

Human Trafficking in the Asia Pacific Region

By Justice Susan Glazebrook¹

Introduction

Human trafficking is one of the fastest growing criminal activities in the world, a phenomenon that has been said to be driven by the same forces that drive the globalisation of markets.² The breadth of the problem is immense and the statistics that outline the prevalence of trafficking in the world today give significant cause for concern. The scope of this global problem is exponentially increasing, and this has been recognised to be in part due to the worldwide increase in poverty that has been caused by the global financial crisis.³

Approximately 12.3 million adults and children are in forced labour, bonded labour and commercial sexual servitude at any given time⁴ and around 80 per cent of transnational victims of human trafficking are women and girls.⁵ The estimated annual profit from trafficking for sexual exploitation alone is US\$27.8 billion worldwide.⁶ The prevalence of trafficking in the Asia-Pacific region has been estimated at the ratio of 3 for every 1,000 inhabitants (with the global ratio being 1.8 for every 1,000 inhabitants).⁷

This paper explores the nature and consequences of trafficking and the position at international law with regard to trafficking. It goes on to examine the recommendations made by various bodies on the actions needed to combat trafficking and then lets some of the victims of trafficking speak for themselves by telling their stories. It finishes with some suggestions for possible actions that can be taken by judges.

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² Joy Ngozi Ezeilo *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children* A/HRC/10/16 (2009) at 5.

³ *Ibid*, at 9.

⁴ United States Department of State *Trafficking in Persons Report 2009* (2009) at 8.

⁵ *Report of the Special Rapporteur* above n 2 at 6.

⁶ Patrick Belser *Forced Labour and Human Trafficking: Estimating the Profits* (2005, Minimum Estimate of Forced Labour in the World Working Paper) at 15, cited in O'Driscoll "AT v Dulghieru: Accounting for the Profits of Sex Trafficking" (2009) 40 VUWLR 695.

⁷ United State Department of State *Trafficking in Persons Report 2010* (2010) at 7.

The Nature of Trafficking

The criminal activity of trafficking is considered to equate to a modern day form of slavery and it involves particularly egregious breaches of fundamental human rights.⁸ Traffickers breach an individual's right to liberty, human dignity, their freedom of movement and the right not to be held in slavery or involuntary servitude.⁹ They can breach the right to life, through the possibility of disease including HIV, but also often because of the conditions in which a person is held. Not only does trafficking threaten the rights of its victims, it is also a crime that has been seen to increase global health risks, fuel growing networks of organised crime and sustain levels of poverty and impede development.¹⁰

A core feature of the human trafficking process is the trafficker's abuse of power over his or her vulnerable victim. As the majority of trafficked persons have entered their destination country illegally, many trafficked persons are left vulnerable to the power of their traffickers. Accordingly, traffickers will be able to use a variety of methods such as threats, use of force, intimidation, detention and the withholding of personal documents to prevent the escape of their victim.¹¹

A large proportion of the victims involved in human trafficking are women and girls. Societal gender inequality has been identified as a driving force behind the large percentage of women caught in the trafficking cycle. For instance, the underlying factors behind the prevalence of female victims in the trafficking industry have been identified as the general feminization of poverty, as well as the widespread occurrence of human rights violations of women in source countries.¹²

For those trafficked internationally the pattern is usually for victims to be abducted or recruited in the country of origin, transferred through transit regions and then exploited in the destination country.¹³ Some countries are primarily source countries. Some are primarily

⁸ Ibid at 5.

⁹ *Report of the Special Rapporteur* above n 2 at 16.

¹⁰ *Trafficking in Persons Report* above n 4 at 5.

¹¹ Ibid.

¹² Ibid.

¹³ United Nations Office on Drugs and Crime (UNODC) *Trafficking in Persons: Global Patterns* (April 2006) at 17. UNODC was established in 1997 through a merger between the United Nations Drug Control Programme and the Centre for International Crime Prevention. As the only UN entity focusing on the criminal justice element of international crimes, the work that UNODC does to combat human trafficking and the smuggling of migrants is underpinned by the United Nations Convention on Transnational Organized Crime and its protocols

destination countries. Others play all three roles: source, transit and destination. Trafficking takes place for a variety of end purposes.¹⁴ However, forced prostitution and forced labour are seen to be the most common forms of trafficking in the 21st century.¹⁵ The initial cooperation of a victim of trafficking will normally be secured through the use of fraud or deception. Thus, a typical situation will involve a girl or young woman being deceived about the cost (and repayment conditions) of the migration or employment services being offered to her, the kind of work she will be doing and/or the conditions under which she is expected to work.¹⁶

Trafficking in the Asia-Pacific Region

In order to understand the nature of human trafficking in the Asia-Pacific region, I will traverse briefly the findings of the report of the United Nations Office on Drugs and Crime on trafficking in persons¹⁷ and also the US Department of State Report. UNODC defines the regions in East Asia and the Pacific¹⁸ and South and South-West Asia.¹⁹

East Asia and the Pacific

UNODC reported that most perpetrators of trafficking crimes in this region were nationals of the country where the case was reported.²⁰ The proportion of minors trafficked relative to the total number of trafficking victims had risen in countries of the region and it was further found that victims in this region were predominantly trafficked for the purpose of sexual exploitation.²¹ Victims of trafficking for forced labour were identified among those returned

on trafficking in persons and migrant smuggling. UNODC helps countries to develop effective law enforcement and criminal justice institutions but has no power to enforce the Trafficking Protocol or provisions from the United Nations Convention on Transnational Organized Crime. The report referred to in this footnote is a comprehensive overview of human trafficking patterns across different regions of the world.

¹⁴ These include domestic service, sexual exploitation, forced marriage and sweatshop labour.

¹⁵ Advisory Council of Jurists *Summary of the Advisory Council of Jurists Background Paper on Trafficking* (2002) at 3.

¹⁶ Ibid.

¹⁷ UNODC *Global Report on Trafficking in Persons* (2009).

¹⁸ The East Asia and the Pacific region included the countries of Australia, Brunei, Burma Darussalam, Cambodia, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Mongolia, New Zealand, Pacific Islands, The Philippines, Republic of Korea, Singapore, Thailand, Timor-Leste and Vietnam.

¹⁹ The South and South-West Asia region included the countries of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka.

²⁰ *Global Report on Trafficking in Persons*, above n 17, at 55.

²¹ This finding was qualified by the fact that the legislation in many of region's countries only included provisions criminalizing trafficking for sexual exploitation.

to Indonesia, Mongolia, the Mekong sub-region (Cambodia, Laos and Thailand)²² and, episodically, in the Pacific sub-region. Forced labour in the form of domestic servitude and, to a lesser extent, forced begging, was detected among victims trafficked to Thailand from other countries and in victims assisted by International Office of Migration in Indonesia.²³ During the reporting period, many East Asian countries were countries of origin for trafficking in persons within and outside the region. East Asia and the Pacific were mainly subject to intra-regional trafficking related to destination countries for victims.

