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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



**ESTABLISHING COOPERATION AGAINST
TRAFFICKING IN WOMEN AND CHILDREN**

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AN OUTLINE OF THE PROPOSED MODEL LEGISLATION AGAINST TRAFFICKING IN PERSONS ESPECIALLY WOMEN AND CHILDREN, FOR CONSIDERATION BY THE MEMBER STATES OF AALCO

I. BACKGROUND

The topic “Establishing Cooperation against trafficking in Women and Children” was included on the agenda of the AALCO at its Fortieth session held in New Delhi, from 20-24 June 2001 upon a proposal of the Government of Indonesia. Countries in Asia and Africa as in other regions are not immune from the menace of this crime. In response to this world wide threat, UN Convention against Transnational Organized Crime and Protocol to Prevent, Suppress and punish Trafficking in Persons, especially Women and Children were adopted by the General Assembly at its millennium meeting in November 2000.

At the forty-third session of AALCO held in June 2004 in Bali, Indonesia, the resolution (RES/43/SP1) adopted after in depth and thought provoking presentations and discussions at the Special Meeting on the topic, reiterated *inter alia*, the request for Member States who were not party to the Convention and its Protocol, to consider becoming parties to the UN Convention against Transnational Organized Crime and its Protocol to prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. It further requested Member States to transmit to the AALCO Secretariat their national legislation if any on the subject, if they have not done so. Also the resolution directed the Secretary General to develop, in cooperation with Member States, a Model Law for the criminalisation of trafficking in persons as well as protection of victims of trafficking, before, during and after criminal proceedings, based on human rights approach with a view to developing a concrete action plan for a joint effort against trafficking in persons, especially women and children.

As a first step towards fulfilling the mandate entrusted to the Secretary General vide RES/43/SP1, the Secretariat intends to proceed with the preparation of Model Legislation in two stages: (i) an outline of the Model Legislation to be presented at the forty-fourth session and (ii) a set of draft articles to be presented for the consideration of Member States at the forty-fifth session. This document provides an outline of the proposed Model Legislation for the consideration of the Member States.

II. OUTLINE OF THE MODEL LEGISLATION

With a view to completing the first stage of the work, the Secretariat conducted a preliminary study of the national legislations received from the Member States of AALCO in light of the Protocol to Suppress, punish and Prevent Trafficking in persons and other relevant international instruments and prepared the following outline with a view to developing a concrete action plan for a joint effort against trafficking in persons, especially women and children.

The proposed model legislation on trafficking in persons, especially women and children, intended for adoption by the AALCO Member States, is primarily based on the Protocol against trafficking in persons, especially women and children and the Recommended Principles and Guidelines on Human Rights and Human Trafficking prepared by the United Nations High Commissioner for Human Rights¹. It would also rely on other relevant international instruments. However, it would include necessary changes to suit the specific conditions of Member States. As stated above the main components of the proposed model legislation would be crime control and victim protection measures.

A. Crime control

Trafficking is often perceived and addressed only as a “law and order problem” and is primarily located within the crime prevention framework. In addition to violations suffered at the hands of traffickers, victims often suffer from re-victimization. Victims of cross-border trafficking are criminalized and prosecuted as illegal aliens, undocumented workers or irregular migrants. Women and young girls who are trafficked into the sex industry are penalized on charges of prostitution. Often, when detained they are denied basic judicial guarantees.

The crime prevention approach is evident from the fact that instead of creating a separate instrument, the Protocol is appended to a Convention that is intended to address the phenomenon of transnational organized crime. It is also apparent that the protocol provisions that deal with the crime of trafficking are made mandatory by way of framing them in obligatory language.

The growing gravity of the problem of trafficking is being increasingly understood as a severe form of crime needing stringent legal mechanisms. Such an example of this trend is that the Statute of the International Criminal Court while including ‘enslavement’ as constituting crime against humanity defines ‘enslavement’ as;

"Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.²

Similarly, In the case of Kunarac,³ the Trial Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY) held that enslavement as a crime against humanity included trafficking of human beings. The Trial Chamber held;

....indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or

¹. E/2002/68/Add.1

². Article 7(2)(c)

³. Prosecutor V. Kunarac, Case No.: IT-96-23-T&IT-96-23/1-T, (22 February 2001).

irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.

Therefore, it is evident from various international developments that emphasis is laid on the crime control dimension of the problem.

