

Legislative Measures to Combat Human Trafficking in a Developing Economy

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Abstract: The effort to combat human trafficking has gained serious momentum in developing economies considering its damaging ramifications on the countries' international images and economic developments. Its effects could be seriously felt on labour demand and supply as issues on human trafficking and illegal workers are difficult to separate. South Asia and South East Asia are said to be in the unenviable position of having the largest numbers of people who are internationally trafficked. The study is carried out by way of qualitative legal method by analyzing legal provisions and their possible effects on the subject matter. Researchers review legislature measure to combat human trafficking in developing economies by using Malaysia as a case study. This study reviews the salient features of the Malaysian Anti-Trafficking in Persons Act 2007 that serves as a useful legislation in combating crime of human trafficking into or from Malaysia. The act covers several important aspects of enforcement such as criminalization and punishment, forfeiture of assets, liability of legal persons, the trafficked person as a victim, prevention and participation. The act itself has many shortcomings which need to be corrected.

Key words: Human trafficking, Palermo protocol, crime, law, illegal workers, Malaysia

INTRODUCTION

Human trafficking is actually a business effort albeit an illegal one (Taylor and Ruth, 1999). The activity is backed up by corporations in different countries using different business methods (Shelley, 2003; Salt and Stein, 1997; Schloenhardt, 1999). For instance, various business strategies are used in the trafficking of women and children for exploitation in the commercial sex trade (Orlova, 2005; Siriporn and Jantateero, 1997). However, the purpose of this study is not to explore human trafficking from an economic (Rassam, 2005; Tiefenbrun, 2002) or business (Taylor and Ruth, 1999) perspective but rather to examine the adequacy or inadequacy of legislative measures to combat human trafficking in developing economies. Human trafficking has been around for centuries but the arrival of globalization is now recognized to be a major reason of its current escalation (Skeldon, 2000; Skrivankova, 2006; Des, 2006; Sullivan, 2003; Taylor, 2005). Nagle (2008) considers human trafficking as one of the most heinous, unintended consequences of globalization. According to Nagle (2008), globalization has exacerbated global trafficking from both the supply and the demand sides. Particularly significant here is a set of pull factors or dynamics which contribute to the demand for trafficking victims in destination countries. These factors are: High demand for cheap or uncompensated labour, weak or no laws

against various forms of forced servitude, demand by men looking for commercial sex and bondage arrangements, indifference to social conditions and morality, lack of public awareness, corruption, weak law enforcement, inconsistent application of public policy and entrenched organized crime networks.

South Asia and South East Asia are said to be in the unenviable position of having the largest numbers of people who are internationally trafficked (Taylor, 2005; Mindy, 2009). The regional figures relating to victims of international trafficking provided by Gekht (2008) are in fact worthy of quoting here. According to her, South-East Asia and South Asia are home to the largest numbers of internationally trafficked persons with 225,000 and 150,000 persons trafficked, respectively. About 100,000 persons are trafficked from the former Soviet Union, 75,000 from Eastern Europe, 100,000 from Latin America and the Caribbean and 50,000 from Africa each year. The Government of Malaysia made some progress in law enforcement efforts against sex trafficking during the reporting period and limited progress in prosecuting and convicting offenders of labor trafficking: Trafficking in Person Report 2010 (US Department of State, 2010).

In Philippines as well as Thailand, countries where both the Transnational Organised Crime (TOC) convention and the Palermo protocol have been ratified, the positive influence of these instruments on the anti-trafficking legislation of the two countries, most

especially those aspects of the legislation dealing with protection and assistance to victims of trafficking are clearly noticeable. In Philippines for example, legal measures have been taken to combat human trafficking. Some of the provisions of the 2003 anti-trafficking legislation relating to the support and protection of the victims of trafficking include: Establishing a trust fund to which the proceeds of all fines imposed under the act and properties forfeited and confiscated under the act shall accrue and the purpose of which is to run programmes for the prevention of trafficking and the protection, rehabilitation and reintegration of trafficked persons (Section 15) dealing with legal protection of trafficked persons including their non-penalisation (Section 17) giving trafficked persons preferential entitlement under the country's witness protection programme (Section 18) guaranteeing trafficked persons who are foreign nationals the appropriate protection, assistance and services to which other trafficked persons are entitled (Section 19) dealing with mandatory services to trafficked persons aimed at ensuring their recovery, rehabilitation and reintegration (Section 23). The legislation requires government agencies to make available to trafficked persons, the following services are provided:

- Emergency shelter or appropriate housing
- Counselling
- Free legal services
- Medical or psychological services
- Livelihood and skills training
- Educational assistance to a trafficked person