South and South West Asia

The UNODC was unable to collect any information on the profile of trafficking offenders in the South and South West Asia region. Among the countries that were able to provide information as to trafficking statistics, sexual exploitation was frequently reported as the main purpose of trafficking. However, it was noted by UNODC that trafficking for forced labour appeared to be equally prominent in the region. Moreover, a few Indian states reported victims of trafficking in persons for the purposes of organ removal and forced marriage.²⁴ The UNODC outlined that domestic trafficking appeared to be a problem within the South and South West Asia region, but intra-regional and trans-regional trafficking was also identified as an issue.

The US Department of State Report

The US Department of State report categorises countries into risk classes from Tier One to Three. Tier One is made up of countries deemed by the State Department to have a trafficking problem but fully complying with the Trafficking Victim's Protection Act's minimum standards for the elimination of trafficking. Tier Two is made up of countries, whose governments the State Department views as not fully complying with the standards but which are seen as making "significant efforts to bring themselves into compliance." The Tier Two Watch list is made up of countries that are on the border between Tier Two and Tier

²² No information was available for Burma.

²³ Ibid.

²⁴ Ibid.

Three. Tier Three includes countries whose governments the State Department deems as not fully complying with those standards and as not making significant efforts to do so.²⁵

From the Asian-Pacific countries, Burma, The Democratic People's Republic of Korea and Papua New Guinea are ranked as Tier Three.. Countries in the Asia/Pacific region at risk on the Tier Two Watch list of this region are: Fiji, Micronesia, Philippines, Brunei, Singapore, Malaysia, Vietnam, Thailand, Laos, China, Bangladesh, India, Sri Lanka and the Maldives.

The largest number of victims in the region are trafficked from South and Central Asia annually according to the US Department of State.²⁶ The growth of sex tourism in this region is one of the main contributing factors. Large-scale child prostitution occurs in many countries. Thailand, Cambodia, and the Philippines are popular travel destinations for "sex tourists," including paedophiles, from Europe, North America, Japan, and Australia. What seems to be an overarching issue in the region is the fact that, although there is thought to be a high number of trafficking victims, there are relatively few prosecutions.

International Law Position on Trafficking

Despite the prevalence of human trafficking, international legal consensus on the nature of the human trafficking problem has been relatively recent.²⁷ Indeed, it was not until December 2000 that the term "trafficking" was accorded a precise definition in international law.²⁸ The definition is found in the primary international instrument which establishes minimum standards that State parties are required to follow with regard to trafficking; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised

²⁵ *Trafficking in Persons Report 2010*, above n 7, at 23.

²⁶ At 53.

²⁷ Anne Gallagher and Paul Holmes in "Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line" (2008) 18 *International Criminal Justice Review* 318 argue at 319 that this was because for many years the problem of human trafficking was lumped together with other migration processes including migrant smuggling. It must, however, be noted that "classical" slavery has been prohibited for many years in a number of international instruments including the 1926 Convention on Slavery, its 1956 Supplementary Convention, the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights. The prohibition on slavery is now recognised as *jus cogens*. There is also a prohibition on forced and compulsory labour contained in the 1930 ILO Forced Labour Convention 1957. See generally, *Summary of the Advisory Council of Jurists Background Paper on Trafficking*, above n 15 at 6.

²⁸ *Summary of the Advisory Council of Jurists Background Paper on Trafficking* above n 15 at 10–11.

Crime 2000 (the Trafficking Protocol).²⁹ The Trafficking Protocol falls within the scope of an international regime, adopted by the UN General Assembly in 2000, that was intended to fight international crime. Included within the regime is the Convention against Transnational Crime, which is the parent instrument to the Trafficking Protocol. That Convention is also supplemented by the Protocol against the Smuggling of Migrants by Land, Sea and Air³⁰ and the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.³¹

The Trafficking Protocol entered into force on 25 December 2003 and has two primary objectives. It seeks to prevent and combat trafficking in persons, paying particular attention to the protection of women and children, and to promote and facilitate cooperation to this end among States Parties.³² A core requirement of the Trafficking Protocol is that States Parties must criminalise, investigate and punish trafficking.³³ Article 3(a) of the Trafficking Protocol 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 purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

²⁹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was adopted by General Assembly resolution 55/25. It entered into force on 25 December 2003. The United Nations Convention against Transnational Organised Crime was adopted by General Assembly resolution 55/25 of 15 November 2000. It was opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. The purpose of this Convention is to promote cooperation to prevent and combat transnational organised crime more effectively. The Convention deals with the fight against organised crime in general and some of the major activities in which transnational organized crime is commonly involved, such as money laundering, corruption and the obstruction of investigations or prosecutions.

³⁰ The Protocol against the Smuggling of Migrants by Land, Sea and Air deals with organised criminal groups who smuggle migrants for profit. It was adopted by General Assembly resolution 55/25, and entered into force on 28 January 2004.

³¹ The objective of the this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. By ratifying the Protocol, States make a commitment to adopt a series of crime-control measures. It was adopted by was adopted by General Assembly resolution 55/255 of 31 May 2001. It entered into force on 3 July 2005.

³² Trafficking Protocol, art 2.

³³ Ibid, arts 4 and 5.

Article 3(b) provides that the consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means of coercion set out in art 3(a) have been used. As noted in the *Trafficking in Persons Report* released by the United States Department of State, the common denominator in trafficking scenarios for adults is the use of fraud, force or coercion to exploit a person for profit.³⁴

Finally, art 3(c) sets out special rules for children under 18. It provides that the “recruitment, transportation, transfer, harbouring or receipt” of a child for exploitation is considered “trafficking in persons” even if none of the means set out in art 3(a) have been employed.

While the Trafficking Protocol is the primary international instrument in this area, there are a number of other international instruments that will have relevance in preventing human rights breaches caused by trafficking. These include the Convention on the Rights of the Child³⁵ and two Optional Protocols that developed from this Convention. The first is the Optional Protocol on the Involvement of Children in Armed Conflict which restricts the involvement of children in military conflicts.³⁶ The second is the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which obliges States to protect the rights and interests of child victims of trafficking, child prostitution and child pornography and child labour.³⁷ Another important document is the Convention on the Elimination of All Forms of Discrimination Against Women.³⁸

Other non-binding international standards that can provide guidance to States in their fight against trafficking include the General Assembly Resolution entitled *Trafficking in Women and Girls*³⁹ and the *Recommended Principles and Guidelines on Human Rights and*

³⁴ *Trafficking in Persons Report* above n 4 at 7.

³⁵ The United Nations Convention on the Rights of the Child came into force in September 1990 and has 193 parties. Only the United States and Somalia have signed but not ratified this Convention.

³⁶ The first Optional Protocol entered into force on 12 February 2002. Currently, 139 nations have ratified or acceded to this Protocol. The Protocol requires governments to ensure that while their armed forces can accept volunteers below the age of 18, they cannot be conscripted.

³⁷ The second Optional Protocol entered into force on 18 January 2002. 141 States have ratified or acceded to that Protocol.

