and compassionate factors.

Similarly, in the case of repatriation while the Protocol notes that return “shall preferably be voluntary”, the travaux préparatoires effectively render this concession meaningless by indicating that these words are to be understood as not placing any obligation on the returning State Party.

Law Enforcement and Border Control

A study of provisions of the Protocol shows that border control is clearly at the heart of the Protocol. The focus is on the interception of traffickers rather than the identification and protection of victims. This concern is elucidated by the fact that this part is worded in obligatory terms whereas the part on protection is worded in optional terms. This clearly shows that border control measures take precedence over protection measures.

Another major weakness of the law enforcement /border control provisions of the Protocol is their failure to address the issue of how victims of trafficking are to be identified. The regime created by the Convention and its two Protocols is such that the trafficked persons are accorded greater protection than the smuggled migrants. Provision of protection to the trafficked persons involves a greater financial and administrative burden and therefore creates a clear incentive for the national authorities to identify irregular migrants as smuggled rather than trafficked. The Protocol does not address the possibility of individuals being wrongly identified and thereby passed on the opportunity to include some kind of counter-incentive in the form of detailed guidance on the identification process. The resulting lacuna is likely to seriously compromise the practical value of Protocol’s protection provisions²⁰⁶. Further, lack of any kind of review or supervisory mechanism is a significant limitation, which will undermine the efficacy of the Protocol.

Preventing Trafficking

²⁰⁶ *Supra* note 11, p.995.

²⁰⁷ *Ibid.*

The Protocol contains a number of provisions aimed at preventing trafficking - all of which are phrased in UN's best, programmatic, non-obligatory style²⁰⁷. Despite the attention given to the issue, there is no reference to the acknowledged root causes of trafficking. Also, it fails to take into account the existence of such preventive measures, which are discriminatory against women and other groups and restrain freedom of movement. A non-discrimination clause in the saving provisions cannot rectify this anomaly.

On the overall analysis of the Protocol it is brought to the fore that the Protocol does not break new grounds in terms of human rights protection and generally espouses a crime-control approach. But at the same time it represents a significant step forward in the fight against trafficking and related exploitation and acts as a meeting ground for different viewpoints and approaches on the issue. The importance given to State Cooperation in preventing and combating trafficking would go a long way in fighting against the evil of trafficking in persons with the legal regime in place. What is required is moral commitment on the part of State Parties to see to effective implementation of the Protocol.

Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime (Smuggling of Migrants Protocol)

D. Background / Origin

The Government of Austria presented the initial proposal for a legal instrument to deal with the smuggling of migrants to the Commission on Crime Prevention and Criminal Justice²⁰⁸. At the same time, the Italian Government, in an attempt to deal with the growing problem of migrant smuggling from Albania, approached the International Maritime Organization (IMO) with a proposal for the issuance of directives regarding trafficking of migrants by sea. Italy subsequently decided to join forces with the Austrians in pushing for the development of a legal instrument against migrant smuggling within the context of the Commission's work against transnational organized crime.²⁰⁹

²⁰⁸ Letter from the Austrian Permanent Representative to the United Nations to the UN Secretary-General dated 16 Sep 1997 accompanying the Draft International Convention against the Smuggling and Illegal Migrants, UN Doc. A/52/357 (1997).

²⁰⁹ Dimitri V. Lassis, **The United Nations Convention Against Transnational Organized Crime and its Three Protocols: Development and Outlook** (unpublished), p 15.

E. Overview of the Migrant Smuggling Protocol

The stated purpose of the Migrant Smuggling Protocol is to prevent and combat migrant smuggling to promote international cooperation among States Parties and at the same time protect the rights of smuggled migrants²¹⁰. Similar to the Convention and the Trafficking in Persons Protocol, many provisions are intended to ensure that the approaches taken by the States under their domestic legislative and law enforcement regimes are as coordinated as possible to make collective international action efficient.

F. Key Provisions and Analysis

As in the case with the Trafficking in Persons Protocol, the Convention provisions apply *mutatis mutandis* to this Protocol. Application of the protocol is only limited to situations of international migrant smuggling involving an organized criminal group.²¹¹

“Smuggling of Migrants” is defined as “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”²¹². The reference to “financial or other material benefit” was included as an element of the definition in order to ensure that the activities of those who provide support to migrants on humanitarian grounds or on the basis of close family ties do not come within the scope of the Protocol²¹³.

States Parties are required to criminalize the smuggling of migrants as well as related offenses including the production, provision, and possession of fraudulent travel or identity documents²¹⁴. The Protocol includes a detailed section on preventing and suppressing the smuggling of migrants by sea because of the seriousness and volume of the problem. Under one of such provisions, States are requested to cooperate to prevent smuggling of migrants by sea and to take necessary measures when they suspect that a vessel is engaging in the smuggling of migrants. States

²¹⁰ *Supra note*, 5 Art 2.

²¹¹ *Ibid.*, Art. 4.

²¹² *Ibid.*, Art 3(a).

²¹³ *Supra note* 36,p.88.

²¹⁴ *Supra note* 5, Art. 6.

²¹⁵ *Ibid.*, Art.(7-9).

²¹⁶ *Ibid.*, Art. 9(1) (a).

may board and search vessels they believe to be of their own registry²¹⁵. At the same time, when taking such action, State Parties are to ensure the safety and humane treatment of the persons on board²¹⁶. State Parties are also required to strengthen border control and oblige commercial carriers of passengers to check travel documents²¹⁷.

The prevention of migrant smuggling is essentially through improved law enforcement like in the Trafficking Protocol and little attention is paid to the root cause of migrant smuggling²¹⁸. Border control, putting restriction on free movement of people, disseminating negative information aimed at discouraging potential migrants are some of the measures propagated by the Protocol to prevent and detect migrant smuggling²¹⁹. The State Parties are exhorted to establish and maintain direct channels of communication between each other as a way of strengthening cooperation among border control agencies. State Parties are to take steps to ensure²²⁰ the integrity of travel documents issued on their behalf and to cooperate in preventing their fraudulent use²²¹. Provision for training is also provided²²².

In contrast to the Trafficking Protocol, the Migrant Smuggling Protocol does not contain even an optional provision on permitting victims to remain in the territory, of the receiving States. State Parties of origin are to facilitate and accept, without delay, the return of their smuggled nationals and those who have a right of permanent residence²²³. There is no requirement for either the State of origin or the State of destination to take into account safety and security of smuggled migrant in repatriation process. Also, no rights are given with respect to legal proceedings or remedies against smugglers. Similarly no protective measures for children find place in the Protocol. However, the Protocol does include a reference to the Refugee Convention and the 1967 Protocol as well as principle of non-refoulment.²²⁴

The Protocol includes a number of additional provisions aimed at protecting the basic rights of smuggled migrants and preventing their

²¹⁷ *Ibid.*, Art. 11(2-4).

²¹⁸ *Ibid.*, Art 15.

²¹⁹ *Ibid.*, Art 11.

²²⁰ *Ibid.*, Art 12 and 13.

²²¹ *Ibid.*, Art. 14(1) and 14(2)

²²² *Ibid.*, Art 14(2)

²²³ *Ibid.*, Art 18(1)

²²⁴ *Ibid.*, Art. 19.

²²⁵ *Ibid.*, Art. 15.

exploitation. The State Parties are required to see that migrants themselves are not to become liable to criminal prosecution, but this does not protect them for violation of national immigration laws²²⁵. State Parties are also requested to take all appropriate measures to preserve the internationally recognized rights of smuggled migrants, in particular, the right to life and right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment²²⁶. They are also required to protect migrants from violence²²⁷ and afford due assistance, as far as possible, to migrants whose life and safety has been endangered by reason of having being smuggled²²⁸. The special needs of women and children are to be taken into account in the application of the Protocol's protection and assistance measures²²⁹. A saving clause similar to that of Trafficking Protocol is included which provides that nothing in the Protocol is to affect the rights, obligations, and responsibilities of States and individuals under international law, including international humanitarian law, human rights law, and refugee law²³⁰.

G. Relationship between the Migrant Smuggling Protocol and the Trafficking Protocol.

Despite the fact that migrant smuggling and trafficking in persons are inter-linked, the relation between the two has not been explored in either Protocol. No provision deals with the potential conflict that may arise between them. As trafficked persons are granted more protection than those provided to smuggled migrants, there is a need to have clear cut identification process to distinguish trafficked person from smuggled migrant. Failing which, the State Parties would be predisposed towards identifying even trafficked person as smuggled migrant for it imposes less cost and administrative burden on the States.

The definition of migrant smuggling is sufficiently broad to apply to all irregular immigrants whose transport has been facilitated - trafficked persons and smuggled migrants alike. It is only the small number of trafficked persons who enter the destination country legally, who would not be considered *prima facie*, smuggled migrants²³¹. The additional

²²⁶ *Ibid.*, Art. 16(1).

²²⁷ *Ibid.*, Art. 16(2).

²²⁸ *Ibid.*, Art. 5.

²²⁹ *Ibid.*, Art 16(4).

²³⁰ *Ibid.*, Art. 19(1).

²³¹ *Supra note 11*, p.1001

elements separating trafficking from migrant smuggling are difficult to establish and invariably puts the burden of proof squarely on the individual seeking protection.

It is increasingly common for an individual to begin his or her journey as a smuggled migrant only to be forced, at journey's end, into an exploitative situation of trafficking. The failure on the part of both Protocols to identify this operational link undermines their practical applicability.

Conclusion

On the complete perusal of the two Protocols along with the Convention on Transnational Organized Crime, it comes to fore that these instruments are more in the nature of transnational cooperative treaties with a crime control focus. However, both the Protocols contain ample number of provisions, which worded in non-obligatory terms, nevertheless, impose moral obligations on the member States to respect and protect international human rights law. Without granting new rights, the Protocols' ensure existing rights to the victims. Moreover, the Protocols' have to be seen in the background of the negotiations and deliberations, which took place in their preparation. In the background of strong resistance towards migrants, inclination towards strong border control, the two Protocols' represent a significant step forward - a step in the evolution of international human rights law on the above issues.

