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TRANSLATING INTERNATIONAL AND REGIONAL TRAFFICKING NORMS INTO DOMESTIC REALITY: A HONG KONG CASE STUDY

Robyn Emerton

INTRODUCTION

Heightened attention has been paid towards the issue of trafficking in the last few years, particularly in the context of prostitution. Estimates of the number of people trafficked globally each year vary enormously, both due to the clandestine nature of this trade, which makes such assessment difficult, and the adoption of different definitions of trafficking. The most widely cited figure is that some 700,000 persons are trafficked around the world each year. Of these, some 225,000 persons are estimated as being trafficked from South East Asia alone, representing one-third of the global

1 Assistant Professor (Research), Faculty of Law, University of Hong Kong. This article is based on Robyn Emerton, Trafficking of Women into Hong Kong for the Purpose of Prostitution: An Assessment of Law and Policy Responses in the Context of Recent International and Asian Regional Developments, NOTTINGHAM HUM. RTS. L. REV., Special Issue Spring 2004: Proceedings of Trafficking in Persons Conference, 20. The author would particularly like to thank, Action for Reach Out (a community organization providing services to and advocating for the rights of local and non-local sex workers in Hong Kong) for its continued collaboration and support of her work; and Mr. Alan Chu, Principal Assistant Secretary for Security, and other relevant government officials, for discussing their experiences in addressing trafficking issues in Hong Kong with the author. This article reflects the position as of 1 January 2004.

trafficking trade. Most of the trafficking in Asia occurs within the region. However, people are also trafficked into Asia from other parts of the world, particularly from Eastern Europe.

Trafficking is a grave human rights abuse, broadly comprising the recruitment, transportation or receipt of persons by means of force, coercion or deception for exploitative purposes. While trafficking can occur for a number of exploitative purposes, including commercial marriage and forced labor, this article focuses solely on trafficking for the purpose of prostitution, which, as in other parts of the world, is a matter of serious concern within the Asian region. In extreme cases, this form of trafficking may manifest itself in the abduction of women to work in prostitution. This is particularly prevalent in China, for example, although more usually for the purpose of forced marriage than for prostitution. More frequently, women from impoverished parts of the region are lured by lucrative offers of work as waitresses, receptionists or domestic helpers, either from other parts of their own country or from abroad, and then forced into prostitution. Other women may initially consent to being recruited into prostitution, but later find themselves trapped in slavery-like situations, physically and/or financially restrained from escaping.

Trafficking of women into and within certain parts of Asia for the purpose of prostitution has been increasingly well documented in recent

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3 Combating Trafficking in South East Asia: A Review of Policy and Programme Responses 16 (INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), 2000). Other reports estimate that as many as one million persons are trafficked from and within the Asian region as a whole, see, e.g., Ruchira Gupta, Trafficking of Children for Prostitution and the UNICEF Response (UNICEF, New York), available at <http://www.asiasource.org/asip/gupta.cfm>, last visited January 20, 2004.

4 Id.

5 TIP Report 2003, supra at note 2, refers inter alia to trafficking from the Republic of Moldova and the Slovak Republic to Japan, and from Russia to the People's Republic of China. Russian and other Eastern European women have also been arrested for engaging in prostitution in Hong Kong, although it is not known to what extent they might have been trafficked, see Hong Kong (China) Legislative Council Official Record of Proceedings 8602 (July 10, 2002), available at <http://www.legco.gov.hk/yr01-02/english/counmtg/hansard/cm0710ti-translate-e.pdf>, last visited January 20, 2004.

years, with further in-depth research projects and programs underway. Surprisingly, however, Hong Kong rarely features in any studies of the issue, despite being an obvious magnet for sex trafficking. First, Hong Kong’s economic status in the region, and indeed internationally, is relatively high. Coupled with a relaxed immigration policy towards visitors, particularly those from Mainland China, it is an attractive destination for


those independently seeking illicit employment in Hong Kong's commercial sex industry, and for traffickers recruiting women into it. Second, although its high cost means it has never been a destination for sex tourism (unlike Thailand for example), Hong Kong does have a fairly substantial local commercial sex market. This market is occasionally buoyed by the docking of military forces for periods of "rest and recreation" in Hong Kong. Third, Hong Kong is home to the triads, a network of organized crime groups with links to Mainland China and overseas. As well as thriving off the management and "protection" of local prostitutes, the triads have been quick to exploit the market for non-local prostitutes by recruiting and bringing women into Hong Kong.

In response to an increase in trafficking worldwide, concerted efforts have been made to formulate new legal instruments at both the international and regional levels to help combat trafficking and assist its victims. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime, represents the high-water mark of efforts to date, notwithstanding its imperfections. In the Asian context, some 18 Asian and Pacific countries have committed to a regional anti-trafficking action plan, and several other nota-

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12 In 1999, it was estimated that one in seven Hong Kong men had visited a prostitute in the last six months, with half of those visits taking place in Hong Kong. One in Seven Makes Visits to Prostitutes, S. China Morning Post (H.K.) [hereinafter SCMP], May 26, 1999. For a general overview of the nature of Hong Kong's sex industry, see Kate Whitehead & Nury Vittachi, After Suzy: Sex in South China (Chameleon, 1997).
13 One local community group providing services to sex workers reports that the demand for free condoms from sex workers soars when the US marines are in town.
14 See generally Yiu-Kong Chu, The Triads as Business, chapter 10 (Prostitution) (Routledge, 2000), and Benjamin Liu, Hong Kong Triad Societies Before and After the 1997 Change-over (Net e-Pub, c.2001).
15 The term "non-local" rather than "foreign" as it is used in this paper includes Mainland Chinese women, who are technically not "foreign" to Hong Kong, since Hong Kong is now part of the People's Republic of China.
BLE INITIATIVES HAVE BEEN TAKEN. CONCENTRATION MUST NOW TURN TO ENSURING THAT THESE INTERNATIONAL AND REGIONAL NORMS ARE TRANSLATED INTO DOMESTIC REALITY.

THIS PAPER OUTLINES LEGAL DEVELOPMENTS IN ADDRESSING TRAFFICKING AT THE INTERNATIONAL AND ASIAN REGIONAL LEVELS, AND SPECIFICALLY CONSIDERS THEIR CONTRIBUTION TO THE PROTECTION OF WOMEN'S HUMAN RIGHTS IN THE TRAFFICKING PROCESS. IT ALSO HIGHLIGHTS THE KEY ISSUES OVER WHICH THERE IS STILL SOME UNCERTAINTY OR DISPUTE AND THE WAY IN WHICH THESE IMPACT ON THE INTERPRETATION AND INCORPORATION OF THE RELEVANT NORMS INTO DOMESTIC LAW AND POLICY.

THEN, AFTER PROVIDING AN OVERVIEW OF THE NATURE OF MIGRATION AND TRAFFICKING INTO HONG KONG'S SEX INDUSTRY, THIS PAPER ANALYSES THE EXTENT TO WHICH HONG KONG'S ANTI-TRAFFICKING LAWS AND POLICIES ALREADY REFLECT ITS INTERNATIONAL AND REGIONAL COMMITMENTS – NOTING THAT IT HAS CONSISTENTLY BEEN CLASSIFIED AS A "TIER 1" COUNTRY IN THE UNITED STATES' ANNUAL TRAFFICKING IN PERSONS REPORT – AND RECOMMENDS AREAS FOR FUTURE IMPROVEMENT AND REFORM.

INTERNATIONAL INITIATIVES AGAINST TRAFFICKING

HISTORICAL DEVELOPMENTS

IN ORDER TO UNDERSTAND THE SIGNIFICANCE OF RECENT DEVELOPMENTS AT THE INTERNATIONAL LEVEL, IT IS NECESSARY TO START WITH A BRIEF INTRODUCTION TO THE INTERNATIONAL TREATIES WHICH HAVE SPECIFICALLY TARGETED TRAFFICKING IN THE PAST.

and to consider their particular contributions to the developments in this field. However, this brief treatment is intended to be no more than an overview, since many others have already addressed this area in depth.¹⁹

Trafficking of women for the purpose of prostitution has been a matter of international concern since the turn of the 19th century, with no fewer than four international treaties adopted on the topic before the Second World War. The first of these, the International Agreement for the Suppression of the White Slave Traffic (1904)²⁰ [1904 Convention] was aimed at combating the “compulsive,” that is, the forced or abusive, recruitment of women for immoral purposes across international borders, although it did not actually oblige states to punish perpetrators. The next, the International Convention for the Suppression of the White Slave Traffic (1910)²¹ [1910 Convention] corrected this particular shortcoming by expressly requiring states to punish traffickers, and extended this to those who trafficked within national borders, as well as across international borders. Like the 1904 Convention, the 1910 Convention limited the definition of trafficking to situations involving “fraud . . . use of violence, threats, abuse of authority, or any other means of constraint . . . ”²² The main progress made by the International Convention for the Suppression of Traffic in Women and Children (1921)²³ [1921 Convention] was that it recognized for the first time that boys, as well as women and girls, could be victims of trafficking. However, it was the International Convention for the Suppression of the


²⁰ International Agreement for the Suppression of the White Slave Traffic, 1 L.N.T.S. 83 (1904).