Malaysia does not ratify the said two instruments had Malaysia ratified them, trafficking victims in the country would have been entitled to as much protection and assistance as their counterparts in the above-mentioned two countries. While much effort has been made by the Malaysian government to combat human trafficking, the introduction of the Anti-Trafficking in Persons Act, 2007 is a good example such criminal activity is still quite rampant (A United Nation document in 2000): A protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations convention against transnational organized crime). Malaysia is said to be a transit point of human trafficking across-borders (Nicola, 2005) (Spotlight: Laying down the law: American international human trafficking specialist Dr. Mohamed Mattar discusses Malaysia's Tier 3 status with P. Selvarani and the enactment of the Anti-Trafficking in Persons Act. New Strait Times, Online 2008/05/25). Concerned with such issue, the Australian government had discussed human

smuggling with the Malaysian government in early November 2010. The United State Department of State reports that Malaysia is a destination and a source and transit country for women and children subjected to trafficking in persons, specifically conditions of forced prostitution and for men, women and children who are in conditions of forced labour (US Department of State, 2010). The majority of trafficking victims are foreign workers who migrate willingly to Malaysia from Indonesia, Nepal, India, Thailand, China, The Philippines, Burma, Cambodia, Bangladesh, Pakistan and Vietnam in search of greater economic opportunities, some of whom subsequently encounter forced labor or debt bondage at the hands of their employers, employment agents or informal labor recruiters (Nicola, 2005). Although, there have been prosecution on the accused persons of human trafficking crime recently, the number is considered quite small (US Department of State, 2010) (On 9 December 1998, the UN established an intergovernmental ad hoc committee to elaborate a comprehensive international convention against transnational organized crime and to also discuss among other instruments and as appropriate, the elaboration of an international instrument addressing trafficking in women and children. The committee carried out the assignment given to it and submitted its report. Meanwhile, Italy offered to host a high level signing conference in Palermo for the purpose of signing the newly drafted convention against transnational organized crime and the two protocols there to including the protocol to prevent, suppress and punish trafficking in persons, especially women and children. The signing conference took place in Palermo, Italy from 12-15 December 2000. The new instruments entered into force on 29th September 2003. The Palermo Protocol supplements the Transnational Organized Crime Convention (The TOC Convention).

Malaysian has been criticized for its weaknesses in not taking adequate actions in combating human trafficking (AHRM, 2006). Based on the United States Trafficking in Persons (TIP), Malaysia's performance in preventing human trafficking crime has been inconsistent. For example, Malaysia has been placed on Tier 3 in 2007, Tier 2 Watch List in 2008 and downgraded to Tier 3 in 2009. In 2010, Malaysia's performance in combating this crime has been upgraded to Tier 2 Watch List (US Department of State, 2010). This study discusses the salient features of the 2007 Act and criticizes some weaknesses contained therein. The discussion of the act is also made against the background of the Palermo protocol and researches written by Mattar (2006) and Gallagher (2001) (According to Section 13, any person who traffics in persons not being a child for the purpose

of exploitation by one or more of the following means: threat; use of force or other forms of coercion; abduction; fraud; deception; abuse of power; abuse of the position of vulnerability of a person to an act of trafficking in persons and the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person commits an offence and shall on conviction be punished with imprisonment for a term not <3 years but not exceeding 20 years and shall also be liable to a fine).

According to Mattar (2008), an international human trafficking specialist commented that the Malaysian 2007 Act is a very good law (According to Section 54 of the 2007 Act: Upon revocation of a Protection Order or expiry of the period specified in a Protection Order, the Protection Officer shall in the case of a trafficked person who is a citizen or permanent resident of Malaysia, release that person or in the case of a trafficked person who is a foreign national release that person to an immigration officer for necessary action in accordance with the provisions of the Immigration Act, 1959/63. The Immigration Officer shall take all necessary steps to facilitate the return of that trafficked person to his country of origin without unnecessary delay with due regard to his safety. The direction that the trafficked person be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act, 1959/63 seems to be directly contrary to the later direction to the immigration officer that he should take all necessary steps to facilitate the return of that trafficked person to his country of origin without unnecessary delay with due regard to his safety). The researcher specifically commended certain provisions of the act for their compliance with the international standards on the issues which they regulate. This rather generous assessment of the act by Mattar needs to be examined through conducting a comprehensive analysis of its salient provisions. Whether or not the 2007 Act is in full compliance with the UN protocol to prevent, suppress and punish trafficking in persons, especially women and children (The Palermo protocol), the most important international instrument on trafficking so far is left for the reader to judge based on the analysis of the act's provisions as contained in this study.

However, even assuming that the act has actually satisfied all the requirements contained in the UN instrument, the position is that it is still possible for further improvements to be made on its provisions.

Gallagher (2001)'s article on the UN protocols on trafficking and migrant smuggling clearly explains the provisions and applications of the convention against transnational organised crime and its three additional protocols. She succinctly remarks the several important

elements of the convention such as that the convention seeks to eliminate safe havens where organized criminal activities or the concealment of evidence or profits can take place. She explains the salient features of the UN convention. The analysis of the Malaysian 2007 Act is made against the provisions of the UN convention.

This study will therefore explore the key provisions of the 2007 Act and provide critique thereof in the light of what we understand to be the international standards on the measures against human trafficking as well as comparable legislative positions in some selected countries. It will also contain suggestions on how some aspects of the act could be improved.

LEGISLATIVE FRAMEWORK

General background to the 2007 Act

Purposes and scope of the act: The Malaysian Anti-Trafficking in Persons Act, 2007 came into force partially on October 1, 2007. By partially, researchers refer to the fact that only parts I, II, Sections 66 and 67 came into effect on this date. The remaining parts came into force on February 28, 2008.

The long title of the act says: An act to provide for the offence of trafficking in persons, the protection and support of trafficked persons, the establishment of the Council for Anti-Trafficking in Persons and for matters connected thereto. The act itself states that its core purpose is twofold: to combat trafficking in persons by ensuring that traffickers are apprehended, their cases investigated, prosecuted and where found guilty, appropriately punished and to protect and support victims of trafficking. Another objective is ofcourse that of setting up legal and administrative mechanisms for the prevention of trafficking and this is quite implicit in the mandate given to the newly-established council for Anti-Trafficking in Persons under the act. Obviously, any attempt at assessing the act and its implementation must revolve around these three objectives.