On the positive side, it can be seen that in the development of agreed definitions of trafficking and migrant smuggling by incorporating a common understanding of trafficking and migrant smuggling into national legislation's, State Parties will be able to cooperate and collaborate more effectively than ever before. Common definitions will assist in much needed development of indicators and uniform data collection procedures.

To conclude, the Trafficking Protocol and Smuggled Migrant Protocol provide a right international legal regime to counter both trafficking and migrant smuggling. Both emphasize the point that human rights cannot be taken as a separate consideration. It is inherent in the very scheme of the two Protocols and needs to be strengthened in future.

Chapter 5

Trafficking of Women and Children in South Asia and the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

Trafficking in Women and Children is a contemporary form of slavery and a gross violation of women's and children's basic human rights, and a growing phenomenon all over the World. The trafficking of women and children has assumed alarming dimensions in South Asian countries like India, Nepal, Bangladesh, Sri Lanka, Bhutan and Pakistan. South Asia has both 'sending' and 'receiving' countries. India, for instance, is not only a receiving country, but transit country as well, from where women and children are siphoned off to sites within the region as well as to other parts of the World²³². Bangladesh, Nepal and Bhutan may be characterized as sending countries, whereas Pakistan is both a country of destination as well as transit.

One of the important steps taken to address the issue of trafficking at a regional level is the signing of the SAARC Convention on Preventing and Combating Trafficking in Women and Children for the purpose of prostitution. The Convention represents the resolve of the member countries to take coordinated action against trafficking and protect the victims by ensuring that their political and social human rights are not infringed upon or overlooked in any way, in whichever country they are. This Chapter would analyze the SAARC Convention to gauge how effective it is to counter trafficking. But before going into the provisions of the Convention and their analysis, the dimension of the problem in member countries affected by trafficking in women and children would be traced.

Nepal

Trafficking of Nepalese women and children for commercial sexual exploitation and for other purposes is a serious problem in Nepal. Trafficking is taking place within Nepal and from Nepal to other countries.

²³² Jyoti Sanghera, *Trafficking of Women and Children in South Asia: Taking Stock and Moving Ahead*, project sponsored by UNICEF and Save the Children Alliance, Nov. 1999 p.4.

It is estimated that every year an average of 5,000 to 7,000 Nepalese women and girls are trafficked to India for the purpose of commercial sexual exploitation and about 200,000 women and girls from Nepal are working under mostly oppressive conditions in the various red light areas of Indian cities²³³.

The reasons for such large scale of trafficking in persons can be found in lack of development, capital, infrastructure and skilled human resources required to carve out an independent path of development. Nepal's economy is agrarian in nature marked by subsistence agriculture, which forms the sustenance base for 90 per cent of its 21 million inhabitants. Adult literacy is as low as 21 per cent for females and 57 per cent for males; infant and maternal mortality rates are the highest in South Asia. Because of above factors, out migration for gainful employment has been high over the past few decades. Linked to the migration is the issue of trafficking for the trafficker's fish in the flow of outmigration.

Added to the above factors is the social custom that designates certain social castes / groups as sub-servant sex workers such as Badi. Similarly, the custom of the Devki system has become synonymous with prostitution. Devki is a medieval system whereby a very young girl child is offered to a deity as servant-keeper of the temple to appease the deity, usually to ask for boons for the parents of the child or for others who acquire the child from an economically unfortunate family for a price. The girl child is then isolated from others and is made to live a celibate life. There are numerous Devkis in the far west of Nepal and the majority of them have openly turned into active and open sex workers. These social castes become the primarily target group for the traffickers.

An open border with neighbouring India and a lack of bilateral and multilateral cross-border coordination to deal with the problem at sub-regional / regional / international level and additional dimension of the problem of trafficking in women and children.

Sri Lanka

Due to the location of Sri Lanka as a island, the incidence of trafficking is less as compared with Nepal, India and Bangladesh. Large scale trafficking of women and children outside of Sri Lanka does not take place. However, within the country women and children are being trafficked by agents from rural areas to cities, especially to Colombo. Some

²³³ *Ibid*, p.9.

of these women end up in the city slum areas and also in brothels. Therefore, prostitution is hidden and dispersed, and it is not concentrated and visible as there are no Red Light Zones. At the same time the open economy and the growth of tourism have led to the rise of high-class brothels in the city and the lure of good money alone keeps the sex workers in the trade. In a survey in Kandy it was revealed that 34 per cent of the sex workers had a history of overseas employment. Sexual promiscuity, sexual abuses and initiation into prostitution while being abroad are common.

Though the incidence of trafficking out of island is not a cause for alarm as the numbers are negligible it is found that there is inward trafficking of Thai and Eastern European sex workers to Sri Lanka. It is said that Thai women are brought in by Thai gem buyers who operate in the gem city of Ratnapura.

Also, the issue of trafficking in Sri Lanka has emerged in the form of trade of women and children as migrants to mainly West Asian countries in search of employment as housemaids. Disguised and modernized forms of trafficking in women take place through seemingly legitimate recruitment of women for employment. Many of these women hail from economically impoverished families from rural areas of the country. The lack of any contractual agreement between the migrant women workers and the employer is seen to be a major factor, which exacerbates the vulnerability of these workers. Therefore, Sri Lanka Bureau of Foreign Employment (SLBFE) set up a special unit in 1997 which makes it compulsory for women migrant workers to register with them prior to embarking on employment overseas. But still there are number of press reports in Sri Lanka according to which women have been called to satisfy the sexual needs of employers as part of their daily chores.

Bangladesh

Trafficking in women and children is now a common phenomenon and social issue in Bangladesh. Women among the poorer communities are offered better jobs and marriages and thereby lured to going "voluntarily" with agents of trafficking networks. Children from middle class and lower middle class families also increasingly face being kidnapped from schools and working places.

Trafficking as an underground business is flourishing and has become an easy-money making opportunity. Though the traffickers

maintain a strong alliance with their counterparts in other countries, efforts of trafficking are very often exposed.

Brokers and agents traffic women and children in the form of family travelling to another country. Every check post in 4,222 Km border region with India is used as a trafficking route. The traffickers have permanent stations in Kuriagram, Lal Monirhat, Panchages and 135 enclaves in Nilfamari. Sixty-six Pakistani camps in fourteen districts serve as a depot for traffickers. These Pakistanis illegally travel to Pakistan using the Punjab route to take women and children to Pakistan and sell them. Their agents are working in every bus, railway station and launch terminal.

There is no reliable data on both internal and cross border trafficking of women and children. It is estimated that 200,000 women and children are estimated to have been trafficked to the Middle East in the last two decades. 200-400 women and children are estimably smuggled out each month to Pakistan, and in all 200,000 women have been trafficked to Pakistan over the last ten years.²³⁴ It is further estimated that 13,220 children have been trafficked out of Bangladesh in the last five years, and that 300,00 Bangladeshi minors work in the red light areas of India²³⁵.

The reasons for the growing menace of trafficking in Bangladesh are same as those of Nepal. Alongside Nepal, Bangladesh is one of the world's poorest countries. More than 48 per cent of its population lives in extreme poverty with an average of 755 persons per square kilometer, Bangladesh is one of the most densely populated countries of the world. 44 per cent of the country's 131 million persons are under the age of 15. This population boom has exerted tremendous pressure on existing resources and, together with political and civil unrest, natural disasters and non-vibrant economy, has resulted in land-lessness and large scale outmigration, both internal as well as cross border. Outmigration, particularly to India, as well as trafficking of persons and girls is facilitated by an accessible and easily traversable border of over 4,222 kms with India. Cross border migration has escalated enormously in the recent years. According to Government of Bangladesh, in 1996-97, 227,584 Bangladeshis were legally employed overseas²³⁶. It is alleged that for each person who migrates legally, several cross the border illegally. For every person arrested for illegal border crossing, there are hundreds who go un-intercepted. Linked to the problem of illegal migration is the problem of trafficking in persons.

²³⁴ Ministry of Women and Children Affairs, Government of Bangladesh, as well as Combined 3rd and 4th Periodic Report on CEDAW, 1997.

²³⁵ Bangladesh National Women Lawyers Association.

²³⁶ Bangladesh Bureau of Manpower and Employment

Pakistan

While in Pakistan trafficking is more prevalent in the case of foreign women being brought into the country, internal trafficking of Pakistani women is said to be on the rise, though there is insufficient information on it. Forced prostitution of girls from lower income backgrounds has always been in existence with very few being able to escape from the net even if they wish to do so.

There are no data available on the magnitude of the problem of trafficking in Pakistan. Trafficking in Pakistan is linked to general migration trends in South Asia, trends which have many facets. The persistent rural urban disparity and problems in urbanization relate to migration in South Asia. Lack of job opportunities and persistent suppression of women in the region contribute to their migrating to other neighbouring countries. Major inflow of the trafficked persons is from Bangladesh. It is estimated that 200,000 Bangladeshi children work in the brothels of Pakistan²³⁷ and about 200-400 women and children are estimatedly smuggled out each month to Pakistan over the last ten years²³⁸. Apart from Bangladesh, a miniscule number of women and children are trafficked from Nepal to service the sex industry in Pakistan. The traffic route from Bangladesh follows from Dhakha to Kolkata, Delhi, Amritsar and Lahore.

India

Within South Asia, India is both a country of transit and destination. There is also considerable internal trafficking and trafficking to the Gulf States and to Southeast Asia. As in the case of Nepal and Bangladesh, no reliable statistical data are available on the number of women and minors in the various red light areas of Indian cities, much less on the victims of trafficking. According to informal sources, it is estimated that cross-border trafficking represents about 10 per cent of the coerced migrants. It is generally estimated that 2.17 per cent are Bangladeshi and 2.6 per cent are from Nepal. Inter-State trafficking, therefore, could comprise as high as 89 per cent of trafficked victims²³⁹. Given this dimension, addressing internal as well as cross-border trafficking issue is essential to any strategic approach at the national level.