²² Id, at art. 2.

Traffic in Women of Full Age (1933)\textsuperscript{24} [1933 Convention] which marked a particularly significant shift in the concept of trafficking to include women recruited consensually (i.e. not forcefully or abusively), although at this stage only where the trafficking occurred across international borders. Thus the 1933 Convention called on states to punish “whoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent a woman or girl of full age for immoral purposes to be carried out in another country” (emphasis added).\textsuperscript{25}

This broader concept of trafficking was maintained when the four treaties were subsequently consolidated (and correspondingly amended)\textsuperscript{26} by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)\textsuperscript{27} [1949 Convention]. Thus the 1949 Convention obliges states to punish any persons who “to gratify the passions of another procures, entices or leads away, for the purposes of prostitution another person, even with the consent of that person”\textsuperscript{28} (emphasis added). For over 50 years, the 1949 Convention remained the most recent international treaty specifically addressing trafficking. It currently has 76 states party to it,\textsuperscript{29} although notably it has not been signed or ratified by some states which were party to the earlier conventions. This is often put down to the fact that the stated objectives of the 1949 Convention were not only to combat trafficking, but also to expunge “the evils of prosti-

\textsuperscript{24} International Convention for the Suppression of the Traffic in Women of Full Age, 150 L.N.T.S. 431 (1933).
\textsuperscript{25} Id. at art. 1.
\textsuperscript{28} Id. at art. 1(1).
\textsuperscript{29} United Nations Treaty Series: Multilateral Treaties Deposited with the Secretary General (status as of January 20, 2004).
tution,"30 with states being called upon to punish anyone involved in the “exploitation of prostitution”31 — previously, a purely domestic matter.32

The only other international treaty which makes a specific reference to trafficking is the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979) [CEDAW], which calls on states to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”33 However, there is no definition of trafficking in CEDAW itself; nor does General Recommendation No. 19 (Violence against Women) (1992), which considers the trafficking provision in more detail, shed any more light on its meaning in the context of this treaty.34 To date, CEDAW’s impact has been relatively limited in this area.

The 1949 Convention has for some time been recognized as both outdated and ineffective. In recent years, there have been renewed efforts within the United Nations to address the issue of trafficking, most notably by the Working Group on Contemporary Forms of Slavery35 and the former

31 Id. at art. 1(2).
Special Rapporteur on Violence against Women, Radhika Coomaraswamy. These have both placed emphasis on the need to address the human rights aspects of trafficking in terms of protecting and assisting the victims of trafficking, an approach that was markedly absent in the earlier international instruments. In addition, the former Special Rapporteur on Violence against Women called for the adoption of a modern definition of trafficking specifically tailored to protect and promote the human rights of trafficked persons, particularly women. This, she felt, should move away from the historical characteristics of trafficking formalized in the 1949 Convention, which she considered “out-dated, ill-defined and non-responsive” to the current realities of trafficking and should be centered instead on the non-consensual nature of trafficking. Thus, while recognizing that “numerous separate abuses are committed during the course of trafficking which themselves violate both national and international law,” the Special Rapporteur stressed that it is “the combination of coerced transport and coerced end practice which makes trafficking a distinct violation from its component parts.”

It should finally be noted that various provisions in the general international human rights treaties and the slavery conventions can also be drawn upon either to engage or to fortify states’ obligations in this area, especially those that protect the right not to be held in slavery, servitude, forced labor or debt bondage, or to be subject to torture or other cruel or

the International Criminal Court, opened for signature July 17, 1998, UN Doc. A/CONF. 183/9*, which has jurisdiction to try individuals for crimes of humanity including widespread and systematic “enslavement” (art. 7(1)(c)), which is in turn defined to include the “exercise of . . . power attaching to the right of ownership over a person . . . in the course of trafficking in persons, in particular women and children” (art. 7(2)(c)).

36 See, e.g., Draft Programme of Action, Id., ¶ 6; Special Rapporteur’s Report, supra note 32, ¶ 22.
37 Special Rapporteur’s Report, supra note 32, ¶ 11.
38 Id, ¶ 10.
39 The Special Rapporteur therefore defines trafficking as “the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons: (i) by threat or use of violence, abduction, force, fraud, deception or coercion (including abuse of authority), or debt bondage; [and] (ii) for the purpose of placing or holding such person, whether for pay or not, in forced labor or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i)”, Id, ¶ 13.
40 Id, ¶ 16.
41 International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR] at arts. 8(1) & 8(2); Slav-
degrading treatment, and those that protect the rights to freedom of movement and liberty to choose one's residence, liberty and security of the person and just and favourable conditions of work, all of which may be violated in the trafficking process.

Recent developments: the UN Trafficking Protocol

In November 2000, these developments within the United Nations culminated in, and indeed were largely overtaken by, the adoption of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime. The Trafficking Protocol, which entered into force on December 25, 2003, is the first modern international instrument on trafficking, and has already been widely accepted, with 117 signatories and 52 parties to date.

There have been strong criticisms of the fact that the Trafficking Protocol was developed in a crime control, rather than a human rights, context. Indeed, the former Special Rapporteur on Violence against Women viewed this as "a failure of the international community to fulfil its commitment to the protection of the human rights of women." Another commentator noted that "a unique opportunity to bring human rights to the forefront of the international legal response to trafficking was thus lost

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43 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85, (1984) [hereinafter CAT], at art. 2(1); ICCPR, supra note 41, at art. 7.
44 ICCPR, supra note 41, at art. 12(1).
45 Id. at art. 9(1).
49 Special Rapporteur's Report, supra note 32, ¶ 7.
and another similar opportunity is highly unlikely."\textsuperscript{50} Nevertheless, the Trafficking Protocol represents a landmark achievement, creating a new consensus on, and focal point for, international efforts against trafficking. In particular, it establishes the first contemporary international definition of trafficking and adopts a holistic approach to trafficking lacking in the earlier international instruments. These core aspects of the Trafficking Protocol will be dealt with in turn.

\textit{Contemporary international definition of trafficking}

Significantly, the definition of trafficking contained in the Trafficking Protocol goes beyond addressing trafficking solely in the context of prostitution, as in the earlier international treaties, and recognizes that it can also occur for other exploitative purposes, including, but not limited to, forced labor, slavery, servitude and the removal of organs.\textsuperscript{51} It also acknowledges the wide spectrum of methods which might be employed to traffic persons,\textsuperscript{52} including force or other forms of coercion, abduction, fraud, deception or the abuse of power, and also abuse of a position of vulnerability. Further, although this was a highly contentious issue in the negotiations leading up to the Trafficking Protocol,\textsuperscript{53} a person's consent to his or her exploitation is deemed irrelevant if it was achieved through one of the enumerated means.\textsuperscript{54}

Although at first sight, the definition of trafficking appears fairly comprehensive, when examined in the specific context of trafficking for prostitution, it has unfortunately still failed to resolve the thorny issue of whether all facilitated migration for prostitution constitutes trafficking, or only that which involves an element of force, coercion or deception. This question has plagued the debate on trafficking for the purpose of prostitution for many years, and indeed almost threatened to derail the very inclu-


\textsuperscript{51} Trafficking Protocol, supra note 16, at art. 3(a).

\textsuperscript{52} Id. at art. 3(a). Note that article 3(c) of the Trafficking Protocol provides that the trafficking of children does not need to involve any of the means set forth in article 3(a).


\textsuperscript{54} United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supra note 16, at art. 3(b).
sion of a definition of trafficking in the Trafficking Protocol.55 Ultimately, while the definition makes specific reference to trafficking for the purpose of "the exploitation of the prostitution of others" and "other forms of sexual exploitation," the compromise was to leave these two terms undefined. The Travaux Préparatoires also expressly note that these terms are without prejudice as to how states address prostitution in their respective domestic laws.56 Some commentators, such as the Global Alliance Against Traffic in Women [GAATW], have honed in on this interpretive note in the Travaux Préparatoires to support their view that the Trafficking Protocol expressly permits states to focus only on trafficking for the purpose of forced or coerced prostitution, if this corresponds to the state's interpretation of the phrase "the exploitation of prostitution" (rather than prostitution being inherently exploitative, and a human rights violation in itself, as others have advocated).57 Therefore, in GAATW's view, the Trafficking Protocol does not require governments to treat all adult participation in prostitution as trafficking.58 However, other commentators such as the Coalition Against Trafficking in Women [CATW] regard this as a "blatant misinterpretation" of the Trafficking Protocol, highlighting the definition of trafficking, which refers to situations in which a woman is recruited by means of "abuse of a position of vulnerability" and has consented to being exploited for the purpose of prostitution.59 Thus, in CATW's view, the Trafficking Protocol simply follows on from the 1949 Convention and requires states to combat all trafficking for the purpose of prostitution, irrespective of whether it involves force, coercion or deception, and irrespective of the woman's consent. The latter interpretation is questionable. First, the Trafficking

55 Jordan, supra note 50, at 32, notes that a compromise was reached only on the last day of negotiations, as "a means to end an unnecessary year-long debate on the issue."