B. Victim protection

It is necessary to initiate preventive measures as they would stop the commission of crime itself, which would avoid the creation of victims of trafficking. However, once the act is committed, it is necessary that legal mechanisms should address the aspect of prosecution of accused in the commission of crime. Equally important dimension is the protection of the victims of trafficking. The protection of victims attains much significance when the victims of trafficking are vulnerable groups such as women and children. Despite its overwhelming human rights dimension, trafficking is often perceived as a law and order problem. In addition to violations suffered at the hands of traffickers, victims often suffer from re-victimization. Victims of cross-border trafficking are criminalized and prosecuted as illegal aliens, undocumented workers or illegal migrants, rather than as victims of a crime. Women and young girls who are trafficked into the sex work are penalized on charges of prostitution instead of receiving assistance. Many a time victims of trafficking are not informed of their rights and how to exercise them, and they are not given access to lawyers or interpreters. Often, victims of trafficking are not protected against violations of the right not to be returned to a country where they would face serious human rights abuses, as established in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention relating to the Status of Refugees.

The framework adopted in the trafficking protocol is also primarily crime control in nature. It is apparent from the fact that the Protocol provisions that deal with the crime of trafficking are made mandatory by way of framing them in obligatory language, while the provisions that deal with victim protection and assistance do not impose strict obligations on the parties to the Protocol. Therefore it is evident from the provisions that the Protocol against trafficking is predominantly intended to curb the crime of trafficking in persons.

C. Overlapping issues

Apart from the two important aspects of crime control and victim protection, there are other overlapping issues which need to be given due consideration while initiating any measures against trafficking in persons. The problem of trafficking in persons needs to be addressed from multiple dimensions. As observed earlier one important dimension of the problem is that it is one of the facets of the transnational organized crime. In

addition to that it involves the protection of human rights of the victims of trafficking in accordance with various human rights conventions at the international level. It also overlaps with the issue of labour rights as addressed by some of the ILO conventions. Further it is looked at as the negative side of the international migration. Many a time it is also linked with aspect of refugee protection. Therefore it becomes imperative that these factors need to be considered carefully to avoid any negative results. An example of how the measures intended to curb the crime of trafficking have implications for the refugee protection is explained below for the purpose of clarification of Member States.

a. Refugee protection

As stated above the problem of trafficking in persons also overlaps with issues like protection of refugees and migrant workers. The trafficking Protocol contains various measures to curb the crime of trafficking. Overlapping character of these issues with the issue of asylum seekers has the potential to end up in a situation that would be detrimental to the institution of asylum itself. Preventive measures against trafficking are looked at as the crime control measures for the benefit of the international community. However its implications to the institution of asylum are not insignificant.

This Protocol *inter alia* enshrines certain measures to be taken by the State parties in order to curb the crime of trafficking. These measures also include border measures as incorporated in article 11⁴. This provision intends to reduce the scope of channels through which trafficking and smuggling takes place. As it becomes difficult to apprehend the persons who are trafficked and smuggled once they cross the borders and enter into the territory, this provision imposes border restrictions, which is relatively an easier task to stop illegal entrants. Therefore, it focuses on the modes of transportation through which people cross borders.

Thus, this provision aims to make the commercial carrier responsible for transporting passengers who do not have valid travel documents. This provision also provides for sanctions in the case of violation of this obligation. Therefore it is the bounden duty of the commercial carrier staff to check the validity of travel documents before allowing the passengers to embark on the carrier. This measure filters those

⁴. Article 11 of the Trafficking Protocol reads as follows:

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.
2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.
3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.
4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

passengers who are to embark on without valid travel documents. As the Protocol intend to impose sanctions for violation of this obligation the carrier staff would take all the measures to exclude those passengers who do not carry valid travel documents. This also gives them, in a way, an arbitrary power to reject a person on a simple doubt about the validity of documents. The carriers may justify this action, as any overlooking on their part would invite serious sanctions against them by the State to which they carry passengers. However, this action of the transport carriers results in the obstruction of asylum seekers in the country where the asylum seeker is in fear of persecution and directly infringes the right of asylum seekers who want to flee from the persecution for the reasons stated under article 1 of the Refugee Convention. It is well established that people fleeing human rights violations in their country of origin are often not in a position to obtain proper legal documents required to enter into another country. Many a time they remain in hiding and leave their country clandestinely. Sometimes situations are so tense and oppressive and do not allow them to wait for proper legal exit. In certain situations it is also possible that State machinery becomes defunct to process the documentation. The yardstick to be considered for granting refugee status is that people flee their country of origin due to the prevailing unfavorable conditions though the gravity of which may vary from case to case.

