



A Comparative Analysis of the Philippine and Malaysian Legal Systems against Trafficking in Persons

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ABSTRACT

The paper aims to analyze the issue of human trafficking in the Philippines and Malaysia from the viewpoint of the legal transplant theory and holistic development perspectives. It clarifies how the international legal framework on trafficking encapsulated in the Palermo Protocol patterned after United States "Three P" model was transplanted into the two countries. It analyzes how their anti-trafficking laws were implemented in response to the former. It evaluates their efforts against trafficking with reference to the UN Toolkit to Combat Trafficking. It proves the need for a holistic approach to development policy formulation for eliminating the economic and social conditions that promote trafficking and that the US framework with emphasis on prosecution diverts attention away from this. It concludes that the trafficking laws in both countries being legal transplants may account for its ineffectiveness.

I. INTRODUCTION

The trafficking of human beings affects virtually every nation on the face of the globe. Countries can either be a sending country, a transit country or a receiving country (United Nations Office on Drugs and Crime, 2011). "Accurate data is difficult to obtain, however anecdotal evidence, discussions with practitioners, and agreed estimations suggest that trafficking, particularly in women and in children, has increased in scope and magnitude, especially for prostitution and other forms of sexual exploitation" (U.N. Development Fund for Women and the U.N. Inter-Agency Project on Human Trafficking, 2002: 5). Sexual exploitation seems to be the most documented type of trafficking and accounts for "70% of the documented cases followed by forced labor which accounts for 18%. Other forms of trafficking like forced or bonded labor, domestic servitude, forced marriage, organ removal and exploitation of children in

begging, sex trade and warfare may be “under-reported” (United Nations Office on Drug and Crime, 2009 Global Reports on Trafficking in Persons, 2009:6). “The largest number of victims trafficked internationally are believed to come from South and Southeast Asia.” (Ribando, 2007:6). According to the U.S State Department, there are an estimated 225,000 women and children who have been trafficked in Southeast Asia. (Ribando, 2007:6)

Organized crime groups such as the Italian *Camorra*, the Chinese *Triads*, the Russian, *Mafia* and the Japanese *Yakuza*, are the trafficking syndicates that link and coordinate with local counterparts in origin, transit and destination countries, to provide transportation, safe houses, local contacts and documentation. (Miko, 2009:3)

It was only in the last 15 years that a heightened transnational awareness of the issue on trafficking in persons began (United Nations Office on Drugs and Crime, 2011) and culminated in the signing of the new UN Convention against Transnational Crime by 141 countries gathered in Palermo, Italy in December 2000 (United Nations Office on Drugs and Crime, 2011). Two months prior to that or on October 28, 2000, the United States promulgated its own comprehensive domestic anti-trafficking legislation – the Trafficking Victims Protection Act of 2000 (TVPA). It was also a couple of weeks before the UN General Assembly adopted the Palermo Protocol (Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children) which was signed by 105 countries.

The Philippines signed both the Convention and the Protocol on December 14, 2000 and ratified it on 28 May 2002. The United States signed the Convention and Protocol with reservations on December 13, 2000 and ratified the same on November 3, 2005. (United Nations Office on Drugs and Crime, 2011). Malaysia acceded to both the Convention and the Protocol with reservations only on February 26, 2009, two years after it established its own law on Trafficking in Persons. (United Nations Treaty Collection, n.d.)

The Convention and the Protocol are the first legally binding international instruments in the field of trafficking in persons. There were international instruments prohibiting slavery such as the League of Nations Slavery Convention of 1926 and others (United Nations Treaty Collection, 2010) which may still be applicable but in recent times the trend in exploitation of people shifted globally from chattel slavery to trafficking in persons—an evolution from ownership and control to movement and commerce (Rassam, 2005:815). Trafficking in persons is now an act of transnational organized crime. It is likewise considered a crime against humanity, according to the newly ratified Rome Statute of International Criminal Court (Rome Statute of the International Criminal Court, 1998:n.d.).



The Palermo Protocol has a “three P” agenda advocating combined efforts on prevention, prosecution and protection of trafficked persons, (U.N. Doc. A/53/383, n.d.) believed to be advocated by the United States. (Potts Jr., 2003:35) In fact, the aforementioned “three P” paradigm has been promoted by the United States since the issuance of President Bill Clinton’s Executive Memorandum on the Trafficking of Women and Children in March 11, 1998, two years before it enacted its own anti-trafficking law, the Trafficking Victims Protection Act (TVPA) of 2000 (US State Department, 2010:13). The said directive established the U.S.-government-wide anti-trafficking strategy of prevention, protection and support for victims, and prosecution of traffickers. In January 1999, the United States and Argentina introduced the first draft of the “Trafficking in Persons Protocol” to the international community. (Ribando, 2008:21) This draft of course embodied the United States formula known as the “three P” agenda. In December of 2000, two months after the TVPA was enacted to law in October 28, 2000, the United States State Department successfully persuaded eighty five countries to sign the Palermo Protocol that necessarily mirrored the “three P” model. (Tiefenbrun, 2007:24).