57 One of the most ardent advocates of this position is CATW, which strongly opposes the "growing trend to separate prostitution and trafficking", and calls for prostitution to be put back on the international policy agenda, see CATW et al., Guide to the New UN Trafficking Protocol, 7 – 8, available at <http://action.web.ca/home/catw/attach/un_protocol.pdf>, last visited March 25, 2004.


59 CATW, supra note 57, at 7.
Protocol only deems a woman’s consent irrelevant when she has been trafficked by one of the enumerated means, e.g. by force, coercion, deception, abuse of power or abuse of a position of vulnerability. This view of consent is much narrower than under the 1949 Convention, which deems a woman’s consent irrelevant, whatever the means of her recruitment. Secondly, the Travaux Précis adopt a relatively restrictive interpretation of the term “abuse of a position of vulnerability,” limiting it to situations in which the person involved “has no real and acceptable alternative but to submit to the abuse involved,” although there will undoubtedly be differences of opinion as to the circumstances in which a woman has “no real and acceptable alternative,” including whether, and to what extent, economic circumstances can be relevant. It will be interesting to see how this debate plays itself out in practice, as states begin to address the realities of crafting legislation and developing policy measures to implement their commitments under the Trafficking Protocol. Indeed, some of the tensions created by these diverging concepts of trafficking will become apparent in the discussion below of Hong Kong’s current law and proposals for reform.

Holistic approach to trafficking

The Trafficking Protocol also recognizes that in order to combat trafficking, a comprehensive approach is required. In particular, the Trafficking Protocol is the first international instrument to expressly address the rights of, and the provision of protection to, the victims of trafficking. Much to the disappointment of human rights advocates, however, these particular provisions were ultimately discretionary rather than mandatory on states party to the Trafficking Protocol. Thus, although the Trafficking Protocol provides, for example, that states “shall adopt” legislation to criminalize trafficking, and “shall” take various law enforcement mea-

63 Trafficking Protocol, supra note 16, at art. 5.
sures,\textsuperscript{64} they need only “consider” implementing measures to provide for the physical, psychological and social recovery of victims,\textsuperscript{65} which includes such critical support as housing, counselling and legal and medical assistance. Similarly, states must only “endeavour to provide” for the physical safety of victims while they are within its territory and “consider” adopting measures to permit victims of trafficking to remain in their territory, whether temporarily or permanently, “in appropriate cases.”\textsuperscript{66} This weak, discretionary provision for the protection of trafficking victims unfortunately means that the burden of advocating for rights-protective national legislation and policies will shift to the national level.\textsuperscript{67} In this regard, it is imperative that the United Nations Commissioner for Human Rights’ \textit{Recommended Principles and Guidelines on Human Rights and Trafficking}\textsuperscript{68} be promoted as a critical supplement to the Trafficking Protocol, since they emphasize the primacy of human rights in efforts to combat trafficking and to protect and assist victims.\textsuperscript{69}

The other key aspect of the Trafficking Protocol is contained in its preventative provisions which, for the first time in any international instrument, require states to tackle the root causes of trafficking. Thus, the Protocol mandates states to “take or strengthen measures . . . to alleviate the factors that make persons . . . vulnerable to trafficking, such as poverty, underdevelopment and the lack of equal opportunity,”\textsuperscript{70} and “to discourage the demand that fosters all forms of exploitation that leads to trafficking”\textsuperscript{71} – to date, a much neglected issue. This duty rests with \textit{all} states, that is, both receiving and sending states are called upon to start tackling the underlying causes of trafficking, thereby breaking the cycle of abuse at its source. The author’s research has not yet extended to the measures taken by Hong Kong in this area (if any).

\textsuperscript{64} \textit{Id.} at art. 10.
\textsuperscript{65} \textit{Id.} at art. 6(3).
\textsuperscript{66} \textit{Id.} at art. 7.
\textsuperscript{67} Jordan, \textit{supra} note 50, at 33.
\textsuperscript{69} \textit{Id.}, at 3. (The primacy of human rights).
\textsuperscript{70} Trafficking Protocol, \textit{supra} note 16, at art. 9(4).
\textsuperscript{71} \textit{Id.} at art. 9(5).
A wide array of regional initiatives has also been taken against trafficking in Asia in recent years, from conferences and action plans to declarations and treaties. One of these merits particular consideration, since it is Asia-Pacific-wide and applies to Hong Kong. Two others are mentioned which are of more limited geographical scope, and which do not apply to Hong Kong, both to provide a more complete picture of recent developments and to highlight gaps in the current level of regional protection in Asia.

**ARIAT Action Plan**

Around the same time the drafting process took place on the Trafficking Protocol (the so-called "Vienna Process"), significant progress was also made on the issue of trafficking in the Asia-Pacific arena. In April 1999, 18 Asian-Pacific countries signed the *Bangkok Declaration on Irregular Migration*, which expresses concern about trafficking within the region, particularly by organized crime groups. The Bangkok Declaration, however, only addresses trafficking in the context of irregular migration. One year later, in March 2000, the same countries gathered for a follow-up meeting specifically to discuss the human rights aspects of trafficking. This forum, entitled the *Asian Regional Initiative against Trafficking in Women and Children*, was convened in Manila, the Philippines, and co-hosted by the governments of the Philippines and the United States. Bringing together representatives from the 18 participating countries, a variety of international organizations and non-governmental organizations, the meetings culminated in the adoption of the *Action Plan against Trafficking in Persons, Especially Women and Children for the Asia-Pacific Region* [ARIAT Action Plan]. Although still not particularly well known, the ARIAT Action Plan contains a number of highly practical and useful recommendations.

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74 Scant reference is made to the ARIAT Action Plan in the literature, although one of the stated objectives of the UH Manoa Globalization Research Center conference on *The Human Rights Challenge of Globalization in Asia-Pacific-US: The Trafficking in Persons, Especially Women and Children* (Hawaii, USA, 13-15 November 2002) was to build on the ARIAT Action Plan, which gave it some international prominence at least for a time.
tions to combat trafficking within the region and, moreover, to protect and assist its victims. Falling under the three overarching areas of "information and data," "cooperation with international organizations, non-governmental organizations, the private sector, civil society and media" and "gender-mainstreaming," and the five strategic areas of "prevention," "protection," "prosecution," "repatriation and reintegration" and "follow-up and progress review," many of these recommendations echo the provisions contained in the Trafficking Protocol, as will become apparent when they are examined below in the Hong Kong case study. However, the ARIAT Action Plan leaves the term "trafficking" undefined, which again demonstrates the unfortunate inability of states to come to a definitive agreement on what type of "trafficking" the fight should be directed against.

The commitment of so many Asian and Pacific countries to the human rights-centred ARIAT Action Plan is a particularly positive development given the lamentable absence of a regional human rights treaty, which might otherwise have acted as a focal point for such initiatives and offered a legislative framework for their implementation and enforcement against states. Sadly, however, and despite its promise, there has been little follow-up on the ARIAT Action Plan to date by the states party to it. Non-governmental organizations in the region, and in particular those from states who are not yet party to the Trafficking Protocol, should therefore be urged to make reference to the ARIAT Action Plan in their work, and to bring their governments to account under it, in order for the ARIAT Action Plan to realize its full potential.

*South Asian Association for Regional Cooperation*

Although there is no pan-Asian treaty on trafficking, significant headway has been made by the South Asian Association for Regional Cooperation, whose *Convention on Preventing and Combating Trafficking in*

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75 The Asia-Pacific region stands alone in having neither a regional human rights treaty, nor a regional human rights court (unlike the European, African and Inter-American systems).

Women and Children for Prostitution (2002) [SAARC Convention] was signed by Bangladesh, Bhutan, India, the Maldives, Nepal and Pakistan on January 5, 2002. Once ratified, the SAARC Convention will oblige states to co-operate in combating trafficking for the purpose of prostitution and to undertake a variety of measures to prevent, interdict and suppress trafficking and provide assistance and protection to trafficked women and children. The SAARC Convention defines trafficking broadly as the “moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person trafficked,” (emphasis added) and requires states to criminalize “trafficking in any form” (emphasis added). However, interestingly, the definition of “persons trafficked” – to whom the protection and assistance provisions apply – is confined to “women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage or any other unlawful means” (emphasis added). While the SAARC Convention does include provisions regarding the care, treatment, rehabilitation and repatriation of trafficking victims, these provisions are rather vague. For example, the SAARC Convention simply leaves states to “work out the modalities for repatriation of the victims” and pending their repatriation, to “make suitable provisions for their care and maintenance.” With a further broad brush stroke, states are required to make “suitable provisions for granting legal advice, counselling, job training and health care facilities for the victims,” but no details are provided. This vagueness has led to calls for more specific provisions to be included on recipient countries’ accountability in rela-


79 Note that men are not included.

80 SAARC Convention, supra note 77, at art. I(3).

81 Id. at art. III.

82 Id. at art. I(5).

83 Id. at arts. IX(1), (2).

84 Id. at art. IX(3).
tion to the protection and assistance of trafficked persons.\textsuperscript{85} SAARC has responded by announcing that once the SAARC Convention is ratified, it will make “direct efforts” to re-examine its provisions and “to expand its scope using a rights-based approach.”\textsuperscript{86}

\textit{Association of South East Asian Nations}

Finally, the Association of South East Asian Nations [ASEAN], which consists of ten South East Asian member states (Brunei, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam), has also taken various initiatives against trafficking, albeit largely under the broader umbrella of its efforts to combat transnational crime. The most important of these are the ASEAN Declaration on Transnational Crime (1999),\textsuperscript{87} and subsequent Plan of Action to Combat Transnational Crime (1999),\textsuperscript{88} which call upon ASEAN member states to pool information on the nature of trafficking and relevant laws in their respective countries, to enhance public awareness of trafficking, to work towards criminalizing trafficking and harmonizing national polices, to consider the feasibility of multilateral and bilateral agreements, and to develop regional training programs for law enforcement.\textsuperscript{89} While the Plan of Action also encourages members to develop regional training programs for the post-repatriation rehabilitation and protection of victims,\textsuperscript{90} it remains completely silent on the subject of the protections and assistance to be afforded to victims in recipient countries before being repatriated, and therefore offers little by way of rights protection to the victims of trafficking. There have therefore been various calls for ASEAN to commence work on


\textsuperscript{86} Bhutan Forward Moving Strategies 2003, supra note 78.


