

# **Comparative Analysis of the Elements of Anti-Trafficking Legislation in the Asia-Pacific-U.S. Region: What Countries in the Region Have to do to Comply with the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.**

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The Human Rights Challenge of Globalization in Asia-Pacific-US:  
The Trafficking in Persons, Especially Women and Children

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The Asia-Pacific countries that I will address include: Cambodia, China, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, the Republic of Korea, Singapore, Thailand and Vietnam.

Of these 12 Asia-Pacific countries:

- Five have already signed the Protocol. These countries are Cambodia, Indonesia, the Philippines, the Republic of Korea and Thailand.
- Only one country, the Philippines, has ratified the Protocol, on May 28, 2002.

Article 17 of the Protocol requires 40 instruments of ratification. Last time I checked the status of ratification 19 countries have already ratified. That means we only need 21 more ratifications. Reaching this number is significant because the Protocol is a significant international legal instrument for the anti-trafficking movement.

To me the Protocol is significant in two ways:

- First, the Protocol moved us from addressing trafficking as a prostitution related activity, which was established by the 1949 Convention on the Suppression of Traffic in Persons and Exploitation of Prostitution of Others; to recognizing a more comprehensive definition of what we consider trafficking.
- Second, the Protocol moved us from criminalizing the act of the trafficked person to treating such a person as a victim.

To me these are the two most important accomplishments created by this international consensus of the Protocol.

What I would like to do is to address these two aspects and examine whether existing anti-trafficking laws in the Asia-Pacific region are in compliance with the mandate of the Protocol.

- Do they recognize all forms of trafficking as criminal offenses?
- Do they treat the trafficked person as a victim?

My first issue is the shift from addressing trafficking as a prostitution related activity to recognizing trafficking as a separate offense which covers trafficking for other purposes.

The Protocol talks about 7 forms of trafficking:

1. Trafficking for the exploitation of prostitution of others.
2. Trafficking for other forms of sexual exploitation
3. Trafficking for forced labor
4. Trafficking to place someone in a condition of servitude
5. Trafficking for the purpose of enslavement of someone
6. Trafficking for purposes similar to slavery; and
7. Trafficking for organs, or the removal of organs from human beings.

That is very different than the language of the 1949 convention, which in Article 1 talks about punishing any person who "procures, entices or leads away for the purposes of prostitution, another person, or exploits the prostitution of another person."

These forms of trafficking must be criminalized by the legal system. The Protocol does not address any of these forms specifically, however they are all included under the seven forms of exploitation.

Forced marriage is a form of slavery which the Protocol does not define, but refers to the 1956 Supplementary Convention on Slavery, where marriage is defined as a form of slavery if:

- A husband is paying a sum of money in consideration for the marriage to the parents or the wife;
- The wife becomes transferable upon death of the husband, or
- The wife may be inherited upon death of the husband.

Similarly, sex tourism and trafficking for the purpose of pornography, though not specifically mentioned, can be considered a part of "other forms of sexual exploitation."

The question becomes whether the legislation in countries of the Asia-Pacific region have made a shift from the language of the 1949 convention to the language of the 2000 Protocol, especially since the Asia-Pacific region suffers from these forms of exploitation.

Many women are trafficked within China to be sold as brides. They are abducted and taken to provinces that are usually far from their homes and then sold to men who have had trouble finding local women to marry.

The Philippines and Thailand are some of the primary Asian destination countries for organized sex tours. The Philippines is an international sex tourist destination, an estimated 300,000 Japanese take sex tours of the Philippines every year.

Singapore, a tier 2 country, is also a source of sex tourists. Sex tourism fuels the trafficking of Indonesian women, who are sold by their parents into sex tourism.

In 1999, 80 percent of the world's pornographic literature was made in Japan.

Many Indonesians and Filipinos are victims of domestic service working as maids in the maid trade in countries of the Middle East and Malaysia. It is reported that hundreds of thousands of women from Indonesia work abroad in these countries as domestic servants, 70 percent of them are women.

Organ trafficking out of China has also been documented.

How do legal systems in the region respond to these problems? Are these forms of exploitation recognized as forms of trafficking and as offenses? The answer to this question is that some countries have specific anti-trafficking laws, but most countries do not criminalize all forms of trafficking.