The mandatory provisions of the Palermo Protocol require signatories to criminalize trafficking and enact border and security measures. It also contains terms regarding the protection and assistance to victims of trafficking but these are discretionary. The Protocol only requires states, for example, to “consider implementing measures to provide for the physical, psychological, and social recovery of victims of trafficking,” and to “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases”. (Potts Jr., 2003:228)

The Philippines is the first Southeast Asian country to pass a national law on trafficking in persons (Solidarity Philippines Australia Network, 2003) while Malaysia is among those countries that just recently promulgated its domestic law on human trafficking. (Humantrafficking.org 2008) Malaysia is more economically developed than the Philippines. (Villegas 2009) In view of the aforementioned factors, this paper aims to analyze the legal systems against trafficking in persons of Malaysia and the Philippines to note similarities and differences in the enforcement and implementation of its domestic trafficking laws. The overall objective is to prove that there is a need for a holistic approach to development policy formulation to eliminate the economic and social conditions that promote the progress of human trafficking. It will likewise endeavor to show that the both the Philippine and Malaysian domestic laws on trafficking are legal transplants, which may account for some of its ineffectiveness.

The term legal transplant was coined by the legal scholar W.A.J. 'Alan' Watson , to indicate the moving of a rule or a system of law from one country to another. (Watson, 1974:29) The notion of legal transplantation is diffusion - based and

according to this concept most changes in most legal systems occur as the result of borrowing. (Watson, 1974:29)

According to contemporary legal transplant scholarship, the state (particularly the legislative branch) is the major conveyor of foreign law, holding the power over whether and how to transplant. The transplanted objects are usually formal law codified in a legal system. The transplant motivations are normally associated with political or governmental functions, such as regulating a new national problem, pursuing foreign policy interests, or gaining governmental legitimacy (Graziadei, 2009:723).

Part I of this article begins with the human trafficking scenario, observing the development of international legal instruments to address the problem. Part II provides an overview of the trafficking problem in the Philippines and Malaysia. Part III describes the legal framework of both Malaysia and the Philippines. Part IV describes the journey of both countries in their fight against trafficking evaluating their efforts using the UN Toolkit to Combat Trafficking as a guide and/or standard (United Nations Office on Drugs and Crime, Toolkit to Combat Trafficking in Persons, 2006:11). This portion of the paper is divided into three parts following the “three P” agenda found in the Palermo Protocol. It hopes to uncover the difficulties encountered by a developing and underdeveloped country in Asia, Malaysia and the Philippines respectively, in trying to successfully implement the foreign US “three P” model in their local milieus.

The UN Toolkit to Combat Trafficking was prepared by United Nations Office on Drugs and Crime in April of 2006, after the Philippines had signed and ratified the Palermo Protocol and passed its own domestic laws on trafficking and a year before Malaysia passed its own national law on trafficking in persons. The toolkit presents a selection of conceptual, legislative and organizational tools used in different parts of the world. It suggests ways in which national governments can develop a comprehensive strategy to address the problem of trafficking in persons. (United Nations Office on Drugs and Crime 2006:11)

The last part of this article concludes that the model United States framework with its “three P” agenda against trafficking in persons conceptualized as early as 1998, proposed to the international community in a draft in 1999 and concretized in the TVPA in October 2000 was encapsulated in the Palermo Protocol in December 2000 and transplanted into the Philippines and Malaysia after they signed the same. It will likewise find that the said US “three P” model framework with its strong emphasis on prosecution of offenders diverts attention away from underlying root causes of trafficking and does not utilize a holistic approach in finding a solution to human trafficking.



II. THE TRAFFICKING PROBLEM IN THE PHILIPPINES AND MALAYSIA: AN OVERVIEW

According to the 2009 Trafficking in Persons Report (TIPS) prepared by the US State Department, the “Philippines is a source, transit, and destination country for men, women, and children trafficked for commercial sexual exploitation and forced labor” (U.S. Dept. of State, Trafficking in Persons Report 2009: 239, 241).

Filipinos are trafficked for labor and sexual exploitation to Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain, Malaysia, Hong Kong, Singapore, Japan, South Africa, North America, and Europe. The government and NGO estimates on the number of women trafficked range from 300,000 to 400,000 and the number of children trafficked from 60,000 to 100,000 (U.S. Department of State, 2008 Human Rights Report, 2008:24).

Because of its porous borders, the Philippines is likewise a transit country for victims trafficked from China (U.S. Department of State, 2008 Human Rights Report, 2008:24) and a destination country for a small number of women who are trafficked for sexual exploitation from China, South Korea, Japan, and Russia. (U.S. Dept. of State, Trafficking in Persons Report 2009: 239, 241)

The Philippine concern on trafficking is anchored on the fact that many Filipino men and women voluntarily migrate to work abroad and they likely fall prey to human trafficking or are coerced into exploitative conditions. (Vecchio, 2008:2) The most common scheme of trafficking Filipinos to foreign countries is recruitment for job placement. Despite the existence of legal channels for overseas employment, intermediaries who offer their services for expeditious but illegal alternatives continue to exist. (Leones & Caparas, 2001:3) This fact coupled with the manufacture and availability of high quality fake travel documents have contributed immensely to the growth of human trafficking. (Leones & Caparas, 2001:29)