\textsuperscript{90} ASEAN, supra note 88, ¶ 2.4(b).
a specific ASEAN declaration, or ideally a legally binding treaty on trafficking,\textsuperscript{91} which would give due regard to the rights of trafficked persons.

Unfortunately, there is no organization or institute similar to SAARC or ASEAN in which East Asian initiatives against trafficking could easily be housed. This means that greater emphasis will be required on the development of bilateral and multilateral agreements in this region.

**OVERVIEW OF TRAFFICKING INTO HONG KONG**

The remainder of this paper sets out the context in which trafficking into Hong Kong occurs,\textsuperscript{92} then examines Hong Kong's current laws and policies, and concludes by making recommendations for future reform by reference to relevant international and regional standards.

**Recruitment**

Large numbers of non-local women are regularly recruited to work in Hong Kong's sex industry. In 2001, 3,620 visitors to Hong Kong were arrested on suspicion of engaging in prostitution. The great majority (3,057) came from Mainland China, followed, at some distance, by Thailand (429) and Vietnam (93). There were also small numbers of women from such countries as Korea, Mongolia and Uzbekistan.\textsuperscript{93} In 2002, this figure more than doubled, with 8,873 such arrests, including 8,455 from Mainland China.\textsuperscript{94} Since these statistics relate only to the number of arrests each year, they imply that far greater numbers of non-local women are en-


\textsuperscript{92} While this section is necessarily descriptive in nature, it is key to understanding the nature of trafficking into Hong Kong for prostitution, which has been the subject of so little research to date. Information is based on correspondence, meetings and ongoing collaboration with various community organizations, consulates and governmental authorities, as well as media reports. See also Emerton, *Trafficking into Hong Kong for the Purpose of Prostitution: Preliminary Research Findings*, (see supra note 9 and accompanying text).

\textsuperscript{93} Hong Kong (China) Legislative Council, *supra* note 5, at 8602.

\textsuperscript{94} Statistics provided during a meeting arranged and chaired by Mr Alan Chu, Principal Assistant Secretary for Security, with a number of top-ranking officials involved in addressing the various aspects of trafficking into Hong Kong, comprising officials from the Security Bureau, Police Force (Organized Crime and Triad Bureau), Immigration Department and Customs & Excise Department, 31 July 2003 [hereinafter Trafficking Meeting, 31 July 2003].
gaged in prostitution in Hong Kong, although it is not clear to what extent such women are victims of trafficking.

Increasingly, women coming to work in Hong Kong’s sex industry do so independently.\textsuperscript{95} However, many are still recruited into it, whether through small informal networks of friends or relatives who have previously worked in Hong Kong, or at the instigation of a boyfriend or “pimp”\textsuperscript{96}, or through the large-scale recruitment drives undertaken by one of the organized vice syndicates operating out of Hong Kong. In the late 1980s to mid-1990s, it was more common for prostitution syndicates to bring women into Hong Kong through an arranged marriage with a local man, who would often be in debt to the syndicate.\textsuperscript{97} Following a crackdown on marriages of convenience in the late 1990s,\textsuperscript{98} however, the syndicates turned to recruiting and bringing in women from Thailand and the Philippines on two-week tourist visas.\textsuperscript{99} In more recent years, recruitment efforts have been heavily concentrated on Mainland China,\textsuperscript{100} as the availability of “two-way permits” allows Mainland Chinese women to remain for a much more lucrative three month stay in Hong Kong, ostensibly to visit relatives, with “chickheads” (talent scouts) receiving about HK$3,000 for each successful recruit.\textsuperscript{101}

Most of the prostitution syndicates operating in Hong Kong have been found to have triad (organized crime) connections,\textsuperscript{102} and many are known to work with their counterparts in Mainland China, Thailand and the Philippines. There are also indications that the Hong Kong triads are now

\textsuperscript{95} Id.

\textsuperscript{96} See, e.g., Zi Teng, Research Report on Mainland Chinese Sex Workers 18-20 (Hong Kong: Zi Teng, February 2000), based on interviews with 11 Mainland women working independently on the streets in Hong Kong.

\textsuperscript{97} See, e.g., Andrew Laxton, Police Hunt Asia’s Biggest Pimp, SCMP, September 19, 1993, at 6.

\textsuperscript{98} Glenn Schloss, Fake Marriages to be Targeted in Vice Purge, SCMP, March 30, 1997, at 3.

\textsuperscript{99} This method had actually started earlier. See, e.g., Jimmy Leung, Gang’s Prostitution Links Investigated, SCMP, March 10, 1994, at 4.

\textsuperscript{100} In 2002, most women were recruited from Guandong and Fujian provinces, see Clifford Lo, 105 Arrested in Latest Vice Swoop, SCMP, November 19, 2002, at 4.

\textsuperscript{101} Li Kui, Inside the Secret Workings of the Cross-Border Sex Trade, SCMP, December 11, 2002, News, at 4. Note that there are currently approximately 7.80 HK$ to US$1.

\textsuperscript{102} Whether they are directly operated by a triad group or through persons with connections to a triad group.
teaming up with the Russian mafia, as evidenced by the recent appearance of Russian sex workers in Hong Kong.\textsuperscript{103}

**Entry into Hong Kong**

The majority of women coming to work in Hong Kong’s sex industry enter legally, either on a two-way permit, which, as mentioned above, permits the holder to stay up to a maximum of three months, or on a tourist visa, which is valid for two weeks. However, around 15% of women arrested on suspicion of prostitution enter illegally,\textsuperscript{104} usually on false documentation.

Until recently, a relatively common form of false documentation was the “chop head” visa, which involved the purchase, by syndicates, of authentic two-way permits. The syndicates would simply replace the photographs with those of the women they wanted to smuggle in.\textsuperscript{105} Following the Immigration Department’s purchase of a state-of-the-art “video spectral comparator” to detect forged documents in 2002, the latest trend is for syndicates to deploy middlemen to purchase two-way permits from corrupt immigration officials in Mainland China which, although authentic, carry personal data belonging to another individual.\textsuperscript{106} Both of these techniques allow the syndicates to obtain two-way permits for women who otherwise would not be entitled to them, such as women who do not have relatives in Hong Kong or who have been black-listed from re-entering Hong Kong due to a previous offence.\textsuperscript{107} These documents reportedly cost between HK$9,000 and HK$23,000 each.\textsuperscript{108} The women are trained to answer the questions of immigration officers and are heavily fined by their traffickers.


\textsuperscript{104} In 2002, of the 8,873 visitors arrested on suspicion of engaging in prostitution, 1,133 were illegal entrants. Information provided at Trafficking Meeting, 31 July 2003, \textit{supra} note 94.


\textsuperscript{106} \textit{Id.}

\textsuperscript{107} See, *The Vice Menace*, SCMP, December 11, 2002, Editorial, at 18, (referring to the announcement by the Hong Kong Police Commissioner in November 2002 of a new policy of black-listing Mainland Chinese who are suspected of having engaged in prostitution in Hong Kong).

\textsuperscript{108} Kui, \textit{supra} note 105.
if they are denied entry,\textsuperscript{109} as this obviously puts the syndicate and officials at serious risk of detection. Further corruption is reported to occur at the Lowu (Mainland China) border checkpoints, where syndicates are apparently able to pay Mainland immigration officials HK$3,000 to HK$4,000 to ransom back women who have just been deported from Hong Kong.\textsuperscript{110} There is no known corruption among Hong Kong officials, however, and syndicates admit that they choose busy public holidays to usher women through the stringent immigration checks on the Hong Kong side to reduce the risk of detection.\textsuperscript{111}

Other means of illegal entry include smuggling women into Hong Kong from Mainland China by speedboat, at a cost of around HK$20,000.\textsuperscript{112} There have even been reports of a syndicate smuggling people across the border from Mainland China in suitcases,\textsuperscript{113} although this last racket, unlike the others, hasn't been specifically linked to smuggling for the purpose of prostitution.