³⁸ The Convention entered into force on 3 September 1981 and 186 States have ratified or acceded to the Convention

³⁹ *Trafficking in Women and Girls* GA Res 51/176 (18 December 2002). The Resolution calls upon national governments to strengthen their national efforts to combat trafficking in women and girls, and to implement joint actions at the bilateral, sub regional, regional and international levels. The Assembly put forward detailed recommendations to prevent trafficking in women and girls, punish perpetrators and protect and support victims of trafficking.

Trafficking of the United Nations High Commissioner for Human Rights (the UN Principles).⁴⁰

Recourse to the UN Principles and other human rights instruments is necessary where the Trafficking Protocol requires additional supplementation. The Trafficking Protocol has relatively weak provisions in relation to legal and welfare assistance to trafficked persons and thus States may need to turn to the UN Principles for a guide to best practice in this area.⁴¹ As outlined by the Special Rapporteur, while the Trafficking Protocol is the main normative framework which operates to combat trafficking, any gap in the Trafficking Protocol can also be filled by relevant human rights instruments.⁴²

The UN Principles

The stated purpose behind the development of the UN Principles was to provide practical, rights-based policy guidance on the prevention of trafficking and the protection of victims of trafficking.⁴³ They seek to promote and facilitate the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions.⁴⁴ They thus list 17 key principles that States should abide by when dealing with trafficking. Broadly, these principles relate to: ensuring the primacy of human rights; preventing trafficking; protecting and assisting victims; criminalising trafficking and providing redress for victims.

Additionally, 11 guidelines are provided for States. These guidelines cover the ways in which States can: promote and protect human rights; identify trafficked persons and traffickers; research, analyse, evaluate and disseminate information on trafficking; ensure the existence of adequate legal frameworks and adequate law enforcement responses; protect and support trafficked persons; prevent trafficking; provide special measures for the child victims of trafficking; provide access to remedies; ensure the obligations of peacekeepers, civilian

⁴⁰ Mary Robinson *Recommended Principles and Guidelines on Human Rights and Trafficking* (text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights) E/2002/68/Add. 1 (2002).

⁴¹ Advisory Council of Jurists *Consideration of the Issue of Trafficking: Final Report* (2002) at 14 <http://www.asiapacificforum.net/acj/references/trafficking/downloads/reference-on-trafficking/final_report.pdf>.

⁴² *Report Submitted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children* above n 2 at 12.

⁴³ Above n 40.

⁴⁴ *Ibid.*

police, and humanitarian and diplomatic personnel are upheld; and cooperate and coordinate between other States.

Steps that can be taken to combat trafficking

UNODC's work

UNODC's prevention work includes raising awareness among policy-makers, law enforcement bodies and civil society. Therefore, UNODC has established the Global Programme against Trafficking in Human Beings in order to eradicate the information deficit about the nature and extent of human trafficking in order to understand its depth, breadth and scope so that effective policies to fight human trafficking can be established.

UNODC is developing training materials for law enforcers working to prevent human trafficking and smuggling across borders. Such materials place an emphasis on international cooperation and holistic approaches so as to ensure that responses to trafficking and smuggling do not merely result in new routes employed by the criminals behind these crimes. For instance, chapter 9 of UNODC's Toolkit to Combat Trafficking in Persons contains 19 tools dedicated to the challenge of preventing trafficking in persons. Issues addressed therein include the root causes of trafficking, the concept of 'demand' and the role of the media and peacekeepers in preventing trafficking.

It is also worth mentioning that UNODC has developed a Training Manual for Judges and Prosecutors on Combating Human Trafficking for Moldova,⁴⁵ which addresses issues relating to the definition of human trafficking in criminal law, root causes of human trafficking, victim identification and methods to combat and prevent human trafficking. With regard to procedural issues, the handbook addresses the competencies of agencies involved in preventing and combating human trafficking, specific features of the investigation process in cases of human trafficking, collaboration between different agencies involved in investigating and prosecuting human trafficking cases, and international cooperation.⁴⁶

⁴⁵ UNODC “Training manual for judges and prosecutors on Combating Human Trafficking – Moldova” <http://www.unodc.org/documents/human-trafficking/Combating_Trafficking_-_Moldova.pdf>.

⁴⁶ There is also a more general manual entitled “Anti-human trafficking manual for criminal justice practitioners”, which contains 14 different modules such as: Indicators of trafficking in persons; Psychological reactions of victims of trafficking in persons; Risk assessment in trafficking in persons investigations; Crime scene and physical evidence examinations in trafficking in persons investigations.

*Recommendations made by the Special Rapporteur*⁴⁷

The most recent report of the Special Rapporteur recommends that, in order to combat trafficking, regional or subregional cooperation mechanisms should be established, reflecting a human rights based standard.⁴⁸ What is also seen to be of vital importance is an active monitoring system, with subsequent evaluation. The report further recommends the inclusion of human trafficking information into school curricula at all levels of education.⁴⁹ The Special Rapporteur acknowledged the difficulty in identifying trafficking if different definitions are applied and therefore urges States to make a commitment to adopt the Trafficking Protocol's definition of human trafficking.⁵⁰

The Special Rapporteur also considered that it is essential to provide an effective prosecutorial and judicial response to trafficking, with a victim-centred approach.⁵¹ The Special Rapporteur suggests the establishment of national legal frameworks to criminalize trafficking, specialized training to law enforcement officials, the creation and strengthening of specialist anti-trafficking units in prosecution offices, cross-border and internal cooperation between these units, possibly by developing handbooks or guidelines that include standard operating procedures on how to investigate and prosecute trafficking cases.⁵²

The Special Rapporteur has previously outlined that the root causes of trafficking, namely, growing poverty, high youth unemployment, gender inequalities and the demand for cheap labour, are not being sufficiently addressed and trafficking continues to thrive as potential victims become more desperate to escape their unfavourable situations. Therefore, it has also been suggested that States should provide training, particularly for labour inspectors that will improve understanding of the interface between migration and trafficking and enhance

⁴⁷ On trafficking in persons, especially in women and children

⁴⁸ Joy Ngozi Ezeilo *Report submitted by the Special Rapporteur on trafficking in persons, especially women and children* A/HRC/14/32 (2010) at 4.

⁴⁹ At 14.

⁵⁰ At 19. The Special Rapporteur in her 2009 Report, above n 2, already stated at 22 that understanding the definition of trafficking and the important elements contained therein may prove fundamental for the proper identification of trafficked victims and for responding effectively to their situation.

⁵¹ At 22. The Special Rapporteur in her 2009 report, above n 2, emphasised at 22 that victims should not summarily be deported. A proper repatriation process which takes into account the safety of victims must be followed.

⁵² At 26–27.

mechanisms for the identification of persons trafficked into exploitative labour and mixed migration situations.⁵³

Recommendations of the ACJ Report

In 2002, I was involved with the publication of a report, which considered the issue of trafficking in the Asia Pacific region. This was prepared for the Asia Pacific Forum of National Human Rights Institutions (APF)⁵⁴ by the Advisory Council of Jurists (ACJ).⁵⁵ The ACJ Trafficking Report⁵⁶ explored the position at international law with regard to trafficking and also made seven core recommendations in relation to steps that should be taken to combat trafficking in the Asia Pacific region.