²³⁷ Layers for Human Rights and Legal Aid, Pakistan.

²³⁸ Ministry of Women and children's Affairs, Government of Bangladesh.

²³⁹ Asian Development Bank, **Draft Report on India for Regional Technical Assistance for Combating Trafficking of Women and Children in South Asia**, Manila, March 2002.

Estimates of the number of Nepalese girls and young women lured or abducted to India for sexual exploitation each year ranges from 5,000 to 10,000. The total number of Nepalese working as prostitutes in India range from 40,000 to 200,000. India also receives women and children from Bangladesh, Bhutan, Sri Lanka and Pakistan and sends them to Europe and Middle East. Therefore, trafficking has assumed a gigantic proportion in India and calls for a comprehensive and concerted efforts on behalf of all the South Asian countries to counter the menace.

On the perusal of the country positions of India, Sri Lanka, Pakistan, Bangladesh and Nepal, the compelling factors in South Asia that fuel trafficking in persons are:

1. Economic Vulnerability

The pull factors are exercised by the demand for cheap, vulnerable labour to reduce the costs of production, to service the sex industry and for the service sector because local labour is not available or willing e.g. Bangladesh women work in carpet weaving, fish drying in Karachi, in construction or home based production in India, as prostitutes or by way of being forced into marriage. The push factor results from survival strategies of poverty and the urge for mobility, leading to movement from villages to towns and across borders. Women's share in poverty is even more pronounced. Their control over land and other means of production is considerably lower than that of men. Structural adjustments followed by economic liberalization have eroded the village production base. Families are increasingly dependent upon women's labour but few opportunities are opening up. Although credit schemes have been opened for women, they do not invest in production but only in petty trade and commerce. Many of them have become waged workers, unpaid family workers or domestic workers.

2. Social and Political Vulnerability

- Political changes in South Asia have created new frontiers against women's mobility. Crossing a river suddenly leads to another country even though 50 years ago it was one.
- Political systems also lead to migration such as the Rohingyas in Bangladesh who become targets of trafficking to Pakistan.
- Discriminatory laws and practices such as desertion,

polygamy, divorce, and absence of post divorce maintenance and dowry has undermined women's social status and is a cause for violence against women.

- Registration of births and marriage is not enforced widely and parents tend to marry them off to persons who do not need dowry, but without registration there is no way to check if the man is already married.
- The sanction of polygamy under the existing personal laws in South Asia particularly Bangladesh, India and Pakistan allows for multiple marriage by men.

It is in the background of the compelling factors existing in South Asia that gives incentive to trafficking in person that the regional cooperation document on the issue, the SAARC Convention on Preventing and Combating Trafficking in Women and Children, 2002 would be looked into and analyzed to serve whether it can emerge as an effective regional instrument to counter trafficking in persons in South Asia.

Background / Origin

The importance attached to the issue of trafficking of women and children is evident from the social agenda that SAARC has developed over the last one decade to address the issue. As a part of this agenda, the development and well being of women have been identified as one of the principal areas of cooperation by the SAARC Member States. The Fourth SAARC Year of the Girl Child in order to ensure a constant attention on problems of the girl child. The Third SAARC Ministerial meeting on Children held in Rawalpindi (1996) commits the signatory countries to combat intra and inter country trafficking in children and assist victims of violence due to prostitution and sexual exploitation and evolve administrative, legal and rehabilitative structures both within and between member States to combat the problem.

The Ninth SAARC Summit of Heads of State of Government held in Male in May 1997 expressed grave concern at the trafficking of women and children within and between countries and pledged to co-ordinate their efforts and take effective measures to address this problem. It was also decided that the feasibility of establishing a Regional convention on Combating the Crime of Trafficking in Women and Children for prostitution be examined by the relevant Technical Committee.

Following the Male Declaration of the 9th SAARC Summit in 1997, the Technical Committee on Women and Development has prepared a draft of SAARC Convention on Trafficking that was finalized in the Tenth SAARC Summit of the Heads of the State Government in Colombo, July 1998. The SAARC Convention was signed on 5th January 2002 at Kathmandu and shall enter into force on the fifteenth day following the day of the deposit of the seventh instrument of ratification with the Secretary General of the SAARC.

Important Provisions of the SAARC Convention

The member States of the South Asian Association for Regional Cooperation (SAARC) are the parties to the SAARC Convention²⁴⁰. The SAARC Convention emphasizes that the evil of trafficking in women and children for the purpose of prostitution is incompatible with the dignity and honour of human beings and recognizes in this regard the importance of establishing effective regional cooperation for preventing trafficking for prostitution and for investigations, detection, interdiction, prosecution and punishment of those responsible for such trafficking. It also emphasizes the need to strengthen cooperation in providing assistance, rehabilitation and repatriation to victims of trafficking for prostitution.

Definitions

The SAARC Convention defines trafficking as moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking²⁴¹. In the Convention, the “persons subjected to trafficking” is limited to only women and children who are victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means²⁴². “Traffickers” have been defined as persons, agencies or institutions engaged in any form of trafficking²⁴³ while “prostitution” means the sexual exploitation or abuse of persons for commercial purposes²⁴⁴.

²⁴⁰ The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution signed on 5th January, 2002 at Kathmandu.

²⁴¹ *Ibid*, Art. I (3).

²⁴² *Ibid*, Art I (5).

²⁴³ *Ibid*, Art 1 (4).

²⁴⁴ *Ibid*, Art 1 (2).

“Child” means a person who has not attained the age of 18 years and thus defines child in sync with the Convention on the Rights of the Child, 1989 and does away with the various prevailing definition of a child in the region.

Scope and Offences

The purpose of the SAARC Convention is to promote cooperation amongst Member States so that they may effectively deal with the various aspects of prevention, interdiction and suppression of trafficking in women and children. The Convention also calls for repatriation and rehabilitation of victims of trafficking and prevents the use of women and children in international prostitution networks, particularly where the countries of SAARC region are the countries of origin, transit and destination²⁴⁵.

The Convention criminalizes trafficking and declares it as an offence punishable by appropriate penalties. The Convention obligates the State Parties to punish any person who keeps, maintains or manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking or knowingly lets or rents a building or other place for the purpose of trafficking²⁴⁶.

The Convention further makes provision for stricter punishment on account of factual circumstances, which make the Commission of offences particularly grave²⁴⁷.

Judicial Proceedings and Mutual Legal Assistance

The Convention obligates the judicial authorities in Member States to ensure confidentiality of identity of the child and women is maintained and to provide appropriate counseling and legal assistance²⁴⁸. The State Parties are also under obligation to grant to each other the widest measure of mutual legal assistance in respect of investigations, inquiries, trials or other proceedings in requesting State in respect of offences under the Convention. Requests for assistance needs to be executed promptly in accordance with national laws of a Member State²⁴⁹.

²⁴⁵ *Ibid*, Art II.

²⁴⁶ *Ibid*, Art III.

²⁴⁷ *Ibid*, Art IV.

²⁴⁸ *Ibid*, Art V.

²⁴⁹ *Ibid*, Art VI.

Extradition or Prosecution

The Convention declares that the offences referred in the convention be regarded as extraditable offences in any extradition treaty which has been or may be concluded between any of the Parties to the Convention. If a State Party, which makes extradition conditional on the existence of a treaty, receives a request for extradition from another State Party with which it has no extradition treaty, the requested State shall, if permitted by its domestic laws, consider this Convention as the basis for extradition in respect of offences set forth in Article III²⁵⁰. The extradition be granted in accordance with the laws of the State to which request is made and States where extradition of their nationals is not permitted under their laws have to initiate judicial proceedings for the prosecution and punishment of the offenders²⁵¹.

Preventive Measures

The preventive measures include:

1. Provision of sufficient means, training and assistance to authorities to enable them to effectively conduct inquiries, investigations and prosecution of offences.
2. Sensitization of law enforcement agencies and the judiciary in tackling trafficking cases.
3. Establishment of a Regional Task Force to facilitate implementation of the provisions of this Convention and to undertake periodic reviews.
4. Provision for mutual agreements and bilateral mechanisms to effectively implement the provisions of the Convention.
5. Regular exchange of information in respect of agencies, institutions and individuals who are involved in trafficking.
6. Supervision of employment agencies in order to prevent trafficking in women and children under the guise of recruitment.

²⁵⁰ *Ibid*, Art VII (1-4).

²⁵¹ *Ibid*, Art VII.(5)

7. Focus on preventive and development efforts on areas that are known for trafficking.
8. Awareness campaign through the use of the media on the problem of trafficking in women and children.²⁵²

Repatriation and Rehabilitation

Repatriation has been defined to mean return to the country of origin of the person subjected to trafficking across international frontiers²⁵³. The Convention obligates the State Parties to the Convention to work out modalities for repatriation of the victims to the country of origin. Pending the completion of arrangement for repatriation, the State Parties are further obligated to make suitable provision for the care and maintenance of victims of trafficking. Establishing protective homes or shelters for rehabilitation can help in this regard. In this endeavour, the Convention asks the State Parties to take the support of the non-governmental organizations. The Convention provides for granting legal advice, counseling, job training and health care facilities for the victims.²⁵⁴

Implementation, Signature and Ratification

The Convention obligates the State Parties to adopt, in accordance with their respective Constitutions, the legislative and other measures necessary to ensure the implementation of the Convention.²⁵⁵ Also, the State Parties can take higher measures of enforcement and protection.²⁵⁶

The Convention opened for signature at the Eleventh SAARC Summit at Kathmandu, 2002 and shall be subject to ratification by the Member States.

Analysis of the SAARC Convention

The SAARC Convention represents the first regional instrument to address the issue of trafficking. The SAARC Members pledge to coordinate their efforts to take effective measures to address this problem and their efforts would go a long way in subverting the growing menace of trafficking in South Asian region.

