

## Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region

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### Abstract

This article focuses on how the responses of the States within the Association of Southeast Asian Nations (hereinafter ASEAN) to combating sex trafficking, or trafficking for the purposes of forced prostitution, have evolved over time. In doing so it assesses the effectiveness of these frameworks in addressing the plight of trafficked victims and breaking the vicious cycle of trafficking. Part 2 gives a brief overview of the various criminal law, human rights and multidisciplinary frameworks developed by the international community against sex trafficking. Particular focus is given to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter the 2000 Palermo Protocol against Trafficking) which has a multidisciplinary and victim-centred approach that reflects a change in the international community's understanding of sex trafficking, not only as a crime, but as a violation of victims' rights and whose complex push and pull factors necessitate a multidisciplinary approach. Part 3 then examines ASEAN's approach to combatting sex trafficking, focusing in particular on how the dominant criminal law approach adopted by ASEAN does not adequately protect trafficked victims, nor does it effectively break the cycle of trafficking. Parts 4, 5 and 6 outline and assess the anti-trafficking strategies developed in Malaysia, a country which has in the past fought sex trafficking via a strict criminal law model, and the Philippines, a country which in the past sought to suppress trafficking pursuant to a labour migration framework. It describes how these countries have, in line with international developments, moved towards adopting a more multidisciplinary and victim-centred approach towards combatting sex trafficking.

### 1. Introduction

Every year approximately 800,000-900,000 people are trafficked across international borders and held captive in slave-like situations of forced labour or sexual slavery.<sup>1</sup> The 2000 Palermo Protocol against Trafficking broke new ground by being the first international instrument to address the problem of sex trafficking in a holistic manner, not only as a crime but also by focusing on all affected segments of society, particularly victims. It comprehensively defines trafficking as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual

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<sup>1</sup>Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report, 2002, available at [www.state.gov](http://www.state.gov), last accessed Jan. 26 (hereinafter known as US Trafficking Report 2002), at p. 7.

exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>2</sup>

It is this element of coercion which differentiates the act of trafficking from illegal immigration, as defined in the 2000 Palermo Protocol against Trafficking and the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter the 2000 Protocol against Smuggling of Migrants).<sup>3</sup> It is also this element of coercion which necessitates a holistic, rights-oriented response to sex trafficking rather than one that focuses on criminalization alone.

Despite the international community's pledges to combat all forms of human trafficking, as reflected in the 2000 Palermo Protocol against Trafficking, human trafficking remains the third most profitable transnational criminal activity, after drug smuggling and illegal trading in firearms.<sup>4</sup> This article focuses on a particularly insidious form of trafficking: the trafficking of women for purposes of forced prostitution, or sex trafficking. This problem, which has historical roots in the ASEAN region<sup>5</sup> has in recent years taken on a new scale and magnitude due to globalization and the involvement of transnational organized criminal groups. The institutionalised nature of the States' labour migration policies serves as an official channel by which traffickers obtain easy access to economically vulnerable women and serves as cover for their illegitimate activities. Trafficked women often face social discrimination. Perceived as 'spoilt goods' and unable to find alternative viable employment, most of these women fall prey once again to traffickers.

Despite sex trafficking's historical and long-standing roots in the ASEAN region, ASEAN States have failed to deal with the problem effectively. This is due to the criminal law model adopted by most ASEAN States in combating sex trafficking. The criminal law model focuses on penalization of the trafficking act and fails to adequately address the socio-economic causes and consequences of sex trafficking. As a result, victims of sex trafficking are neglected or revictimized by authorities of the destination country, are left in limbo while awaiting repatriation, and upon repatriation are ostracized or marginalized in their States of origin. The vulnerability of rescued victims is often exploited by traffickers. To effectively break the vicious cycle of trafficking, a new victim-centred approach that addresses the multi-dimensional nature of trafficking needs to be adopted by ASEAN States. Rescued victims should be protected at the destination state, guaranteed safe repatriation and have access to proper rehabilitation and reintegration programmes.

Instead, as non-nationals in destination States, trafficked victims are labelled as illegal immigrants with a view to their eventual deportation. Not only are trafficked victims from politically and economically marginalized classes within society, but in addition they have to deal with the social and moral stigma attached to their status as 'sex workers'. Though there are an increasing number of males, especially young boys, being trafficked for forced prostitution, the majority of sex trafficking victims are female, who often find themselves subject to practices of gender discrimination, which are especially

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<sup>2</sup> Article 3(a), 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons especially women and children, supplementing the United Nations Convention against transnational organized crime A/RES/55/25. More information can be obtained at [http://www.unodc.org/unodc/en/crime\\_cicp\\_signatures\\_trafficking.html](http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html), last accessed 3 Nov. 2005

<sup>3</sup> Ibid.

<sup>4</sup> [www.unodc.org](http://www.unodc.org), last accessed 24 Nov. 2005.

<sup>5</sup> The ASEAN Member States consist of Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam. More information on ASEAN can be obtained at its official website, [www.aseansec.org](http://www.aseansec.org), last accessed 24 Nov. 2005

prevalent in most ASEAN societies.<sup>6</sup> These factors contribute to female victims' especial vulnerability even after they are rescued, making them easy targets for traffickers. All these factors, combined with the very magnitude of sex trafficking today, have resulted in significant gaps between the response of policy-makers and the actual problem itself. More often than not destination States perceive victims trafficked for the purposes of forced prostitution as nuisances and a threat to their society's moral order, whose needs are of secondary importance compared to the myriad of more pressing, politically important issues. On the other hand, generally less developed States of origin face real resource limitations in attempting to repatriate or rehabilitate returning trafficked victims. United Nations (hereinafter UN) studies and reports have recognized the inextricable link between poverty, international debt and trafficking.<sup>7</sup>

## 2. Responding to the Plight of Trafficked Victims: Frameworks Developed by the International Community

The sheer magnitude and consequences of sex trafficking have led to the development of different approaches towards sex trafficking, which seek to address its socio-economic causes and prevent further revictimization of trafficked victims. The protection of trafficked victims has generally been developed through human rights or criminal justice frameworks. Section 2.1 focuses on the kind of protection developed within human rights frameworks. Section 2.2 focuses on the protection within criminal justice frameworks. Lastly, Section 2.3 focuses on the trafficking-specific multidisciplinary framework adopted by the 2000 Palermo Protocol against Trafficking.

### 2.1 The protection of trafficked victims within a human rights framework

Sex trafficking or, more specifically, trafficking for the purposes of forced prostitution, violates a variety of human rights norms recognized by the international community, such as those set out in various international conventions against slavery<sup>8</sup> and forced labour;<sup>9</sup> women's rights as set out in the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW)<sup>10</sup> and specific norms against trafficking set out in international conventions against trafficking such as the 1949 Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others<sup>11</sup> (hereinafter the 1949 Convention) and the 2000 Palermo Protocol against Trafficking.