In summary, it was suggested that States Parties should ratify the Trafficking Protocol and ensure effective implementation of the Trafficking Protocol in national legal frameworks. It was also urged that there should be a more aggressive enforcement of laws regarding trafficking and that adequate protection must be afforded to victims of human trafficking. The need for more research surrounding the nature of trafficking and the development of education about trafficking was also recognised by the ACJ. Finally, the co-operation of States on a multilateral and bilateral basis was seen to be a vital step in the fight against trafficking. I discuss these recommendations in turn.⁵⁷

⁵³ *Report of the Special Rapporteur*, above n 2, at 22.

⁵⁴ The APF is a regional human rights organisation in the Asia Pacific. It was established in 1996 as a member-based organisation that supports the establishment and strengthening of national human rights institutions (NHRIs) in the region. The NHRIs of Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, the Palestinian Territories, the Philippines, Qatar, the Republic of Korea, Thailand and Timor Leste are all full members of the APF. See generally <<http://www.asiapacificforum.net>>.

⁵⁵ The Advisory Council of Jurists is a body of jurists that advises the APF on the interpretation and application of international human rights law. It was established in 1998. The ACJ has considered nine references: sexual orientation and gender identity (2010); human rights, corporate accountability and government responsibility (2008), environment (2007), education (2006); torture (2005); anti-terrorism legislation and the rule of law (2004); trafficking of women and children (2002); death penalty (2000); and the regulation of child pornography on the internet (2000). See generally <<http://www.asiapacificforum.net/acj/references>>.

⁵⁶ Advisory Council of Jurists *Consideration of the Issue of Trafficking: Final Report* (2002) <http://www.asiapacificforum.net/acj/references/trafficking/downloads/reference-on-trafficking/final_report.pdf>.

⁵⁷ Since the release of the ACJ Report, the APF has taken a proactive role in adopting some of the ACJ's recommendations. The recommendation that NHRIs cooperate to share information and resources regarding trafficking has been embraced by the APF through its creation of the focal point network on human trafficking in 2005. Essentially, the aim of a focal point network is to enable APF member institutions to share information and resources, develop cooperative partnerships and establish best practice standards. Another initiative taken by the APF following the ACJ report has been the organisation of a number of regional workshops, so far held in Australia, Sri Lanka, Fiji, Republic of China and India, on trafficking which was aimed at improving the regional engagement of NHRIs in relation to human trafficking: <<https://www.asiapacificforum.net/services>>.

Ratification of the Trafficking Protocol

The first recommendation made by the ACJ was that there should be widespread ratification of the Trafficking Protocol.⁵⁸ The overarching objective of widespread ratification of that Protocol by States in the Asia Pacific region was seen to be important for a number of reasons. Ratification would provide clear standards for all States to work towards the objective of the Protocol, namely: to prevent and combat trafficking; to assist the victims of trafficking; and to promote cooperation among the party States to achieve these objectives. The ACJ considered that ratification would facilitate a global network of co-operation and information sharing, as it would encourage countries of origin, of transit and of destination to recognise their role in the problem and its solution and to act accordingly.⁵⁹ It was also recognised that ratification of the Protocol would be vital for States with fewer or inadequate resources as it would provide them with greater access to regional and global support in their fight against trafficking and related exploitation.⁶⁰

Implementation of the Trafficking Protocol

Ratification of the Trafficking Protocol, unsurprisingly, was not seen by the ACJ to be a step that would suffice in and of itself. Thus, the next recommendation made by the ACJ was that States would need to ensure the effective implementation of the Protocol within domestic legal frameworks. Indeed, it was emphasised that the expectation of the ACJ was that legislative and administrative measures would follow ratification. Moreover, it was urged that such measures need not await the formal procedures involved in ratification.⁶¹

[/networks/trafficking](#)>. The member institutions of the APF have also taken active roles in their countries to combat trafficking.

⁵⁸ *ACJ Final Report*, above n 56 at 5. Within the East-Asia and Pacific region, as defined by the UNODC in its *Global Report on Trafficking in Persons*, above n 17, Australia, Cambodia, Indonesia, New Zealand and the Philippines have signed and ratified the Trafficking Protocol, while Laos, Malaysia and Timor-Leste have acceded to the Trafficking Protocol. Countries that have signed but not ratified the Trafficking Protocol are Japan, the Republic of Korea and Thailand: <<http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>>.

Unfortunately, less progress has been made within the South and South-West Asia region, as defined by the UNODC in its *Global Report on Trafficking in Persons* above n 17, as no countries have yet ratified the Trafficking Protocol. India and Sri Lanka are, however, signatories.

⁵⁹ *ACJ Final Report* above n 56 at 5

⁶⁰ *Ibid.*

⁶¹ *Ibid.* Most of the countries in East Asia and the Pacific region have adopted specific legislative provisions to combat trafficking in persons, or at least some of its aspects. The exceptions, however, are the Pacific States of Micronesia, Samoa, the Solomon Islands and Tuvalu, where the specific offence of trafficking in persons did not form part of the relevant criminal codes. See *Global Report on Trafficking in Persons* above n 17 at 33. With

Additionally, it was recommended that National Human Rights Institutions (NHRIs) should play an important role in encouraging their respective States to use existing criminal laws and procedures, as well as appropriate welfare measures, to deal with various aspects of trafficking and help its victims.⁶² It was also suggested that NHRIs could play a vital role in raising public awareness about trafficking through sharing reports that the NRHIs had undertaken on trafficking within the region.⁶³

Enforcement

The third broad recommendation made by the ACJ was that enforcement officials and agencies should play a proactive role in combating trafficking as trafficking would proliferate when not adequately policed. The need for more aggressive enforcement of laws to combat trafficking was emphasised by the ACJ.⁶⁴ Aggressive enforcement was seen to be important because of the argument that the best disincentive for traffickers would be apprehension of prosecution and conviction.⁶⁵

The ACJ then argued that, once adequate enforcement measures had been established, there would be a need to create social support and mobilisation programmes. The development of such programmes was seen to be a fundamental step in encouraging victims of trafficking to come forward and report traffickers and co-operate with enforcement agencies as available witnesses.⁶⁶

Protection of Victims

While the fundamental role that enforcement would play in combating trafficking was recognised by the ACJ, it was equally emphasised that the rights of victims of trafficking

regard to the South and South-West Asia region, all the countries covered in the UNODC report, except for the Maldives and Afghanistan, included the specific offence of trafficking in persons in their criminal codes during the reporting period. Interestingly, it was noted by UNODC that trafficking in persons was not a new legislative concept in the South and South West Asia region. In fact, the offence of human trafficking existed in most national legislations in the region before it did in other parts of the world.

⁶² *ACJ Final Report*, above n 56, at 6.