Cambodia is placed in tier 3. The Trafficking in Persons Report explicitly states that "Cambodia does not have a law against all forms of trafficking in persons, but traffickers have been prosecuted under related laws." Although the 1996 law on Suppression of the Kidnapping, Trafficking, and Exploitation of Human Persons explicitly prohibits "the kidnapping of human persons for trafficking, sale or for prostitution and exploitation of human persons, inside or outside the Kingdom of Cambodia."

In placing Indonesia in tier 3 the Trafficking in Persons Report explicitly states, "Indonesia does not have a law against all forms of trafficking in persons."

In Singapore, there is no specific law against trafficking in persons, however such acts are punishable under laws that prohibit,

- The trafficking of women and girls into the country for purposes of prostitution
- Unlawful custody or control of children
- Wrongful confinement; and
- Trafficking of illegal immigrants

More than 100 cases of trafficking were prosecuted in the Republic of Korea, a tier 1 country, although there is no specific anti-trafficking law. Traffickers have been tried for visa fraud for the purpose of

trafficking in aliens.

But on the other hand, there is some recognition of specific forms of trafficking. The Penal Code of Burma, in Article 366, prohibits "forced marriages", i.e. prohibits kidnapping or abducting a woman "with intent that she maybe compelled, or knowing it to be likely that she will be compelled to marry any person against her will."

The criminal code of Vietnam, a tier 2 country, penalizes anyone who forces another to enter into marriage against his or her will. Punishment is imprisonment for up to 3 years and penalizes anyone who arranges and early marriage, that is the marriage of a person who is not of legal age to marry. Punishment is imprisonment for up to 2 years.

The Labor Law of Cambodia prohibits debt bondage, "hiring people for work to pay off their debts." Similarly, the 1995 Migrant Workers and Overseas Filipinas Act penalizes "illegal recruitment" with up to 6 years of imprisonment, and provides in section 4 for travel advisory and information dissemination. The United States Child Sexual Prevention Act of 1994, which is currently subject to amendment by the 2002 Sex Tourism Prohibition Improvement Act, applies not only to a person who is traveling abroad to engage in sex with a child but also to the travel tour operator.

The legal responses of a legal system differ in countries of destination as opposed to countries of origin. However, the point here is the legal response must be comprehensive to address all forms of trafficking.

Another problem is enforcement. Thailand has a law against trafficking in women and children but investigations and prosecutions have been limited.

Recognizing trafficking as a crime is not enough; the legal system must also recognize trafficking as a serious crime. The "parent convention" against transnational organized crime defines a serious crime as any crime the punishment of which is four years or more.

I have no problems with the penalties provided in most of the countries of the Asia-Pacific region.

In Burma punishment is up to 10 years imprisonment.

In Cambodia punishment is 5 to 10 years, which is enhanced to 10 to 20 years if the offense is committed against a minor younger than 15.

In Indonesia punishment for trafficking is imprisonment up to 6 years.

In Malaysia punishment for trafficking is imprisonment for up to 5 years.

In Singapore the punishment for trafficking is also imprisonment for up to 5 years.

Thailand's Penal Code provides for an enhanced penalty of up to 15 years imprisonment if the victim is between 15 and 18 years old, and up to 20 years if the victim is under the age of 15.

The Penal Code of Vietnam also provides for an enhanced penalty of to 20 years if the trafficking is transnational, i.e. for the purpose of sending a woman to a foreign country, or is organized, i.e. an activity which is carried out by 3 or more persons, as opposed to an individual.

The Protocol is silent as to the issue of forfeiture of assets although an early draft provided that "States Parties shall take all necessary and appropriate measures to allow the seizure of confiscation of gains obtained by the criminal organizations from offenses covered by this Protocol. The proceeds from such seizure and confiscation shall be used to defray the costs of providing due assistance to the victim." But the Parent Convention does state in article 14(2) "...States Parties...shall...give priority consideration to returning the confiscated proceeds of crime or property to the requesting party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners."

The 1999 Anti-Money Laundering legislation of Thailand explicitly authorizes confiscation of any proceeds from prostitution or other illegal activities.

In Singapore, the 1999 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act provides for the confiscation of the proceeds of crimes.

The 1997 Anti-Corruption Act of Malaysia criminalizes soliciting or accepting any gratification in consideration for doing or refraining from doing an act in relation to a public official's public duties and punishes such offense for up to 20 years imprisonment.

The Penal Code of Thailand has expanded the extraterritorial jurisdiction of the law to cover indecent sexual acts and trafficking offenses, provided in sections 282-283 of the Penal Code, irrespective of where such offenses are committed.