²⁵² *Ibid*, Art. VIII.

²⁵³ *Ibid*, Art I.

²⁵⁴ *Ibid*, Art IX.

²⁵⁵ *Ibid*, Art X.

²⁵⁶ *Ibid*, Art XI.

The SAARC Convention draws mainly from the relevant legal instruments relating to prevention of trafficking in women and children, including the Convention for the Suppression of Trafficking in Persons and of the Exploitation of Prostitution of Others, 1949; Convention on the Elimination of All Forms of Discrimination Against Women, 1979; International covenant on Civil and Political rights, 1966; and the Convention on the Rights of the Child, 1989. At the time when the Convention was under deliberations, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol)²⁵⁷, supplementing the United Nations convention Against Transnational Organized Crime²⁵⁸ was also being discussed. Therefore, SAARC Convention could not draw from the progressive legal regime represented in the Trafficking Protocol. This situation has resulted in a scenario where the SAARC Convention has relied on international law that the international community regards as inadequate to respond to the exigencies of modern forms of trafficking.

The effective prevention and eradication of trafficking in persons is dependent on ensuring that the human rights of trafficked persons are protected and promoted. Human rights violations are both cause and consequence of trafficking. The failure of States to protect and promote women's human rights, generally, and their economic and social rights, particularly, has created a situation in which trafficking in women has flourished. Compounding these violations of women's social and economic rights, trafficking further subjects women to additional human rights violations including deprivation of liberty, denial of security of person, debt bondage, servitude, rape, forced labour, and torture, cruel, inhuman and degrading treatment. To be effective, any strategy to combat trafficking must, therefore, begin and end with the protection of the human rights of trafficked persons. With this aim in mind, the present Chapter would analyze the SAARC Convention.

Expansion of the Trafficking Definition

Effective elimination of trafficking in all of its modern manifestation necessitates that the definition of trafficking be revised to include trafficking for any forced labour or slavery-like practice. The SAARC

²⁵⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/55/383 (2000), Annex.

²⁵⁸ United Nations Convention Against Transnational Organized Crime, *opened for signature*, 12 Dec 2000, U.N. GAOR, 55th Sess, Annex I, Agenda Item 105, at 25, U.N. Doc A/55/383 (2000).

Convention defines trafficking solely in terms of prostitution and sexual exploitation. On the contrary, documentation of trafficking patterns and practices demonstrates that persons are trafficked not only for forced prostitution, but also for other forms of forced labour and slavery-like practices, including forced, domestic or factory labour, and forced marriages. By singling out trafficking for prostitution, the SAARC Convention therefore threatens to leave certain categories of trafficked persons outside the purview of State protection.

There exist inconsistencies between Article I definition of “trafficking” and “persons subjected to trafficking”. These definitions create a hierarchy of victims. Despite “trafficking” being defined as “the moving, selling or buying of women and children for prostitution with or without consent”, “persons subjected to trafficking” are “women and children victimized or forced into prostitution”. This language could be subject to the interpretation that only those women who were forced into prostitution are to be considered victims. The definition of “persons subjected to trafficking” thereby entrenches a system that distinguishes between those who are worthy of claiming their rights as citizens and accessing State services and those who are not worthy. By or favouring protection of women clearly perceived as victimized by prostitution - i.e. those who are forced into prostitution - the SAARC Convention could encourage discriminatory application of human rights protection for trafficked persons. This hierarchy of protection thus would constitute a clear violation of international proscriptions against discrimination²⁵⁹.

Furthermore, the SAARC definition focuses more on the purpose of trafficking than on critical elements common to all forms of trafficking. Specifically, these central elements include the brokering of the trafficked person, accompanied by the exploitative or servile conditions of the work or relationship in which the trafficked person finds herself, coupled with lack of consent in arriving at that position.

The requirement of coercion is necessary to distinguish between consensual and non-consensual movement of labour. Research reveals that women can and do consent to work in a variety of exploitative conditions. In the absence of the requisite element of force, coercion, deception or violence, such actions should not be considered as trafficking.

²⁵⁹ Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, **Position Paper on the Draft SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution**, 2000.

Definition Restricts Women's Freedom

In failing to distinguish between consensual and non-consensual movement and labour, the SAARC Convention further risks creating a regional regime that encourages national policies that restrict women's freedom, including women's human right to freedom of movement. It is imperative that efforts to combat trafficking do not inadvertently promote the violation of women's human rights in this respect. A distinction must be maintained between issues of trafficking and issues of migration. Efforts to combat trafficking must not interfere with women's mobility. It is feared that in the present form SAARC Convention may be used as an instrument to restrict or to policewomen's voluntary movement across regional and national borders.

No Distinction between Women and Children

The SAARC Convention does not distinguish adequately between adult women and children into one category. This has resulted in a legal regime that discriminates against women, and fails to provide appropriate protection for children. While the presence or absence of consent is a critical factor in determining whether trafficking has victimized an adult, consent is irrelevant with respect to the trafficking of children. But the SAARC Convention tends to "infantalize" women and refuses to recognize women's agency and decision-making capacity in order to accord women the full measure of their human rights. At the same time, the SAARC Convention, also fails to recognize children's unique vulnerability, a recognition of which would help in formulating of child-specific policies and mechanisms of redress that are also gender sensitive.

Protection of Trafficked Persons

The SAARC Convention fails to provide adequate protection to the trafficked persons. Adequate protection is a precondition for an effective prosecution of the traffickers. Without guaranteeing the safety and integrity of trafficked person or witnesses, the State cannot have them as effective witnesses. The convention must include measures that ensure protection of trafficker persons from intimidation and reprisals by traffickers before, during and after any legal proceedings.

Further, there is a fear that Article VI on "Mutual Legal Assistance" may be interpreted in such a manner as to allow inclusion of trafficked persons among those who are to be "made available" to provide evidence

or assist investigations. Forcing a trafficked person to assist in the prosecution of traffickers would subject trafficked persons to an extremely high risk of reprisals by the traffickers. Therefore, there is a need to ensure that certain procedural protections are guaranteed before, during and after any legal proceedings involving the trafficked person. Also there is a need to protect trafficked person from victimization at the hands of the State for lack of immigration documents or involvement in the sex industry.

Status of the Trafficked Person in the Receiving State

The SAARC Convention fails to grant temporary residency status to trafficked person to facilitate successful prosecution and punishment of traffickers, and prevention of trafficking. Trafficking fact patterns indicate that the threat of deportation deters many trafficked persons from reporting to the authorities, as trafficked persons could, upon their return, face social ostracism by their families and communities, possible arrest or detention by authorities in their home countries, and reprisals by traffickers who are often waiting at the border to re-traffic them. Providing temporary residency status and work authorization, as well as the possibility of permanent residency status, would help allay fears of immediate deportation, and thus, remove the deterrent against reporting, and facilitate the initiation of legal proceedings against traffickers.

Preventive Measures

The SAARC Convention under Article VIII gives many measures to prevent and interdict trafficking in women and children. It is interesting to note preventive measures such as training and assistance to authorities, sensitization of law enforcement agencies, formulation of a Regional Task Force and bilateral mechanism for exchange of information are worded in obligatory terms, the measures such as those which go to the root of problem by removing discrimination and encouraging development efforts are worded in discretionary terms without addressing the root causes of trafficking, other preventive measures have only cosmetic value.

Repatriation and Reintegration of the Victims

As in the Trafficking Protocol, the SAARC Convention does not make provision for voluntary repatriation. The UN High Commissioner for Human Rights has said that safe and, as far as possible voluntary

return must be at the core of any credible protection strategy for trafficked person²⁶⁰. But the SAARC only talks about working out modalities for repatriation of the victims to the country of origin. It is only pending the completion of arrangements for the repatriation of victims of cross-border trafficking; the State Parties to the Convention shall make suitable provisions for their care and maintenance. Even here the emphasis is on the rehabilitation of the victims and not their reintegration. Reintegration is a more positive concept and it provides better guidelines for socially and psychologically sensitive programmes that better meet the needs of the survivors. Similarly the use of words like “protective homes” or “safe homes” in the SAARC Convention in a way give the impression of detention centers. In many cases “rescue and rehabilitation” in such homes has been forcibly undertaken in violation of women’s human rights. Research reveals that in the South Asian region, under the guise of “protection” women have been placed in restrictive state custody and, in some cases, subjected to custodial violence²⁶¹. In particular, protective homes have been used to detain “deviant” women, in an attempt to deal with the problem of prostitution generally and to “cure” women engaged in prostitution specifically. Therefore, if “protective home” or “safe shelter” were mentioned, it would help in operationalisation of the process of community reintegration.

Enforcement and Punishment

The SAARC Convention has many loopholes, despite many State protective mechanisms. The Convention has no monitoring mechanisms besides the task force. This is a fatal omission for the regime. Only a proper monitoring mechanism can ensure effective working of the Convention. Further, to punish traffickers, it would be ideal to create regional court for adjudication of transnational crime such as trafficking.

International Obligation to Protect Human Rights

Like in saving Clause of the Trafficking Protocol, it would be added protection to the victims of trafficking if the Convention include “Non-discrimination Clause”. Non-existent or inadequate human rights protection create an atmosphere of discrimination and marginalization,

²⁶⁰ Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Note by the UN High Commissioner for Human Rights, the UNICEF, the UNHCE, and the IOM on the draft protocols concerning migrant smuggling and trafficking in persons U.N. Doc A / AC254/27 / p. at 8.

²⁶¹ *Supra note 28*, p.10.

in which trafficked women are deterred from reporting the abuse and from pursuing and assisting in the prosecution of the traffickers. Thus, to be effective in combating trafficking, the SAARC Convention must include provisions to protect the human rights of trafficked persons in order to facilitate trafficked persons' cooperation with authorities in efforts to prosecute traffickers.

