



Advocate Sigma Huda

## **‘Conceptual Clarification of Trafficking and Migration’**

**Sigma Huda**

Advocate

Supreme Court of Bangladesh

Paper read at the NGO Forum at Commission on the Status of Women Beijing Plus Ten Conference held on 2nd March, 2005 at New York, USA then published in HRPB Magazine.

Delegates, Ladies and Gentlemen, please accept my greetings and felicitations for attending this workshop arranged by a Bangladeshi organization – The Institute for Law and Development which was created to promote and further the development of law. To this end, the organization felt that though the UN has realized that trafficking has increased globally bringing millions of dollars to the traffickers at the cost of human beings especially women and children whose dignity and human rights are trampled upon making the offence the most degrading of all human rights violations and that there is a need to address this issue specifically and hence the Mandate was adopted creating the office of the Special Reporters to look into trafficking. The traffickers are not satisfied with physical transportation and subsequent exploitation of persons but have moved onto the control of beings through the misuse of internet and websites. We welcome all organizations aiming to eradicate and / or combat trafficking in persons since there is nothing worse than taking full control of a person – through which one’s freedom to move freely and their right to expression is constricted and actions are forced on them without their consent. However there are many misconceptions to confuse undocumented and illegal migrants as trafficked victims.

Trafficking has been defined in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others which was adopted by the UN on 2<sup>nd</sup> December 1949 as being incompatible with the dignity and worth of the human person and endangers the welfare of the individual, the family and the community. The convention was created, amongst others, primarily, to punish any person who, to gratify the passions of another: (1) procures, entices or leads away for the purpose of prostitution, another person, even with the consent of that person; (2) Further, the Convention provides in Article 2 to punish any person who (1) keeps or manages or knowingly finances or takes part in the financing of a brothel: (2) knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others. Again in Article 16, the Parties to the Convention agree to take or encourage through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social

adjustment of the victims of prostitution and of the offences referred to in the Convention.

Since 1949 when the Convention was adopted, much waters have flowed. Trafficking increased not only into the area of sexual exploitation of women and girl child but also in other fields, such as forced labour, sale of children for the purpose of camel races as jockeys or to procure organs etc. Movement from the interior to cities or even across the international borders have seen the advent of flesh traders who take advantage of poverty, illiteracy and the need to better oneself and offer their services to the unsuspecting victims with the promise to provide better jobs with better wages. Thus the trafficking starts and the victims find themselves in positions of being controlled and confined. What was primarily an issue of migration soon became a case of trafficking. Trafficking became a serious concern for all. It soon became one of the biggest challenges facing the world today. Everyday, multitude people cross international boundaries in search of a better life and unscrupulous persons taking advantage of the situation soon trick, sell or force them into situations of exploitation. What is trafficking and who gets affected? To us, trafficking denotes the denial of the right to make a choice, liberty and security. It entails torture, violence cruelty. Though trafficking denies the victim the dignity of life yet it is identified with law and order and as such is located within the crime prevention framework. Trafficking is viewed as a criminal action and in cases of cross border trafficking, the victims are treated as illegal aliens and prosecuted as such. While the sending countries were understandably concerned with the increase of trafficking, the developed or the First World also became concerned with the influx of undocumented migrants entering their countries. Their concern was based on their need to control immigration. The need for more effective Conventions and Protocol was felt. Both the Convention Against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children as well as the Recommended Principles and Guidelines on Human Rights and Human Trafficking Development by the Office of the High Commissioner for Human Rights (OHCHR) came in to effect in the year 2003. Though in the year 2000, the United Nations General Assembly had adopted, through its Resolution 55/25 of 15 November, 2000, the Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Organized Crime. In this Protocol in Article 3(a), trafficking has been defined clearly to mean and include: 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 of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (b) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) “child” shall mean any person under eighteen years of age.

From the above definition, we can easily understand that trafficking is not restricted to exploitation of the prostitution of persons or other forms of sexual exploitation as was done in the past such as the 1949 Convention and the Convention on the Elimination of All Forms of Discrimination Against Women where trafficking was seen as a feminine offence with only women as victims. However the sphere was widened and the States realized that trafficking did not only mean women in situations of sexual exploitation and prostitution but also to the control and use of persons for the purpose of other forms of slavery, forced or bonded labour etc. Thus trafficking took on a new dimension and the Protocol was created to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such trafficking, with full respect for their human rights; and to promote cooperation among State Parties in order to meet those objectives. The Protocol also called upon States to adopt such legislative and other measures as may be necessary to establish criminal offences. At the same time to protect the privacy and identity of the victims of trafficking, including by making the legal proceedings relating to such trafficking confidential. The Protocol also has made the States to consider implementing measures to provide for the Physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with nongovernmental organization, other relevant organizations and other elements of civil society, and in particular, the provision of appropriate housing, counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand, medical, psychological and material assistance and employment, educational and training opportunities. In addition the receiving States shall consider adopting legislative or their appropriate measures that permits victims of trafficking in person to remain in its territory temporarily or permanently in appropriate cases. In implementing the said provision each State Party shall give appropriate consideration to humanitarian and compassionate factors. The Protocol as stated above was created to prosecute offenders, prevent trafficking and protect the victims. The Global Program against Trafficking in Human Beings in collaboration with the United Nations Interregional Crime and Justice Research Institute assist member States in their efforts to combat trafficking in persons. It looked at the involvement of organized crime groups and the routes and methods used. The member States made efforts to strengthen the criminal justice system, improve law enforcement agencies etc. The Stability Pact Trafficking Task Force assisted the South Eastern Europe States to adopt national plan of action to incorporate prevention, awareness-raising, law enforcement, reforms of existing laws where found appropriate in order to maximize protection. All these Conventions and Protocol read with the Recommended Principles on Human Rights and Human Trafficking and the Guidelines thereto developed in the year 2002 sought to promote and protect human rights in implementing the key provisions of the Protocol. At this stage it is pertinent to state that whilst we discuss trafficking we really cannot miss the linkage trafficking has with migration. Albeit that of irregular or undocumented migration. With the advent of globalization, the world has become a small place. This factor coupled with the awareness of the right to move freely and the right to choose one's employment has increased the percentage of irregular or undocumented migration who more than ever fall prey to the traffickers and though consent is immaterial, many of the victims had

originally given their consent to be sent abroad on certain terms and conditions. It is only when the migrants fall victims to the traffickers do they begin to seek or want justice.