As to prevention, the Protocol calls on States Parties to "establish comprehensive policies and programs and other measures...to prevent and combat trafficking in persons." There have been some prevention efforts in the Asia-Pacific region establishing a government task force or a public awareness campaign.

However, two issues are of concern to me. First, in the public awareness campaigns, are we including a warning against the dangers of prostitution as the 1949 convention specifies, or only a warning against the dangers of trafficking as the 2000 Protocol mandates? Unlike the 1949 Convention that provides for "measures for the prevention of prostitution" in Article 16, which the Convention regarded as "incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community", the Protocol shifts the focus to the "prevention of trafficking" in Article 9.

The second, is what are we doing about demand? The Protocol mandates that countries must do something about demand. The supply of trafficking is not addressed by the Protocol, which focuses instead on the demand side mandating the states to adopt measures "to discourage the demand that fosters all forms of exploitation of persons especially women and children, that leads to trafficking" (Article 9(5)).

On the protection level, the Protocol mandates that States Parties provide, or consider providing as appropriate and as permitted by domestic laws appropriate assistance and protection.

The Trafficking Act in Thailand provides for "appropriate assistance" to victims of trafficking, including food, primary shelter, and repatriation to their original country.

The Women and Girls Protection Act in Malaysia provides for removal of a woman or girl in prostitution to a "place of refuge", especially if she is "in urgent need of protection as there is reasonable cause to believe that she is being threatened or intimidated for the purpose of prostitution. The Act affords the same protection to a trafficked woman who "has been brought into or is sent out of Malaysia" for the purpose of prostitution.

In Singapore, the Penal Code provides for removal of a woman or girl in need of protection to place of safety.

Japan's Prostitution Prevention Law mandates the establishment of "females' consultative offices" to respond to females needing protection to carry out necessary investigation into such matters, and to provide such females with "temporary protection". In addition to functional training, the offices provide medical treatment and psychological counseling.

But the real problem is compliance with the Protocol mandate to "consider adopting legislation or other appropriate measures that permit victims of trafficking in persons to remain in its territory temporarily or permanently in appropriate cases giving appropriate consideration to humanitarian and compassionate factors."

Immigration laws in countries of the Asia-Pacific region, however, consider alien victims of trafficking to be in violation of the immigration law.

This last August 5, 2002, the Cambodian Court charged victims of trafficking with illegal immigration and issued them prison sentences.

Malaysia, a tier 2 country, treats foreign victims of trafficking as immigration offenders, detaining and deporting them. However, foreign trafficking victims may obtain special permission to remain in the country to testify in criminal proceedings.

In the Philippines, a tier 2 country, trafficked persons are rarely detained, jailed or deported, and they may request temporary residence status.

The United States Trafficking in Persons Report, placing Burma in tier 3, explicitly states "victims of trafficking for prostitution may be treated as criminals and incarcerated or fined in some cases."

The Protocol is explicit in providing that "each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offenses established in accordance with this protocol." So you have to shift the focus when you address the issue of prohibited immigrant from the women in prostitution to the trafficker, the person implicated in the commission of the offense of trafficking.

The Immigration Act of Singapore considers a "prohibited immigrant" one living on or receiving the proceeds of prostitution or one who procures or attempts to bring into Singapore women or girls for the purpose of prostitution. We want to shift the focus here from the person in prostitution to the person who traffics the person in prostitution. The trafficker must be the "prohibited immigrant." Admission or entry into a country must be prohibited if the alien has committed an act of trafficking.

Trafficked persons must be treated as victims of a crime, not criminals. I would have liked to see the Protocol define a victim for us. Although the Protocol treats a trafficked person as a victim it does not define what a victim is. The Protocol talks about trafficked persons as victims, but the Protocol does not define for us the concept of a victim of trafficking. However, the concept of a victim of trafficking as a victim of a crime has been defined by the U.N. Declaration of the Basic Principles of Justice for Victims of Crimes of 1985, which states that victims are "persons who, individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states."

I would also like to see the Protocol providing for the principle of the non-criminalization of the acts of a trafficked victim. Unfortunately the Protocol was silent in this regard. This is a problem, providing for the principle of non-criminalization of the conduct of the trafficked victim, whether it relates to:

- Illegal entry into a country
- Working without the proper permit; or
- Prostitution

In conclusion, while there have been some efforts to combat trafficking in countries of the Asia-Pacific region, there is a lot to be done. Whether reforming existing laws, or providing for preventative campaigns or assisting victims of trafficking with the appropriate protective measures.