Examining the various norms set out above, it is undeniable that the act of sex trafficking itself is contrary to international law. However, the exact consequence of the breach of such norms is less clear. In cases of sex trafficking whereby victims find themselves isolated from familiar networks of support, with neither source nor destination States willing to provide protection, the exact rights accruing to such victims become even less clear than they already were. This section examines the various

<sup>6</sup> Report of the Special Rapporteur on Violence against Women, E/CN.4/2000/68, 29 Feb. 2000, para. 58.

<sup>7</sup> Report of the Working Group on Contemporary Forms of Slavery, E/CN.4/Sub.2/2001/30, 16 July 2001, para. 43. More information can be obtained at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/022ff217839f666d802566640047de55?>

<sup>8</sup> Article 2, 1926 Slavery Convention, available at [www.unhchr.ch](http://www.unhchr.ch), last accessed on 24 Nov. 2005

<sup>9</sup> Article 1(1), 1930 Forced Labour Convention (No. 29), available at [www.unhchr.ch](http://www.unhchr.ch), last accessed on 24 Nov. 2005.

<sup>10</sup> Article 2, Convention on the Elimination of All Forms of Discrimination against Women, available at [www.unhchr.ch](http://www.unhchr.ch), last accessed on 24 Nov. 2005.

<sup>11</sup> Article 1, 1949 Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, available at [www.unhchr.ch](http://www.unhchr.ch), last accessed on 24 Nov. 2005.

international legal frameworks which have been used by advocates of trafficked victims' rights. It asks what the obligations of a State are on whose territory such sex trafficking has occurred, what rights may be claimed by victims of sex trafficking, and against which State, the destination State or the State of origin. In particular, this section assesses the effectiveness of these different frameworks in meeting the needs of trafficked victims and breaking the vicious cycle of trafficking.

### 2.1.1 *General human rights law and the Velásquez 'due diligence' standard*

International human rights law traditionally addressed only human rights violations committed by States. Trafficking for the purposes of forced prostitution diverges from this traditional paradigm of human rights violations due to the fact that it is by and large committed by organized criminal groups, by private rather than public actors.

According to the Inter-American Court of Human Rights (hereinafter the IACHR) in the *Velásquez* case, a State will be held liable for human rights violations perpetrated by private actors if it fails to meet a 'due diligence' standard in ensuring the protection of human rights within its territory.<sup>12</sup> The IACHR found that the due diligence standard arises from Article 1 of the Inter-American Convention on Human Rights, which states that 'the State Parties to this Convention undertake to respect...*and to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms (contained in the Convention)...' [italics added]. The concept of the State's due diligence responsibility for private actors has been popularly used to promote the rights of trafficked victims who have had their rights violated by private actors acting in direct defiance of State laws or policies.<sup>13</sup>

In fulfilling its duty to 'ensure' respect of such rights, the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.<sup>14</sup>

The *Velásquez* 'due diligence' duty, while invaluable in holding the State responsible for the acts of private actors, does not adequately protect trafficked victims for several reasons. While the *Velásquez* judgment articulates three separate duties, of prevention, punishment, and victim compensation, its formulation of the State's duty to compensate victims is phrased in less obligatory terms than the first two duties. The Court held that 'States *must* prevent, investigate and punish any violation...and moreover, *if possible*, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.' [italics added]<sup>15</sup>

Furthermore, in formulating the 'due diligence' doctrine, the *Velásquez* judgment did not clearly set out what is expected from a State in fulfilling its preventive actions. The Court recognized that 'the existence of a particular violation does not, in itself, prove the failure to take preventive measures'.<sup>16</sup> It goes on to explain that 'the duty to prevent includes all those means of a legal, political, administrative and cultural nature' which would 'promote the protection of human rights and ensure that any violations are

<sup>12</sup> *Velásquez Rodríguez Case* (hereinafter *Velásquez*), Judgment of 29 July 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988). Art 1(1) of Inter-American Human Rights Convention, accessible at [www.oas.org](http://www.oas.org), last accessed on 24 Nov. 2005.

<sup>13</sup> 2000 Report of the Special Rapporteur for Violence against Women, n. 6 above, para. 51-3; Anthony P. Ewing, *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention of Human Rights*, 26 Colum. Human Rights L.Rev. 1997.

<sup>14</sup> *Velásquez*, n. 12 above, para. 174.

<sup>15</sup> *Ibid.*, para. 166.

<sup>16</sup> *Ibid.*, para. 175.

considered and treated as illegal acts...'.<sup>17</sup> However, the court qualifies its statement by acknowledging that 'it is not possible to make a detailed list of all such measures, since they may vary with the law and the conditions of each State Party'.<sup>18</sup>

The *Velásquez* doctrine, while providing a progressive general framework for the advocacy of trafficked victims' rights, is itself insufficient to meet their specific needs. Trafficked sex victims have very specific and urgent needs that can only be met with the recognition of concrete rights which are not subject to the discretion of States.

### 2.1.2 *As victims of human rights abuses*

Apart from the *Velásquez* 'due diligence' standard, trafficked victims may also advance their claims as victims of human rights violations. This victim-centric framework was developed in the 1990s by jurists and international bodies. As explained below, this approach focuses on meeting the needs of the victim of human rights violations, rather than the State's obligations under international law, and has been developed separately from the actual substantive human right violated.

In 1989 the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed Theo van Boven as Special Rapporteur to consider and formulate guidelines outlining the right of victims of gross violations of human rights to restitution, compensation and rehabilitation. The Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law (hereinafter the 1996 Theo van Boven principles) were finalized by Theo van Boven in 1996. In the context of impunity for human rights violations, in 1991 the Sub-Commission on Human Rights appointed Joinet as Special Rapporteur on amnesty, to develop a set of guidelines relating to the question of the impunity of perpetrators of violations of human rights. The Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity were finalized and presented to the Sub-Commission in 1997. In 1998 the Commission on Human Rights appointed Bassiouni as an independent expert to prepare a revised version of these principles with a view to their adoption by the General Assembly. Bassiouni built on the work of van Boven and Joinet as well as international developments to produce a set of principles which were submitted to the Commission in 1999.

The guidelines are based on the State's obligation 'to respect and ensure respect for human rights'.<sup>19</sup> States are to guarantee victims of human rights violations access to effective remedies and reparation. Reparation is defined as consisting of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>20</sup> The aim of restitution is, whenever possible, to restore the victim to the original situation before the occurrence of the violation concerned.<sup>21</sup> Such restitution includes the right to return to one's place of residence.<sup>22</sup> Compensation is required for any economically assessable

<sup>17</sup> Ibid.