Malaysia on the other hand, is primarily a destination country for women and children trafficked for the sex trade and for willing migrant workers from most of Southeast Asia including the Philippines. Many victims voluntarily travel to Malaysia to work in factories, in construction and the agricultural sectors and as domestic servants, but are later coerced into debt bondage or subjected to conditions of involuntary servitude by Malaysian employers. Legitimate recruitment agencies often serve as fronts for trafficking. Among the victims of forced labor are Burmese migrants registered with the United Nations as refugees but whose status are not recognized as such by the Malaysian government, because the latter has not signed the UN Convention Protocol Relating to the Status of Refugees (U.S. Department of State, Trafficking in Persons Report 2009, 2009:242).

There are widespread reports of Malaysian immigration authorities selling off Burmese refugees to Thai traffickers along the Malaysian-Thailand border where the latter are taken for deportation. Deportees can pay money to smugglers who will return them to Malaysia undetected while the rest are dumped literally into the hands of criminal syndicates for labor or sexual exploitation (U.S. Senate 111th Congress, 2009:14). In January of 2010, the US Senate Foreign Relations Committee drew attention to the trafficking of migrants and refugees at the Malaysia-Thai border. They highlighted the fact that Malaysian law enforcement officials are complicit in the “sale” of people to human smugglers/traffickers (U.S. Senate 111th Congress, 2009:10).

There are also approximately 300,000 domestic workers, most of them from Indonesia, who are employed in Malaysia. The two countries are presently revising a 2006 Memorandum of Understanding (MOU), regulating migration of domestic workers that authorizes Malaysian employers to confiscate and keep the passport of the domestic employee throughout the term of employment.

NGO reports and complaints from domestic workers of nonpayment of wages including a series of high-profile abuse cases in 2009 resulted to the suspension by Indonesia of the migration of domestic workers to Malaysia until the MOU is amended or replaced (Office of the U.N. High Commissioner for Refugee, 2010).

To a lesser extent Malaysia is also a source country for women of Chinese ethnicity and children trafficked for prostitution and a transit country for men, women and children trafficked for forced labor. (U.S. Department of State, Trafficking in Persons Report 2009, 2009:197)

The US State Department bewailed the fact that the number of traffickers prosecuted in Malaysia are negligible and that the Malaysian Government offers shelters but no legal alternatives to repatriation for victims who face hardship or retribution in their country. Furthermore, the Malaysian government does not adequately identify its trafficking victims and most illegal migrants were deported or imprisoned without identification.

The 2009 State Department report concluded that "as a regional economic leader approaching developed nation status, Malaysia has the resources and government infrastructure to do more in addressing trafficking in persons." Malaysia has accused the United States of unfair treatment over its decision to re-list the country on a trafficking blacklist in its 2010 Trafficking in Persons Report (AFP Google News, 2009). A country that appears on the blacklist, for two consecutive years, can be subject to US sanctions described in Part III. This was the third time Malaysia has been singled out for its record on human trafficking. It was first included in the State Department



blacklist in 2001 and again in 2007, but was removed from the list in 2008. (Sulekha.Com News Hopper, 2009).

III. LEGAL FRAMEWORKS TO COMBAT TRAFFICKING IN PERSONS OF THE PHILIPPINES AND MALAYSIA

The foremost intention of the Palermo Protocol was to create a global language in defining trafficking in persons and to jumpstart domestic legislation on trafficking. (U.N. Document A/53/383, 2000).

A responsive step was then taken by the Philippine Congress and Republic Act 9208, the Anti-Trafficking in Persons Act of 2003 was promulgated on 26 May 2003. The Malaysian House of Representatives likewise passed Act 670, an Anti-Trafficking in Persons Act on July 26, 2007 (ATIP 2007), two years before its' accession (United Nations Treaty Series, 1969: Vol. 1155) with accompanying reservations, to the Convention and its supplementary Protocol (Humantrafficking.Org., 2006) The law was fully implemented only in late February 2008. (U.S. Dept. of State Trafficking in Persons Report 2008: 174).

Article 3 of the Palermo Protocol defines trafficking in persons as: "The recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation" (U.N. Doc. A/53/383, 2000).

Both the domestic laws of the Philippines (RA 9208) and Malaysia (Act 670), substantially followed the aforementioned definition of trafficking found in the Protocol and the "three P" model it promotes. Both statutes likewise increased the criminal consequences for traffickers. Both laws also adopted the representation model incorporating the full partnership of civil society organizations in governments' anti-trafficking efforts and the inclusion of representatives of non-governmental organizations concerned with the issue of trafficking as part of a national inter-agency body tasked with implementing anti-trafficking policies. Lastly, both laws makes consent of the trafficked victim irrelevant in all cases.

One of the unique features of the Philippine law on trafficking in persons is that the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall also be considered as "trafficking in persons" even if it does not involve any of the means set forth in the Protocol."(Philippine Republic Act No.9208, 2003). The other salient feature of the law is the creation of an Inter-Agency Council

against Trafficking (IACAT). This council consists of representatives from various agencies involved in trafficking and is charged, with the formulation of a comprehensive anti-trafficking strategy; the implementation and monitoring of such a strategy; and coordination between various agencies. (Republic Act No. 9208, 2003).