⁶³ *Ibid.*

⁶⁴ Often individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms. There is an attempt to improve protection by establishing offices and protection programmes but success seems miniscule.

⁶⁵ *ACJ Final Report*, above n 56, at 6.. One interesting initiative that I noticed in Malaysia is that air travellers are warned of the high penalties for people traffickers before landing.

⁶⁶ *Ibid.*

could not be lost sight of during that process. The need to secure and promote the human rights of trafficking victims was urged and it was noted that any measures that were introduced to combat trafficking should take care of the protection and welfare of victims.⁶⁷ The core recommendation was thus that victims should not be re-victimised through the enforcement of laws regarding trafficking.⁶⁸

Coordination between NGOs, NHRIs, the APF and the United Nations on this issue was thus encouraged. NHRIs and the APF could instigate a process to ensure that States implemented the protection of victim's rights, as articulated in the Trafficking Protocol⁶⁹ and the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking.⁷⁰

Research and Policy Making

The need for NHRIs to ensure that research and analysis of trafficking and its related issues was undertaken was also strongly emphasised by the ACJ. It was noted that the development of research projects was important as such projects could provide a sound basis for policy recommendations by NHRIs in the region to their respective governments.⁷¹ It was recommended that research and policy initiatives should include consideration of the wider social and economic measures necessary to deal with the root causes of trafficking. The ACJ envisaged that such research would play a vital role in enhancing the rights of women and children and attacking the causes of economic disparity both within and between States.⁷²

Education

Education was also seen by the ACJ to play a crucial role in ensuring the effectiveness of measures taken to combat trafficking in all its forms. It was thus recommended that education and training programmes for border control officials, law enforcement personnel, labour

⁶⁷ Ibid at 7.

⁶⁸ Since the release of the ACJ Report, there have been measures taken to provide protection for victims of trafficking. For example, India has developed a Plan of Action, a programme for the prevention, rescue and rehabilitation and reintegration of sex trafficking victims and supports regional workshops. Nepal has established the office of a national Rapporteur and Australia has implemented changes to the Support for Victims of People Trafficking Program and the People Trafficking Visa Framework.

⁶⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000, art 6.

⁷⁰ *ACJ Final Report*, above n 56, at 7.

⁷¹ Ibid.

⁷² Ibid.

inspectors, the judiciary, and all other relevant government officials in relation to each element involved in the trafficking issue should be devised.⁷³ Furthermore, the value of community education was also recognised by the ACJ. Accordingly, the ACJ suggested that education programmes for the community about the causes and consequences of trafficking and potential victims and vulnerable groups could be effective tools in combating trafficking.⁷⁴ Finally, in addition to national programmes for education and training, it was recommended that each State should work together and with the APF and relevant NGOs and international agencies to develop regional programmes covering the various issues surrounding the practice of human trafficking.

Cooperation

The final recommendation by the ACJ was that States should cooperate on a bilateral and multi-lateral basis in the fight against trafficking. The ACJ was of the opinion that the APF could play a significant role in facilitating cooperative measures.⁷⁵ For instance, one initiative that was suggested was for NHRIs to share information and research data both among themselves and with NGOs and international and national agencies on “best practice” in the region.⁷⁶ The ACJ also recommended that APF members work cooperatively to seek funding for regional initiatives from agencies such as the World Bank, the Asian Development Bank, national funding bodies and the business community.⁷⁷

Victims’ stories

In order to understand why it is so vital that such recommendations are actioned, it is helpful to turn to the very real human stories that come from victims of trafficking. I believe in the power of stories to effect change and thus would like to share some stories here.⁷⁸

⁷³ Ibid, at 8.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid, at 9.

⁷⁸ I believe that stories of actual victims help to turn the abstract and general into the personal, evoking proper feelings of empathy which can hopefully act as the catalyst for action to be taken.

Typical scenarios

The first three stories I have chosen are designed to give an idea of three typical scenarios. The first is from a Human Rights Watch report on Thai women trafficked into debt bondage in Japan. The study was completed in 2000. This is not to single out Thailand or Japan in particular. As I said earlier, the problem is rife throughout the region. The story I have chosen from that report is that of M and it is a composite profile of women who were interviewed in a women's shelter in Tokyo in 1999.

Before arriving at the shelter, M had spent more than two months working as a hostess in what was quaintly termed a dating snack bar. Her tasks included serving drinks at the bar but also accompanying clients to nearby hotels to provide sexual services. She had been recruited from Thailand with the promise of a generous monthly salary for factory work. When she arrived she was told, not only that she was to be working at the snack bar, but that she would be working without pay until she had paid off a debt of approximately US\$70,000 for travel and job placement expenses.

Her manager confiscated her passport and warned her that, if she tried to escape, she would be followed and caught by Japanese gang members or the police. She was housed under constant surveillance in an apartment next door to the snack bar, where a motion sensitive light outside the door meant that she could not go outside unnoticed. After working for about two months, M's debt had almost doubled. This was because of the cost of board, HIV tests and what were called protection fees, as well as a hefty fine for giving the snack bar's telephone number to her parents. This sum naturally far exceeded the amount she had been able to earn, particularly as the accounting systems left a great deal to be desired.⁷⁹

The second story deals with forced labour as against sexual exploitation. Jayati and her husband were bonded labourers at a rice mill in India for more than 30 years. From 2 a.m. to 6 p.m. every day, they separated and boiled rice, often suffering burns, injuries and illnesses. The owner of the mill threatened to hurt them if they tried to leave. Their children were forced to leave school and work alongside them in the mill. Their grandchildren were born into bonded servitude. In 2005, Jayati and her family were finally freed with the help of

⁷⁹ See Susan Glazebrook "Human Rights in the Asia-Pacific Region" (Address to the AGM of the Wellington Women Lawyers' Association, 28 May 2007) at 7 < http://www.courtsofnz.govt.nz/speechpapers/Speech28-05-2007.pdf/at_download/file>.

NGOs and local authorities. She said after being freed “I never dreamt of a day like this in my life.”⁸⁰

The third story is from a book given to me by an organisation that helps trafficked children. The book is a simple publication describing the work of the organisation but it mainly lets the children speak for themselves by providing a selection of stories. I have chosen the story of a girl identified by her initial, K. This, in fact, is one of the less harrowing stories in the book. K came from a small West Bengali village. Her family consisted of two young brothers and her father who was a village priest. The father became ill and was diagnosed with cancer and this obviously put a major financial strain on the family. A family friend offered to get K work as a maid in Calcutta with a good family so that she would be able to support her father and brothers. K went with the friend and was taken to Calcutta where she was put into the care of an elderly woman.

She was given something to eat and she remembers nothing more until she woke to find herself in Mumbai. There she was put to work as a prostitute expected to service over 20 customers a day. This came to an end eventually after a raid on the brothel by the police. She had been hidden behind a false wall but took the risk of banging on the wall during the raid. Rescue came too late for K, however, as she was already HIV-positive. The heartbreaking part for me was the narrator recording that K is sure that the drugs she had been given since her rescue will cure her and that she will have a brighter future. She was then only 16 years old.