\textit{Working conditions}

Non-local women working in Hong Kong's sex industry tend to work on the streets, in villas (brothels) or occasionally in karaoke bars and massage parlours. Many of those working on the streets do so independently, although some are under the control of a syndicate or triad organization. Some of these work out of \textit{dai pai dong}, small food markets where the women wait for business and, after a telephone call to the pimp, are sent up in twos or threes to a short-stay hotel or massage parlour for the client to make his choice. However, the majority of those working in villas are recruited and managed by a syndicate or triad gang\textsuperscript{114} and invariably include those who enter Hong Kong illegally, since they are at less risk of detection by the police working inside a villa than on the streets. Usually, these women are required to provide sexual services to the first 100 to 200 clients without pay, to cover the cost of the arrangements to bring them into Hong

\textsuperscript{109} Kui, \textit{supra} note 101.

\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Prey, \textit{Sex Crosses the Border}, SCMP, March 10, 1997. A local community organization has heard of cases where women are smuggled into Hong Kong by speedboat to work for just one day at a time.

\textsuperscript{113} Li Kui, \textit{Illegal Immigrants Smuggled into Hong Kong by Suitcase}, SCMP, February 5, 2003, News, at 1.

\textsuperscript{114} In 1999, it was estimated that there were about 15 villas operated by triads in Yuen Long district alone, Alex Lo, \textit{War on One Woman Brothels}, SCMP, December 12, 1999.
Kong. After they have met this quota, they can earn anything from HK$30 to HK$100 per client, with the syndicate taking the rest of the HK$300 to HK$450 fee. However, there are reports of women who never receive the money owed to them, and many women are arrested long before they have met their quota. The women are usually guarded to prevent them from escaping from the villa and may have their identity documents confiscated, although security may be relaxed after they have met their quota. Nevertheless, they will always be accompanied by a mafu, or minder, when outside the villa. Similar conditions apply to those working on the streets who are controlled by a syndicate or triad gang.

In addition, some (mainly Filipino) women are legitimately recruited by agencies to work as entertainers in Hong Kong's nightclubs on six-month employment visas. The "escort services," which most of the women provide on the side, are carefully arranged so that the club, the women and the clients all remain within the confines of the law. While some human rights issues arise in this context, preliminary research indicates that the situation of Hong Kong's nightclub workers is unlikely to amount to trafficking (whichever definition is adopted) and is therefore outside the scope of this paper.

Instances of force, coercion, deception and slavery-like conditions

Much more information has been available in the last few years on the methods of recruitment and working conditions of migrant sex workers in Hong Kong, in part as a result of top-quality investigative reporting in the South China Morning Post. However, there remains a dearth of information and data on the subset of women who are forced, coerced or deceived into prostitution or women who are voluntarily recruited for pros-

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117 Andrew Laxton, Police Hunt Asia's Biggest Pimp, SCMP, Sept. 19, 1993. Community organizations working with prostitutes confirm this is still the case.
118 Id.
titution, but end up in slavery-like end-situations – and in turn a general lack of awareness of this darker side of the sex industry in Hong Kong.\textsuperscript{120}

The Police Force (Organised Crime and Triad Bureau) estimates that roughly 99\% to 99.9\% of non-local women working in Hong Kong’s sex industry do so voluntarily.\textsuperscript{121} Moreover, they express the view that women have many opportunities to escape if they are unwilling to continue to work as a prostitute, for example, by running away from their mafu while going from one premise to another or simply by walking out of a villa or karaoke bar.\textsuperscript{122} However, this view may severely overestimate the level of control women have over the situation. This will in turn depend on the degree of power exercised over them by their minders and managers, as well as their vulnerability in terms of their limited monetary resources and the foreign surroundings, which may impede their ability to seek help. Assuming the Police Force estimates are correct, 0.1\% - 1\% of women are involuntary participants. Using the number of arrests of non-local women on suspicion of engaging in prostitution in 2001 and 2002, one may deduce that between three and 30 non-local women were involuntarily involved in prostitution in 2001 and between eight and 80 women in 2002.

The lower end of this estimate is borne out by the author’s research to date. In a preliminary study based on a press survey and interviews with community groups and consulates, the author was able to identify some 30 cases of forced prostitution which had been reported in the ten years between 1990 and 2000.\textsuperscript{123} All of the cases involved women who had been deceived into coming to Hong Kong in the belief that they would be taking up other types of employment. Since this study was completed, the Police Force (Organised Crime and Triad Bureau) has reported that it has identified two cases of forced prostitution in 2001, four in 2002, and one in the

\textsuperscript{120} The author and co-investigators have recently been awarded a Small Project Grant by the University of Grants Council of the University of Hong Kong to undertake interviews of non-local women who have been involved in sex work in Hong Kong and have been detained in prison on immigration offences. The project will commence in March 2004. It is hoped that this project will shed more light on the situations of migrant sex workers and in particular women trafficked into Hong Kong.


\textsuperscript{122} Trafficking Meeting, supra note 94.

\textsuperscript{123} Emerton, supra note 9, at 23.
first half of 2003.\textsuperscript{124} Several further cases have come to the author's attention informally. For example, a community organization reported that two frightened Mainland women sitting on a street corner in one of Hong Kong's sex districts had explained that they had booked a week's tour of Hong Kong and had discovered on arrival that several days had been built in for sex work, a ruse which had not been heard of before. A barrister also reported that two Mainland women who appeared before the Magistrates Court on immigration offences in March 2003 successfully raised in mitigation the argument that they had been deceived into working in prostitution. There is also evidence that some women who knew that they would be working as prostitutes when they came to Hong Kong were not fully aware of the conditions of their work. The Thai Consulate, for example, has reported that a number of women approach it each year complaining that they have been asked to serve far more clients than they agreed to before coming to Hong Kong.\textsuperscript{125}

Without the systematic investigation and recording of the circumstances in which women are recruited into Hong Kong's sex industry and their working conditions, no reliable data can be established. It is hard to see how appropriate policies can be formulated to address the problem in Hong Kong and its sending countries without this fundamental information. It is therefore absolutely imperative that the Hong Kong government conduct, or support, detailed research into this area. Indeed, should it become bound by the Trafficking Protocol, the government will be expressly required to do so.\textsuperscript{126}

**Hong Kong's International Obligations and Regional Commitments**

As Hong Kong is not a state, it does not have international legal obligations in its own right. Rather, its international obligations arise through the People's Republic of China [China], of which it has been a

\textsuperscript{124} Trafficking Meeting, supra note 94.

\textsuperscript{125} Minutes of Round Table on Trafficking of Women into Hong Kong for the Purpose of Prostitution, hosted by the CCPL, ¶ 14, at 4 (University of Hong Kong, Feb. 28, 2001), available at <http://hku.hk/ccpl/research_projects_issues/trafficking/index.html>, last visited January 20, 2004.

\textsuperscript{126} Trafficking Protocol, supra note 16, at art. 9(2). This point has also been emphasized in other fora, such as the Conference Recommendations: Prevention of Future Abuses, arising out of the conference on Pathbreaking Strategies in the Global Fight against Sex Trafficking (Washington, D.C., Feb. 23-26, 2003), [hereinafter Washington Conference Recommendations], available at <http://www.state.gov/g/tip/rls/rpt/20834.htm>, last visited January 20, 2004.
special administrative region since July 1, 1997. For the hundred years prior to that date, Hong Kong was a colony of the United Kingdom [UK]. Despite the change of sovereignty, most of the international treaties which were previously extended to Hong Kong by the UK have continued to apply to it by agreement between China and the UK, including treaties to which China itself is not a party.\textsuperscript{127}

Hong Kong is expressly obliged under the 1904, 1910 and 1921 Conventions to combat trafficking and punish the perpetrators in circumstances where force or other abuse is used in the recruitment of women into prostitution. However, neither the 1933 Convention nor, most importantly, the 1949 Convention has ever applied to Hong Kong. This is particularly interesting as Hong Kong’s current domestic law is nevertheless premised on the broader concept of trafficking advanced by these later treaties, both of which oblige states to punish anyone who recruits a person for the purpose of prostitution, even where that person consents. Furthermore, Hong Kong’s domestic law is driven by the prohibitionist approach to prostitution adopted in the 1949 Convention, in which all third party acts relating to prostitution are criminalized, but not prostitution itself.

In addition, Hong Kong is bound by the more recent CEDAW, which, after strong lobbying by local women’s community groups, was finally extended to it by the UK in 1996 and has continued to apply to it after the change of sovereignty.\textsuperscript{128} Under article 6 of CEDAW, Hong Kong is required to adopt legislative and other measures to combat trafficking (although CEDAW does not define the term). Indeed, in its Concluding Comments on Hong Kong’s initial report under CEDAW, the CEDAW Committee specifically recommended that the government monitor the links between the presence of migrant women, a regulatory approach to


\textsuperscript{128} On the campaign of the women’s movement to introduce CEDAW in Hong Kong, see Carole J. Petersen and Harriet Samuels, \textit{The International Convention on the Elimination of All Forms of Discrimination against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong}, 26 \textit{HASTINGS INT’L \\& COMP. L. REV.}, 1, 21-29 (Fall, 2002).
prostitution and trafficking in women. However, China, and through it Hong Kong, is not party to the Optional Protocol to CEDAW, which might otherwise provide victims of trafficking (as well as other concerned individuals) with an avenue of complaint against the state for any breaches of the trafficking provision, as well as broader enforcement mechanisms, if required.