Contrary to the provisions imposing carrier liability sanctions the 1951 Refugee Convention does not bar the illegal entry of genuine asylum seekers into the destination country recognizing the unfavourable conditions under which asylum seekers flee their home country and require a safe place to their lives. Accordingly, article 31 allows illegal entry into another country of those who are in need of international protection.

It is to be pointed in this regard that article 31 of the Refugee Convention underlines the fact that many a time asylum seekers are forced to flee in unfavorable conditions and refusal of entry merely on the basis of improper documentation would result in the violation of article 33 of the Convention which contains the principle of *non-refoulement* which has also attained the status of customary international law. On many occasions it is found that genuine asylum seekers were denied entry by the airlines staff due to the fear of sanctions by European countries in accordance with their national legislation. It is further observed that many a time exact figures and details of those who are denied entry are made available neither by these countries nor by the airlines staff.⁵

The Protocol against Trafficking in Persons is intended to be victim friendly and also efforts are made to make them with a human rights approach as developed in various human rights instruments. It is to be noted in this regard that this Protocol contains saving clause that recognize the significance of other instruments⁶. However, concerned

⁵. Frances Nicholson, "Implementation of the immigration (Carriers' Liability) Act 1987: Privatizing Immigration Functions at the Expense of international Obligations?", *International and Comparative Law Quarterly*, Vol. 46, Part. 3, 1997. p. 591.

⁶. Article 14(1) of the Trafficking protocol and Article 19(1) of the Smuggling of Migrants Protocol (wording of both the provisions is the same) read as follows: 1. 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,

international organizations have expressed their concern about the lurking danger of denial of refugee protection to the genuine asylum seekers while focusing on the prevention of trafficking in persons and smuggling of migrants.⁷ The saving clauses- no doubt, act as balancing factors seeking due recognition to the existing international law, in this context the Refugee Convention- however, do not provide a fool-proof mechanism. It is so because the carrier liability measures required under article 11 restrict the movement of genuine asylum seekers in the country of origin prior to crossing the borders itself as the staff of carriers act in accordance with this provision prior to the embarkation on the carrier. Thus any action under article 11 regarding carrier liability precedes exercising the option of exploring the possibility of presenting a case before the concerned authorities of the receiving State as the asylum seekers are stopped much before reaching or crossing the borders. The genuine asylum seekers are prevented from showing causes for their flight without valid documents as the matter ends even before it starts because the carriers staff are concerned with checking the validity of documents but not with the claims for asylum in accordance with article 31 of the Refugee Convention. It was observed in a decision concerning airline sanctions that even while the right to seek asylum cannot arise before the asylum-seeker has actually entered the territory of another state, that state cannot prevent access to asylum procedures through administrative measures, which hinder entry.⁸

The carrier liability measures intending to curb trafficking and smuggling of migrants entrust the staff of carriers with the task of assessing the validity of the immigration claims which they are not trained in. Similar measures of carrier liability initiated in some countries were opposed by trade unions expressing their inability to perform such task, as they are not trained in doing so.⁹

where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

7. It was observed that “ while States have a legitimate interest in strengthening border controls in order to detect and prevent trafficking, HCHR, IOM, UNHCR and UNICEF are concerned that these measures do not impinge upon the human rights of individuals as set out in the major international instruments including the International Covenant on Civil and Political Rights, the Refugee Convention and the Convention on the Rights of the Child. It is especially important to ensure that border measures do not limit the right of individuals to seek and enjoy in other countries asylum from persecution as provided for under the Refugee Convention. In particular, provisions of the draft Protocol should not undermine the fundamental principle of non-refoulement”. *Note by the United Nations High Commissioner for Human Rights, International Organization for Migration, United Nations High Commissioner for Refugees and the United Nations Children’s Fund on the Protocols Concerning Migrant Smuggling and Trafficking in Persons*, submitted to the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Eighth Session, Vienna, 21 February to 3 March 2000.

8. Decision No. VI/3 H 2728/87 of 13 October 1987 of the Administrative Court in Frankfurt. Cited by Erika Feller, “Carrier Sanctions and International law”, *International Journal of Refugee Law*, Vol. 1, no. 1, January 1989. pp. 61-62.