HIV and trafficking

In light of this last story it is pertinent to explore the link that exists between HIV transmission and human trafficking. As outlined by researchers for the Harvard School of Public Health, one of the most significant health consequences of sex trafficking is the risk of HIV infection. Inconsistent use of condoms demonstrated among men seeking commercial sex and survivor’s experiences of forced unprotected sex have been noted to constitute two distinct sources of HIV risk.⁸¹ Moreover, the high rates of HIV transmission among young girls trafficked for sexual exploitation has been attributed to the perpetuation of the

⁸⁰ *Trafficking in Persons Report*, above n 4, at 8.

⁸¹ Jay G. Silverman and others “HIV Prevalence and Predictors of Infection in Sex-Trafficked Nepalese Girls and Women” (2007) 298 JAMA 536 at 536.

misconceived notion that sex with virgin girls will both prevent and cure HIV.⁸² In a study conducted of the trafficking that takes place in India, it was found that a common motivation for traffickers who trafficked children was the high demand for virgin girls that exists amongst male clients. A large percentage of the traffickers surveyed said that clients demand virgin girls for safe sex.⁸³ This egregious exploitation of children gravely violates their fundamental human rights and quite clearly will rob them of their ability to lead a full and productive life.

The legal system and trafficking victims

The next story has been chosen to illustrate how the legal system can help trafficking victims but also how it can fail them. The first story occurred in New Zealand in 2001.⁸⁴ A Thai woman turned herself in to the border investigation group of the New Zealand Department of Immigration. She said that she and other Thai women had been told that for NZ\$10,000 they could get a job at a restaurant in Auckland. They agreed to pay that sum to a recruiting agent in Thailand at an interest rate of 36 percent.

When they were picked up at the airport on their arrival in New Zealand their money, return tickets and passports were taken from them. They were taken to live in a house with 14 other Thai women where they slept six to a room. Some \$150 a week in rent was added to their debt, even though rent on the whole house was only \$450 a week. Every day at 1 p.m. the women were picked up and taken to a brothel. Every night they were picked up at the brothel at 3 a.m. and brought back to the house, with all the money they had earned that night taken from them to repay their debt.

As a result of the woman's complaint, immigration officials obtained a warrant to search the house and the police accompanied those officials on the execution of the warrant. The women living in the house were removed from the house within a week and were, I understand,

⁸² P.M. Nair *A Report on Trafficking of Women and Children in India: 2002-2003* (2004) at 188. It is hard to countenance that the men really believe that they will be cured by this means. One is tempted to brand it as merely a cynical excuse for the exploitation of children.

⁸³ *Ibid* at 152.

⁸⁴ For a fuller discussion see Susan Coppedge "People Trafficking: An International Crisis fought at the Local Level" (2006) <http://www.fulbright.org.nz/voices/axford/docs/axford2006_coppedge.pdf>. Susan Coppedge is a US Federal Prosecutor, who reported on human trafficking in New Zealand. She was based at the Ministry of Justice and worked with the New Zealand Police and Immigration New Zealand, investigating recent New Zealand cases and laws passed to curtail and punish human trafficking, smuggling and commercial sexual exploitation in order to determine whether they are being effectively implemented by those in local law enforcement.

removed from the country. No case was ever brought against anyone, including the brothel owners. The police at that time considered that, without bondage or physical restraints, the women were free to come and go from the home and the brothel. They therefore did not think that they had any grounds for prosecution.

I hasten to add that this happened before the June 2002 amendments to the New Zealand Crimes Act.⁸⁵ Those amendments added the offences of people smuggling and people trafficking to the Act (in accordance with New Zealand's obligations under the Trafficking Protocol). The New Zealand police now would also be better educated on trafficking, which is also enhanced by the Plan of Action and an Inter-Agency approach.⁸⁶

However, I would suggest that the police were clearly wrong not to prosecute the 2001 case in New Zealand. They did not need the trafficking amendments to the Crimes Act to do so. It seems to me that there had been any number of ordinary offences committed. For example, fraud, obtaining money by deception, kidnapping⁸⁷ and possibly even theft of the victims' earnings.

A similar case the year before had, however, had an interesting legal aftermath, even if the prosecution that should have resulted did not eventuate. One woman pursued a civil action through the New Zealand Disputes Tribunal (which is a small claims tribunal) and was awarded the money that she had paid to her traffickers, supposedly for work in a restaurant in New Zealand. This case was the first civil claim made in New Zealand where money was successfully retrieved from traffickers who cheated a victim.⁸⁸

⁸⁵ In 2002, sections 98 B-F of the Crimes Act were introduced to deal with smuggling and trafficking of people. Because these specific sections only cover cross-border activity, there may be less scope for prosecutions under these provisions. Additionally in 2002, ss 7A and 7B of the Crimes Act, which provide for extraterritorial jurisdiction in respect of certain offences with transnational aspects, were introduced. It is, however, to be noted that the Crimes Act has other sections that govern behaviour that may be associated with trafficking such as s 208 (abduction for purposes of marriage or sexual connection), s 98 (dealing in slaves), and s 98AA (dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour).

⁸⁶ A table of responsibilities of the different departments can be found here: <<http://www.dol.govt.nz/publications/research/people-trafficking/action-items.asp>>. Nevertheless there consists to be a lack of identification of trafficking crimes and hence of prosecutions.

⁸⁷ A trafficked person often psychologically feels restrained even if no true physical barrier exists. Further, the lack of a passport in order to leave the country could be a form of physical restraint. There are also of course language barriers.

⁸⁸ "Money returned in sex trafficking case" *Tirohia, Quarterly Newsletter of the New Zealand Human Rights Commission* (April 2001) cited in Coppedge, above n 84, at 59. For discussion of a civil claim in England that was brought against traffickers see Anne O'Driscoll "AT v Dulghieru: Accounting for the Profits of Sex Trafficking" (2009) 40 VUWLR 695

The stories that have emerged from New Zealand illustrate the importance of educating those in the justice system so that they are aware that many of the behaviours associated with trafficking can in fact be sanctioned through different provisions in our Crimes Act. Furthermore, there is room for some creativity in using the legal system to sanction traffickers, as shown by the civil action taken.

Finally, the fact that the Thai women involved in the story from 2001 were sent back to their home country raises important issues with regard to the questions as to how trafficking victims can be adequately protected. It is vital that the courts ensure that the appropriate legal frameworks are used to ensure protection of victims. If victims are sent back to their home countries without being given any assistance, they are very likely to find themselves in the same situation and thus are at real risk of re-trafficking. Moreover, it must be borne in mind that victims who are sent back to their home countries are unavailable as witnesses.