None of these international instruments specifically addresses the rights of victims of trafficking. Nevertheless, Hong Kong is bound by a number of international human rights treaties and slavery conventions which can be called upon in this respect. These comprise the International Covenant on Civil and Political Rights (as incorporated into domestic law vis à vis the state by Hong Kong's Bill of Rights Ordinance), the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. As discussed above, these instruments variously protect the right not to be held in slavery, servitude, forced labor or debt bondage, the right not to be subjected to torture or other cruel or degrading treatment, the right to freedom of movement and liberty to choose one's residence, the right to liberty and security of the person, and the right to just and favourable conditions of work, all of which might be violated in the trafficking process.

In addition, at the regional level, Hong Kong (and China) is a party to the human rights based ARIAT Action Plan. Although not legally binding, the ARIAT Action Plan nevertheless publicly signifies Hong

129 This comment followed a recommendation by the UN CEDAW Committee that Hong Kong put adequate regulations in place to protect sex workers, hence the reference to Hong Kong monitoring "a regulatory approach to prostitution," Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China, A/54/38, ¶ 326 (March 2, 1999).


131 Id. at art. 2 (establishing communications procedures).

132 Id. at art 8 (allowing the CEDAW Committee to initiate a confidential investigation where it has received reliable information that a state has committed a grave and systematic violation of any of its obligations of the rights protected by the Convention).

133 See supra notes 41-46 and accompanying text.

134 ARIAT Action Plan, supra note 73.
Kong’s recognition of the gravity of the situation of trafficking in the region and its commitment to combating it, and underscores its promise to protect and assist the victims of trafficking.

At the international level, China has ratified the Convention against Transnational Organized Crime, but declared that the application of the Convention to Hong Kong requires prior enactment of domestic legislation by Hong Kong, and therefore that the Convention will not apply to Hong Kong until the government of the PRC notifies the United Nations otherwise. China however, has yet to sign the Trafficking Protocol whether on behalf of itself or Hong Kong. This is disappointing, but it is not clear whether China’s signature has been delayed due to changes in its key government personnel in the last few years, or whether there are more serious issues behind its non-signature. Strong lobbying is therefore required both locally and internationally to press China to become party to the Trafficking Protocol and legally cement many of the commitments which China (and Hong Kong) has already made under the ARIAT Action Plan.

Since the Trafficking Protocol represents a new international consensus on, and focal point for, transnational efforts against trafficking, it can usefully be employed as an additional “barometer” of Hong Kong’s anti-trafficking laws and policies, notwithstanding the fact that China, and through it Hong Kong, is not (yet) party to it. Thus, Hong Kong’s performance will be assessed against its established commitments, particularly those contained in the ARIAT Action Plan, and the Trafficking Protocol and other relevant standards.

Hong Kong’s domestic law meets its various international obligations to criminalize trafficking for the purpose of prostitution and also provides for the power of confiscation of assets. Domestic law does not,


136 Research of English and Chinese language press and other relevant materials, and inquiries of contacts at the Foreign Ministry of the PRC, have so far come up with a blank on this question.

137 It should be noted that, as a special autonomous region of the PRC, Hong Kong is entitled to retain its legal system for at least the next 50 years, thus its domestic law is different from that of the PRC. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, ¶ 3(2) (1984),
however, provide for the protection and assistance of the victims of women, which is currently dealt with as a matter of policy rather than law.

*The traffickers*

Hong Kong does not have a separate statute dealing with trafficking, but it does have an express prohibition on "trafficking in persons to or from Hong Kong" in section 129 of its Crimes Ordinance. This states:

1. person who takes part in bringing another person into, or taking another person out of, Hong Kong for the purpose of prostitution shall be guilty of an offence.

And further provides that:

2. It shall not be a defence to a charge under this section to prove that the other person consented to being brought into or taken out of Hong Kong whether or not she or he knew it was for the purpose of prostitution or that she or he received any advantage therefor.

Thus the bringing of any person into Hong Kong for prostitution constitutes trafficking, regardless of whether the person consented, knew she would be working as a prostitute, or received payment. The offence is punishable by up to ten years of imprisonment.

Hong Kong is not under any international obligation to define trafficking so broadly. In particular, it is not bound by the 1949 Convention, which together with the 1933 Convention expanded the concept of trafficking to include "trafficking" with the woman's consent, as mirrored in the Hong Kong Crimes Ordinance. Arguably, Hong Kong's concept of trafficking is also out of sync with more contemporary understandings of trafficking. This is certainly true if compared with the position taken by the former Special Rapporteur on Violence against Women, who called for the adoption of a modern international definition of trafficking which would be centred on the non-consensual or coerced nature of trafficking. Even when compared with the more narrow definition of trafficking ultimately adopted in the Trafficking Protocol, the Hong Kong approach is still broad. Thus, while the Trafficking Protocol (like the Hong Kong Crimes Ordinance), provides that the consent of the trafficking victim to the intended

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138 Trafficking in persons to or from Hong Kong, Cap. 200 Crimes Ordinance § 129, L.N. 229 (Hong Kong, 1998).

139 See supra notes 37-40 and accompanying text.
exploitation is irrelevant, it then expressly limits this to situations in which a person has been trafficked by force, coercion, deception, abuse of power or abuse of a position of vulnerability, or one of the other enumerated means. Further, although the Trafficking Protocol specifically defines trafficking to include trafficking for the purpose of "the exploitation of the prostitution of others," the Travaux Préparatoires expressly note that the term is without prejudice to how states address prostitution in their respective domestic laws. Thus, as some commentators have argued, the Trafficking Protocol permits states to focus their laws only on trafficking for forced prostitution.

When this issue was raised with top-ranking law enforcement officials working in this area in Hong Kong, their feeling was that the broad concept of trafficking adopted in the Crimes Ordinance is advantageous in offering flexibility and a lower evidentiary standard in the prosecution of traffickers. This may be true, but it could also be argued that by classifying all facilitated migration for sex work as trafficking, the law as it currently stands deflects much-needed attention from the situations of women who are forced, coerced or deceived into prostitution or find themselves working in slavery-like conditions. This in turn may hinder awareness and understanding of their position and may potentially have a negative impact on their treatment within the criminal justice system and in the protective measures and assistance extended to them. These issues will be considered further below.

Proceeds of trafficking

An important addition to the criminalization of trafficking, given the extent of organized crime involvement in trafficking into Hong Kong, is section 8 of the Organised and Serious Crimes Ordinance, which gives courts the power to make a confiscation order to recover the proceeds of certain organized crimes, including trafficking of persons into Hong Kong, where the proceeds exceed HK$100,000. This meets both the recommendations of the ARIAT Action Plan and the requirement of the Convention on

140 See supra notes 57-60 and accompanying text.
141 Report of the Ad Hoc Committee on the Elaboration against Transnational Organized Crime on the work of its first to eleventh sessions, supra note 56, ¶ 64.
142 See supra note 56 and accompanying text.
143 Trafficking Meeting, supra note 94.
144 Confiscation orders, Cap. 455 Organized and Serious Crimes Ordinance § 8, L.N. 145 (Hong Kong, 2002).
145 Strategic Areas for Action: Prosecution (1). See also UNHCHR Trafficking Guidelines, supra note 68, at Guideline 4(4).
Transnational Organized Crime\textsuperscript{146} on the need to confiscate assets of organized crime groups involved in trafficking (although, interestingly, the Trafficking Protocol lacks a similar provision).\textsuperscript{147} Confiscated assets are centralized in the Government Treasury, and are at least indirectly available, through a bidding process, to government departments and NGOs to support anti-trafficking programmes and services to victims of trafficking. This goes some way to meeting various recommendations that any such assets be used for the benefit of victims of trafficking,\textsuperscript{148} although neither the ARIAT Action Plan nor the Trafficking Protocol includes such provision. Indeed, the Convention on Transnational Organized Crime simply requires states to dispose of such assets "in accordance with its domestic law and administrative procedures."

\textit{The victims of trafficking}

There are no express provisions for the protection and assistance of victims of trafficking under Hong Kong law. Indeed, technically, victims of trafficking may be charged with soliciting\textsuperscript{150} and/or offences under Hong Kong's immigration laws. These make it an offence to enter Hong Kong.

\textsuperscript{146} Convention Against Transnational Organized Crime, \textit{supra} note 17, at art. 12.

\textsuperscript{147} Note that an earlier draft of the Trafficking Protocol did require states to take appropriate measure to allow the seizure or confiscation of gains obtained by criminal organizations from trafficking, \textit{see} Dr. Mohamed Mattar, \textit{Comparative Analysis of the Elements of Anti-Trafficking Legislation in the Asia-Pacific-US Region: What Countries in the Region have to do to Comply with the 2000 Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 4}, The Protection Project, available at \texttt{<http://www.protection-project.org/commentary/ca.htm>}, last visited January 20, 2004. In any event, the provisions of the Convention on Transnational Organized Crime apply \textit{mutatis mutandis} to the Trafficking Protocol, \textit{supra} note 16, at arts. 1(1), (2).