The Malaysian Congress enacted Act 670, the Anti-Trafficking in Persons Act of 2007 or ATIP 2007. It makes punishable the specific offense of trafficking in children and profiting from the exploitation of a trafficked person. (Laws of Malaysia, Act 670, 2007: 11-14) ATIP 2007 likewise established an interagency National Council for Anti-Trafficking in Persons, which includes representatives from civil society. The Council is tasked to coordinate the implementation of this ATIP 2007, formulate policies and programs to prevent and suppress trafficking in persons, formulating protective programs for trafficked persons and initiate education programs to increase public awareness of the causes and consequences of trafficking in persons. (Laws of Malaysia, Act 670, 2007: 11-14).

Meanwhile, the US TVPA created a sanctions regime which authorizes the US President to withhold non-trade related, non-humanitarian financial assistance from countries who do not meet the minimum standards for eradication of trafficking (22 U.S.C.A. § 7107 (a)(1), 2008).

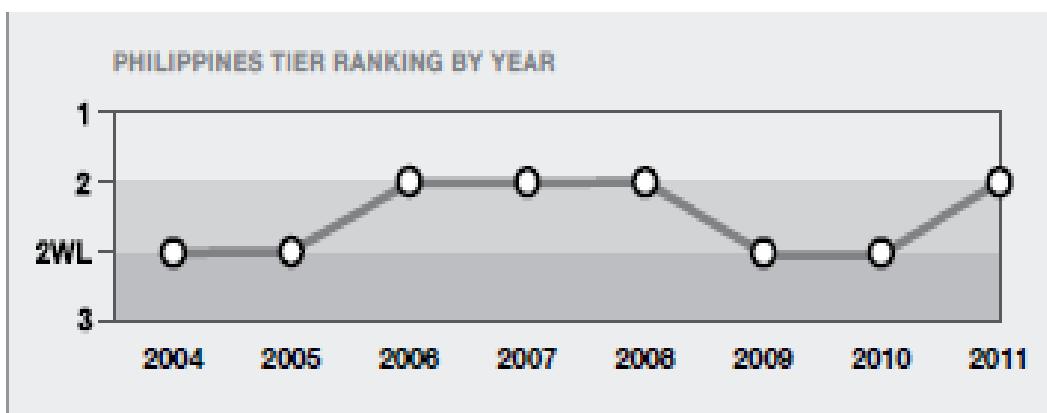
For this purpose, it requires the US State Department to study the global problem of trafficking and place each country included in its TIPS Report into one of the three lists, described as tiers (22 U.S.C.A. § 7107 (a)(1) (2008).

This placement is based more on the extent of government action to combat trafficking, rather than the size of the problem, important though that is. The government which fully complies with the TVPA's minimum standards for the elimination of trafficking is placed in Tier 1. Governments that are making significant efforts to meet the minimum standards are placed in Tier 2. Governments that do not fully comply with the minimum standards and are not making significant efforts to do so are placed in Tier 3. Finally, the Special Watch List criteria are considered and, when applicable, Tier 2 countries are placed on the Tier 2 Watch List. A country that fails to make significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking in persons, receives a "Tier 3" assessment in this Report. Such an assessment could trigger the withholding by the US of non-humanitarian, non-trade-related foreign assistance, until such government complies with the minimum standards or makes significant efforts to bring itself into compliance with such standards. The financial sanctions are designed to deny a government access to specific financial resources, while avoiding or at least reducing any adverse humanitarian consequences.

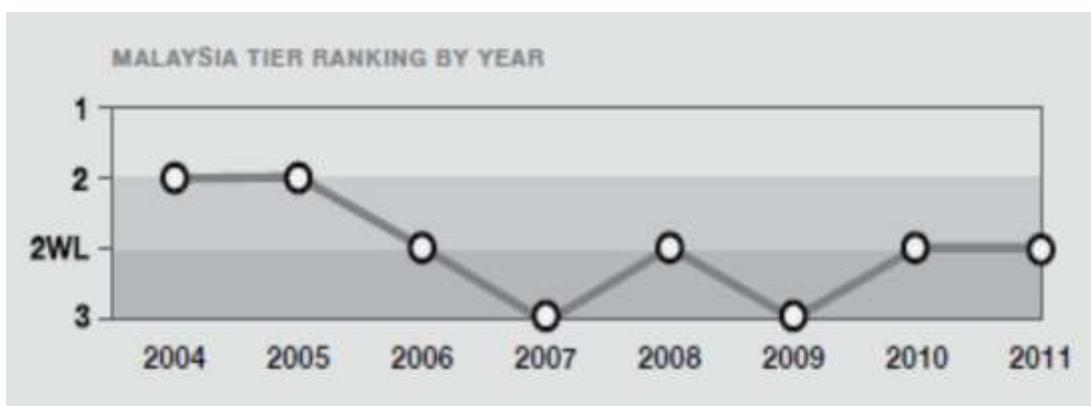
The TVPA does not impose automatic or immediate sanctions and provides for a grace period of three years to allow foreign governments time to take the necessary measures required to eliminate trafficking. Moreover, the US President may waive the imposition of sanctions to avoid the adverse impact on vulnerable populations, especially women and children (U.S. Dept. of State, Trafficking in Persons Report 2009, 2009:239).