Listening to the needs of victims

This brings me on to my next set of stories which illustrates the difficulties for victims even after they have been rescued. For instance a story from the United States Department of State report illustrates the risk of re-trafficking well. Waleed is 45. He was a bonded brick kiln worker in Pakistan until he was freed in 1997 by a historic Supreme Court decision that deemed bonded labour illegal. But he found it difficult to adjust to a life of freedom, not knowing how to support his family of six. Work at the kiln was the only life his family knew. So they went back. Ten years later, Waleed is once again in bondage, having accumulated more than US\$700 in debt. He, his wife, two young daughters, son, and daughter-in-law all work as brick makers. Together they make 2,000 bricks a day, for which they are paid US\$3. To cover their daily expenses - including food, electricity for a single 60-watt light bulb, and medical care for frequent mosquito-borne illnesses - the family takes more loans from the kiln owners and continues working to repay their debts.⁸⁹

Another story from that report shows the difficulty of the re-integration of trafficking victims into their communities. Xiao Ping was 20 and had spent most of her life in her small village in the Sichuan Province of China. She was thrilled when her new boyfriend offered to take her on a weekend trip to his hometown. But her boyfriend and his friends took her instead to

⁸⁹ *Trafficking in Persons Report* above n 4 at 11.

a desert village in the Inner Mongolia Autonomous Region and sold her to a farmer to be his wife. The farmer imprisoned Xiao Ping, beat her, and raped her for 32 months. In that time Xiao Ping grew depressed and homesick, and she became pregnant and had a son. Xiao Ping's family borrowed a substantial sum to pay for her rescue, but the farmer's family forced her to leave behind her six-month old baby. To cancel the debts, Xiao Ping married the man who provided the loan. But her husband regarded her as "stained goods" and the marriage did not last.⁹⁰

The final story is one told by the former UN Special Rapporteur on Violence against Women who tells the story of a group of women she met in Mumbai in November 2000.⁹¹ They explained to her that they belonged to a caste that traditionally gives their younger daughters into temple prostitution. They had left the temple for Mumbai in search of a better life. In Mumbai they earned enough money through prostitution to send money home to their parents who were caring for their children. Their main concerns were health protection and earning enough to give their children a good life, including good schooling.

They worked at night, played cards during the day and said they were reasonably happy. They certainly became extremely offended when it was suggested that a rehabilitation centre be set up and that they be trained for another occupation. They did not want to change occupation and they did not want the State or the police in their lives. They were, however, considering forming a trade union like the sex workers in Calcutta to ensure better conditions. This story provides a vivid illustration of the need for judges, and other organisations, to listen to victims and seek out the victims' own views on their needs.

This brings me to my final story. In 2002, while I was involved in preparing the report on trafficking for the ACJ, we had the opportunity to visit some NGOs in the Asian region who rescued trafficked children. On one occasion, we were being taken to visit a centre which housed some rescued children. On the way our guide said that she wanted to stop into another centre because a young rescued woman was going to be married the following day and she wanted to congratulate her. Well we duly drove into the centre and met the young woman who was having her hair and makeup done by the other women in the centre in preparation

⁹⁰ *Trafficking in Persons Report* above n 4 at 22.

⁹¹ Radhika Coomaraswamy "Fishing in the Stream of Migration: Modern Forms of Trafficking and Women's Freedom of Movement" (Address given to the International Association of Refugee Law Judges Conference, Wellington, 22–25 October 2002).

for the wedding. We were told that the NGO taught the rescued young women skills so they could find jobs in the outside world and did not need to return to prostitution.

This all of course sounded fine but I was uneasy. The marriage worried me. I asked about it. We were told that the young woman was marrying a young man that she had known before she was trafficked and that it was a love match with the full support of both sets of parents. Well I was still sceptical but I hope that was the case and that she was not swapping one form of bonded labour and abuse for another. But what was bothering me more was that when we were driving to the centre we had passed through a very tall fence with razor wire at the top.

On pressing our guide she explained that the young women in the centre were in detention because it was a country where prostitution was illegal and they were to be prosecuted. It also transpired that I was right to be uneasy about the marriage. It appears that marriage was one of the ways to ensure release from detention and, as I understood it, a discharge from prosecution. So there was a concern that the marriage was in some measure arguably another form of trafficking: effectively forced marriage sanctioned by the State.⁹²

What becomes clear from such a story is that trafficking victims are just that – victims and not criminals. Therefore, as judges we must be vigilant in trying to identify trafficking victims who might come before us in courts. Moreover, if we are uneasy about a situation then we should not hesitate to ask questions and strive to ensure that victims are given adequate protection.

What can judges do?

In light of the proliferation of trafficking activity that has occurred both in the Asia Pacific region and across the globe, it is vital that all relevant institutions and organisations, including courts, remain active in their attempts to combat human trafficking. I recognise that there will be some inherent limitations in the role of a judge and differences between what might be deemed appropriate in different jurisdictions but I make some suggestions as to possible actions that could be taken below.

Identifying and combating crimes associated with trafficking

⁹² I freely admit that I may have misunderstood what was occurring. I also stress that this was in 2002 and that now no doubt the young trafficked women would be recognised as victims and not criminals in that country also.

It seems to me that judges should play an active role in ensuring the application of national laws in order to combat trafficking. Regardless of the scope of legislation that specifically prohibits trafficking, judges should both be alert to and use national laws that prohibit actions commonly associated with the activity of trafficking. Even where there are no specific trafficking offences, traffickers must have committed a number of ordinary offences. The fact that offences have been committed in the course of trafficking a human being has to be a seriously aggravating factor for sentencing purposes. Trafficking is after all a form of slavery.

Judges should also be vigilant in attempting to identify instances of trafficking. It might be that you come to suspect that a person appearing before you is in actual fact a trafficker. They could, for example, come before you for labour law violations. In that case it must be our duty to report the matter in some way and ask that this be investigated.

Judges should also seek to ensure that appropriate sentences for trafficking offenders are imposed. As UNODC has outlined, the activity of trafficking will often result in a number of aggravating factors which must be taken into account in the sentencing process. Such aggravating factors can include: the use of weapons; the targeting of vulnerable victims; the use of narcotics to control the victim; and the fact that the offence was motivated by financial or material gain.⁹³ Where possible, reparation to the victim and confiscation of profits should be ordered. Moreover, judges should be wary of granting bail to alleged traffickers, given the very high risk of flight.

Protecting Victims

The judiciary can also play an important role in ensuring the adequate protection of victims of trafficking. It is well recognised that an essential factor in ensuring the protection of victims of trafficking is that victims must not be prosecuted for trafficking related offences.⁹⁴ As outlined by principle 7 of the UN Principles, trafficked persons should not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in illegal activities to the extent that such involvement is a direct consequence of their situation as a trafficked person. It is vital that

⁹³ United Nations Office of Drugs and Crime *Anti-Human Trafficking Manual for Criminal Justice Practitioners* at 13. See for a recent example of harsh sentences in the UK “Sentencing for Trafficking” *R v Ducan, Arslan, Facuna and Dolce* [2009] EWCA Crim 2436.