The scope of the application of the act seems to be all encompassing in its coverage of the domestic as well as the extraterritorial activities of traffickers, recruiters and other exploiters of trafficked persons. According to Section 3 of the act, the provisions of the act shall apply regardless whether the conduct constituting the offence took place inside or outside Malaysia in the following circumstances:

- If Malaysia is the receiving country or the exploitation occurs in Malaysia
- If the receiving country is a foreign country but the trafficking in persons starts in Malaysia or transits in Malaysia

Under Section 4 of the act, it is also provided that its provisions shall apply to any act of trafficking which occurs on board a Malaysian ship or a Malaysian registered aircraft. The same section goes on to state in effect that where the perpetrator of the offence of trafficking as defined under the act is a Malaysian citizen or is permanently resident in Malaysia, the provisions of the act will apply to him or her irrespective of the country where the offence takes place. This provision seems to imply that a citizen or permanent resident of Malaysia will be criminally liable for any act of trafficking committed in any foreign country even if the act itself is not a crime under the law of the foreign country in question.

An analytical framework: This approach to the analysis of the act shall be broadly anchored on the framework contained in articles written by Mattar (2006, 2003, 2004, 2008) and Gallagher (2001). Both of the writers based their analysis on the UN convention and protocols. According to Mattar (2006) in his article entitled *Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, there are five basic elements that should be incorporated into any anti-trafficking legislation. These five elements are:

- Recognition of all forms of trafficking as specific crimes that are subject to serious sanction
- Identifying the trafficked person as a victim of a crime who is entitled to basic human rights while taking into consideration the victim, the derivative victim, the vulnerable victim, the potential victim and the presumed victim
- Adopting a comprehensive five P's approach to combating trafficking in persons including prevention, protection, provision, prosecution and participation
- Targeting all actors in the trafficking enterprise including the natural person, the legal person, the private person and the public person
- Acknowledging trafficking in persons as a transnational crime that warrants transnational policies, especially extraterritoriality, extradition and exchange of information

A comprehensive definition: The term Trafficking in Persons is one of the 22 terms that have been defined under Section 2 of the 2007 Act. According to the section, the term means: The recruiting, transporting, transferring, harbouring, providing or receiving of a person for the purpose of exploitation. Under the same section, the term exploitation is defined as all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.

It is submitted that this definition is comprehensive in its prohibition of various forms of exploitation and is in line with the definition contained in Article 3 (a) of the Palermo protocol. However, two points should be noted here with regard to it. First, unlike the Palermo protocol, under the act, use of any of such means as coercion, force, abduction, fraud, deception, abuse of power or position of vulnerability is not an essential element of the offence of trafficking. Once any of the trafficking acts is committed for the purpose of exploitation, the offender is liable to punishment for trafficking. According to Mattar (2006), this approach of the law makes the prosecution of such crime easier. The second point is that the 2007 Act does not, unlike the provision under Section 3 of the Philippines Anti-Trafficking Act of 2003 for example, define each of the prohibited forms of exploitation which are enumerated in the act and which are the usual purposes for which human beings are trafficked. Under Section 3 of the Philippines Anti-Trafficking in Persons Act 2003, the following terms have been defined: Prostitution, forced labour and slavery, sex tourism, sexual exploitation, debt bondage and pornography. It is submitted that although the approach of the act is line with that of the Palermo protocol, there is the need for each of such exploitative practices to be defined by the act, so that judges, lawyers and prosecutors can be properly guided. The crime of trafficking is a complex matter and all those involved in the fight against it should be availed with the legislative weapons they may require.

According to Section 16 of the 2007 Act, a trafficker who is being prosecuted for the offense of trafficking under the act shall not claim as a defence, the fact that the trafficked person has consented to the act of exploitation. Again, it appears that the 2007 Act has gone beyond the requirement under the Palermo protocol which provides that the consent of a trafficked person will not avail the trafficker only where the latter has used any of such illegal means as coercion, force, abduction, fraud, abuse of power or position of vulnerability except of course in the case of child trafficking where consent will be completely irrelevant. The position of the 2007 Act on the complete irrelevance of consent as a defence generally seems to coincide with the position taken by Mattar who believes that consent is irrelevant in all cases of trafficking and that very victim of trafficking is a vulnerable victim who has no choice but to submit.

On the other hand, the approach of the Palermo protocol is seen (at least in the context of prostitution) by another commentator as an attempt to draw the line between consent and coercion as well as a way to avoid the debate of whether prostitution is necessarily a form of violence or can be freely chosen work. The definition of trafficking was the most heated debated topic during the preparation of the convention (Gallagher, 2001). The debate came to a question whether the offence of

trafficking could occur irrespective of the consent of the person. One side argued that the inclusion of such a phrase would enable traffickers to escape court conviction by adopting the victim's so-called consent as a defence. However, the other side argued that the issues of consent should not arise because trafficking necessarily involves the presence of some kind of consent-nullifying behavior (Gallagher, 2001). Finally, the ad hoc committee decided against including the phrase irrespective of the consent of the person. The proposal that use in prostitution be included as a separate end-purpose was also discarded in favour of the phrase exploitation of the prostitution of others which narrowly refers to pimping.