The succeeding graphs were taken from the US Department of State Trafficking In Persons (TRIPS) 2010 and shows how the Philippines and Malaysia were ranked before, during and after implementation of their domestic laws on trafficking.

Graph I. Philippines Tier Ranking by Year



Graph II. Malaysia Tier Ranking by Year



(Source: U.S. Dep't of State, Trafficking in Persons Report 2011)

It's ironical that both the Philippine and Malaysian tier ranks dropped to the Tier 2 Watch List and Tier 3 levels respectively, in the same year that they enacted their domestic legislations on trafficking in persons and in the next two years that they started to implement the said laws. Since then a fluctuating trend is noted in the performance of the two countries.

IV. EFFORTS TO ERADICATE TRAFFICKING IN PERSONS BY THE PHILIPPINES AND MALAYSIA

The efforts of both the governments of Malaysia and the Philippines are gauged using the United Nations Toolkit to Combat Trafficking in Persons. Focus is made on tools applying the “three P’s” prescribed by the UN Trafficking Protocol in assessing both countries’ efforts to eradicate trafficking in persons.

PROSECUTION

There are 13 tools on law enforcement and prosecution in the UN Toolkit, 8 of them dealing with the process of investigation. Among the investigative tools, reactive victim-led investigation is said to be the least effective because it relies heavily on the testimony of the victim who may not cooperate with authorities until the termination of the judicial process. (United Nations Office on Drugs and Crime, Toolkit to Combat Trafficking in Persons, 2006:70) Proactive investigation and use of joint investigation teams, on the other hand are highly recommended being a combination of intelligence, human and technical surveillance and a result of sharing intelligence information on traffickers and cooperative efforts among enforcement agencies (United Nations Office on Drugs and Crime, Toolkit to Combat Trafficking in Persons, 2006:70).

The Philippine anti-trafficking statute, RA 9208 does not provide the mandate for a proactive form of investigation although it advocates collaboration and sharing of information between two law enforcement agencies namely the Philippine National Police (PNP) and the National Bureau of Investigation (NBI).

The PNP had mainstreamed trafficking in persons in their Women and Children’s Concerns Desks nationwide, that had led to the arrest and the rescue of victims and the filing of cases before the prosecutor’s office (Leones & Caparas, 2001:10). The NBI on the other hand created a specialized unit called Anti-Human Trafficking Division, which investigated cases and recommended them for prosecution (Leones & Caparas, 2001:10). The absence of any joint rescue operation thus far is an indication that the two law enforcement agencies do not collaborate in their efforts. Each agency conducted their own separate rescue operations based on complaints from victims which suggest the use of the reactive, victim-led investigation tool.

RA 9208 likewise affords victims protection in the government’s Witness Protection Program when they testify as complaining witnesses. The UN Toolkit cited the Philippine Witness protection program as one of the best practices in witness protection (United Nations Office on Drugs and Crime, Toolkit to Combat Trafficking in Persons, 2006:233).



The Malaysian government has been using a variety of laws to prosecute traffickers prior to the enactment of Act 670, such as the Child Act for trafficking of children, the Immigration Act, and the restricted Emergency Ordinance and Resident Act to prosecute traffickers. Penalties for traffickers included 15 years in prison, a caning, and fines (US State Dep't, Trafficking in Persons Report 2009, 2009:198).

It has just been over two (2) years since Malaysia had enacted its own anti-trafficking law, so it's no wonder if the 2009 Trafficking in Persons Report of the US State Department states that Malaysia despite "some progress in investigating sex trafficking offenses and punishing trafficking offenders, has not demonstrated efforts to investigate, prosecute or convict offenders of labor trafficking (US State Dep't, Trafficking in Persons Report 2009, 2009:198). Based on personal accounts of victims featured in the 2008 and 2009 Trafficking in Persons Report of the US State Department and news stories posted in the internet, the Malaysian Royal Police seems to be using the reactive victim-led kind of investigation which is also being used in the Philippines, where victims are oftentimes unwilling to testify. The Bukit Aman Police Headquarters at Kuala Lumpur set up a special Anti-Human Trafficking Unit in July 2009 and plans branches in each district. Last December 2009, the Malaysian Royal Police began a series of road shows on trafficking in persons that will visit every contingent. They also held briefings on Act 670 and procedures for trainers, as well as a seminar at the Royal Malaysia Police College with participants from Thailand, Singapore and Indonesia, and Immigration, Customs and Malaysian Maritime Enforcement Agency officials (NST Online Analysis, 2009). The Malaysian Home Minister has said the government will do "whatever it takes" to stop the trafficking problem in Malaysia, but noted there were many hurdles including a porous border with Thailand and what activists estimate to be hundreds of thousands of people from Myanmar who live illegally in Malaysia in addition to 140,000 illegal Myanmar migrant workers. (Sulekha.Com News on Trafficking, 2009).

