

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



THE LEGAL PROTECTION OF MIGRANT WORKERS

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The Legal Protection of Migrant Workers

I Introduction

The item entitled “Legal Protection of Migrant Workers” was included on the agenda of AALCO at the reference of the Government of Philippines during AALCO’s Thirty-Fifth Annual Session held at Manila in 1996. Ever since, it has been a subject of intense deliberations at various Annual Sessions of AALCO and occasionally in special meetings.

The resolution adopted at the Thirty-Sixth Annual Session at Tehran in 1997 directed the AALCO Secretariat to study the utility of drafting a Model Legislation on the legal protection of migrant workers within the framework of the *1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* [the ICMW, 1990], international labour Conventions and Recommendations along with the relevant resolutions of the UN General Assembly. This was in accordance with the established practice of AALCO to adopt legal instruments in the nature of principles, guidelines or model legislations to enable Member States to incorporate internationally recognized principles into their national legal systems.

The Member States of AALCO were urged to transmit to the AALCO Secretariat their national legislations if any, on the situation of migrant workers. Both the Government of Sri Lanka and the Government of Philippines responded by reiterating the immense significance of having a model law on the topic. Be that as it may, the year 2000 saw a fresh impetus being given to the topic when AALCO entered into a Cooperation Agreement with the International Organization for Migration [IOM].

Against this backdrop, Resolution SP/1 “Special Meeting on Some Legal Aspects of Migration” adopted on 24th June, 2001 at the Fortieth Annual Session of AALCO *inter alia* directed the Secretariat to explore the feasibility of drafting a “Model Agreement for Cooperation Among Member States on Issues Related to Migrant Workers” and requested the Secretary-General to consider the possibility of convening an open-ended working group for an in-depth consideration of these issues. Pursuant to that mandate, a *draft Model Agreement*¹ was prepared by the Secretariat in collaboration with IOM. Useful input was also received from the Office of the High Commissioner for Human Rights (OHCHR). This agreement, which has a Preamble and twenty articles, is yet to be adopted formally by the Member States.

Be that as it may, it is pertinent to recall here that a *Workshop on Trafficking in Persons, Smuggling of Migrants and International Cooperation* had been jointly organized by the Attorney General’s Chambers, Government of Malaysia and the Asian-African Legal Consultative Organization from 24 to 26 November 2010, at Putrajaya, Malaysia. The

¹ The complete name of which is: Draft Regional Model Cooperation Agreement Between States of Origin and States of Destination / Employment within AALCO Member States.

Workshop was attended by delegates from sixteen Member States of AALCO. Delegates from Non-Member States and other institutions such as International Organization for Migration also attended the Workshop. The Workshop was divided into three segments; Trafficking in Persons, Smuggling of Migrants and International Cooperation. The welcome address was delivered by Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO and the keynote address was rendered by Hon'ble Honorable Datuk Idrus bin Harun, Solicitor General of Malaysia. This was followed by lively deliberations that focused on the need to find necessary ways and requisite measures to prevent, punish and eradicate the scourge of trafficking and smuggling of persons. At the Workshop, a proposal was also put forward to address the question Mutual Legal Assistance in Criminal Matters and to draft an Asian-African Convention on Mutual Legal Assistance in Criminal Matters.

This AALCO Secretariat's Report for the current year seeks to look at the issue of trafficking within a broader migration framework due to the intimate linkage that exists between irregular migration and human trafficking. There is often reluctance to see the exploitation of irregular migrants as an aspect of trafficking (and often, forced and/or child labour). Hence this report focuses on the nexus between trafficking and migration and goes on to, albeit briefly, find out the legal protection afforded to children who are victims of trafficking.

II. Trafficking and Migration Nexus

Trafficking, smuggling and migration are separate, but inter-related issues. Migration may take place through regular or irregular channels and may be freely chosen or forced upon the migrant as a means of survival (eg. during a conflict, an economic crisis or an environmental disaster). If the method of migration is irregular then the migrant may be assisted by a smuggler who will facilitate illegal entry into a country for a fee. The smuggler may demand an exorbitant fee and may expose the migrant to serious dangers in the course of their journey, but on arrival at their destination, the migrant is free to make their own way and normally does not see the smuggler again.