<sup>18</sup> Velásquez, n. 12 above, para 175.

<sup>19</sup> Final Report of the Special Rapporteur M. Cherif Bassiouni submitted in accordance with Commission resolution 1999/33, (hereinafter known as 1999 Bassiouni principles), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/42bd1bd544910ae3802568a20060e21f/\\$FILE/G001\\_0236.doc](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/42bd1bd544910ae3802568a20060e21f/$FILE/G001_0236.doc), E/CN.4/2000/62, 18 Jan. 2000, Draft of the 1996 Theo van Boven principles, para. 1, available at <http://www.ohchr.org/english/events/meetings/docs/versionrev.doc>, (Rev. 05 August 2004)

<sup>20</sup> 1999 Bassiouni principles, n. 19 above, para. 21; Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Subcommission on the Prevention on Discrimination and Protection of Minorities, Forty-ninth session (hereinafter the 1997 Joinet principles), principle 36; Final report submitted by Mr. Theo van Boven, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (hereinafter known as the 1993 Theo van Boven principles), E/CN.4/Sub.2/1993/8, 2 July 1993, paras. 12-16.

<sup>21</sup> 1999 Bassiouni principles, n. 19 above, para. 22; 1996 Theo van Boven principles, n. 20 above, para. 12.

<sup>22</sup> Ibid,



damage resulting from a human rights violation, such as physical or mental harm or harm to reputation or dignity.<sup>23</sup> Rehabilitation is stated as being inclusive of medical and psychological care as well as legal and social services.<sup>24</sup>

General international law governing inter-State relations states that reparation for breaches of international obligations should be made in the form of restitution and if not possible, compensation and satisfaction in that order. The various forms of reparation due to the victim are defined individually but not ranked in the guidelines developed by Theo van Boven, Joinet or Bassiouni. In fact, Bassiouni's 1999 principles qualify the State's duty of reparation by stating that it should be carried out 'in accordance' with the State's domestic law, other international obligations and the individual circumstances.<sup>25</sup>

It should be noted however that while such principles are progressive, they remain soft law and have yet to be adopted by the General Assembly.

## **2.2 The protection of trafficked victims within a criminal justice framework**

Trafficking of women for the purposes of forced prostitution has historically been condemned by the international community pursuant to a variety of international instruments negotiated under the auspices of the League of Nations and the United Nations. The international community has generally adopted a criminal law approach towards the combat of sex trafficking and the establishment of frameworks of mutual criminal cooperation. On the other hand, as explained in section 2.2.2 below, the increasing popularity of restorative justice concepts has introduced victim protection directly into criminal justice frameworks.

### *2.2.1 International criminalization of trafficking and related practices*

Over the years, various instruments have been negotiated by the international community aimed at combating trafficking, such as the 1904 International Agreement for the Suppression of the 'White Slave Traffic' (hereinafter the 1904 Convention); the 1910 International Convention for the Suppression of 'White Slave Traffic' (hereinafter the 1910 Convention);<sup>26</sup> the 1921 International Convention for the Suppression of the Traffic in Women and Children (hereinafter the 1921 Convention); the 1933 International Convention for the Suppression of the Traffic in Women of Full Age (hereinafter the 1933 Convention) and the 1949 Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (hereinafter the 1949 Convention).<sup>27</sup> These international instruments have attempted to address, to varying extents, the needs of trafficked victims.

The above-mentioned counter-trafficking instruments require parties to criminalize trafficking as defined in the respective conventions,<sup>28</sup> and to ensure that the crime is subject to appropriate and proportionate punishment.<sup>29</sup> For the purposes of facilitating mutual criminal cooperation between State parties in the combat of trafficking, parties are required to recognize trafficking as a crime (which shall also be

<sup>23</sup> 1999 Bassiouni principles, n. 19 above, para. 23; 1996 Theo van Boven principles, n. 20 above, para. 13.

<sup>24</sup> 1999 Bassiouni principles, n. 19 above, para. 24; 1996 Theo van Boven principles, n. 20 above, para. 14.

<sup>25</sup> 1999 Bassiouni principles, n. 19 above, para. 21.

<sup>26</sup> 1910 International Convention for the Suppression of "White Slave Traffic" (hereinafter the 1910 Convention)

<sup>27</sup> 1949 Convention, n. 11 above.

<sup>28</sup> Arts. 1-3, 1910 Convention, available at <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html>; Art. 2-3, 1921 Convention, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1922/10.html>; Arts. 1 & 2, 1933 Convention (not found); Arts. 1-4, 1949 Convention available at <http://www.unhchr.ch/html/menu3/b/33.htm>.

<sup>29</sup> Ibid.

extraditable), regardless of where the act is orchestrated. State parties are also obliged to exchange information with each other.<sup>30</sup>

There are few provisions relating to victim protection in these conventions, and these mainly focus on the regulation of employment agencies, repatriation arrangements and immigration.<sup>31</sup> The 1949 Convention, the UN's first counter-trafficking instrument, which consolidates and updates previous counter-trafficking instruments, breaks new ground by having a general clause which requires State parties 'to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution'.<sup>32</sup> It further imposes certain victim-related obligations on destination States prior to the repatriation of victims. Article 19(1) requires State parties 'to make suitable provisions for their (victims) temporary care and maintenance.' However under this obligation State parties are only required to do so 'in accordance with the conditions laid down by domestic law and without prejudice to prosecution or other action for violations thereunder.' In other words, victims may be prosecuted for criminal offences committed as a direct result of their being trafficked. Also, article 19, which provides for victim repatriation, requires victims to 'themselves repay the cost of repatriation'. In the event that they cannot do so,

the cost of repatriation as far as the nearest frontier or port of embarkation or airport in the direction of the State of origin shall be borne by the State where they are in residence and the cost of the remainder of the journey shall be borne by the State of origin.<sup>33</sup>

Pursuant to this provision, victims may effectively be left in a state of limbo in the event that the State of origin refuses to pay for the remaining part of the journey.

#### 2.2.2 *The rights of victims of serious crimes: restorative justice and policy*

Restorative justice concepts have introduced a more victim-centric approach to criminal justice. In 1985, the General Assembly adopted the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter the 1985 UN Declaration), which recognized certain principles of entitlement for victims of crimes. The 1985 UN Declaration defines victims as

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States...<sup>34</sup>

Such victims are to be guaranteed access to justice, restitution, and, in the event that restitution from their perpetrators is not possible, compensation from the State if they 'have sustained bodily injury or impairment of physical mental health as a result of serious crimes.'<sup>35</sup> Paragraph 17 furthermore states that 'in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.'<sup>36</sup> The UN Office on Drugs and Crime (hereinafter UNODC) has

<sup>30</sup> Art. 3, 1904 Convention; Art. 5, 1910 Convention available at <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html>; Art. 4, 1929 Convention; Art. 3, 1933 Convention; Arts. 7 & 9, 1949 Convention, available at <http://www.unhchr.ch/html/menu3/b/33.htm>.