PROTECTION

RA 9208, the Philippine anti-trafficking law has incorporated all of the 9 tools for the protection of and assistance to victims of trafficking found in the UN Toolkit. The 9 tools are the following: Access to information and legal representation; Assistance to victims; Assistance to child victims; Medical assistance; Psychological assistance; Language and translation assistance; Shelter programs; Rehabilitation, skill training and education and Restitution and compensation for victims. (United Nations Office on Drugs and Crime, Toolkit to Combat Trafficking in Persons, 2006:70)

The Department of Social Services and Development (DSSD) is the lead agency that implements the protection mandate in RA 9208. Among the programs it administers are the 42 temporary shelters, temporary residency status, relief from

deportation, and access to legal, medical, and psychological services to trafficking victims in the Philippines (Leones & Caparas, 2001:9). The Philippine diplomatic missions abroad also offer psychological counseling to trafficking victims and overseas Filipino workers. The Department of Labor and Employment began a reintegration program for overseas workers who had been abused while working abroad. The Filipino government adequately identifies all trafficking victims who had been rescued and there have been no reports of victims who have been imprisoned, fined, or deported (Leones & Caparas, 2001:9).

The area of protection and assistance to identified victims is perhaps where the IACAT has accomplished a lot and has been given due recognition even in the US State Department's 2009 Trafficking in Person's Report. (U.S. Dept. of State, Trafficking in Persons Report 2009, 2009:239) and the Global Report on Trafficking in Persons produced by the United Nations Office of Drugs and Crime (United Nations Office on Drugs and Crime, 2009 Global Reports on Trafficking in Persons, 2009:55).

Malaysia's Act 607, which came into force only in February of 2008, likewise provides for care and protection of trafficked persons. The month after following its promulgation, the Women, Family and Community Development Ministry opened two places of refuge for women and child trafficking victims. NGOs, such as Tenaganita, the Women's Aid Organization and the Good Shepherd Sisters in Sabah, also manage shelters (NST Online Analysis, 2009). Among the protective tools found in the toolkit that is mandated in the Act 670 and are currently being implemented are medical assistance and shelter programs.

The 2009 Trafficking in Persons Report of the US State Department mentions "the modest efforts to protect victims of sex trafficking" in Malaysia while the "efforts to protect victims of labor trafficking remained inadequate" (U.S. Dept. of State Trafficking in Persons Report 2009, 2009:197).

PREVENTION

There are 7 tools in the UN Toolkit meant to address the preventive aspect of the trafficking problem. They are the following: Policies to address the root causes of trafficking in persons, Awareness-raising measures, Awareness-raising campaign checklist, Corruption prevention, Discouraging the demand for trafficked persons for purposes of sexual exploitation, Eliminating gender-based discrimination and promoting women's economic rights and Bilateral and multilateral cooperation to prevent trafficking (United Nations Office on Drugs and Crime, Toolkit to Combat Trafficking in Persons, 2006:245)



Only 2 out of the 7 tools for prevention are incorporated in the Philippine anti-trafficking statute and these are awareness-raising measures and awareness-raising campaign checklists. (Philippine Republic Act No.9208, 2003).

There is no mandate in RA 9208 on the preparation of an Action Plan to Combat Trafficking in Human Beings, in the same manner that was done by the Organization for Security and Cooperation in Europe (OSCE) Permanent Council identifying economic and social policies to address the root causes of Trafficking in Persons. (Philippine Republic Act No.9208, 2003). Neither is there any reference about curbing or punishing corruption contemplated by the tool “corruption prevention” nor was there anything said in the regulations about gender bias as envisaged by the last tool which is “Eliminating gender-based discrimination and promoting women’s economic rights” (United Nations Office on Drugs and Crime, Toolkit to Combat Trafficking in Persons, 2006:427).

The Philippine Overseas Employment Agency (POEA), tasked with implementing “awareness raising measures” issued new employment requirements for Filipinos overseas to protect them from employer abuse, increasing the minimum monthly wage and minimum age while the Department of Tourism had not implemented any program at all to reduce the demand for sex tourism in the Philippines” (U.S. Dept. of State Trafficking in Persons Report 2009, 2009:241).

The Malaysian government has few programs to prevent human trafficking. In fact the Trafficking in Persons Report of the US State Department states that Malaysia “made limited efforts to prevent trafficking in persons” in 2009. The activities for prevention were mostly the talks given by senior government officials against the crime of trafficking and the distribution of government printed brochures on trafficking to the public by the Ministry of Women, Family and Community. The same agency also held a conference to teach police and immigration officials to identify trafficking victims” (U.S. Dept. of State Trafficking in Persons Report 2009, 2009:241).

Malaysia’s Act 670, only provide for one of the tools for prevention found in the UN Toolkit. The Malaysian government had been implementing awareness raising measures, albeit on a very limited bases. There is no other information found on the utilization of the other tools in the toolkit by the Malaysian government.