Trafficking is fundamentally different as it involves the movement of people for the purposes of exploiting their labour or services. The vast majority of people who are trafficked are migrant workers. They are seeking to escape poverty and discrimination, improve their lives and send money back to their families. They hear about well-paying jobs abroad through family or friends or through "recruitment agencies" and other individuals who offer to find them employment and make the travel arrangements. For most trafficked people it is only once they arrive in the country of destination that their real problems begin as the work they were promised does not exist and they are forced instead to work in jobs or conditions to which they did not agree.

It is no coincidence that the growth in trafficking has taken place during a period where there has been an increasing international demand for migrant workers, which has not been adequately acknowledged or facilitated. The lack of regular migration opportunities

to take up work in other countries and the fact that many migrants are looking for work abroad as a means of survival, rather than an opportunity to improve their standard of living, has left migrants with little choice but to rely on smugglers or traffickers in order to access these jobs.

Migration is a broad general concept and trafficking is a sub-set or category of migration. Migration is a process of movement of people from one place to another (in case of international migration one country to another) in order to take up employment or establish residence or change their place of residence for various reasons. It applies to various types of movements guided by diverse causes. International migration in particular is a complex and multidimensional phenomenon. The dynamics of international migration are often explained or measured in relation to (either alone or in combination) factors such as citizenship, residence, time or duration of stay, purpose of stay or place of birth. On the other hand, trafficking in persons as a subset of migration is a movement (either internally or internationally) of a person under a situation of deceit, force, threat, debt bondage or other form of coercion involving exploitation and violation of human rights. Trafficking in persons therefore mostly results in abusive exploitation and human rights violations. A person, by being in the hands of traffickers, loses control of his/her fate and freedom and ends up in a “harm” situation.

The concept of regular migration is understood as migration occurring through regular and legal channels. Regular migration therefore extends to those covered under the definition of “migrants” as elaborated above and to “migrant workers”. According to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, a “migrant worker” is a person who is to be engaged, is engaged or has been engaged, in a remunerated activity, in a State of which, he or she is not a national. Therefore regular migration implies a voluntary nature of migration.

As regular migration and trafficking both share the common migratory space, it is difficult to clearly differentiate between regular migration and trafficking. Regular migration and trafficking are two distinct but inter-related phenomena. The demarcation between the two phenomena in practice is often not clear or apparent. Therefore, efforts attempting to draw a clear line between the two concepts is described as working in a “terminological minefield”. In some cases, researchers and practitioners mistakenly use movement, mobility and migration as interchangeable concepts. Though the movement or mobility is be a common element of trafficking and regular migration, it is the presence or absence of coercion, exploitation, abuse, loss of control on life options (or agency) could be considered as determining factors. Absence of some or all of these makes a person’s movement regular migration and the presence, trafficking. The presence of exploitation or violations of rights are trafficking outcomes irrespective of the nature of mobility. Sometimes attempts, though wrongly, are made to distinguish migration as a labour issue and trafficking as a human rights issue. The two phenomena are further complicated as people continue to move from regular to irregular situations and vice-versa. Therefore any such generalization in identification of the differences between the two concepts can be misleading.

In general, violations of rights of migrants are addressed by a specific set of legal instruments which are different from the legal procedure for addressing trafficking cases. The national, regional and global approach, norms and practices concerning the migrants and the trafficking survivors also reinforce the assumption that the two groups have distinctive causes, purposes and consequences in their experiences and expectations.

In simple terms, the difference could be as follows:

- Trafficked persons are deceived or forced (actual or by threat) to move. Whereas, regular migrants are not usually deceived or forced to leave their place of residence. But, sometimes it could be difficult to draw a line between the two concepts, as there are grey areas in between blurring a clear distinction.
- Both trafficking in persons and migration share the same “migratory space” as both involve movement. Nevertheless, the two phenomena have very different reasons behind movement and outcomes, with trafficked persons being exposed to a “harm” situation and end up in slave like situations. Exploitation, profit and illegality are all central to the idea of trafficking in persons. That is certainly not the case in the regular migration process.
- Trafficking is a development-retarding phenomenon, whereas regular migration is generally a development enhancing process.
- Trafficking is viewed as an anti-social and morally degrading heinous event. However, migration is widely considered as a process that could enhance social progress in both the origin and destination countries, if managed properly; it could also be an empowering process for the migrants.