Criminalization and punishment: As indicated earlier, legislative measures against trafficking must ensure that traffickers, their accomplices and their helpers are apprehended, punished and prevented from committing the crime of trafficking again. According to Ryf (2002), the objective of the law here should be to turn trafficking into high risk and low profit industry. A look at the array of offences established under the 2007 Act leaves one with the impression that its framers have tried to do what every anti-trafficking legislation should do in this regard. Gallagher (2001) remarks that states are required to criminalise:

- Participation in an organized group
- Laundering of the proceeds of the crime
- Public sector corruption

This can be seen from the fact that the act has criminalized the following: The act of trafficking per se as defined in Section 2; trafficking using any of the means listed in Section 13; child trafficking (Section13); profiting from exploitation of a trafficked person (Section15); making/obtaining/giving/selling/possessing a fraudulent travel or identity document for the purpose of facilitating an act of trafficking (Section18) and knowingly recruiting or agreeing to recruit another person to participate in the act of trafficking (Section19). Other offences established by the act are: providing facilities like premises, house, room or equipment in support of trafficking in person (Section 20); providing financial services or facilities for purposes of trafficking (Section 21); supplying an offender or with shelter, food, drink, clothes, money, arms, ammunitions or means of conveyance with the aim of assisting him/her to evade apprehension (Section 21) and preventing, hindering or interfering with the arrest of a suspected trafficker (Section 22). The act also imposes an obligation on the owner, operator or master of any conveyance which

engages in the commercial transportation of goods or people to ensure that every person travelling on board is in possession of travel documents for lawful entry into the receiving country (Section23).

Intentional omission to give information relating the commission of any offence under the act (Section 24), obstructing/impeding/interfering/failing to comply with a lawful demand of an enforcement officer performing his duty under the act and disclosing information regarding an investigation being carried out or to be carried out by an investigation officer under or for the purposes of the act are also offences established under the act (Section 24).

In his phighly illuminating comment on the illinois anti-trafficking legislation, Tanagho (2005) quoted someone as saying that the only thing traffickers fear is hard jail time. If the fear of hard jail time indeed deters people from engaging in trafficking, one would expect less trafficking to take place in Malaysia, since the enactment of the 2007 Act, considering the not-so-lenient penal sanctions which offenders under the act will receive after their conviction.

The least jail term which an offender can receive if convicted under the act is a maximum of 3 years of imprisonment and this, according to Section 63, applies to any person who commits an offence under this act for which no penalty is expressly provided. A perusal of the act reveals that the offences for which no penalties have been expressly provided relate to such procedural issues as refusing to cooperate with an enforcement officer in his investigation, obstruction of investigation, tampering with material evidence and so on.

The two most serious trafficking offences under the act (at least from the perspective of the severity of punishment) are: The trafficking of adults for exploitation by means of one or more of the seven aggravating circumstances listed under Section 13 and the trafficking of children as provided under Section 14. A person found guilty of committing either of the two offences is to be punished with imprisonment for a term of not <3 years but not exceeding 20 years. He/she will also be liable to a fine. It should be noted here that under Section 2, the term child has been defined as a person who is under the age of 18 years.

Closely following the two afore-mentioned trafficking offences are two others: The ordinary trafficking of adults for exploitation as provided under Section 12 and profiting from the exploitation of a trafficked person as provided under Section 15. Any person found guilty of committing either of the two offences is to be punished with imprisonment for a term not exceeding 15 years. Both offences also attract a fine but in the case of the latter offence, the fine payable is stated to be not <RM50,000

but not exceeding RM500,000. Trafficking offences such as: Making/obtaining/ giving/possessing fraudulent travel or identity document for the purpose of facilitating an act of trafficking; recruiting or agreeing to recruit another person to participate in the commission of an act of trafficking; providing facilities and/or financial services in support of trafficking; supplying a trafficker with shelter, food, drink or money with the intention of harbouring him and breach of the obligation imposed on a conveyance owner with regard to travel documents attract a jail term not exceeding 10 years each and a fine of stated or unstated amount.

Looking at the above-mentioned criminal offences and their sanctions, the pertinent question to ask is: Are they in line with the minimum international standards as provided under the Palermo protocol? To answer this question, it should first be reiterated that: A strong and rights-based response to trafficking requires governments to sign and ratify the convention and the Trafficking protocol and adopt domestic legislation implementing all provisions from the two instruments (Jordan, 2002).

In the case of Malaysia, the first requirement is clearly not met because the government has neither signed nor ratified the TOC Convention and the Palermo protocol. As for the second requirement, the 2007 Act is a clear testimony to the fact that there is a domestic legislation on trafficking although, whether such legislation implements all provisions from the two instruments will be seen from the discussion in the remaining part of the article.

Criminalization of trafficking under the Palermo protocol is governed by Article 5, according to which state parties are required to criminalize trafficking, attempted trafficking, participating as an accomplice and organizing and directing trafficking. This provision is of course in addition to whatever criminalization obligations that are contained in the TOC convention, since the provisions of the latter instrument apply to the former *mutatis mutandis* unless there is an intention to the contrary. That being the case, it should be noted that state parties to the TOC convention are required to criminalize participation in organized criminal groups, money laundering, corruption and obstruction of justice (Jordan, 2002).