Conclusion

The SAARC Convention represents the strong will of the Member States to fight the menace of trafficking in the region. But the Convention as it has emerged because of its narrow focus on trafficking for the purpose of prostitution would not be able to tackle the manifold dimensions of the problem of trafficking. The Convention needs to broaden its horizon by amending its definition of trafficking in persons to include trafficking for all exploitative purposes, by broad basing its human rights protection to the victims and providing special protection to children at the same time respecting the free agency of women and by providing monitoring mechanism to ensure effective implementation of the Convention. By protecting the rights of the victims of trafficking, the Convention can ensure that trafficking is killed at its roots. The shift in focus from crime and migration control policies to human rights approach would help in creating a potent regional legal regime worthy of being emulated by other regional and sub-regional bodies.

Chapter 6

Combating Trafficking

A. Approaches

In order to address the complex dimensions of the problem and to take into account the full trafficking cycle from the roots and causes to their impacts and consequences at both the individual and societal level, an integrated and holistic approach needs to be evolved. This approach should make it possible, with very limited resources to offer a full range of services and programmes that are synchronized and complementary. An ideal approach is a precondition for developing mechanism and strategies for combating trafficking. Therefore, before going into various strategies for combating trafficking, different approaches with concomitant strategies would be discussed in this section.

i) A Moralistic Approach

This approach is the most used and sees trafficking particularly of women for the purpose of sexual exploitation and prostitution as an evil that should be controlled.²⁶² This approach sees prostitution as morally deviant and wrong for the prostitute, the family and the community. Some moralists may regard women who work in prostitution as 'fallen' or 'misguided', others see the institution of prostitution itself as a social evil, and the women working in prostitution as helpless but deviant victims. Action against trafficking within this approach aims at controlling and punishing the parties involved. The problem with this approach is that women in prostitution risk punishment, which in turn leads to their stigmatization and victimization.

ii) A Criminal (crime control) Approach

This approach has been used in the Trafficking Protocol, which sees trafficking as a part of transnational organized crime. It calls for stronger legislation, heavier punishments, improved international police cooperation, extraterritorial operation of criminal laws and other measures that can enable a more effective prosecution of the offenders. The crime

²⁶² Quoted from the speech of Ms. Wijers delivered at the Transnational Seminar on Trafficking in Women held at Budapest from June 20-24, 1998.

control approach addresses trafficking and smuggling of persons simultaneously. It holds that harsher punishments will discourage traffickers and smugglers from operating and stricter border controls will make it more difficult for traffickers and smugglers to transport persons to end destinations. This approach is not without risk as the interest of the victims of the traffickers become subordinate to the interests of the prosecution. The criminal approach often hits back at the victims who being held guilty of prostitution or illegal migration face criminal charges and convictions.

iii) A Migration Approach

In the migration approach, trafficking is a problem of illegal migration and action that aims at “keeping persons at home by measures “ such as stricter border control, supervision of mixed marriage, etc. This approach reflects the interest of the State to be protected from undesirable aliens and leads to paternalistic strategies, which impinges on the right to migration particularly those of women. The concern is to regulate migration, in order to reduce the presence of undocumented migrants. It is usually countries that wish to protect their borders that take this approach. The strict border regimes, further throws the undocumented migrants into the hands of traffickers. Also, conflating trafficking with illegal migration leads to simplistic and unrealistic solutions, which generally attempts to put restriction on movements of those who are vulnerable to trafficking.²⁶³

iv) A Public Order Approach

Related to criminal approach, the public order approach, views trafficking as a law and order problem in the supply, demand and transit countries. According to the approach, increase in trafficking leads to increase in crimes being committed which result in social unrest. Also, trafficked cheap labour results in loss of employment opportunities for the citizens of the destination countries, a situation, which further exacerbates the discontentment of locals culminating in law and order problems. This approach further sees prostitution as a public health issue and calls for regulation of prostitution. One way of doing this is by way of regular medical examinations and checkups of the sex workers.

²⁶³ Ratna Kapur, *Tricks and the Law: Legal Regulations of Trafficking, Sex Work and Migration*, Technical Consultative Meeting on Anti-Trafficking Programs in South Asia, Kathmandu, Nepal, September, 2001.

v) A Labour Approach

This approach views trafficking as essentially a labour problem for victims of trafficking are used for forced labour, which can range from forced commercial sexual exploitation to working like slaves in inhuman conditions in sweatshops. It is concerned about labour market and the problems that arise from domestic unemployment and policies regarding migrant workers. This approach calls for labour opportunities, working rights and improvement in conditions of work.

vi) A Human Rights Approach

Treating trafficking in persons as a human rights problem offers twin ways of analysis: first, trafficking per se is a human rights violation and second that the process and end purposes of trafficking leads to manifold violation of rights of victims and commitment of crimes like rape, murder, sexual abuse, assault, battery etc. The human rights approach treats trafficking as an issue of violence against victims and involves programmes and strategies that revolve around the needs of the victims such as the need to be freed from imprisonment of traffickers; the need to be protected from reprisals of traffickers; protection from deportation and prosecutions; opportunities of counselling and social empowerment, etc.

On analysis of the above approaches, two types of strategies can be distinguished. On the one hand, there are the repressive strategies, such as restrictive immigration policies, severe penalization and strong and more effective prosecution.

Empowering Strategies

Some examples of empowering strategies:

- Strategies which rest upon women's rights to control their own bodies, lives, work and specifically their right to migrate, to decide for themselves and to be free from violence and constraint.
- Helping victims to understand their rights in criminal and civil processes.
- Increasing the range of choices for vulnerable groups especially women, increasing access to different economic options.

- Recognizing the needs of migrant workers, enforcing workers' rights regularization of labour status and working conditions.
- Increasing channels for legal migration.
- Respect and strengthen rights of migrants, regardless of their legal status.
- Assistance to victims with due respect to their decision and self-determination in the process.

On the other hand, there are strategies against violence and abuse that rest upon strengthening of the rights of victims of trafficking, particularly women and children. It calls for clearer criminal codes and stricter and non-discriminatory enforcement of existing laws, in combination with providing practical social, legal and medical support²⁶⁴. The human rights approach that provides for these strategies is best suited to tackle the problem of trafficking. The human rights approach in order to be more effective must adhere to the fundamental human rights principle of participation and self-representation of the concerned person in the action. For example, in evolving strategies on the issue of prostitution, sex workers should be empowered to speak rather than having other interest groups representing them. Rights are theoretical and not real until a person becomes conscious of her or his entitlement and is able to act to secure or exercise that right. The best strategies are those that enable the affected persons to express their grievances, to undertake actions of their own designs and on their own behalf and to organize, form alliances and obtain the necessary expertise and resources in order to act on their own behalf.²⁶⁵

B. Strategies to Combat Trafficking

1. Preventive

It is said, "Prevention is better than Cure", therefore preventive strategies must be designed in such a manner as to minimize the vulnerability of the high-risk groups to trafficking. This can be done in

²⁶⁴ GAATW, *Human Rights and Trafficking in Persons: A Hand Book*, Global Alliance Against Trafficking in Women, Bangkok, Thailand, February 2001. p.74

²⁶⁵ *Ibid*, p. 75.

many ways, prominent among them are strategies for spreading education, gender equality, awareness about rights especially that of women, children and ethnic minorities, increasing employment opportunities development and poverty alleviation. These strategies should be such that they empower the vulnerable groups instead of putting restriction on migration or movement of women and girls. In the long run, real 'prevention' will be through the enactment and enforcement of laws, policies and practices that improve status of vulnerable groups and enable them to exercise all their rights. This involves improvement in economic, legal and social systems, action for justice and democracy within and between States. An attempt has been made to discuss some of the strategies in detail here.

a) Gender Equality

The State should endeavor to improve the status of women in the society. Most important causes for trafficking are the "feminization of poverty" and "feminization of migration". Lack of access to means of production, leads to lack of viable employment opportunities in their home, which further leads women to seek opportunities to work outside their villages, cities or countries. At the same time, the economic burden of women is increasing as male unemployment rises. In many cases, reductions in demand for male labour due to economic slowdowns in receiving countries spur female migration. Women increasingly migrate to support their families, especially since the demand for maids and nurses continue to increase. Therefore, to increase the status of women, States need to undertake affirmative actions by providing employment opportunities, removing social barriers, spreading awareness about rights

Case of Liaquat

Liaquat was four and a half years old when he left his home in Pakistan and was taken by an agent to Abu Dhabi. The agent, Shaukat Cheema, told his parents that Liaquat was going to live and work in a sheikh's palace. Zainab Bibi, Liaquat's mother said "I told him that the sheikh's wives loved children and that they would take very good care of him". Liaquat, however, was to spend the next five years working as a camel jockey. After a few weeks of training Liaquat was made to participate in races. He remembers the race as noisy and dangerous, where more than 50 camels with screaming children strapped onto their backs would run. Liaquat personally saw about 20 children dies, and more than a dozen injured every week. He recalls, "There was this one kid whose strap broke at the beginning of the race. His head was crushed between the legs of the running camel. Once the race has started it cannot stop".

<http://www.cwa.tnet.co.th/vol13-2&3/cv14n28.htm>

and providing basic education. These strategies may also involve process of sensitization of society towards the needs of women and elimination of discrimination of women in all spheres, especially in the labour market.

b) Sustained Education and Information Campaigns

Knowledge is power. The lack of opportunities for education, formal and informal, not only pushes children and women into seeking better lives through other means but also make them easy preys for traffickers. Basic education and information campaigns on trafficking would fortify the vulnerable groups against trafficking. In the preventive education programmes, support from survivors of trafficking could be taken, whose personal testimonies would enlighten communities about the operations of trafficking agents.

Education must be also seen from the demand side of trafficking especially for the purpose of prostitution. Programmes must begin to resocialize men as conscious and active agents in minimizing sexual exploitation and the sex trafficking trade, as they are the main market consumers for the trade. This approach seeks to demystify prostitution and trafficking as women's problems and squarely puts the burden of combating trafficking for prostitution before the men who demand sex. Similar education and rehabilitation programmes be made for the pedophiles, sweatshop employers, employers of child camel jockey, etc. Such strategies would go a long way in combating trafficking both from the demand side and supply side.