\textsuperscript{149} Convention Against Transnational Organized Crime, \textit{supra} note 17, at art. 14.

\textsuperscript{150} Soliciting for an immoral purpose, Cap. 200 Crimes Ordinance § 147 (Hong Kong). Note that prostitution itself is not an offence in Hong Kong, although the zealous use against women (and very occasionally their male clients) of the offence of soliciting effectively criminalizes it.
illegally\(^\text{151}\) or to breach one's conditions of stay.\(^\text{152}\) Since both two-way permits and visitors' visas prohibit the holder to engage in any type of employment while in Hong Kong, it is an offence for women entering on such documents to work as prostitutes in Hong Kong.\(^\text{153}\) The standard penalties under these offences are 15 months imprisonment if the women entered illegally and three months imprisonment if they entered Hong Kong legally (the maximum penalty for both being two years). They are then deported.\(^\text{154}\) Mainland Chinese women may also be fined or sent to re-education-through-labor camps on their return to China, where prostitution itself is illegal.\(^\text{155}\)

However, as a matter of policy, immunity from prosecution is invariably granted to victims of trafficking for forced prostitution. In addition, any women who have been "trafficked" in the broader sense adopted under Hong Kong's Crimes Ordinance and who agree to act as witnesses against their traffickers may be granted immunity, depending on the importance of their evidence to the prosecution.\(^\text{156}\) Alternatively, their willingness to assist the prosecution may be taken into account in mitigation of sentence.\(^\text{157}\)

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\(^\text{151}\) General provision as to immigration control, Cap. 115 Immigration Ordinance § 7, 28 s.2(2) (Hong Kong, 1998) (whether using forged or altered documents or landing without permission); also statements, forgery of documents and use and possession of forged documents, Cap. 115 Immigration Ordinance § 42, L.N. 46 (Hong Kong (1999).

\(^\text{152}\) Breach of condition of stay, Cap. 115 Immigration Ordinance § 41 (Hong Kong, 1997).

\(^\text{153}\) Prostitution was expressly recognised as employment for these purposes in 1993, although the policy was not extended to Mainland Chinese women until 1995, see Jimmy Leung, Vice Squad Step Up Crackdown on Prostitution Rackets, SCMP, June 21, 1994, at 4.

\(^\text{154}\) Indeed, even in cases where women are merely arrested on suspicion of engaging in prostitution (for example, when they are loitering and have a supply of condoms or lubricants in their handbags), but there is not sufficient evidence to prosecute, they are also deported. Further, any Mainland women who are deported (whether or not they are prosecuted) are placed on a black-list and banned from returning to Hong Kong for 5 years. See, The Vice Menace, SCMP, December 11, 2002, Editorial, at 18 (referring to the announcement of the policy by the Police Commissioner in Nov. 2002).


\(^\text{156}\) Letter from Director of Public Prosecutions (May 3, 2000) (on file with author).

\(^\text{157}\) Id.
Compensation for victims of trafficking

Mention must finally be made of the opportunity for victims to obtain compensation, which is mandated by the Trafficking Protocol, although the ARIAT Action Plan remains silent on this point. Importantly, Hong Kong courts already have the power to order a convicted offender to compensate the victim of a crime in an amount they consider reasonable. Ideally, this power should routinely be employed in trafficking cases. Theoretically, it is also open to victims to pursue a private right of action against their traffickers in Hong Kong, for example under the torts of false imprisonment, assault or battery. A victim may find that having control over the initial filing of a case and subsequent proceedings can act as a source of empowerment and vindication. However, a more practical solution might be for a portion of the assets confiscated from traffickers to be channelled into a special compensation fund for the victims of trafficking. This would ensure that victims receive timely and appropriate compensation (and any payment from the fund would need to be taken into account in the award of any further compensation to the victim).

Hong Kong's Law Enforcement, Criminal Justice and Policy Responses to Trafficking

Prosecuting the traffickers

Recent reports indicate that the Hong Kong Vice Squad has seriously stepped up its campaign against vice syndicates operating in Hong Kong, including those trafficking women into Hong Kong. Many of these operations have been in cooperation with the Mainland police. For example, in May 2003, it was reported that police had raided 77 vice establishments controlled by the largest prostitution syndicate in Hong Kong (which

158 Trafficking Protocol, supra note 16, at art. 6(6).
159 Power to award compensation, Cap. 221 Criminal Procedure Ordinance § 73 (1997).
160 Further research is required to establish the extent to which this power is in fact used by courts in the sentencing of traffickers in Hong Kong.
161 For the requirements of these torts, see Rick Glofcheski, Tort Law in Hong Kong 425-443 (Sweet & Maxwell Asia, 2002).
163 The Human Rights Caucus proposed that an express provision be contained in the Trafficking Protocol on the use of confiscated assets to provide compensation to victims, although ultimately without success. See Jordan, supra note 50, at 34. See also UNHCHR Trafficking Guidelines, supra note 68, at Guideline 4(4).
was linked to the 14K triad society), and arrested 213 people, including 18 suspected core members of the syndicate and 113 prostitutes, mostly from the Mainland, who had been smuggled into Hong Kong by land and sea routes. An additional 41 people were arrested on the Mainland. Police applied to freeze HK$86 million (US$11.1 million) in assets, and the syndicate was said to have a monthly turnover of HK$10 million (US$1.3 million).164

However, these efforts do not seem to be reflected in an increase in prosecutions for trafficking, which, as is a common pattern in many countries, remains at a disappointingly low level. Statistics show that a mere 16 persons were arrested for trafficking in the last five years, with only four arrests in 2002 and one arrest in the first half of 2003.165 Frustratingly, no publicly available statistics are kept on the number of prosecutions and convictions in relation to these cases,166 yet the US State Department Trafficking in Persons Report 2003 refers to “at least six convictions against traffickers” in 2002,167 which indicates that an informal record is being kept by the authorities or at least that it is possible for the information to be collated when required.168 Another problem in establishing the prosecution rate of traffickers is that traffickers are often prosecuted for crimes other than trafficking. For example, a wide range of provisions in the Crimes Ordinance target the exploitation of prostitution more generally, such as living off the earnings of prostitution of others and keeping a vice establishment.169

166 Letter from Director of Public Prosecutions, supra note 155.
168 Given that only four arrests were made for the offence of trafficking in 2002 and one arrest in the first half of 2003, however, this figure must incorporate convictions for offences other than the specific offence of trafficking.
169 Living on earnings of prostitution of others, Cap. 200 Crimes Ordinance § 137, L.N.229 (1998) and Keeping a vice establishment, Cap. 200 Crimes Ordinance, § 139, L.N. 229 (1998). In one case in 1993, the accused was found guilty of living off the earnings of prostitution, rather than trafficking, for which he had also been charged. See Prison for Thai Bride Trafficking, SCMP, September 16, 1993, at 8.
In addition, there is no official data available on the types of sentences handed down to traffickers. However, the *Trafficking in Persons Report* 2003 states that the sentences of the six traffickers convicted in 2002 ranged from one- to five-year prison terms. These sentences are highly unlikely to act as a deterrent to traffickers, given the huge profits involved, and are also extremely lenient compared with the standard three to fifteen month sentences received by the women brought into Hong Kong.

Much more concerted efforts should be taken to bring traffickers to justice and to utilize the specific offence of trafficking more frequently. Both the ARIAT Action Plan and the *Trafficking Protocol* require states to increase public awareness of trafficking, which cannot be achieved if the very existence of trafficking and traffickers remains hidden under the cloak of the criminal justice system. The media should also be encouraged to follow up on what happens to traffickers, and not simply wrap-up their coverage the day after the vice squad has made a raid, as is invariably the case in Hong Kong. The situation would also be much improved if Hong Kong kept more meaningful statistics on trafficking. This could perhaps be taken up by the CEDAW Committee, in monitoring a state's compliance with the trafficking provision in CEDAW – certainly no comment was made on the incomplete statistics provided by Hong Kong in relation to trafficking in its Initial Report under CEDAW in 1999. The U.S. State Department could also wield its influence in this area. Indeed, in its *Trafficking in Persons Report* 2003, the U.S. State Department recognized the lack of statistics as a shortcoming in its earlier reports and expressed its

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170 *Country Narratives, Hong Kong*, supra note 166.

171 *ARIAT Regional Action Plan against Trafficking in Persons, especially Women and Children*, supra note 73, at Overarching Area (2): Cooperation with international organizations, non-governmental organizations, the private sector, civil society and media.


173 The author has been able to identify only one case since 1990 in which the South China Morning Post (one of the two English language newspapers in Hong Kong) reported on the outcome of court proceedings against two traffickers, *Prison for Thai Bride Trafficking*, supra note 168.