<sup>31</sup> Art. 2, 1904 Convention; Arts. 6 & 7, 1921 Convention; Arts. 17, 19, 20, 1949 Convention.

<sup>32</sup> Art. 17, 1949 Convention

<sup>33</sup> Art. 19, 1949 Convention

<sup>34</sup> 1985 UN Declaration, para. 1, available at [www.ohchr.org](http://www.ohchr.org), last accessed on 24 Nov. 2005

<sup>35</sup> *Ibid.*, para. 12 (a)

<sup>36</sup> *Ibid.*, para. 17. This refers to, amongst others, discrimination on the basis of one's gender

focused on developing victims' rights within a framework of restorative justice.<sup>37</sup> The 1985 UN Declaration, whose basic features have been outlined in the section above, forms the basis for the UNODC's work. All this has taken place under the rubric of restorative justice, one of the five sub-themes identified by the Crime Congress 'with the most widespread potential and relevance for application in criminal justice reforms around the world'<sup>38</sup> and which is seen as an alternative or complement to the current models of criminal justice.

The UNODC has noted that there is today a special need for victims' rights, due to the disappearance of more traditional networks of support such as 'the family, the community or the tribe'.<sup>39</sup> The approach adopted by the UNODC is mainly policy-oriented and has focused on the development of guidelines and specific programmes rather than the formation of specific norms. Aside from general recommendations and follow up programmes with regard to member States' adoption of victim-sensitive measures under the wider rubric of restorative justice, UNODC has prepared two guidebooks, one for victims and another for policy-makers, on achieving victim-oriented justice. The guidebooks recommend guidelines to be adopted based on State compensatory schemes in New Zealand, Poland, Finland, France, and Quebec. These schemes focus on victims of violent crime. Restitution by the offender to the victim is also recommended, not as an alternative but as a complement towards offsetting the harm suffered by the victim and as a method of ensuring the offender's accountability. Such restitution may take various direct or indirect forms, such as financial, individual service, financial community restitution, community service or restitution fines. The guidebooks also emphasize the need for victim rehabilitation, which aims to assist victims to cope with the immediate aftermath of the crime and longer term effects of victimization, such as helplessness and insecurity. The guidebooks also detail and recommend specific techniques and guidelines of crisis intervention, victim counselling and case advocacy.

These standards have largely been articulated as policy recommendations or open non-binding terms due to the fact that crime, in contrast to human rights violations, is traditionally perceived as falling within a State's domestic affairs. This fails to guarantee adequate protection to trafficked victims at both source and destination States. This is due to the fact, as elaborated on earlier, that trafficked victims are non-nationals in the destination State and often victims of gender discrimination either in their home or destination State.

### **2.3 The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: a multi-disciplinary approach**

The 2000 Palermo Protocol against Trafficking is the first universal counter-trafficking instrument to adopt a multidisciplinary, victim-centred approach. The Protocol's formal incorporation of victims' rights was largely due to the participation of NGOs and victim interest groups during its negotiation. Article 2 (b) of the Protocol formally states that it aims 'to protect and assist the victims of such trafficking, with full respect for their human rights'.

The multidisciplinary approach is clearly reflected in the preventive measures set out in Article 9. This imposes on State parties the explicit duty 'to protect victims of

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<sup>37</sup> The UNODC has been mandated to provide technical assistance and advisory services to States regarding the implementation of UN standards and norms on criminal justice and criminal prevention. ECOSOC Res 2002/15 of 24 July 2002. available at <http://www.unodc.org/unodc/index.html>

<sup>38</sup> 12<sup>th</sup> Crime Congress report, para. 8, accessible at [www.unodc.org](http://www.unodc.org), last accessed 24

<sup>39</sup> UNODC Victims Guidebook, p.1, accessible at [www.unodc.org](http://www.unodc.org), last accessed 24 Nov. 2005.



trafficking in persons, especially women and children, from revictimization' by undertaking educational measures; by appropriate coordination between governmental agencies and civil society; by undertaking bilateral or multilateral arrangements aimed at reducing 'poverty, underdevelopment and lack of equal opportunity' which 'make persons, women and children, vulnerable to trafficking'; and by discouraging 'the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.'

Nevertheless, upon closer examination, the 2000 Palermo Protocol against Trafficking's provisions relating to victim protection are phrased in less than mandatory terms. Article 6(1) requires State parties 'in appropriate cases and to the extent possible under its domestic law' to protect the privacy and identity of victims. According to article 6(3), State parties 'shall consider implementing measures to provide for the physical, psychological and social recovery of victims...' including housing and counselling. Article 6(4) says that State parties 'shall endeavour' to provide for victims' physical safety while on their territory. Provisions relating to the legal status of victims in destination States are even less certain. Article 7(1) only requires State parties to 'consider' adopting measures which would grant temporary or permanent residence to such victims.

While the 2000 Palermo Protocol against Trafficking does contain certain mandatory provisions relating to victims' rights, it is not clear if these obligations should fall on the destination or the source State. For example, article 6(5) requires State parties to 'ensure' that domestic legislation provides victims with the possibility of obtaining compensation for any damage suffered. It does not however specify if this obligation is incumbent on the destination or the source State. Article 8, which sets out what is expected of State parties with regard to the repatriation of victims, fails to specify on whom the cost of repatriation falls.

### 3. The Phenomenon of Sex Trafficking in ASEAN: A Continuing and Evolving Problem

It is estimated that nearly one-third of the global trafficking trade involves women and children from South-east Asia. About 60% of this takes place within the ASEAN region itself and about 40% to the rest of the world.<sup>40</sup> All ASEAN States serve to some extent or other as source, transit or destination countries, the extent of which being dependent on the prevalence of push and pull factors within the State concerned.

Trafficking routes from Thailand's rural villages and from Laos, Cambodia and Myanmar lead into cities like Bangkok, which thrive on sex tourism.<sup>41</sup> The Philippines government's recent labour migration policy has made it a destination and source country at the same time.<sup>42</sup> Labuan, a Malaysian port city, has become a convenient transit stop for traffickers and a destination for many trafficked women from the Philippines or other parts of Malaysia.<sup>43</sup> Trafficked ASEAN women have been found as far away as the Middle East while Eastern European women have been rescued from Malaysian brothels. The complexity of push and pull factors driving trafficking, the

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<sup>40</sup> International Organization for Migration Report on Combating Trafficking in South-east Asia: A review of Policy and Programme Responses (hereinafter IOM Report), available at [www.iom.int](http://www.iom.int), last accessed 24 Nov. 2005.