What's a Paedophile?

Paedophiles are people with sexual desires for children. There are two types: the preferential and the situational abusers. A minority of abusers are women, who mainly go for adolescent boys.

Preferential paedophiles are those who have a clear yearning for sex with children. Situational abusers prefer an adult partner, but find a child less threatening to their self-esteem.

Preferential abusers go great lengths to accommodate their preference, networking among themselves and travelling to countries where their behaviour will not attract penalties. They justify themselves saying that sex with a child is a good way of showing them love.

From THE WEEK, 4 August 1996.

As reported in Janaki, Vol. 1 No. 1, November, 1996)

c) **Advocacy and Raising of Awareness**

Advocacy is speaking up about a problem or an issue in the relevant political arena in order to bring about policy changes to improve the situation for those affected by the problem. An advocacy campaign is a set of target actions in support of the cause or issue. Potential areas for advocacy in relation to trafficking could be as follows:

- Children's rights, women's rights, and human rights.
- Amendment of laws on trafficking.
- Women's right to migrate and have access to relevant information.
- Migrant and migrant worker's rights, e.g., employment conditions welfare and benefits in relation to local workers' standards.
- Government policies to protect migrant workers, including the undocumented ones.
- Humanitarian treatment for trafficked persons, including those without legal immigration status.
- Channels and process for trafficked person to reclaim their rights and compensation.

The NGOs, the international organizations and concerned officials, and individuals should be sensitized along with mass media personnel by way of disseminating information on trafficking. This may include illustration of the cases showcasing the plight of victims and provide insight into trafficking realities and their impact. Public forum, seminars, focus group discussions, etc. could also be organized to help improve the understanding on trafficking to help change attitudes towards victims.

d) **Reform of Laws and Extraterritorial Legislation**

The UN Protocol on Trafficking directs the member countries to enact laws where none exist and amend existing ones on trafficking to ensure decriminalization and confidentiality of identities of victims, higher penalties for exploiters and traffickers, including clients and guardians

and adopting of victim sensitive legal / judicial procedures, with scope for participation of NGOs and other entities of civil society. But it is generally seen that although all countries have laws concerning crimes committed by traffickers, few traffickers are punished for any of the crimes. More commonly, traffickers are punished under migration-related laws that are less serious offences and carry less severe sentences. Also, traffickers who traffic women into the sex industry are prosecuted under laws relating to prostitution rather than laws relating to the real and serious harm done to victims. Some countries conflate trafficking with either prostitution or migration and therefore create a serious anomaly in laws and their applications. Thus, there is a need to amend, reform and enact new laws.

Furthermore, there is a need to have extra-territorial laws, which may help to combat human trafficking by making sure that a wrong doer does not escape punishment merely because of lack of jurisdiction. The extra territorial legislation is based on the maxim of 'aut dedre aut punire' and a number of principles govern the conditions under which a government can extend its jurisdiction to criminal acts committed beyond the boundaries of its own territory. In brief these are:

- The 'active personality' of the offender, which means that jurisdiction can be extended outside national territory to acts committed by nationals;
- The 'passive personality' of the victim, whose nationality provides the basis for the establishment of extra-territorial jurisdiction;

Case of Marty's

Tourist couple, Wilhelm Albin Marty (59) & his wife Loshiar Mary Lily Marty (56), have been visiting India at least once a year to shoot pornographic material that they confess to selling at the handsome price abroad, including websites on the Internet. Police say the couple has been visiting other countries including Thailand & Sri Lanka, for the same purpose.

The duo was caught red handed in the act when the police raided the room. Two girls aged 8 & 9 years were present in the room. The police also seized a sophisticated camera, a laptop, and a VCD from the hotel room, which were used to store the offensive material.

HAQ (Center for Child Rights)

Child Trafficking in India

- The principle of protection, through which States reserve the right to take action with respect to acts that threaten their national security;
- The principle of universality, which refers to 'universal crimes' that, is sometimes called 'crimes against humanity'²⁶⁶.

Other legal concepts that are important in this field are:

- Double criminality, which entails that, for extraterritorial legislation to be used, the act involved must be illegal according to the laws of the countries of the offender and of the country where the crime was committed.
- Double jeopardy (*ne bis in idem*), whereby a person who has been acquitted or convicted of an offence cannot be prosecuted again for the same offence²⁶⁷.

The above-mentioned two concepts create problems in the application of extraterritorial legislation and therefore require uniformity of legal provisions on trafficking across countries.²⁶⁸

e) Reform of Restrictive Immigration Policies

As already explained in the previous chapters, a massive contradiction exists between the need for labour and repressive migration policies. The immigration laws of countries of destination fail to satisfy the demand for labour, on the other hand, the effect of repressive laws and policies on migration is to make people who are desperate to leave for work abroad to fall into the trap of agents and others so as to facilitate their migration. The illegality of the situation binds victims to the traffickers, who have found numerous ways to get around immigration obstacles. Therefore, there is a need to have a more humane migration policy, which recognizes the right to migrate and treat the victims within the perspective of human rights. Such a migration policy must provide the basis for effective migration at both the local, national and regional levels. In planning a National Response on Migration Policy, the following considerations need to be made:

²⁶⁶ Vitul Munarbhorn, *Extra-Territorial Criminal Laws to Combat Trafficking in Humans*, in UNESCAP Resource Guide on Using Legal Instruments to Combat Trafficking in Women and Children, 2003.

²⁶⁷ <http://www.ibcr.org/cgi-bin/tribunal-processor.pl>

²⁶⁸ For further discussion on extraterritorial legislation see *supra* note 5.

- A division of responsibilities among the central authorities dealing with migration issues.
- A coordinating body and its structure and staff.
- An information system.
- The legal basis for population movement, immigration and citizenship matters.
- The technical capacity for the management of borders.
- A system for training immigration officials and staff.
- Provision of budget and resources.
- Coordination with civil society.²⁶⁹

2. Prosecution of Traffickers

Investigation and prosecution of trafficking must be targeted at offenders and not at those who are the victims of such practices. A critical condition to an effective detection, investigation and prosecution of traffickers is the readiness of the victims concerned to report to the police and act as witnesses. Practices show that victims often refrain from reporting to the authorities as they are faced with arrest, detention and expulsion as illegal aliens and / or prostitutes. Therefore, there is a need for measures to encourage and assist victims to report to the police against their offenders and to act as witnesses, to upgrade and ensure the appropriate 'fair treatment' response on the part of the criminal justice system. For example, specific guidelines could be developed for the police and public prosecutors, as to how to deal with women and children who are victims of trafficking. Similarly, the Judicial Officers dealing with victims of trafficking could be trained and educated. Given below is a brief discussion on some of the important factors vital for effective investigation and prosecution.

a) Law Enforcement

Law by itself is not the only panacea in stopping trafficking. Its

²⁶⁹ Srisak Thaiarry and Lance Bonneau, **Memorandum of Understanding**, in UNESCAP Resource Guide on Using Legal Instruments to Combat Trafficking in Women and Children, 2003, p. 93.

effective implementation is also necessary. Only effective implementation brings to fore lacunae existing in laws, which needs to be filled through further amendment and revision. One must remember that fighting traffickers often demands cooperation between people and police agencies. There is a need to build liaison with different countries by collecting, exchanging and analysing information and keeping records of traffickers. Extradition of criminals to the country where they are wanted for crimes committed and extra-territorial application of criminal laws help in better prosecution.

b) Training

The fight against organized criminal groups demands a broad, multi-agency, and flexible cooperative approach both nationally and internationally. The training programmes must address this concern. Personnel from different agencies must be mixed during training in a manner so as to improve mutual respect and understanding. Such training programmes are needed for police, prosecutors and judges so that they learn to respect the rights of victims while handling trafficking cases. Training programmes should also focus on improving cooperation between police and non-governmental agencies for working out safe shelters and other relevant assistance during a trial.

c) Victim Handling

The basic principle for investigators is to have the interest of the victims in mind during the whole investigative process. This is a clear humanitarian duty, it follows from the legal obligations set down by the International Human Rights Law.

It is also a basic principle that investigations must be planned and conducted with the aim of collecting enough evidence to successfully prosecute the traffickers, without relying on testimony from the victims of trafficking. This requires a strong focus on other investigative techniques, and can be described as a proactive, or a police led approach, to trafficking investigations²⁷⁰.

A risk assessment process must be conducted for all victims of trafficking; starting from the moment when the first information on their

²⁷⁰ Jan Austad, *Law Enforcement issue in cases of Trafficking in Women for Sexual Exploitation* in UNESCAP Resource Guide on Using Legal Instruments to Combat Trafficking in Women and Children, 2003, p100.

situation reaches the investigators to the time when the trial ends. Investigators must be sensitive to immediate needs of victims. Physical safety and medical and psychological assistance must be considered, and is the responsibility of the investigators.

d) Witness Protection

In the process of prompt and efficacious prosecution of traffickers, victims have a key role to play as witnesses. But a cooperating victim is always at risk, therefore, there is a need to have witness protection programmes. The best available solution is often “safe-house” accommodation provided by non-governmental organizations that specialize in supporting trafficking victims. It is the responsibility of the police to assess whether a local organization has the capacity to address the security needs of the victims, for in ultimate analysis, it is the police that is responsible for protection measures before, during and after court proceedings. Some of the points, which can be borne in mind while providing witness protection, are:

- Acknowledge the trauma caused by the crime and penal proceedings to victims.
- Witness needs to be provided with temporary residence status during criminal proceedings pursuant to having been victim of trafficking.
- Enable victims to defend their interest, during criminal proceedings by providing for legal advice and / or other appropriate assistance, and for competent and qualified translators.
- Provide for adequate victim support, including safe shelter, medical and social assistance.
- Ensure that no action, including detention, is taken for immigration reasons, which might undermine the value of victims of trafficking as witnesses in criminal proceedings.
- Provide good care and counselling to the victim that helps in getting better evidence.