In order to better understand the migration-trafficking nexus, we need to look at the concept of “smuggling in migrants” and identify interlinks between the concepts of trafficking and smuggling. Smuggling in migrants is a phenomenon in which a person acts to facilitate his/her border crossing in an irregular manner, with the help of an entity and by making a financial or other material payment to another person or entity. There are differences between trafficking in persons and smuggling in migrants, both in their process of movement and in the outcome. The critical factor separating trafficking from smuggling is the presence of *force or coercion* throughout or at some stage in the process of trafficking – that the force or coercion being the purpose of exploitation. Another crucial factor that helps distinguish the two phenomena is consent of the individual involved in the movement. In a case where a person was misled about the dangers of the journey, and irrespective of the treatment he/she receives at the hands of smugglers, provided there is consent to the original transport and provided an exploitative relationship does not develop or was not envisaged between the two parties, it would be considered as smuggling in migrants. However, drawing such distinctions between the

two phenomena is not absolute or fool proof. In practice, establishing a clear cut distinction between trafficking and smuggling is a very challenging task.

Be that as it may, the international community has adopted what is known as the **Palermo Protocol**, which draws a distinction between trafficking and smuggling. According to this Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, "trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, either by the threat or use of abduction, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, with the aim of submitting them to any form of exploitation [...]". On the other hand, according to the Protocol against the Smuggling of Migrants by Land, Air and Sea (other part of Palermo protocol) "Smuggling of migrants shall mean the procurement of the illegal entry into or illegal residence of a person in (a) (any) State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit".

The definitions stated above suggest that the primary difference between trafficking and smuggling appears to be in relation to coercion, exploitation and violation of human rights primarily as the outcome of the migration experience. Smuggling is clearly the manner in which a person enters a country, and with the involvement of third parties that assist him/her to achieve entry. Therefore, a potential migrant requests and pays a third party for assistance to cross into another State where, she/he has no right of residence and the third party (smugglers) involvement goes no further than the facilitation of the illegal border crossing. Whereas, in the case of trafficking, it requires consideration not only of the manner in which a migrant enters a country but also his/her working conditions (outcome). Trafficking involves coercion and exploitation and the main purpose of trafficking is to place persons in a "harm" situation where their labour can be exploited under conditions that involve human rights abuses. Trafficking involves particularly women and children and forces them into commercial sex, work in sweatshops, forced labour, begging and forced labour. Trafficking is not a single event but a process starting from recruitment, continuing on with travel, and ending with exploitation of the person (outcome).

In general however, the differences between smuggling and trafficking could be as follows:

- Normally, smuggled migrants "know" to some extent the dangers and ways and means of the travel and voluntarily engage themselves in the process of irregular migration. Trafficked persons are very seldom aware of the entire process. Even if they submit themselves freely to the trafficker, they can not give consent to the abuses or exploitation or human rights violations they are subjected to.
- While smuggling of persons indisputably involves international cross-border movements, trafficking could also occur within national borders, although the vast majority happens across international borders.

The challenge in clearly separating the cases of trafficking in persons from these of smuggling in migrants could also jeopardize the possibilities and potentials of regular migration. Over emphasizing on the gravity of trafficking in persons and failure to deal with trafficking within the broader migration framework or “mixing” the issues of trafficking and/or smuggling with regular migration could be counter productive in addressing the problem of trafficking and smuggling in persons. It may also make regular migration difficult especially for the people of developing countries. The argument that “trafficking in migrants” is a criminal act and there is a need for strict crime prevention strategies to tackle the problem, might not be an effective way to address the problem of trafficking or smuggling in migrants. In addressing the trafficking problem, the crime prevention strategies need to be combined with protection for the trafficking victims.

The ambiguities and confusions in identifying different categories of population movement make management of migration a difficult task, especially in an environment where there is no international regime for regulating migration. Some countries have developed ad hoc and reactive policies to address the various challenges of population movement.