<sup>41</sup> IOM Report, n. 40 above, at p.32-49; 2002 US Trafficking Report, n. 1 above, at p.149

<sup>42</sup> 2002 US Trafficking Report, n. 1 above, p.120

<sup>43</sup> UNODC Global Programme on Phill-Mal, accessible at [www.unodc.org](http://www.unodc.org), last accessed 24 Nov. 2005.

variety of recruitment and trafficking methods employed, and its global nature have contributed to the severity and magnitude of sex trafficking within ASEAN today.

There are two major trafficking patterns within the ASEAN region, which take place within the greater Mekong region and the Malay archipelago.<sup>44</sup>

Trafficking within the Mekong region largely leads into Thailand, with its established sex tourism industry and relative economic wealth. To a lesser extent, Cambodia and Vietnam also serve as destination countries within the Mekong region. Cambodian, Vietnamese and Burmese women are trafficked into Thailand across its porous, loosely guarded borders. Methods of recruitment differ from country to country, ranging from the abduction and sale of indigenous minorities by Myanmar's military junta; the sale of young daughters into bonded labour by desperate parents in rural villages; and the deception of job-seekers about employment opportunities.<sup>45</sup> Poverty, women's culturally subordinate role and the weaker rule of law prevalent in countries within the greater Mekong region result in traffickers' usage of recruitment methods that amount to coercion, or are at least more coercive in nature when compared to those employed by traffickers within the Malay archipelago. The situations in which victims find themselves are also harsher than the fate of those trafficked within the archipelago, due to the extent of control exerted over them by their traffickers and the involvement of government officials in the trafficking process itself.

Trafficking patterns and routes within the Malay archipelago are largely influenced and exacerbated by job migration movements taking place from the Philippines and Indonesia to Malaysia and Singapore. The 'Indonesian maid' or 'Filipino maid' has become a ubiquitous fixture in the middle-class households of Malaysia and Singapore. The increasing affluence and education levels within Malaysia and Singapore have resulted in a need to import labour for jobs no longer favoured by locals. Trafficking networks have taken advantage of the official policy of importing and exporting labour between these countries, using it as a cover to deceive women seeking overseas employment. While many willingly risk their chances with illegal traffickers, most victims are deceived with regard to the nature of employment to be undertaken at their destination country. Upon arrival, these women are forced into sex prostitution in order to pay off the cost of their travel to their traffickers. The amount of these debts makes it virtually impossible for these trapped women to pay them off immediately, forcing them into several years of bonded sexual servitude. Recent UN surveys show that many uneducated young women, when asked what the job of a 'hostess' entailed, thought it required nothing more than wearing a 'Western' dress and waitressing in a restaurant.<sup>46</sup> Others have their passports and work permits confiscated once they arrive at their destination countries.<sup>47</sup> The coercive and abusive nature of trafficking for the purposes of forced prostitution has also given rise to the increasingly popular view today that it can never be justified by the victim's consent.<sup>48</sup>

#### 4. ASEAN's Approach Towards Sex Trafficking: Two Models

States within the ASEAN region and ASEAN as a regional organization itself have generally sought to combat sex trafficking through criminal legal frameworks. Section 4.1

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<sup>44</sup> IOM Report, n. 40 above

<sup>45</sup> *Ibid.*, at pp. 32-49; 2002 US Trafficking Report, n. 1 above, at pp. 43-4, 94 and 149

<sup>46</sup> UN study on Trafficking from Philippines to Japan, accessible at [www.unodc.org](http://www.unodc.org), last accessed on 24 Nov. 2005

<sup>47</sup> Working Group against Trafficking Report 2001, para. 29, accessible at [www.unodc.org](http://www.unodc.org), last accessed on 24 Nov. 2005

<sup>48</sup> 2000 Report of the Special Rapporteur for Violence against Women, n. 6 above..

briefly summarizes ASEAN's counter-trafficking strategy. Section 4.2 sets out several regional counter-trafficking initiatives which have taken a more victim-oriented approach.

#### **4.1. The criminal law model: within ASEAN's transnational crime programme**

In 1996, at the 29<sup>th</sup> ASEAN Ministerial Meeting, the ministers of ASEAN States recognized the need for a unified regional strategy in response to transnational crime. This eventually gave rise to the 1997 ASEAN Declaration on Transnational Crime, which amongst others, pledges to 'expand the scope of Member Countries' efforts against transnational crime such as terrorism, illicit drug trafficking, arms smuggling, money laundering, traffic in persons and piracy...'.<sup>49</sup> ASEAN countries also undertook to adopt measures relating to national police and customs cooperation as well as regional coordination. The declaration's aspirational and non-binding nature is emphasized in paragraph 3, which calls upon ASEAN States to 'hold discussions with a view to signing mutual legal assistance agreements, bilateral treaties, memorandums of understanding or other arrangements...' among themselves.

As a follow up, the 1998 Manila Declaration on the Prevention and Control of Transnational Crime declared the member States' aim to combat the 'increase and expansion of organized criminal activities, such as the trafficking in human beings, [and] transnational exploitation of woman and children...', and recommended several criminal cooperation measures, such as 'extradition, mutual assistance, witness protection, transfer of prisoners, seizure and forfeiture of the proceeds of crime as well as [...] other forms of regional and international cooperation in criminal matters'.<sup>50</sup>

The 2002 ASEAN Work Programme to implement the ASEAN Plan of Action to Combat Transnational Crime focused on recommending criminal and judicial cooperative measures to States seeking to combat trafficking in persons, including women for the purposes of forced prostitution. For example 'interested States' are encouraged 'to look into' developing mutual legal arrangements and victim rehabilitation programmes. In a region without a history of multilateral criminal cooperation schemes and taking into consideration trafficked victims' politically weak positions, it is unlikely that such mutual legal arrangements which provide for the 'apprehension, investigation, prosecution and extradition, exchange of witnesses, sharing of evidence, inquiry, seizure and forfeiture of the proceeds of the crime' will be implemented if left to the initiative of 'interested States'.

#### **4.2. The victim-centred approach: modest beginnings**

Victim sensitive responses to sex trafficking have been relatively few within the ASEAN region in comparison to criminal law approaches towards sex trafficking. In 1999 the Bangkok Declaration on Irregular Migration was adopted by ASEAN States, NGOs and States from other regions. This Declaration adopts a holistic multidisciplinary approach towards sex trafficking. It explicitly recognizes 'poverty' as a root cause of trafficking and 'the need for international cooperation to promote sustained economic growth and sustainable development in the countries of origin as a long-term strategy to address irregular migration'.<sup>51</sup> However, the only specific steps outlined in this Declaration relate

<sup>49</sup> 1997 ASEAN Declaration on Transnational Crime, para. 8, accessible at [www.asean.org](http://www.asean.org), last accessed on 24 Nov. 2005.