3. Protection of Trafficked Persons

There is a need to have obligatory assistance and protection provided to the trafficked persons. These can be ranging from protecting the identity and privacy of trafficking victims; ensuring full provisions of information on legal proceedings and facilitate to present their views; providing physical and psychological recovery of victims; ensuring physical safety of victims to ensuring that domestic laws provide victims with the possibility of compensation.²⁷¹

Trafficked persons must be protected not only from retaliation by the traffickers, but also from revictimization. This is the responsibility of both the executive and the judicial system. At the same time protection strategies must not go beyond a limit where they become paternalistic but be made more holistic thereby seeking not only to protect but also promoting human rights of all victims. Thus protection of victims can be done by:

- Providing information to trafficked women and children.
- Making attitudes of police and immigration officials more humane and proactive towards the needs of victims.
- Provision of assistance by way of shelter, home, counselling, medical and other services.
- Setting up guidelines for coordinated actions related to assistance and treatment of victims by agencies involved.
- Training police, immigration officers, lawyers, judges, doctors, health officers, psychologists, social workers on issues of human rights, trafficking techniques and in dealing with victims etc.

4. Repatriation and Reintegration

On the issue of repatriation, the UN High Commissioner for Human Rights expressed the view that: “safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons²⁷². This view was further reinforced by the Inter-Agency Group

²⁷¹ Anne Gallagher, **The International Legal Response to Human Trafficking**, paper presented for the Technical Consultative Meeting on Anti-Trafficking Programmes in South Asia, Kathmandu, Nepal, September, 2001.

²⁷² UN DOC. A/AC.254/16, para 20..

working on the Draft UN Protocol on Trafficking that proposed that identification of an individual as a trafficked person be sufficient to ensure that immediate expulsion, which goes against the will of the victim does not occur and the protection and existence provisions of the Protocol become immediately applicable"²⁷³. But despite these submissions, provisions in the Protocol on Repatriation are directory or optional in nature. The Protocol leaves to the discretion of the State Parties to consider adopting legislative or other measures permitting victims of trafficking to remain in their territories temporarily or permanently in appropriate cases²⁷⁴ "with appropriate consideration being given to humanitarian and compassionate factors"²⁷⁵. This is due to the fact that States take the inclusion of such a right as encouraging illegal migration and actually benefiting traffickers.

In actual terms, the provisions on repatriation and reintegration are the weakest link to the human rights perspective and leave much to be desired. There is a need to move from a paradigm of rescue, rehabilitation and deportation to an approach, which is designed to promote human rights of the victims, in both the countries of origin and countries of destination. In this regard, the Human Rights Standards for the Treatment of Trafficked Persons (HRS) prepared by the NGOs working on trafficking provide an ideal framework for providing resident status and laying down repatriation procedures and processes.²⁷⁶

Resident Status

The status of the victim in the Receiving State has always been a sensitive issue. It became clear during the negotiation process for the Protocol on Trafficking that States would not agree to the inclusion of some kind of right of trafficked persons to remain in the receiving country even temporarily and thus left the issue to the discretion of the State Parties. Some States like the United States under the United States Trafficking in Victims Protection Act of 2000 has made provision for

²⁷³ Ad-Hoc Committee on the Elaboration of a Convention Against Transnational organized Crime, Note by the United High Commission for Human Rights, the United Nation's Children's Fund, the United Nations High Commissioner for Refugees, and the International Organization for Migration on the Draft Protocol on Migrant Smuggling and Trafficking in Persons.

²⁷⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 7(1).

²⁷⁵ *Ibid*, Article 7(2).

²⁷⁶ See generally Human Rights Standards for the Treatment of Trafficked Persons, prepared by Foundation Against Trafficking in Women, International Human Rights Law Group, and Global Alliance Against Traffic in Women, 1999.

granting of temporary visa or 'T' visa. But, this seemingly humanitarian provision is fraught with problems. It is extended to only those victims if they can credibly establish their 'victim' credentials. Such proof includes that the person is a victim of a severe form of trafficking or has not attained the age of 15, and she / he should agree to provide reasonable assistance in the investigation or prosecution of trafficking acts. In addition, the 'victim' must prove that she / he has a well-founded fear of retribution involving the infliction of 'severe' harm if she / he is removed from the US. An annual cap of 5,000 'T' visa is totally out of sync with the number of people ranging about 50,000 women and children who are trafficked into the US each year.²⁷⁷

Thus, eligibility for 'T' visa is extremely strict and include only those persons who have been literally dragged, or forced into crossing borders, or deceived into crossing borders and forced to engage in a commercial sex act or subjected to involuntary servitude or slavery like practices that are effected by force, coercion, fraud, or deception²⁷⁸. Any demonstration of agency or choice could render the subject ineligible for a 'T' visa. The overriding assumption of the provisions is that the victim must be able to demonstrate that she is not responsible for her condition²⁷⁹. These conditions are difficult to prove as many a time migration and trafficking are so inextricably linked that it is difficult to prove when one stops and the other begin. The strong conditionalities for 'T' visa in effect renders many of the trafficked victims out of the State protection net.

In this background following principles need to be kept in mind while determining the status of the victim:

- i) No immediate expulsion. Victims be given breather time to decide whether or not to initiate a civil action or to be witness in a criminal action against traffickers.
- ii) If the trafficked person decides to either initiate civil suit or act as a witness in criminal proceedings, then the State must endeavour to provide the person with residential status during the entire duration of such cases.
- iii) No deportation if there are substantial grounds for believing

²⁷⁷ Section 102 (b) (1) of the **Trafficking in Victim Protection Act, 2000.**

²⁷⁸ Ratna Kapur, **Tricles and the Law: Legal Regulation of Trafficking, sex work and Migration**, Technical Cnsultative Meeting on Anti Trafficking Programs in South Asia. Kathmandu, Nepal, September2001, p 7.

²⁷⁹ *Ibid.*

- that such a person can be subjected to torture / persecution on return.
- iv) Provision of all necessary information and an opportunity to apply for permanent residence.
 - v) Due care be taken regarding dangers of reprisal by trafficker or persecution or harassment by authorities on return.
 - vi) In the case of statelessness, the residing country must provide the trafficked person with all the rights and privileges granted to other stateless persons. Stateless persons residing outside their country of usual residence are defined as refugees²⁸⁰.

These principles serve two interests:

- i) First, the trafficked person is able to recover and take back control over her / his life.
- ii) Second, it enables the effective prosecution of traffickers by encouraging victims to report to the authorities and to act as a witness.

Types of Residence Status

Temporary permits allow victim to stay in a country for a specific period of time.

Economic asylum: Refugees status for trafficked person, which is granted after the asylum seeker has convinced the authorities that he or she will be unable to survive economically if he or she returns to the country of origin. The asylum seeker must also show that he or she will be able to earn enough money to survive and to contribute to the society.

Political asylum a refugee status difficult to obtain. The applicant must be able to demonstrate that he or she personally is likely to be singled out for persecution if he or she returns to the country,

²⁸⁰ UN Convention on the Status of Refugees, 1951, Article 1 (2).

5. Repatriation and Compensation

In most cases, trafficked persons have been deprived by traffickers of the financial means to pay for return to their home country or community. Apart from lacking the financial means, trafficked person may also lack travel documents as traffickers characteristically confiscate the passport or identity papers of their victims. Without money and without papers it is impossible for trafficked person to return to their home or country. This might result in their being held in shelters or detention centres, often for years and under inhumane circumstances²⁸¹. In this regard, the obligations of States in Repatriation Processes are:

- i) Arrange for necessary travelling documents and identity papers so that immigration and emigration authorities do not harass the victim. This question is related to determining the status of the victim in the destination country.
- ii) Provide the necessary funds for the trafficked person to return to his / her home country.
- iii) Provide trafficked persons with information and an opportunity to apply for permanent resident under national laws and international treaties.
- iv) States to cooperate in providing as far as possible voluntary repatriation.

6. Reintegration

Trafficked persons, who are able to return to their home country either voluntarily or as a result of deportation, face multiple problems. The absence of adequate support and opportunities upon their return place them at a heightened risk of repeated abuses and exploitation, including victimization. Thus, reintegration services are essential to end the cycle of trafficking. Such reintegration programmes should:

- i) Solve health, legal and financial problems of the victim.
- ii) Provide employment opportunities and practical assistance.
- iii) Overcome social barriers and rejection by families or communities.

²⁸¹ *Supra* note 16.

- iv) Protect victims from reprisal or persecution from traffickers.
- v) Protect victims from harassment and persecution from the authorities.
- vi) Prevent stigmatization of victims of trafficking.
- vii) Guarantee confidentiality and the privacy of the trafficked person.

7. State Cooperation

Cooperation between States is absolutely essential if trafficking has to be routed completely. This cooperation between States can work at bilateral, sub-regional and regional levels. Only multi-disciplinary and multi-level strategies can combat the sophisticated network operating throughout the world. States must work together to ensure that traffickers are never able to find a 'safe haven' anywhere in the world. Without such a concerted and coordinated effort; trafficking will never be stopped or even minimized²⁸². Thus, State cooperation is an essential precondition for countering the menace of trafficking. In this regard, following points can be borne in mind.

- i) Allow for extraterritorial application of criminal laws and provide for extradition of traffickers for effective prosecution.
- ii) Establish bilateral agreements to help trafficked women and children. This should include coordination for repatriation, assistance in reintegration, extradition agreements and cooperation in bringing criminals to justice.
- iii) Attempts be made to analyze laws and relevant regulations in each country and to harmonize these laws with the normative law and among countries.
- iv) Sharing information and conducting joint investigations. Provision can be made for Liaison Officers in sending, transit and destination countries.
- v) Organize summits and seminars at sub-regional and regional

²⁸² GAATW, *Human Rights Standards for the Treatment of Trafficked Persons*, GAATW, Bangkok, Thailand, January 1999.

levels where common concerns can be advocated and action can be strengthened.