III. Rights of Migrant Children

Until recently, migration has been discussed mainly in terms of adult, male movement. Women and children have been viewed as migrating only as dependents – following their male relatives. Consequently, child migrants have been considered as passive, vulnerable and exploited.

Pursuant to the Convention on Rights of the Child (CRC), States must undertake all efforts to prevent or eliminate child trafficking and they can be held accountable for not so doing. Furthermore, the UN Convention against Transnational Organised Crime and its Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol), which is not a human rights instrument but a Convention on international crime, provides additional protection to victims of trafficking.

Explicit protection against trafficking in the CRC is found in Article 35, which provides that “States Parties shall take all appropriate, national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. The Article does not elaborate the terms, but the words “for any purpose or in any form” suggest that it is to be interpreted broadly. The responsibility for taking measures to avoid trafficking is expressly placed on the State, which implies a State responsibility if it does not succeed in prosecuting offenders, thus making the international obligation applicable at the “trafficker level”.

In accordance with Article 35, States Parties should respond appropriately to prevent such trafficking. Necessary measures include identifying unaccompanied and separated

children; regularly inquiring as to their whereabouts; and conducting information campaigns that are age appropriate, gender sensitive and in a language and medium that is understandable to the child. Adequate legislation should also be passed and effective mechanisms of enforcement established with respect to labour regulations and border crossing. This implies that Article 35 obliges States to prevent trafficking not only with criminal measures, but with a full range of rights based measures.

Article 2 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP II), which has entered into force as part of the CRC for the ratifying States, helps clarify the definition of trafficking in Article 35, defining the sale of children as "...any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration". A very important Article in OP II is Article 3, which provides that:

"States Parties shall ensure the definition of the following acts as a crime, irrespective of whether they are committed domestically or transnationally nationally, on an individual or organised basis: Offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child; Transfer of organs *of the child for profit; Engagement of the child in forced labour.*"

The Trafficking Protocol contains the most comprehensive legal definition of "human trafficking" under international law. The Protocol contains an important distinction between "smuggling" and "trafficking", useful for remembering that the smuggling of migrants and trafficking in human beings are two different concepts, necessitating different responses. It also contains the important provision that children may never consent to trafficking. Where consent is alleged, in order to be dealt with as victims and not irregular migrants, adults must show that their consent came about due to threat, force, abduction, deception or abuse of power; but as far as children are concerned, no consent is valid.

The Protocol is important for various reasons. It provides, for the first time, a detailed and comprehensive definition of trafficking. It applies to all people, but particularly women and children, since States Parties have recognized their specific vulnerability. It also offers tools in order to empower law enforcement and to strengthen border control through, for example, the exchange of information, the training of law enforcement and border police, and measures aiming at ensuring the quality of travel documents. The Protocol integrates the foregoing by strengthening the response of the judiciary through the obligation for States Parties to criminalise trafficking; to create penalties that reflect the grave nature of these offences; and to create the possibility to investigate, prosecute and convict traffickers.

The CRC is extremely important for migrant children: both its underlying fundamental principles and specific Articles grant them comprehensive protection; so too are the ILO Conventions and the UN Convention on the Protection of All Migrant Workers and Members of Their Families. The ICCPR, ICESCR and other core human rights conventions also cover child migrants. The legal obligations under the CRC are both

negative and positive in nature, requiring States not only to refrain from measures infringing on children's rights, but also to take measures to ensure the enjoyment of these rights without discrimination. This implies that active measures are required by States in the protection of all children, nationals and non nationals alike.

It is important that children's particular needs are at all times respected. It is equally crucial that they are treated with dignity since their character will be framed during this period and they are naturally fragile. Similarly vital is that children's migration projects and goals are respected and that children may benefit from working in a safe, respectful environment. Finally, of the utmost importance is that both the child's vulnerability and their independence and resourcefulness are taken into consideration when protection is planned. Ensuring adequate protection requires a careful balance of these considerations.

Child migrants are children before they are migrants. It is a common problem that child migrants are not considered primarily as children, but "only" as migrants. This is true not only from a practical protection point of view, but also legally, since the respect due to any child on the basis of the CRC is superior to the protection offered to migrants (especially irregular migrants) in most national legislation.