While globalization may be considered beneficial yet it is apparent that it has also increased the disparity and the gap between the haves and the have-nots. The world is now divided into two groups rich and poor. Due to this alone there is a high incidence of vulnerability to trafficking often stemming from the desire to better oneself. In fact, there are many incidents where irregular migration has been converted to a case of trafficking even without the victim becoming aware of such conversion until he has been apprehended by the immigration official or the police. Children too are not spared. They are prone to being trafficking across international borders to become camel jockeys or to sell their organs or into domestic slavery where they become vulnerable to sexual exploitation and abuse. There are many instances where. Women and children of either sex are used for prostitution or pornography. Mail order brides are found to be a growing phenomenon. Very recently a big legal battle was won by an Ukrainian woman who had married an US citizen through the intervention of marriage broker through mail and the Courts held that the marriage broker agency was liable for negligent conduct that put a woman at grave risk in an abusive relationship and kept her in danger by misleading her as to her legal options. She was awarded \$400,000.00 as damages, over \$300,000.00 as punitive damages for the agency's egregious conduct. The broker agency had failed to inform her that she could have escaped from the abusive relationship without fear of automatic deportation. This is just one incident. There are many incidents of varied nature occurring in the different parts of the world and which merit the united efforts of all and the establishment of a separate mandate by which there could be a person appointed to specifically focus on the issue of trafficking in all its forms. In such circumstances and in view of the gravity of the issue, the Commission on Human Rights recalling its resolution 2002/51 of 23 April 2002 and bearing in mind its resolution 2004/45 of 19 April 2004, decided in its 55<sup>th</sup> meeting held on 19.04.2004 without a vote to appoint, for a period of three years, a Special Rapporteur, whose mandate will focus on the human rights aspects of the victims of trafficking in persons especially women and children. Under this mandate, the Special Rapporteur will report to the Commission together with recommendations on measures required to uphold and protect the human rights of the victims. From records and materials made available, one finds that there are significant numbers of women and children in prostitution or in situations of commercial sexual exploitation, labour exploitation in domestic work living in dismal conditions and treated like slaves, agriculture, construction etc.

I have been nominated by the Office of the High Commissioner for Human Rights in October this year. As my mandate has focused on the issue of the human rights of actual or potential victims of trafficking and being aware of the primary root cause for such trafficking, I shall therefore focus on Article 9 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing The United Nations Convention Against Transnational Organized Crime where in Section 5 it has been stated that State Parties shall adopt or strengthen legislative or other measures such as educational, social or cultural measures including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children. That leads of trafficking has categorically stated that trafficked persons shall not be detained, charged or prosecuted for the

illegality of their entry into or residence of transit and destination or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons. The State shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings. Therefore, recognizing the importance of “demand” as being a primary cause for trafficking, I have decided to focus this first year of my mandate on how the countries address the issue of demand. To ~ie this is an interesting debate. Demand in the context of globalization and employment are very crucial to the understanding of the mechanisms available to the trafficker in the countries. I shall study the situation of trafficking in the countries of source as well those used as transit and receipt. My understanding is that sending or source States often turn a blind eye to the question of irregular or undocumented migrants who soon find themselves in trafficking situations as long as the remittances are pouring in and debts serviced. In this big power play, the rights of the trafficked victims are underplayed. I would therefore like to focus on the measures taken by such countries to prevent and combat trafficking and the extension of adequate protection of the human rights of the persons affected by trafficking. Where there are legislations protecting the rights of the trafficked persons, I would also look at the reasons for non implementation, if any of such laws and policies. To that end, when I visit the source. Transit and destination countries I shall not only seek the cooperation of the Government but also of the international and non governmental agencies who have already put in much of their time and commitment to the combating of trafficking. In the context of trafficking for sex purposes, I would also look at the role of the international agencies working in vulnerable areas as well as the behavior and attitudes of the peace keepers in the different regions of the world. One cannot undermine the importance of the sincerity and commitment of the Member States to combat trafficking. Whether `push ins` or `push outs` by bordering countries where influx of undocumented persons cross over in search of employment or are trafficked across with the assistance of border forces help bring reduction in trafficking is yet to be seen. To that end I would appreciate documents and information on this issue. During my tenure, I plan to make minimum two missions per year to areas most vulnerable to trafficking. Initially I plan to visit the South Eastern Europe countries as source and transit countries and have listed Bosnia and Estonia as possible countries and then to go on to the destination countries of Western Europe such as Greece, Germany or Italy. However I also intend to look at the Sub Saharan region for both source and transit countries. I have also been requested to look at the passage or flow of persons from the Latin American and Caribbean countries through Mexico to USA as well as the situation of foreign undocumented persons who have been trafficked in to countries such as Malaysia and are now in the process of being deported to their home countries. The area of operation in my mandate is wide and I hope that with the cooperation of all I shall be able to do justice to the mandate so as to be in my humble way a contributor to the minimizing the offence of trafficking as well as ensure the protection of the rights of the victims as has been contemplated by the Protocol.

Therefore, I request all of you present here to extend your help and assistance in making the Mandate fruitful and rewarding. Thank you.

-----