CONCLUSION

The latest most significant development in the field of Comparative Law to date is perhaps the determination that for the most part, transformations in legal systems are attributed to legal transplants.(Mattei, 1994:2) “The moving of a rule or a system of

law from one country to another", the definition given by Watson to legal transplants, has been argued to be a major reason for legal development since "most changes in most systems are the result of borrowing." (Watson, 1974:29) Furthermore, globalization had been made to account for the further development of legal transplants. (Gerber, 2008:950) Globalization has likewise been found to vastly increased human trafficking in the last decade. (Brewer, 2008:1)

It now appears that both the Philippine and Malaysian laws against trafficking in persons are legal transplants that moved from the United States TVPA to the Palermo Protocol and then on to the signatory countries. The national legislatures of the latter were the final destination for the transfer of the US model framework against trafficking - from the United States TVPA via the Palermo Protocol. For both countries, the transplant motivations may be regulating the human trafficking problem and pursuing a foreign policy interest of avoidance of unilateral sanctions from the US and in so doing adopting some tools in the UN toolkit.

The question on whether the US model legal framework against trafficking in persons would be viable in the legal cultural environments of the Philippines and Malaysia would depend on numerous factors external to the quality of the transplanted law itself. "Basically the outcome of a legal transplant can be mutation, withering or albeit rarely unscathed survival" (Graziadei, 2009:741). A legal transplant may on the other hand, undergo a cultural adaptation or "domestication" and probably could become effective (Graziadei, 2009:741).

The low tier classification of both Malaysia and the Philippines is enough evidence that the legal transplants are not currently working effectively.

The Philippines is able to apply most of the protection tools, only because of financial aid from the US, other foreign countries and local and international NGO's. However, there are limited resources to fund viable economic alternatives to employment opportunities in the destination country, as a preventive tool. There is also the lack of a political will to eliminate corruption in government which hinders prosecution of traffickers in particular and economic development in general. Most of the sophisticated techniques requiring the use of modern and state-of-the-art gadgets for proactive investigation as a prosecution tool are not available; hence the latter's dependence on the reactive type of investigation utilizing victim's complaints.

The US State Department in its 2009 Trafficking in Persons Report commented that the reliance of the Philippine government on victim testimony for the prosecution of traffickers is likewise "severely limited by an inefficient judicial system and endemic corruption" (U.S. Dept. of State, Trafficking in Persons Report 2004, 2004:259). Complaining witnesses cannot sustain the long and tedious judicial process due to lack of resources and threats from employers and traffickers. Some victims end up recanting



their testimonies or not appearing at all during the trials which could lead to dismissal for failure to prosecute. The US State department recommends the provision not just of “modest protection from reprisals and economic dislocation, but more effective incentives for assisting in prosecutions of trafficking offenders” (U.S. Dept. of State, Trafficking in Persons Report 2009, 2009:6). The aforementioned aspiration is better said than done, since trafficking being a hidden crime is difficult to document, as the victims are intimidated into silence. They are more often than not, poorly educated, possess no knowledge of human rights and unable to understand the language of the destination country. The problem becomes even more complicated where the victims are children. Moreover, the oriental woman is culturally timid and giving evidence against her traffickers as a complaining witness can be a traumatic one for her. This trauma is sometimes referred to as secondary victimization. (UNODC Anti Human Trafficking Manual for Practitioners, 2009: 11).

The conceptual approach to trafficking taken by Philippines to which it had responded with a legal and policy framework found in RA 9208, would show that trafficking is still considered an issue of law-and-order or organized crime, migration and labor.

As a result important challenges compromise the effective prosecution and prevention of this form of exploitation. For one, the anti-trafficking statute RA 9208 is primarily focused on the criminalization of trafficking or related activities at the behest of the United States through the recommendations in the trafficking reports. Secondly, the preventive mechanisms seem to be restricted to information and awareness about trafficking. Finally, the broader issues of gender equality, corruption and poverty and development were not considered in the programs implemented by the IACAT even if it is subsumed in most of the provisions in the regulations and strongly recommended in the UN Toolkit.

The conceptual approach for the formulation of programs and services in the Philippines should really view trafficking as a human rights, poverty and development, and gender issue as well, making it a more holistic approach. The Philippine preventive agenda should be anchored in promoting growth with social equity and the dispersal of development initiatives. The root causes of migration problems being founded on limited opportunities for gainful employment in the Philippines should likewise be addressed.

On the other hand, the trafficking in persons situation in Malaysia is very intricate and complicated because being a destination and transit country, the trafficking chain may start with Myanmar and end in Thailand. The complexities and wide range of actors and stakeholders involved along the trafficking chain and the multiple changes of hands and modus operandi between the time the person is trafficked and the time

they are rescued requires multifarious efforts and experience that the country is still grappling with at this stage of early implementation of their trafficking law.

In order for Malaysia's anti-trafficking campaigns and programs to become effective, the "states' response to victims at the transit and final stages must shift from criminal to human rights and victims' protection provided on the basis of already existent obligations inherent in international human rights, criminal and refugee law" (Gekht, 2008:37). This becomes problematic because, as has been mentioned earlier, Malaysia is not a signatory to the UN Convention Protocol Relating to the Status of Refugees. A successful anti-trafficking strategy in the case of Myanmar, Malaysia and Thailand, as the source, transit and destination countries, must be based on the differentiated notions of states responsibilities and obligations, applicable in accordance with the trafficking chain. "Such responsibilities include obligations under the human rights, criminal and refugee branches of international law" (Gekht, 2008:37).