<sup>50</sup> 1997 Manila Declaration on the Prevention and Control of Transnational Crime, paras. 2 & 9, accessible at [www.asean.org](http://www.asean.org), last accessed on 24 Nov. 2005.

<sup>51</sup> 1999 Bangkok Declaration on Irregular Migration, paras. 9 & 10, Part I, available at <http://www.thaiembdc.org/info/bdim.html>, 21-23 April 1999

to national criminalization and international criminal cooperation.<sup>52</sup> The Declaration recognizes that ‘greater efforts should be made to raise awareness at all levels...of the adverse effects of migrant trafficking and related abuse, and of available assistance to victims.’<sup>53</sup> It also recognizes that ‘irregular migrants should be granted humanitarian treatment, including appropriate health and other services... Any unfair treatment towards them should be avoided.’<sup>54</sup> Limited rights on the part of irregular migrants are specified by the Declaration and mainly focus on their repatriation. Timely repatriation is required, but is recognized as subject to principles relating to ‘the sovereign rights and legitimate interests of each country to safeguard its borders and to develop and implement its own migration/ immigration laws’.<sup>55</sup>

In 2000 ASEAN States, NGOs and other States formulated the Asian Regional Initiative Against Trafficking in Women and Children (ARIAT). This document adopts a multidisciplinary, victim-centred approach by focusing not only on the criminalization of trafficking but on enhancing inter-agency cooperation, the role of civil society, socio-economic measures and victim protection. Victims are to be provided with ‘appropriate housing, economic, medical and psychological assistance... [and] physical safety assurance.’<sup>56</sup>

The non-binding and ad hoc nature of the 1999 Bangkok Declaration and 2000 ARIAT strategy has resulted in a lack of follow up programmes. The 1999 Bangkok Declaration designated the Bangkok office of the International Organization for Migration (hereinafter IOM) as the body responsible for ensuring follow-up measures. ARIAT in turn set up two working groups to monitor its implementation. However no updates on these two initiatives have been issued so far.

Breaking with the above-mentioned ASEAN anti-trafficking strategies, which had been pursued within the criminal framework, the 2004 ASEAN Declaration against Trafficking in Persons particularly Women and Children (hereinafter the 2004 ASEAN Declaration Against Trafficking) reflects a clear victim-centred approach against trafficking. It calls upon ASEAN States ‘to distinguish victims of trafficking in persons from the perpetrators’.<sup>57</sup> States are called to ‘undertake actions to respect and safeguard the dignity and human rights of genuine victims of trafficking in persons.’<sup>58</sup> Specifically, steps should be taken to ‘identify the countries of origin and nationalities of such victims’, and to provide them ‘with such essential medical and other forms of assistance deemed appropriate... including prompt repatriation’.<sup>59</sup> Admittedly, qualifying these victim entitlements by restricting them to what is ‘deemed appropriate by the respective receiving/ recipient country’ considerably weakens these entitlements.<sup>60</sup>

## 5. The Criminal Law Approach Towards Sex Trafficking: Malaysia as a Case Study

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<sup>52</sup> Ibid., para. 8, Part II

<sup>53</sup> Ibid., para. 11, Part II

<sup>54</sup> Ibid., para. 14, Part II

<sup>55</sup> Ibid., para. 12, Part I & para. 13, Part II

<sup>56</sup> ARIAT, para. 8, available at <http://secretary.state.gov/www/picw/trafficking/riarap.htm>, accessed 29-31 Mar. 2000.

<sup>57</sup> 2004 ASEAN Declaration Against Trafficking, para. 5, available at [http://www.humantrafficking.org/collaboration/regional/eap/news/2004\\_12/asean\\_declaration.html](http://www.humantrafficking.org/collaboration/regional/eap/news/2004_12/asean_declaration.html), last accessed on 29 Nov. 2004

<sup>58</sup> Ibid., para. 6

<sup>59</sup> Ibid., para. 5

<sup>60</sup> Ibid.

In 2004 the Human Rights Commission of Malaysia, more popularly known by its Malay acronym SUHAKAM (*Suruhanjaya Hak Asasi Manusia Malaysia*), issued a report on trafficking in women and children.<sup>61</sup> This report, apart from adopting the definition of trafficking in the 2000 Palermo Protocol against Trafficking, defines trafficking as the illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the traffickers, such as forced domestic labour, false marriages, clandestine employment and false adoption.<sup>62</sup>

This definition captures the particular socio-economic and employment push and pull factors driving trafficking within the Malay archipelago. Based on interviews with trafficked victims, SUHAKAM observes that these victims are often lured and duped by promises of work abroad or offers of further overseas studies.<sup>63</sup>

### **5.1. Charging victims for criminal offences: revictimizing the victimized**

Most trafficked victims in Malaysia find themselves charged with prostitution or legal immigration offences. Prostitution is illegal under Malaysia's laws, which impose a 30 day jail sentence on prostitutes. Amongst the priority issues identified by participants of SUHAKAM's 2004 forum is the lack of procedures to differentiate genuine victims of trafficking from illegal migrants who have entered prostitution as a free choice.<sup>64</sup> Due to the lack of such procedure, many victims of sex trafficking have been charged with illegal immigration upon being discovered during police raids at illegal prostitution dens.<sup>65</sup> During SUHAKAM's visits to detention centres in Malacca, Perak and Kedah, it was determined that half of the detained women interviewed by SUHAKAM were in reality victims of trafficking.<sup>66</sup> These women are required to appear in court and are then summarily deported. There have been cases in which foreign trafficked victims have been jailed for immigration offences.

The 2000 Palermo Protocol against Trafficking expressly forbids the charging of trafficked victims with crimes arising directly out of their trafficked situation. Furthermore, the UN's Recommended Principles and Guidelines on Human Rights and Human Trafficking Guidelines (hereinafter known as the UN Guidelines) expressly forbids holding trafficked victims in illegal immigration detention centres.<sup>67</sup> Charging them with crimes over which they had no control is inconsistent with the deterrent and retributive aims of criminal law. It further reinforces the unwillingness of trafficked victims to seek help from the authorities and to participate or cooperate in police investigations, for fear of being charged with such offences. SUHAKAM has observed that trafficked victims generally distrust the authorities, who, in their view, possess 'blame-the-victim mentalities'.<sup>68</sup> On the other hand, the distrust and the uncooperative attitude of victims often frustrates police investigation and the prosecution of traffickers.<sup>69</sup> Working with victims at the Kajang women's prison, SUHAKAM has

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<sup>61</sup> *Trafficking in Women and Children*, Report of the Human Rights Commission of Malaysia (SUHAKAM), (hereinafter SUHAKAM 2004 report) available at [www.suhakam.my](http://www.suhakam.my), last accessed on 24 Nov. 2005.