⁹⁴ United Nations Office on Drugs *Toolkit to Combat Trafficking in Persons* (2006) at 103, *Global Report on Trafficking in Persons* above n 17 at 22.

decision-makers around the world bear this principle in mind when faced with cases that may have originated from the activity of human trafficking. For example, in countries where prostitution is illegal, judges should attempt to ascertain whether the person charged has voluntarily entered into prostitution. It is difficult to see how prosecution of a coerced victim can be justified. At the least, any penalties should concentrate on rehabilitation rather than punishment.⁹⁵

Steps should also be taken by the courts to protect victims in situations where trafficking offenders are on trial. As acknowledged by UNODC, a number of measures can be taken at the trial stage to protect the victims of trafficking. For instance, the use of testimony by video-link can protect the witness from direct confrontation with and intimidation by the accused.⁹⁶ Moreover, additional measures such as video-linked testimonies combined with image and/or voice altering devices can protect the physical security of the trafficking victim.⁹⁷

We must be also vigilant in our courtrooms to identify anyone who might be a victim of trafficking. Such people could come to court for a variety of reasons – immigration issues, petty crimes, prostitution (in countries where that is illegal), or as witnesses perhaps in assault or domestic violence cases. If we do have any suspicions then it has to be our duty to ask further questions or to ask someone else to do so, such as the lawyer acting for the person accompanied by a social worker, who is expert in trafficking matters.

It might be that you can see someone in court obviously controlling the victim. You could then perhaps clear the court to make any further inquiries and make sure that the person is excluded from any subsequent interview even if they pose as a supporting partner. Active measures should be taken by the judiciary when it is clear that criminal activity has occurred as a direct consequence of trafficking. For instance, where it is evident that an accused is a victim of trafficking, victim co-operation with the police should be encouraged, and the step of adjourning the case to facilitate such co-operation is recommended.

⁹⁵ In the course of discussion during the oral presentation at the IAWJ conference, reference was made to the phenomenon of trafficking victims becoming themselves traffickers exploiting other victims. The question was asked as to when these persons ceased to be victims and became criminals. The answer I gave was that they will of course also become criminals when they involve themselves in exploiting others. However, they will never cease to be victims, given the coercion or fraud they suffered to get them into that position (and any continuing coercion would of course diminish their criminality). This applies in particular to children.

⁹⁶ Ibid at 96.

⁹⁷ Ibid at 97.

It seems to me that we need as judges to inform ourselves of the services⁹⁸ that might be available to victims of trafficking and to forge links with those services, whether provided by NGOs or the State and, if these seem inadequate, to say so (in the manner and to the extent that it might be appropriate in your jurisdiction for judges to do this). Attempts should be made, to the extent that it is appropriate, to put the victim in contact with appropriate rehabilitative services.

If we are legally obliged to send victims back to their home countries then at least we can inquire whether they will have access to proper services from the State or NGOs when they are sent back, including counselling and medical services, and that they will be protected from being trafficked again. If possible we could refuse to send a person back without being assured services are available. In addition, there might need to be services to the family and the community to allow re-integration (and protect against re-trafficking).

We also need to think of creative ways that victims might be protected. A judge could examine whether the victim could feasibly fall within the scope of the definition of a refugee provided by the 1951 Convention Relating to the Status of Refugees, in order to benefit from the obligation of *non-refoulement* encompassed within the Convention.⁹⁹ A judge could also consider other international human rights obligations which might allow victims to stay in the destination country and not be sent back to the home country if they do not want to go. The use of protections under employment laws could also be considered (as well as other civil remedies, such as damages or accounts of profits).

Judges should also remain cognisant of international human rights instruments outside the Trafficking Protocol that may assist in the protection of victims and prevention of trafficking. For instance, in the European context, the European Court of Human Rights has held that the Convention has to be interpreted as a living instrument and therefore that trafficking in human beings falls within the scope of art 4 of the European Convention on Human Rights which prohibits slavery, servitude and forced labour.¹⁰⁰ It has recently been held that art 4

⁹⁸ For example, medical, housing, trauma counselling, immigration services, resettlement services and vocational training.

⁹⁹ See Jenna Shearer Demir “The Trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?” (2003) <http://www.jha.ac/articles/a115.pdf>.

¹⁰⁰ Rantsev v. Cyprus and Russia Application no 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, <<http://www.unhcr.org/refworld/docid/4b4f0b5a2.html>> Siliadin v. France Application no 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005,

requires States to put in place adequate measures regulating businesses often used as a cover for human trafficking and if authorities are aware of a situation of human trafficking or a risk that an individual will get into such a situation, it will be obliged to take measures such as investigating situations of human trafficking.¹⁰¹

The Need for Education and Cooperation

Judges have a role in educating themselves and others (including the public), about the crime of human trafficking. Of course, in order for the judiciary to take such measures it is vital that judicial awareness about the differing facets of trafficking exists. The fundamental need for judicial education in this field cannot be under-emphasised. As noted by Gallagher and Holmes, international practice has illustrated that there is an inherent value in judges and prosecutors receiving awareness training on trafficking. As to what such training should consist of, it has been suggested that the focus of such training should be on the applicable legal framework surrounding trafficking and related offences, the roles and responsibilities of the judiciary and prosecutors and on best practice.¹⁰² Increased judicial awareness can be further enhanced through cooperation both with judges across the world and agencies that work with trafficked persons.

Finally, cooperation is another key aspect in the fight against trafficking. In most of our countries there will be some government action to try to combat trafficking as political awareness has grown over recent years. To the extent appropriate in our particular jurisdictions I think that judges should have some role in contributing to the content of government action plans as they have a particular perspective to add, given their role in the criminal justice system. Judges should also be prepared to cooperate and share information about best practice with each other.

The IAWJ could have a real role to play in this regard. The IAWJ could for example collect cases and best practices from its members. A network of members could be established so that cross-border cooperation could be encouraged in trafficking cases. It could also build networks with other organisations dedicated to combat trafficking. Cross border cooperation

<<http://www.unhcr.org/refworld/docid/4406f0df4.html>> (Pending cases: L R v United Kingdom Application no 49113/09 and Lilyana Sashkova Milanova and Others v Italy and Bulgaria Application no 40020/03).

¹⁰¹ Antoine Buyse “Landmark Judgment on Human Trafficking” (January 2010)

<<http://echrblog.blogspot.com/2010/01/landmark-judgment-on-human-trafficking.html>>.

¹⁰² Gallagher and Holmes above n 27 at 328.

is a key aspect in a globalized crime such as trafficking and the IAWJ can use existing collaborations to raise awareness for this crime and how to deal with it. Combined with measures designed to increase the efficacy of investigation, prosecution, and conviction rates of trafficking crimes, an adequately designed penalty regime should result in deterrence considering the costs and risks associated with the crime of human trafficking.

Conclusion

As many fundamental human rights are breached through the crime of human trafficking, it is imperative that as judges we remain committed to combating this egregious crime. This requires a willingness to educate ourselves, to cooperate with each other and to ensure that we make use of our national legal frameworks not only to ensure the denunciation of all activities associated with trafficking but that all victims are adequately protected. All judges can play an important role in the fight against trafficking and our duty in this regard should not be forgotten.