IV. Comments and Observations of AALCO Secretariat

The linkage between irregular migration and human trafficking is critical. International migration and child trafficking affect a significant number of women and children. Women and children constitute the majority of the globally displaced population in that they form the majority of trafficking victims. Besides, as migrants or the children of migrant workers, they are also particularly vulnerable to abuse and exploitation.

Trafficking in persons is a human rights issue that cuts across political boundaries affecting mostly women & children. It is brought about by a multitude of factors (political, economic, social, cultural and personal). It needs a comprehensive response at all levels and sectors of society. As a form of organized crime, trafficking threatens sustainable development and the Rule of Law because illicit profits may be used for corruption, other criminal activities and in some cases even for promoting terrorism.

Trafficking in women and children is a gross violation of human rights. It is the worst form of modern day slavery. Sexual exploitation of women and girls is an obscene threat to the dignity of a female. It indeed is a de-humanizing concept to treat human being as commodities or chattels. Children are trafficked all around the world for a variety of purposes, although sexual exploitation of young boys and especially girls is probably the most widespread form of exploitation related to trafficking in persons. With regard to children trafficked for prostitution, Kelly concludes that girls and young women under the age of 18 constitute 10 - 30% of the total number of trafficked women².

² Kelly, E., *Journeys of Jeopardy: A Review of research on Trafficking in Women and Children in Europe* IOM Migration Research Series, No.11, Geneva, IOM, 2002, pp. 22.

As we have seen, the situation of women and children has been the subject matter of a number of international legal instruments. For instance, the Convention on the Rights of the Child (CRC), which is the most ratified international instrument, poses an international obligation on States to protect children from any kind of exploitation and to prevent child trafficking. Thus, any State in the world – apart from the United States of America and Somalia, which have not yet ratified the CRC – may be considered accountable for not acting to prevent child trafficking and to protect children who have been exploited. The two CRC Protocols establish clear commitments for States Parties too. As regards the ILO 182 Convention against the Worst Forms of Child Labour, it imposes an obligation on States Parties to fully implement its provisions, preventing and eliminating the worst forms of child labour and assisting the exploited children in their rehabilitation and social integration. Importantly, it calls on states to assist one another in eliminating these practices which gives scope for addressing the situation of migrant children.

The laws can lay down the norms and principles, but they would be of little value if they are not enforced and acted upon. Migrants can not benefit from the protection provided in the international instruments unless they are ratified, incorporated in national laws and enforced. Since its adoption by the United Nations General Assembly in 1990, only **44** states have ratified the IMWC. However, in order to become an effective instrument for fighting violations of migrants' human rights, all states, those of departure, transit and destination of migrants must ratify.

Hence, Governments need to be encouraged to ratify international legislation, including the Palermo Protocol, the Optional Protocol on the sale of children, child prostitution and pornography, and ILO Convention 182 on Worst Forms of Child Labour. Besides, Countries should review their legislation in the light of the principles recognized by these international instruments. Legal requirements and procedures that criminalize trafficked children or other categories of migrant children should be eliminated as far as possible, and children should be detained only as a last resort and for the shortest possible period of time. Technical support should be available for mechanisms to monitor the situation of child migrants. Law enforcement officials must ensure the safety and security of every child and their treatment in a manner consistent with the promotion of their sense of dignity and worth. The fight against child trafficking can only be won by effectively combining legislation with other policy measures, including better quality for education, redistribution, or appropriately targeted poverty alleviation programs, debt cancellations and arms control policies.

To conclude, some steps forward have been made over the last few years to focus the attention of the international community on the need to guarantee the protection of trafficking victims. However, work remains to be done to induce States to modify their legislation putting the human rights of trafficking victims, and especially of children, who are the most vulnerable victims, at the centre of their actions in the fight against human trafficking.

V. Annex- I

Participation of Asian-African States in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

Entry into force : 1st July, 2003

Status: : Signatories 31, Parties: 44 [as of 26-4-2011]

Signature

Bangladesh
Cameroon
Indonesia
Sierra Leone

Ratification/Accession

Egypt
Ghana
Libya
Nigeria
Philippines
Senegal
Sri Lanka
Syria
Turkey
Uganda