The 2009 Trafficking in Persons (TIPS) report recommends that Malaysia vigorously implement their trafficking law, recommending the use of the proactive type of investigation to increase the number of prosecutions and convictions and penalize sex and labor traffickers. (U.S. Dept. of State Trafficking in Persons Report, 2009: 91, 160, 279)

This is again looking at trafficking as a problem of transnational crime or of law and order within Malaysia and isolating it from the poverty that pushes migrant workers out from Myanmar and Indonesia into Malaysia and the demand for cheap labor and prostitutes in Thailand. These root causes of trafficking are actually beyond the control and jurisdiction of Malaysia. The problem may not only be law enforcement in Malaysia but poverty and human rights in Myanmar and Indonesia and gender and human rights in Thailand as well. These issues affecting the efforts to combat trafficking in Malaysia should be primarily addressed by Burma, Thailand and Indonesia.

It should be noted that Burma at Tier 3 is undergoing unilateral sanctions by the United States while both Indonesia and Thailand are in Tier 2. (U.S. Dept. of State Trafficking in Persons Report 2009:91, 160, 279)

As Mary Robinson, then UN High Commissioner for Human Rights has insisted in international forums, "trafficking is not one but a series of constituted acts and circumstances implicating a wide range of actors" (Robinsons, 2002). This requires policy makers to address each stage of the trafficking process: from origin, to transit, and to destination. Robinson further urged a focus on the rights of the individual victim to ensure that "trafficking was not simply reduced to a problem of public order, transnational crime – but rather something that involves all these areas" (Robinsons,



2002). Moreover, Article 9(4) of the Palermo Protocol requires States to “take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment, and lack of equal opportunity” (U.N. Doc. A/53/383, 2000).

Trafficking in persons will not therefore be rooted out completely without addressing in the long term its underlying causes which are extreme poverty and severe lack of economic opportunities in home countries, inequality of women and absence of state support on one hand and inability to migrate legally from deprived source countries to more economically prosperous destination countries. “Long term development and poverty reduction schemes together with human rights, democracy and women empowerment promotion must be part of the solution as well regulating the flow of migrant workers” (Raviv, 2003:659).

Thus, while the Palermo Protocol properly identifies “prevention” as one of three critical areas in combating human trafficking, the same will not be prevented unless systemic issues such as racism, sexism, poverty, and others are addressed (Todres, 2006:885).

The sanctions regime created by the TVPA, had tremendous effects on domestic anti-trafficking efforts worldwide. “Eager to avoid the threat of US sanctions an unprecedented number of governments worldwide have passed anti-trafficking legislation and developed domestic infrastructure to meet the US minimum standards (Chuang, 2006:437). “In one sense then the sanctions regime has contributed to the international framework by promoting recognition of states’ obligation to address trafficking” (Chuang 2006). “But whether the action taken by a government result from a genuine commitment to eradicate trafficking or, instead serve as expedient cover against the threat of US economic sanctions is a critical distinction to bear in mind” (Chuang, 2006:438).

Moreover, “sanctions can exact collateral damage on innocent people, especially the poor and marginalized. Trafficking is predominantly a criminal activity committed by individuals, and sanctions will not directly affect the wrongdoers. Economic sanctions can hurt victims of trafficking by decreasing the resources available to them and by increasing their vulnerability” (Mathews , 2005:649).

In fairness, there are provisions found in the Palermo Protocol (Articles 9 paragraphs 4 and 5) on alleviating the factors that make persons vulnerable to trafficking and establishing social and educational measures to discourage the demand of such persons and requiring States to adopt or strengthen legislative or other measures to deal with conditions which create the demand that fosters all forms of exploitation

(U.N. Doc. A/53/383, 2000) but these are not incorporated into the Philippines' RA 9208 and Malaysia's Act 670.

The demand issue is most apparent in the high profile sex tourism sector in Southeast Asia with its new forms of packaging commercial sex – including massage parlors, nightclubs and lap dance clubs – aimed at the tourist market. Activists groups believe that strategies that fail to address the entire spectrum of sex trafficking supply and demand will remain partial and fail. Gender issues and problems had led to a general reluctance to challenge the environment which tolerates certain male behaviors and attitudes that sustain the sex trafficking industry. (U. N. Non-governmental Alliance Services NGLS Round-Up, 2001)

The aforementioned provisions demonstrate an attempt to address the underlying factors that contribute to both supply and demand in the trafficking industry. However, the fluctuating trend in both countries' performance in combating human trafficking may be an indication that their domestic laws being transplants of the US TVPA, does not apply the more effective holistic approach, to the solution to the trafficking problem.

It could only be hoped, that in time, the Philippines and Malaysia would be able to make their transplanted laws against Trafficking in Persons, adapt to their local legal milieus and work effectively towards eradicating this modern day form of slavery called Trafficking in Persons.

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