As to the requirement regarding the severity of the sanctions applicable to the offences criminalized, the Palermo protocol itself is silent while the TOC convention only made reference to the need for sanctions to take into account the gravity of each of the offences criminalized. It appears that in its criminalization of trafficking and trafficking related offences, the 2007 Act is short of what

the Palermo protocol and the TOC convention require in at least three ways. Non-criminalization of participation in trafficking acts involving organized criminal groups. This is in direct contrast to what is obtainable, for example in both Philippines and Thailand. Under Sections 6 (c) and 10 (c) of the Philippines Anti-Trafficking in Persons Act, 2003 not only is trafficking by a syndicate or in large scale criminalized but such trafficking is considered as one of the seven most serious crimes under the act, the so-called qualified trafficking in persons and therefore, made punishable with life imprisonment. Similarly, Sections 4 and 10 of the Thai Anti-Trafficking in Persons Act B. E. 2551 have defined the term organized criminal group and further provided that in case where a trafficking offence is committed by it, the offender shall be liable to heavier punishment than that prescribed in the law by one-half.

Non-criminalization of attempted trafficking in persons. Under the 2007 Act, there is no provision dealing with attempt like for example, Section 10 of the Thai Anti-Trafficking in Persons Act B.E. 2551 which states that whoever prepares to commit an offence as aforesaid shall be liable to one-third of the punishment stipulated for such offence.

Absence of a specific provision dealing with the case of corrupt public officers who commit trafficking offences under the act, mostly especially law enforcement officers. Again, this is in direct contrast to what is obtainable in both Philippines and Thailand. Under Sections 6 (f) and 10 (c), the Philippines Anti-Trafficking in Persons Act 2003, an act of trafficking which is committed by a member of the military or law enforcement agencies is regarded as a form of qualified trafficking and therefore, punishable with life imprisonment. Similarly, under Section 12 of the Thai Anti-Trafficking in Persons Act B.E. 2551, it is provided that whoever, amongst the so many public officers listed therein, commits an offence under the act, he shall be liable to twice the punishment stipulated for that offence.

As to the severity of the sanctions attached to trafficking offences, it is submitted that relative what is obtainable under the Philippines Act of 2003 for example, criminal sanctions under the Malaysian 2007 Act are rather lenient. It may be recalled that in Malaysia, the highest jail term that is provided is 20 years that is for offenders engaged in child trafficking or trafficking involving the use of illegal means like force, coercion and abduction, etc. On the other hand, in the Philippines, life imprisonment awaits any person who commits any of the seven severe forms of trafficking, namely: Child trafficking, trafficking through the use of adoption,

trafficking committed by a syndicate or in large scale, trafficking by an ascendant, parent and guardian, etc., trafficking for prostitution at the instance of a member of the military or any of the law enforcement agencies and trafficking resulting in the death of victim or his/her affliction with HIV or AIDS.

Forfeiture of assets: One way through which the crime of trafficking can be made a high risk and low profit industry is for an anti-trafficking legislation to provide for asset forfeiture against traffickers in persons in order to eliminate the profit of the crime.

Although, the Palermo protocol has no specific provision dealing with seizure and confiscation of assets, the TOC convention has taken care of that under Article 12. Essentially, the requirements under the said Article are for provisions in domestic anti-trafficking legislation which will enable confiscation of:

- Proceeds of crime derived from the offences covered by this convention or property the value of which corresponds to that of such proceeds
- Property, equipment or other instrumentalities used in or destined for use in offences covered by this convention

In Malaysia, a rather relatively narrow approach is taken with regard to the forfeiture of assets derived from or used in the crime of trafficking. This is evident from the provision of Section 36 of the 2007 Act. According to subsection 1 of the Section: All conveyance, moveable property, book, record, report or document or any human organ seized in the exercise of any power conferred under this Act are liable to forfeiture.

According to sub-section 2 of the same section, forfeiture of the items listed excepting human organ which is subject to forfeiture in all cases is mandated only where there is prosecution in respect of any one of them. A comparison of the provisions of the TOC convention and the 2007 Act outlined above will reveal that the latter only addresses the issue of property, equipment or other instrumentalities used in the crime of trafficking while ignoring completely the question of what to do with the proceeds of the crime generally and even then it does that in a limited way by referring only to moveable property.

Liability of legal persons: Article 10 of the TOC convention requires states parties to include in their anti-trafficking legislation provisions which will establish the liability of legal persons. Such liability, according to the Article, may be criminal, civil or administrative and it shall be without prejudice to the criminal liability of the

natural persons who have committed the offences. In Malaysia, it appears that the relevant provision on the issue is contained in Section 64 of the 2007 Act. The pertinent part of the section is as follows (Section 64): Offence by Body Corporate where any offence against any provision of this act has been committed by a body corporate, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate or was purporting to act in any such capacity or was in any manner responsible for the management of any of the affairs of such body corporate or was assisting such management shall also be guilty of that offence unless he proves that the offence was committed without his knowledge, consent or connivance. One obvious shortcoming of this section is the clear dissonance between its heading which refers to offence by body corporate and its text which in reality deals with the criminal liability of any natural person who has committed any trafficking offence in the name of or on behalf of a body corporate. These are two different issues as the provision of the TOC convention referred to earlier shows.