9. In 1992 Civil Aviation Section of the International Transport Workers Federation passed a resolution, which, *inter alia*, read; “that government policies and airline practices are improperly pushing aviation employees into the role of policing immigration. Aviation employees are not trained for such duties, nor should aviation employees be involved in any measures which jeopardize the international rights of asylum seekers”. It further condemned “the practice of governments of imposing carriers liability penalties against airlines, and”.....”all practices of

The measures intended to control borders for the purpose of preventing trafficking may result in asylum seekers approaching traffickers and smugglers, despite the risks involved in it, to avoid persecution in the country of origin. It is argued that severely restrictive immigration policies are more likely to lead to organized illegal immigration through trafficking and smuggling.¹⁰ In the case of asylum seekers it becomes inevitable for them to cross borders with the help of traffickers and smugglers in the face of restrictive immigration measures adopted by destination countries. In the context of European Union it has been pointed out that the countries from where more number of people trafficked or smuggled are the same countries from where many people seek refugee protection. “The main nationalities that are being smuggled and trafficked to Europe in order to claim asylum are those very same nationalities that are recognized as refugees by European countries themselves. Yet, these are also the same nationalities that have been the main target of all European anti-trafficking and anti-smuggling activity”¹¹. It is further observed in this context that “it is misleading to describe the customers of traffickers and smugglers as ‘illegal migrants’ or ‘illegal aliens’, and that the term ‘refugee in need of international protection, would in fact be more appropriate in many cases”¹².

As elaborated above, the problem of trafficking in persons poses complex challenges, which need careful consideration while developing any normative framework.

D. Proposed Model Legislation: A Combination of Crime Control and Victim Protection

Any attempt at creating a more comprehensive mechanism to address the problem of trafficking needs to provide an equal balance between the crime control and victim protection. A comprehensive mechanism needs to be evolved within the framework of the existing human rights mechanisms at the international level. In this regard it is worth mentioning the guidelines prepared by the OHCHR for the protection of the victims of trafficking. These guidelines along with other human rights instruments would provide a substantial background for addressing the protection of the victims of trafficking in the proposed legislation.

Therefore the Protocol intends to balance the aspects of crime control and protection of victims of trafficking. The latter needs a human rights dimension as enshrined in various human rights conventions. The proposed model legislation of the AALCO Secretariat would attempt to balance both these aspects.

airlines managements which use aviation staff in immigration control duties which are clearly beyond their proper employment duties”.

¹⁰. Anne Gallagher, “Trafficking, Smuggling and Human Rights: Tricks and Treaties”, *Forced Migration Review*, 12 January 2002. p. 28.

¹¹. John Morrison and Beth Crosland, “The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?”, *New Issues in Refugee Research, Working Paper No. 39*. p. 17, Available online at <http://www/unhcr.ch/>

¹². Ibid.,

III. THE LEGAL FRAMEWORK

Any attempt at formulating a legal framework needs to be approached from the angle of how some national laws should, apart from controlling the crime, take required measures to avoid revictimization of the victims rather than protecting them.

The immigration laws of several countries may not have adequate provisions to deal with the victims of trafficking from the point of view of affording protection to them. In effect, this means that the victims who enter a country without proper immigration papers are classified as ‘illegals’ or ‘illegal immigrants’ subject to fines and imprisonment. Matters are aggravated by those systems, which impose upon their nationals the need to acquire exit visas before leaving the country; those failing to do so may be treated as ‘illegals’ or ‘illegal emigrants’. Thus the victims of trafficking undergo multiple forms suffering. They suffer as victims of trafficking, as illegal immigrants and as illegal emigrants.

Several countries criminalize prostitution, and those landing up in prostitution-including victims of trafficking- may find themselves criminalized as prostitutes. In such situations also they suffer as victims of trafficking and also as criminals/prostitutes.

Several countries treat children and adolescents who find themselves in various criminal activities as ‘delinquents’ rather than as victims, including in regard to sexual exploitation. The approach taken by the law is thus punitive rather than child rights centered and victim responsive. The punitive approach may lead to incarceration of the young people rather than their treatment as victims to a healing process and social reintegration.

Therefore any legal framework that intends to address the problem of trafficking in persons needs to rely on various international legal instruments. The proposed model legislation would primarily rely on the Protocol to Prevent, Suppress and punish Trafficking in Persons, especially Women and Children 2000 and the Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council¹³. Apart from these instruments the model legislation would be drafted with reference to various other human rights dimensions as established in various international legal instruments. These instruments *inter alia* may include:

UN Convention against Transnational Organized Crime, 2000

Universal Declaration of Human Rights, 1948

The International Covenant on Civil and Political Rights, 1966

¹³. E/2002/68/Add.1

The International Covenant on Economic, Social and Cultural Rights, 1966

The Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment, 1984

Convention on the Elimination of All Forms of Discrimination against Women, 1979

The International Convention on the Elimination of All Forms of Racial Discrimination, 1965

The Convention on the Rights of the Child, 1989

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

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956

ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (ILO Convention No. 182)

Convention relating to the Status of Refugees, 1951 and its 1967 protocol