<sup>62</sup> *Ibid.*, at p. 1

<sup>63</sup> *Ibid.*, at p. 24

<sup>64</sup> *Ibid.*, at p. 31

<sup>65</sup> *Ibid.*, at p. 32

<sup>66</sup> *Ibid.*, at p. 15

<sup>67</sup> UN Guidelines, available at [www.ohchr.org](http://www.ohchr.org), accessed on 24 Nov. 2005

<sup>68</sup> *Ibid.*, at p.6

<sup>69</sup> *Ibid.*



developed a questionnaire which will enable victims to be easily and accurately identified by the authorities.<sup>70</sup>

## 5.2. Assessing legislative approaches to victim protection

Malaysia has no specific anti-trafficking statute. Various provisions in the Malaysian Constitution, Penal Code and Immigration Act may be used in relation to trafficking for the purposes of forced prostitution,<sup>71</sup> but these focus on criminal punishment, which at times even extends to the victims, rather than victim protection or rehabilitation. One exception is the 1973 Women and Girls' Protection Act, which contains several references to victims of forced prostitution.

The 1973 Act adopts a paternalistic stance towards victims of sex trafficking and forced prostitution. Its provisions are based on a perception of these women as engaged in immoral activities and in need of protective custody. Upon 'reasonable cause to believe' that any woman has been 'purchased or by fraud, false representation or false pretences'; 'procured...for the purpose of being used, trained or disposed of as a prostitute'; or 'detained against her will for the purpose of prostitution or for immoral purposes', regardless whether in Malaysia or outside, the Prosecutor can order her detention at a 'place of refuge', established by the Minister for the purposes of the 1973 Act.<sup>72</sup> She can be detained for up to 24 hours before being brought before a magistrate, who may confirm her detention for up to one month pending an enquiry being made into her case. After the completion of the enquiry, the magistrate may, 'if satisfied' that she 'is in need of protection', order her detention in a place of refuge for up to three years or place her under the supervision of a Social Welfare Officer for up to three years. The period of detention may be amended by the magistrate, though the Act does not say if the magistrate is allowed to amend it to exceed the original three years maximum period. The magistrate is also allowed to order the detention of any female, in respect of whom a third party is charged of an offence under the Act, for her 'protection' until the determination of proceedings. While 'detained in a place of refuge' an individual is subject 'to rules as are prescribed' and in the event of her leaving the 'place of refuge' without proper authorization, she 'may be arrested without warrant and taken back' to serve twice the remaining detention period under the original warrant.

In its 2004 report SUHAKAM recommends that the government should pass a comprehensive anti-trafficking act which specifically targets trafficking and adopts a victim-centred approach.<sup>73</sup> A specific trafficking unit trained in the detention, reception and processing of irregular migrants, and differentiating between irregular migrants and trafficked victims, should also be set up in police stations. Also the possibility of providing legal stay and shelter for victims and a right to redress while they are in Malaysia is recommended. Furthermore repatriation should be voluntary, with an emphasis on ensuring proper reintegration and rehabilitation. When applied to inter-State trafficking cases, this would require coordinated agreements between Malaysia and source States within the region. SUHAKAM recommended that the 2000 Palermo Protocol against Trafficking, which provides such an over-arching framework for cooperation between its member parties, should be ratified as soon as possible. Such ratification is only the first step towards effective inter-State cooperation, particularly in relation to

<sup>70</sup> Ibid., at p. 16

<sup>71</sup> Federal Constitution, Art. 6, available at <http://www.cmseducation.org/wconst/malaysia.html>; Penal Code, s. 371; Immigration Act 1959 (revised 1963), s. 8. [Http://www.suhakam.org.my/docs/document\\_resource/trafficking/Trafficking\\_Chap5.pdf](http://www.suhakam.org.my/docs/document_resource/trafficking/Trafficking_Chap5.pdf) has articles on the domestic laws of Malaysia relating to these rules.

<sup>72</sup> For what follows, see 1973 Women and Girls' Protection Act, Art 10(1-3), 8(10), 26(1), 33(1-2)

<sup>73</sup> For what follows see Suhakam 2004 Report, n. 61 above, pp. 47-57

victims' protection. Due to the open-ended nature of these provisions their actual implementation will require the negotiation of more detailed arrangements between States.

### **5.3 Changing mindsets: towards a multidisciplinary victim-oriented approach**

In April 2004 SUHAKAM organized a forum on 'Trafficking in Women and Children - A Cross Border and Regional Perspective'.<sup>74</sup> Among those invited were the police, officers from immigration, prisons, the Ministry of Foreign Affairs, the Welfare Ministry, and the Women's Development Ministry, representatives from regional embassies, NGOs, the Bar Council, academics and human rights practitioners.<sup>75</sup>

The 2004 SUHAKAM Report recommended that a National Task Force on Trafficking, consisting of various agencies from different sectors, should be set up.<sup>76</sup> This task force would be responsible for receiving and examining individual grievances and proposing guidelines for combating trafficking. Such a multidisciplinary approach is necessary to facilitate the exchange of information between agencies from different perspectives and to broaden each agency's own understanding of trafficking, especially with regard to victim protection issues. Regular education and training was also recommended, not only for law enforcement agencies but also for labour inspectors, the judiciary and other government departments.<sup>77</sup> In particular the assistance and expertise of NGOs and civil society groups should be sought in implementing repatriation, reintegration and rehabilitation programmes for victims.<sup>78</sup>

## **6. The Victim-Centred Approach Towards Sex Trafficking: Philippines as a Case Study**

The Philippines, with its history of labour migration, has relatively comprehensive legislative and administrative frameworks protecting the rights of overseas migrant workers. However a specific anti-trafficking strategy has only been developed in recent years.

### **6.1 From migrant protection to anti-trafficking**

In 1999 the Philippines government signed an agreement with the UNODC to undertake a research project on the trafficking phenomenon, with special focus on trafficking in women for the purposes of forced prostitution. Based on the findings and proposals of this research, in 2000 the Philippines government signed another agreement with UNODC to undertake a pilot anti-trafficking project.

Before the Philippines joined UNODC's global programme against trafficking, the only framework of protection that trafficked victims could avail themselves of were those put in place for overseas Filipino workers. Through Philippine embassies and consulates, the Department of Foreign Affairs (DFA) runs various services catering to the needs of overseas Filipino workers. These services can be accessed by both documented and undocumented workers and include Resource Centres for Women, which provide shelter for migrant Filipino women prior to their repatriation. These centres, which have relatively restricted capacities of seventeen persons each, are only found in States where there are at least 20,000 documented Filipinos. The government

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<sup>74</sup> Suhakam 2004 Report, n. 61 above, ch3

<sup>75</sup> Ibid., at p. 27

<sup>76</sup> Ibid., at p. 48

<sup>77</sup> Ibid., at p. 53

<sup>78</sup> Ibid., at p.53

repatriation fund is only available to Filipinos who can prove that neither they nor their family are able to provide for their repatriation back to the Philippines.