A sharp contrast to the Malaysian provision just cited is that which obtains in Philippines. As indicated earlier in that country, a legal person is as liable as a natural one for any trafficking offence committed. But more importantly, Section 10 (e) (f) of the said 2003 Act has unequivocally provided the sanction to which such legal person is liable when it states as follows:

- If the offender is a corporation, partnership, association, club, establishment or any juridical person, the penalty shall be imposed upon the owner, president, partner, manager and/or any responsible officer who participated in the commission of the crime or who shall have knowingly permitted or failed to prevent its commission
- The registration with the Securities and Exchange Commission (SEC) and license to operate of the erring agency, corporation, association, religious group, tour or travel agent, club or establishment or any place of entertainment shall be cancelled and revoked permanently. The owner, president, partner or manager thereof shall not be allowed to operate similar establishment in different name

The trafficked person as a victim: A person who is a victim or object of trafficking needs protection, support and assistance. It is one of the functions of the Council for Anti-trafficking in Persons to coordinate the formulation of programmes which are aimed at ensuring that such support and assistance are made available to

any identified trafficked person (Section 7 (1)). Specifically, the council is required to formulate a national action plan on the prevention and suppression of trafficking in persons including the support and protection of trafficking victims (Section 7 (2)). It is not clear to us whether such action plan has been formulated and if it has what programmes for protection, support and assistance to trafficking victims are contained in it. Suffices it to say that for now, any attempt to identify the legal protections that trafficking victims are entitled to will have to confine itself to the actual provisions of the 2007 Act.

Under the 2007 Act, a trafficked person enjoys immunity from prosecution for any immigration offences that he has committed as a result of his being trafficked (Section 62). The immunity extends to illegal entry into Malaysia, unlawful residence in the country and procurement or possession of any fraudulent or identity document used or to be used for illegal entry into the country. The immunity against prosecution for these offences will however only be available where the acts relating to the offences are a direct consequence of an act of trafficking that is alleged to have been committed or was committed. The 2007 Act also mandates the establishment of a place of refuge for the care and protection of trafficked persons (Section 42 (1)). A place of refuge is apparently the Malaysian equivalent of a temporary shelter for housing trafficked persons. Places of refuge are required to be categorized according to age and gender for the purpose of separating the trafficked persons to be housed in them (Section 42 (2)). It is not clear how many such places have so far been established by the minister concerned; let alone the manner in which they are being run. There is however, an indication from the act itself that such places of refuge are to be run by Social Welfare or Protection officers as they are called (Section 43). Whenever a trafficked person is found or rescued, he is to be taken into temporary custody by an enforcement officer (Section 44).

Thereafter, specifically within 24 h, an enforcement officer is to produce him before a magistrate for the purpose of obtaining an interim protection order. The magistrate before whom a trafficked person has been produced may make an interim protection order for the trafficked person to be held in a place of refuge for a period of fourteen days for the purpose of carrying out investigation and inquiry.

Within the lifetime of an interim protection order obtained from a magistrate, the enforcement officer is expected to investigate the circumstances of the person's case for the purpose of determining whether he is a trafficked person or not (Section 51). If based on the investigation report tendered before him/her by an

investigation officer, the magistrate is satisfied that the person in question is a trafficked person who is in need of care and protection, the magistrate may make a protection order for the trafficked person to be placed in a place of refuge. The maximum period for which a magistrate can order a trafficked person to be held in a place of refuge is 3 months except if the trafficked person is a citizen or is permanently resident in Malaysia in which case he may be ordered to be kept for a maximum period of 2 years (Section 51 (3)).

The protection order may be extended by the magistrate in the case of a trafficked person who is a foreign national for the purpose of recording his evidence relating to the act of trafficking for which criminal prosecution has been instituted.

The fate of a trafficked person whose protection order has expired or has been revoked has not been determined with finality under the 2007 Act. Instead, the 2007 Act resolved the issue by passing the buck to the Immigration Department (Section 54). It remains to be seen whether such approach will not ultimately in fact defeat the main purpose of the legislative measures which is to treat cases of trafficking differently from that of illegal immigration or human smuggling.

It also remains to be seen what, in concrete terms, the rather formalistic protection and assistance regime described above generally gives to a trafficked person. There is no doubt that the place of refuge required to be established under the act can afford a trafficked person some sort of physical protection and safety although, the distinction between it and a detention centre is not quite clear. The provision of the act creating a right to medical examination and treatment in favor of a trafficked person who is under a protection order is another aspect of the protection regime that is worthy of note here. But beyond these two issues, it is difficult to pinpoint with certainty some other substantive rights on matters relating to protection and assistance to which a trafficked person is entitled under the act. It has been argued by a commentator that ideally, an anti-trafficking legislation like the 2007 Act should guarantee any identified trafficking victim the following ten rights:

- The right to safety
- The right to privacy
- The right to information
- The right to legal representation
- The right to be heard in court
- The right to compensation for damages
- The right to medical assistance
- The right to social assistance
- The right to seek residence
- The right to return

It is doubtful if there is any domestic anti-trafficking legislation or international instrument which has so far been able to guarantee all these rights. Even the Palermo protocol is considered wanting in this regard by human rights organizations. Its provisions dealing with the rights of trafficked persons are seen to be not mandatory because of its use of weak language in determining the obligations of state parties. Yet with all their imperfections, the protocol's provisions dealing with the obligations of state parties on matters relating to the rights of trafficking victims as contained in Articles 6-8 are by far more generous than whatever the 2007 Act contains or even envisages.