- vi) Evolve sub-regional and regional conventions and agreements for combating trafficking.
- vii) Institutionalize cooperation on trafficking for permanent benefits.
- viii) Encourage civil society and NGOs cooperation between countries.

8. Documentation and Research

There are various reasons for researching on trafficking. For example, to generate data on trafficking in order to raise awareness, and to find out more about the trafficking process including patterns and forms in order to develop strategies for prevention. Documenting forms of human rights violations that victims of trafficking face are useful for developing appropriate assistance and strategies to trafficked victims. Documenting the issue of trafficking, such as, trends, patterns, form and the magnitude of the problem is a vital source of information for advocating changes in policy and legislation. Most important of all, research is a strategy to empower persons who have been trafficked to take control over their own lives again. A list of potential research topics can be:

- Mapping of trafficking in persons including trafficking networks, modes of transport, mobility patterns etc.
- Law, legal processes and policies of countries involved.
- Health issues pertaining to trafficking.
- Human rights violation in trafficking.
- Research for advocacy campaigns.
- Migration patterns and related policies.
- Development of patterns and strategies.
- Sex industries like brothels, sex tourism, massage parlours, dance bars etc.

- Political situation prevailing in a region that encourages migration and trafficking.
- Analyses of media reporting on trafficking.

These researches help in recording obstacles and lessons learned. Best Practices can be evolved through these research studies for treatment of victims of trafficking especially women and children.

9. Role of Human Rights Institutions and NGOs

The Human Rights Institutions and NGOs can play a vital role in combating trafficking. Human Rights Institutions can help by reviewing the laws on trafficking, bringing to fore the human rights violations faced by victims, helping in evolving assistance and reintegration programmes and conducting research and documentation. Complaints filed with the National / International Human Rights Institutions help in not only clarifying the issues involved but also developing strategies for countering them. Bereft of political burdens of State governments, Human Rights Institutions can be more realistic and humanistic in their approaches towards trafficked persons. They can act as strong pressure groups to bring legislation closer to the normative and also to help in changing the attitudes of the Government officials and agents by making them more proactive. This can be done by publishing guidebooks on trafficking for police, judges, immigration officials and NGOs and conducting workshops and seminars on trafficking.

Involving both domestic and international NGOs to take care of trafficked persons strengthens the task in dealing with and assisting trafficked persons. In fact NGOs have done a yeoman's work in the field of trafficking by spreading public awareness about the real dangers associated with trafficking, leading many advocacy campaigns for reform of laws and more humane treatment of victims of trafficking, collaborating with States in repatriation and reintegration programmes and providing other necessary assistance and supports. NGOs like Global Alliance Against Trafficking in Women, International Human Rights Law Group, Foundation Against Trafficking in Women, have strongly lobbied for the protection of human rights of the victims of trafficking in the UN deliberation on the Draft UN Protocol on Trafficking. It is because of their sincere efforts that the UN Protocol has much safeguards and protection provisions for the victims. They have also been instrumental in taking out "Human Rights Standards for the Treatment of Trafficked Persons", which includes all-encompassing definition of trafficking, and

a set of State responsibilities which ensures that trafficked persons are promoted under human rights law. Similarly, NGOs like Foundation for Women (Thailand), Maiti Nepal, Sanlaap (India), KOK - German NGO Network Against Trafficking in Women (Germany) etc. all are working towards eradicating this modern day slavery.

The focus area for the NGOs can be summarized as follows:

- Spreading awareness about rights guaranteed by the constitutions of different countries.
- Providing information to vulnerable groups about the activities of traffickers.
- Sensitizing police and border control officials.
- Helping victims to repatriate by approaching administration, judicial system, embassy etc. and linking with counterpart NGOs in other countries.
- Helping in locating family.
- Providing shelter on repatriation.
- Helping in reintegration of the victim with the society.
- Providing legal aid to victims.
- Providing medical facilities and counseling to victims of trafficking.
- Lobbying nationally and regionally for changes in personal laws, support to victims and criminal justice systems.

Conclusion

Trafficking in human beings, especially women and children, is a form of modern day slavery and requires a holistic, multi-sectoral approach to address the complex dimension of the problem. It is a problem that violates the rights and dignity of victims and therefore requires essentially a human rights perspective while working on its eradication. The difficulties inherent in developing and applying rights-based approach to trafficking need to be openly and honestly addressed. The fact that traffickers and their accomplices are largely non-State actors is

one problem. Another significant obstacle is presented by the fact that international human rights law and special conventions on trafficking do not deal with the issue in any consistent or reliable way²⁸³. The first comprehensive Convention on Trafficking, viz. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, equates trafficking in persons only with prostitution. It is moralistic in tone and considers prostitution as an evil and endeavors to abolish it. But by focussing only on trafficking for the purpose of prostitution, it deprives others the protection. Furthermore, the crime control perspective of the Convention deprives women of the right to non-discriminatory treatment, right to migration and labour rights. The lack of monitoring mechanism, further, adds to its ineffectiveness. Its failure can be gauged from the fact that up till now only 72 countries have ratified it.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 is the most recent international instrument on trafficking. The Protocol can, in many respects, be seen as a significant step forward in the fight against trafficking and related exploitation. After long hours of deliberation, an internationally agreed definition on trafficking has emerged. But still the Protocol has not broken new grounds in terms of human rights protection though it contains a number of saving clauses to ensure that international law, including human rights law, humanitarian law and refugee law, is not adversely affected. Its major weaknesses lie in optional nature of key protection provisions and the failure to explicitly acknowledge victims right of access to information. The lack of review or supervisory mechanism is also a significant limitation that will no doubt undermine political commitment to the Protocol and thereby, it's eventual effectiveness²⁸⁴. Further, the Protocol does not lay down any guidelines for the identification of trafficked persons, because of which, the victims are in the danger of being dealt under the Migrant Smuggling Protocol. This lack of identification procedure can seriously undermine the Protocol's already weak protection provisions.

On the sub-regional level, the SAARC Convention on Trafficking represents strengthening of legal regime at sub-regional level for combating trafficking. But the SAARC Convention is also not bereft of problems. Trafficking in persons has been defined very narrowly by including only women and children and that too only for the purpose of prostitution. It excludes from its ambit plethora of purposes for which

²⁸³ *Supra* note 11 at 18.

²⁸⁴ *Ibid.*

trafficking in persons takes place. Also, it does not make any distinction between women and children thereby denying the rights of making choices and autonomy of women. When adult women are denied freedom of action they are infantilized²⁸⁵. Further, it fails to distinguish between consensual and non-consensual movement and labour thereby risking an emergence of legal regime that encourage national policies which restrict women's freedom, including women's human rights to freedom of movement and freedom to engage in paid labour²⁸⁶. Therefore, one sees that though the emerging instruments on trafficking represent evolution of human rights perspective on trafficking in persons, they are still short of the normative standard. It is hoped that the progressive development of human rights law plays a significant role in the development and application of anti-trafficking laws and policies at the national, regional and international levels.

Trafficking is a human rights problem. The connection between human rights and abusive forms of migration such as trafficking makes it imperative that the international human rights community takes up this issue with full force and diligence. The human rights community has a special responsibility to ensure that trafficking is not seen only as the problem of migration, a problem of labour, a problem of public order or a problem of organized crime but be seen in all its dimensions through the lens of human rights. In the fight against trafficking, government organizations, non-governmental organizations, civil society, thematic pressure groups, international bodies and above all victims of trafficking all have to play an important role. Law can not be the only panacea of all problems. Apart from effective enforcement of law, the alliance against trafficking should ensure that the root causes of trafficking are addressed. Poverty, lack of development and education, lopsided effects of globalization, unemployment, gender discrimination etc. needs to be taken up for finding long lasting solutions to the problem of trafficking.

In the final analysis, the State has the ultimate responsibility to respect and protect human rights of its citizens. This includes duty to prevent violations, to investigate violations, take appropriate action against violators and afford remedies and reparation to those who have been injured as the consequence of such violations.

²⁸⁵ Jyoti Sanghera, **Trafficking of Women and Children in South Asia: Taking Stock**, a project sponsored by UNICEF and Save the Children Alliance, Delhi, 1999.p7.

²⁸⁶ Position Paper on the Draft SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution submitted by the Special Rapporteur on Violence Against Women, Radhika Coomaraswamy.

The human rights standards for the treatment of trafficked persons (HRS) have laid down following State obligations towards trafficked persons.

- ***Principle of Non-Discrimination***

State shall not discriminate against trafficked persons in substantive or procedural law, policy or practice.

- ***Safety and Fair Treatment***

States shall recognize that trafficked persons are victims of serious human rights abuses, protect their rights notwithstanding any irregular immigration, status, and protect them from reprisal and harm.

- ***Access to Justice***

The police, prosecutors and court shall ensure that their rights to punish traffickers are implemented within a system that respects and safeguards the rights of the victims to privacy, dignity and safety.

- ***Access to Private Actions and Reparations***

States must ensure that trafficked persons have a legal right to seek reparations from traffickers as well as assistance in bringing such actions, if necessary.

- ***Resident Status***

States shall provide trafficked persons with temporary visas including right to work during the pendency of any criminal, civil or other legal actions and shall provide trafficked persons with the right to seek asylum and have the risk of retaliation considered in any deportation proceedings.

- ***Health and Other services***

State shall provide trafficked persons with adequate health and other social services during the period of temporary stay.

- ***Repatriation and Reintegration***

State shall ensure that trafficked persons are able to return home safely, if they so wish, and when they are able to do so.

- ***Recovery***

Includes medical and psychological care as well as legal and social services to ensure the well being of trafficked persons.

- ***State Cooperation***

State must work together in order to ensure full implementation of these standards.

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