The Overseas Workers Welfare Administration administers the Overseas Workers Trust Fund, consisting of mandatory contributions from foreign workers to ensure the protection and security of overseas workers. Services maintained through Filipino Workers Development Centres (FWDC) overseas include legal, medical and welfare assistance and operate on a 24-hours-a-day, 7-days-a-week basis. The Fund also administers re-integration programmes for victims upon repatriation to the Philippines, which, besides physical and psychological welfare programmes, carry out skills and career development training courses as well. However, these migrant worker frameworks were not sufficiently specific to meet the needs of trafficked victims. There have been arguments that in reality, due to the isolation of the Filipino domestic worker and the power imbalance between her and her employers, her vulnerability is not much different from that of trafficked victims. In some circumstances indeed, especially where the migrant woman's freedom of movement is severely curtailed and her legal documents have been confiscated, her position approximates that of the trafficked victims.<sup>79</sup> However, in most situations documented migrant workers whose status is legally recognized by the destination country, and who often develop close community ties with fellow migrant workers, are relatively more protected from abuse or the effects of abuse compared to the trafficked victim.

## 6.2. Victim protection under the 2004 Anti-Trafficking Act

In 2003, the Philippines Senate and House of Representatives passed the Anti-Trafficking in Persons Act, Republic Act 9208. Section 2 of the Act declares its victim-oriented policy, stating that:

The State values the dignity of every human person and guarantees the respect of individual rights. In pursuit of this policy, the State shall give the highest priority to the enactment of measures and development of programmes that will promote human dignity, protect the people from any threat of violence and exploitation, eliminate trafficking in persons, and mitigate pressures for involuntary migration and servitude of persons, not only to support trafficked persons but more importantly, to ensure their recovery, rehabilitation and reintegration into the mainstream of society.<sup>80</sup>

Section 17 states that trafficked victims are formally to be recognized as victims and 'shall not be punished for crimes directly related to the acts of trafficking.'<sup>81</sup> Consent is also deemed irrelevant. In seeking to protect the confidentiality of trafficked victims, section 7 empowers law enforcement officers, prosecutors and judges, in cases where 'necessary to ensure a fair and impartial proceeding' and 'after considering all circumstances for the best interest of the parties', to 'order a closed-door investigation, prosecution or trial.'

According to section 18 trafficked victims are also entitled to protection under witness protection programmes. Section 15 of the Act sets up a trust fund to be composed of proceeds and property forfeited by offenders, which will, amongst others, provide for certain mandatory services to be made available to trafficked victims. These mandatory services are listed in section 23 as emergency shelter or appropriate housing, counselling, free legal services, medical or psychological services, and livelihood and skills training. The same section states that these mandatory services aim 'to ensure recovery, rehabilitation and reintegration into the mainstream of society' and foresees the parallel adoption of 'sustained supervision and follow through mechanisms that will track the

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<sup>79</sup> UNODC Strategic Assessment of Trafficking in the Philippines, at p. 20, available at [www.unodc.org](http://www.unodc.org), last accessed 24 Nov. 2005.

<sup>80</sup> Anti-Trafficking in Persons Act 2003, s.2

<sup>81</sup> For what follows, see Anti-Trafficking in Persons Act 2003, Sections 7, 15, 17, 18, 19, and 23

progress of recovery, rehabilitation and reintegration.’ According to section 19 the same rights apply to trafficked victims who are foreign nationals.

### **6.3 Formalizing the co-operation of agencies: embracing a multidisciplinary approach**

Even before the 2004 Anti-Trafficking Act was passed, thirteen governmental agencies signed a Memorandum of Undertaking on 14 June 2000 which set out their agencies’ respective responsibilities. The Act formalizes the exact responsibilities of each of these agencies in seeking to ‘establish and implement preventive, protective and rehabilitative programmes for trafficked persons’.<sup>82</sup> Among the agencies involved are the Philippines National Police, charged with implementing the effective investigation and apprehension of traffickers; the Department of Foreign Affairs, charged with making resources overseas available to trafficked Filipinos; the Department of Social Welfare and Development, charged with cooperating with NGOs to provide rehabilitation programmes for victims; and the Department of Justice, charged with ensuring effective prosecution of traffickers and at the same time providing legal assistance to victims.<sup>83</sup>

The Act also sets up an Inter-Agency Council against Trafficking.<sup>84</sup> This council consists of representatives from the various agencies mentioned above,<sup>85</sup> and is charged, among others, with the formulation of a comprehensive anti-trafficking strategy; the implementation and monitoring of such a strategy; and coordination between various agencies.

## **7. Conclusion**

As demonstrated by the case studies above, internationally, and regionally within ASEAN, there is a general movement towards adopting a victim-centred and multidisciplinary approach to combating sex trafficking. Anti-trafficking strategies which are implemented wholly within a criminal justice framework fail to take into consideration the social, cultural and economic push and pull factors driving the vicious trafficking cycle. A purely criminal law approach in which victims are perceived as law-breakers revictimizes them and impedes the criminal prosecution of those truly responsible, reinforcing the vicious cycle that characterizes sex trafficking. At an international level, attempts to formulate more victim-oriented and multidisciplinary frameworks have proceeded via declarations and other sources of soft law. Sex trafficking is still perceived more as a crime than a human rights violation. Treaties and conventions against trafficking have focused more on criminalization and mutual criminal assistance rather than victim protection. The 2000 Palermo Protocol against Trafficking, while emphasizing victim protection, leaves the details of such protection open-ended and vague.

Within ASEAN, it is only recently that sex trafficking has been addressed. The 2004 ASEAN Declaration against Trafficking contains encouraging references to victim protection, although the non-binding and aspirational nature of the Declaration weakens its actual impact. However, individual ASEAN countries are gradually moving towards adopting a more victim-centred approach towards trafficking. Malaysia, which has traditionally adopted a strict criminal law approach, has seen initiatives advocating a more victim-centred and multidisciplinary approach. Assisted by the UNODC’s pilot trafficking programme, the Philippines’ approach towards sex trafficking has evolved

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<sup>82</sup> Anti-Trafficking in Persons Act 2003, section 16

<sup>83</sup> Ibid.

<sup>84</sup> Ibid., s.20

<sup>85</sup> Ibid., s.21

from one focusing on employment migration to one which ensures the adequate protection of trafficked victims regardless of their nationalities or origins.