The obligations of state parties under Article 6 of the protocol, some of which obligations are said to arise only in appropriate cases and are to be satisfied only to the extent possible under domestic law may be summarized as follows: Protecting the privacy and identity of trafficked persons including, for example by making legal proceedings to such trafficking confidential; establishing legislative or administrative systems containing measures that provide information on relevant court and administrative proceedings to victims of trafficking, as well as assistance that will enable their views and concerns to be presented at appropriate stages of criminal proceedings against offenders; implementing measures to provide for the physical, psychological and social recovery of victims of trafficking, particularly through the provision of assistance in the form of appropriate housing, counseling and information regarding their legal rights in the language which the victims can understand.

States parties are also required to implement measures that ensure the provision of medical, psychological and material assistance as well as employment, educational and training opportunities. In trying to meet all these obligations, state parties are required to take into account the age, gender and special needs of victims of trafficking in particular the special needs of children for appropriate housing, education and care. Furthermore, state parties are required to provide for the physical safety of victims of trafficking and also establish measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.

Under Article 7 of the protocol, a receiving country is obligated to consider (in appropriate cases) adopting measures that permit trafficked persons to stay in its territory temporarily or permanently. In doing that, the receiving country is to give appropriate consideration to humanitarian and compassionate factors. As for the country from which the trafficked person originates, its obligations as provided under Article 8 include:

Facilitating and accepting the return of the victim of trafficking without undue or unreasonable delay if requested, verifying, without undue or unreasonable delay whether a victim of trafficking is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving country if requested, agreeing to issue to its national who is a victim of trafficking in the receiving country such travel documents or other authorization as may be necessary to enable the person to travel and to reenter its territory.

Prevention: The major aim of any measures against trafficking should be to drastically reduce it first and then eliminate it completely in the long run. To achieve this aim, effective preventive measures are required. Effective preventive measures are those measures which seek to address the root causes of trafficking from both the demand and supply sides.

As earlier indicated, the 2007 Act does not specifically identify prevention as one of its main objectives. However, most of the stated functions of the Council for Anti-Trafficking in Persons are explicitly preventive in nature. Such functions include (Section 7): Formulating and overseeing the implementation of a national action plan on the prevention and suppression of trafficking; making recommendations to the Minister concerned on aspects of prevention and suppression; monitoring immigration and emigration patterns in Malaysia for evidence of trafficking; formulating and coordinating measures to inform and educate the public on the causes and consequences of trafficking and collecting and collating data and information and authorizing research in relation to prevention and suppression of trafficking.

It is submitted that these functions are substantially in line with the preventive measures that state parties are required to put in place by Article 9 of the Palermo protocol requires. Unfortunately, as the 2008 TIP report indicates, the council does not seem to be doing what the law requires it do.

Participation: Most of the factual information relating to the phenomenon of trafficking in Malaysia is traceable to Tenaganita, a Malaysia NGO with a long history of working in the field of immigrant workers' rights and related matters. This should be an indicator to the significant role which NGOs and other civil society groups can play in the combat against trafficking.

In recognition of such role, the Palermo protocol has in a number of articles, obligated state parties to bring in NGOs and other civil society groups in implementing their protective and preventive measures in the area of

combating human trafficking. In Malaysia, the 2007 Act has given NGOs some form of representation in the Council for Anti-Trafficking in Persons but it still unclear whether they will have required autonomy, independence and financial support in the performance their responsibilities in this regard.

Anti-smuggling of migrants: The 2007 Act was criticised it does not cover of acts of smuggling of migrants. Realising such inadequacy, parliament has in 2010 amended the act to include provisions pertaining to preventing and combating the smuggling of migrants. The Preamble to the 2010 amendment Act states that legislative measures are needed to tackle the problems of the influx of illegal migrants from conflict countries who are seeking better life either in Malaysia or third countries and who in particular are using Malaysia as a transit point while they await their onward journey to possible countries. It further states that it must be noted that these migrants are distinct from trafficked persons in that they normally seek and finance the illegal migration themselves and the only danger of exploitation faced is cruel or inhuman or degrading treatment or being endangered in the course of their journey. Under international law, Malaysia is under a humanitarian obligation to ensure the safety of such migrants while they are on Malaysian territory. The influx of these illegal migrants also posed a security threat to Malaysia as their methods of entry and exit are generally illegal.

Weaknesses of the 2007 Act: Considering the points made earlier in the analysis of the provisions of the 2007 Act, it is submitted that in a number of ways, the act is not as much good law as it is said to be. Specifically, the 2007 Act is defective in these areas: Corrupt public officers and organized criminal groups have not been specifically targeted for tougher sanctions for committing trafficking offences; it seems there is no provision penalizing traffickers for attempted trafficking; the provision dealing with forfeiture of assets is short of what is required because it does not cover all assets but only moveable property; the provision dealing with liability of legal persons seems to be limited to imposing liability on natural persons who commit trafficking offences in the name or behalf of legal persons. Strange as this may sound, it does not seem to cover the legal persons themselves; many of the rights that the victims of trafficking should be entitled to have not been specifically provided for in the act.

CONCLUSION

Human trafficking, a crime amounting to the enslavement of people and their exploitation is on the rise both globally and in Malaysia. The enactment of the 2007

Malaysian Anti-Trafficking in Persons Act is a significant step toward addressing the problem. It is probably too early to assess the impact of the new Anti-trafficking Legislation. However, there are indications that the complicity of law enforcement officers in trafficking related offences and a seeming lack of seriousness in enforcing the provisions of the act on the part of the government agencies which are charged with responsibility of doing so are the two major challenges facing the fight against human trafficking in Malaysia. In addition, the act itself has many shortcomings which need to be corrected. The best way of doing that is for Malaysia to ratify the TOC convention and the Palermo protocol and thereafter amend the relevant provisions of the act for the purpose of bringing them into conformity with the two international instruments.

RECOMMENDATIONS

The researchers propose that the government take several measures to further combat human trafficking crime as follows:

- Apply stringent criminal penalties to those involved in fraudulent labor recruitment or exploitation of forced labor
- Increase efforts to prosecute and convict public officials who profit from or are involved in trafficking or who exploit victims
- Develop and implement procedures to identify labor trafficking victims among vulnerable groups such as migrant workers and refer them to available protection services
- Ensure that victims of trafficking are not threatened or otherwise punished for crimes committed as a result of being trafficked
- Re-negotiate MOUs with source countries to incorporate victim protection and revoke passport or travel document confiscation
- Increase cooperation with NGOs to improve victim protection efforts including in shelters for trafficking victims
- Continue to expand the training of officials on the effective handling of sex and labor trafficking cases with a particular emphasis on victim protection and continue and expand a comprehensive and visible anti-trafficking awareness campaign to encompass both labor and sex trafficking

REFERENCES

AHRM, 2006. Rule of law and human rights in Asia. Asian Human Rights Commission.

- Des, T., 2006. Child laundering: How the inter country adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping and stealing children. *Wayne State Univ. Law School Wayne Law Rev.*, 52: 113-113.
- Gallagher, A., 2001. Human rights and the new UN protocols on trafficking and migrant smuggling: A preliminary analysis. *Human Rights Quarterly*, 23: 975-1004.
- Gekht, A., 2008. Shared but differentiated responsibility: Integration of international obligations in the fight against trafficking in human beings. *Denv. J. Int. Poly*, Vol. 37,
- Jordan, A.D., 2002. Annotated guide to the complete UN trafficking protocol: A tool to assist advocates in the development of a human rights framework for national anti-trafficking laws and policies. *Global Rights*, Washington DC., USA.
- Mattar, M.Y., 2003. Monitoring the status of severe forms of trafficking in foreign countries: Sanctions mandated under the US trafficking victims protection act, 10. *Brown J. W. Affairs*, 1068: 159-178.
- Mattar, M.Y., 2004. Trafficking in persons: An annotated bibliography. *Am. Assoc. Law Libraries Law Library J.*, 1: 96-96.
- Mattar, M.Y., 2006. Incorporating the five basic elements of a model anti-trafficking in persons legislation in domestic laws: From the United Nations protocol to the European convention. *Tul. J. Int. Comp.*, 14: 357-419.
- Mattar, M.Y., 2008. Comparative models of reporting mechanisms on the status of trafficking in human beings. *Vanderbilt J. Transnat. Law*, 41: 1355-1413.
- Mindy, W.M., 2009. Human trafficking in Asia: Increasing individual and State accountability through expanded victims rights. *Columbia J. Asian Law*, 22: 283-313.
- Nagle, L.E., 2008. Selling souls: The effect of globalization on human trafficking and forced servitude. *Wis. Int. L. J.*, 26: 131-131.
- Nicola, P., 2005. A problem by a different name? A review of research on trafficking in South-East Asia and oceania. *Int. Migration*, 43: 203-233.
- Orlova, A.V., 2005. Trafficking of women and children for exploitation in the commercial sex trade: The case of the Russian federation. *Georgetown J. Gender Law*, 6: 157-178.
- Rassam, A.Y., 2005. International law and contemporary forms of slavery: An economic and social rights-based approach. *PA Penn State Int. Law Rev.*, 23: 809-809.
- Ryf, K.C., 2002. The first modern anti-slavery law: The trafficking victims protection act 2000. *Case W. Res. J. Int. L. J.*, 34: 45-45.
- Salt, J. and J. Stein, 1997. Migration as a business: The case of trafficking. *Int. Migrat.*, 35: 467-494.
- Schloenhardt, A., 1999. Organized crime and the business of migrant trafficking. *Crime Law Soc. Change*, 32: 203-203.
- Shelley, L., 2003. Trafficking in women: The business model approach. *Brown J. World Affairs*, 10: 119-131.
- Siriporn, N.B. and C. Jantateero, 1997. *The Traffic in Women: Human Realities Of The International Sex Trade*. Zed Books Ltd., London, New York.
- Skeldon, R., 2000. Trafficking: A perspective from Asia. *Int. Mi*, 38: 7-30.
- Skrivankova, K., 2006. Trafficking for forced labour: UK country report. *Anti-Slavery International Skrobanek*.
- Sullivan, B., 2003. Trafficking in women. *Int. Feminist J. Politics*, 56: 67-67.
- Tanagho, J., 2005. New illinois legislation combats modern-day slavery: A comparative analysis of illinois anti-trafficking law with its federal and states counterparts. *Loy. U. Chi. L. J.*, 38: 895-895.
- Taylor, I. and J. Ruth, 1999. Sex trafficking and the mainstream of market culture. *Crime, Law Soc. Change*, 32: 257-278.
- Taylor, L.R., 2005. Dangerous trade-offs: The behavioral ecology of child labor and prostitution in rural Northern Thailand. *Current Anthropol.*, 46: 411-431.
- Tiefenbrun, S.W., 2002. Trafficking of women sex workers and an economic solution. *T. Jefferson L. Rev.*, 24: 161-170.
- US Department of State, 2010. Trafficking in person report 2010. The Office of Electronic Information, Bureau of Public Affairs, USA.