174 See supra note 129.

175 As criticised for example in Human Rights Watch, *US State Department Trafficking Report Missing Key Data, Credits Uneven Efforts* (June 6, 2002) (calling on the US State Department to relay basic information such as the number of actual prosecutions and convictions for trafficking and information on sentencing), available at <http://www.hrw.org/press/2002/06/us-report0606.htm>, last visited January 20, 2004).
resolve to improve its reporting in this respect.\textsuperscript{176} It thus called on the Hong Kong government to “take steps to keep better statistics on trafficking victims,”\textsuperscript{177} although, strangely, no reference was made to the gaps in its statistics on traffickers.

A more radical response, and one which at least seems worth exploring, would be to reform the near-redundant offence of trafficking under Hong Kong law, and to limit it to trafficking for prostitution where force, coercion, deception or slavery-like conditions are involved.\textsuperscript{178} Arguably, this might encourage more focused prosecutions under the offence and harsher penalties, by zeroing in on the most pernicious forms of trafficking. It would also be clearly distinguishable from those offences relating to the exploitation of prostitution more generally, which would continue to be available both in relation to non-local and local prostitutes.

\textit{Protecting and assisting the victims of trafficking}

Hand-in-hand with their crackdown on prostitution syndicates, the police have also stepped up the intensity of their campaign against migrant sex workers in recent years. Indeed, the number of women arrested on suspicion of illegal employment as prostitutes rocketed from a total of 1,702 in 1999\textsuperscript{179} to 8,873 in 2003.\textsuperscript{180} This huge increase in arrests has led to overcrowding in Hong Kong’s women’s prisons, which are now operating at 200% capacity.\textsuperscript{181} This, of course, is a pattern seen in many other countries around the world, with the women making much easier targets than their traffickers, although some of the Hong Kong Police Force seem to be under the illusion that, by arresting prostitutes, police can cut the income of triads and force them to give up their business.\textsuperscript{182} This is naïve, since the traffick-

\begin{footnotes}
\item[176] TIP Report, \textit{supra} note 2, at Introduction (“Areas for Improvement”).
\item[177] \textit{Id.}
\item[178] In this regard, \textit{see}, \textit{e.g.}, the recommendations of the International Human Rights Law Group, IHRLG \textit{Annotated Guide}, \textit{supra} note 147, at 7-9. In particular, the IHRLG recommends that states avoid adopting the complex definition of trafficking contained in the Trafficking Protocol, as it would require too many elements to be proved by the prosecution, and its language could be open to challenge by defendants.
\item[179] Hong Kong (China) Legislative Council, \textit{supra} note 5, at 8598-8603.
\item[180] Trafficking Meeting, \textit{supra} note 94.
\item[181] \textit{See} Raymond Ma, \textit{Mainland Vice Girls Swell Jail Ranks}, \textit{SCMP}, November 6, 2001, at 8; and Li Kui, \textit{How the SAR has Tried to Tackle the Vice Syndicates}, \textit{SCMP}, December 11, 2002, at 4.
\item[182] \textit{See} Chow Chung-Yan, \textit{Vice Prosecutions Increase 50%}, \textit{SCMP}, December 5, 2000, at 3 (quoting a Hong Kong District Police Commander).
\end{footnotes}
ers have a ready supply of women to replace those arrested. As a local community organization reports, after a couple of days (sometimes, merely a matter of hours), the traffickers are up and running again as if nothing had happened. But what has Hong Kong done to protect and assist women who have been forced, coerced or deceived into prostitution in Hong Kong, or who have found themselves in slavery-like conditions? This section will examine the current level of protection afforded to victims of trafficking in this narrow sense\textsuperscript{183} and suggest areas for improvement.

\textit{Identifying the victims of trafficking}

Unfortunately, the increase in the number of arrests of non-local women on suspicion of prostitution does not seem to have been matched with a more focused approach regarding the identification of victims of trafficking amongst them.

In relation to the Hong Kong Police Force, it must be said that in the few reported cases where women were obviously being held against their will, or had escaped from abusive situations, the police took the matter very seriously, and made concerted efforts to apprehend the traffickers and bring them to justice.\textsuperscript{184} However, with respect to routine raids of vice establishments and at street level, community organizations express concern that the police rarely investigate whether any women have been forced into prostitution, or are working under coercive conditions.\textsuperscript{185} For their part, the police state there are many opportunities for women to seek help during these routine raids, both when interviewed initially and later if taken to the police station (where they are interviewed individually, in the absence of any \textit{mafu} or minder).\textsuperscript{186} Immigration officers also conduct further questioning during the repatriation process in relation to the women’s means of entry into Hong Kong, including whether there was any syndicated arrangement, which gives them a final opportunity to come forward if they require assistance,\textsuperscript{187} although this seems to be too late to aid any of the particular women concerned. Notably, the Trafficking Protocol assigns a particular role for immigration officials, as well as law enforcement, in the detection of trafficking cases at the point at which persons cross the border using

\textsuperscript{183} The term “victims of trafficking” is specifically used in this section of the paper to make a distinction between this particular group of women whose human rights have been violated and facilitated migrant sex workers more generally, who are all regarded as “trafficked women” under Hong Kong’s law.

\textsuperscript{184} Emerton, \textit{supra} note 9, at 34.

\textsuperscript{185} Gray, \textit{supra} note 121.

\textsuperscript{186} Trafficking Meeting, \textit{supra} note 94.

\textsuperscript{187} \textit{Id.}
false documentation, which seems to be of more assistance to the women involved. However, the Hong Kong Immigration Department has stated that it does not regard itself as having a role in the detection of victims of trafficking, but only in controlling the entry of immigrants and enforcing the Immigration Ordinance against immigration offenders.

The police, and to a lesser extent immigration, need to adopt a more proactive approach to establishing whether the women have been trafficked or are in need of assistance, rather than seemingly placing so much reliance on the women to come forward and seek help if they require it. Although women in the most extreme situations may come forward (and indeed some do), others may not be aware of their rights or may be reluctant to engage with the police, particularly if they come from countries where the authorities are complicit in the trafficking trade or generally able to act with impunity. In this regard, the United Nations High Commissioner for Human Rights specifically recommends that states develop guidelines and procedures to permit the rapid and accurate identification of trafficked persons, as well as appropriate training. However, informal discussions with those attempting to draft such guidelines in other countries suggest that appropriate drafting has not proved an easy task in practice.

Both the ARIAT Action Plan and the Trafficking Protocol recommend that victims of trafficking should be offered a range of services, including appropriate shelter, economic, medical, legal and psychological assistance and physical protection. Notably, all of these services are – at least theoretically – available to trafficking victims in Hong Kong, although they are not specifically designed for them. Thus, women are provided with shelter and basic subsistence at either the Social Welfare Department refuge centre or one of the three NGO-run refuge centres for victims of family violence, all of which receive government subsidies. These refuge centres also offer counselling. This may be supplemented by general government services, such as social security payments, medical and clinical

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188 Trafficking Protocol, supra note 16, at art. 10(1)(a).
189 Letter from Immigration Department (April 28, 2000) (on file with the author).
190 UNHCHR Trafficking Guidelines, supra note 68, at Guidelines 2(1), (2).
191 For more general provisions on the requirement to strengthen the training of police and immigration officers, see ARIAT Action Plan, supra note 73, at Strategic Areas for Action: Prosecution (2); and Trafficking Protocol, supra note 16, at art. 10(2).
192 ARIAT Action Plan, supra note 73, at Strategic Areas for Action: Protection (2).
194 Trafficking Meeting, supra note 94.
psychology services and police protection. However, in practice, these services appear to be provided on a rather ad hoc basis, if indeed at all; community organizations report that they are not aware of women having been offered any such government services, while the authorities maintain that trafficking victims rarely seek such assistance.

Again, it seems that a more proactive and systematic approach might be required towards offering and providing services to victims of trafficking in Hong Kong. This should be in conjunction with community organizations. Ideally the victim’s right to such services should be given legislative force, most appropriately in the context of a new trafficking ordinance, since this would not fit well within the existing Crimes Ordinance, which aims to punish perpetrators of certain crimes, rather than to protect their victims. However, in this context, a distinction should definitely be made between victims of trafficking in the narrow sense (that is, those forced, coerced etc. into prostitution), who should be given the right to such services, and others “trafficked” in the broad sense of the term as currently adopted in the Crimes Ordinance, to whom the provision of such services should be discretionary, depending on need. It seems difficult to argue, either as a matter of principle or as a practical matter of prioritising resources to those most in need, that all women brought into Hong Kong for prostitution should have the right to such services. Nevertheless, the authorities’ desire to retain flexibility to respond to all persons in need, regardless of whether they classify as a victim of trafficking, should definitely be supported.

Encouraging victims of trafficking to co-operate with the authorities and act as witnesses against their traffickers

Given the very low prosecution rate of traffickers in Hong Kong, measures also urgently need to be adopted to encourage women to co-operate with the authorities in bringing their traffickers to justice. This might be achieved by offering women more incentives. More importantly, however, measures to protect a victim’s identity, privacy and vulnerability in the court process need to be strengthened to the maximum extent possible.

Currently, women who agree to act as witnesses receive shelter and are offered the various services described above, but they are not permitted to work while they remain in Hong Kong, regardless of how long it takes for their cases to come to court. This may be a problem; certainly in one early case, several women who had agreed to act as witnesses against their

195 Id.
196 Trafficking Meeting, supra note 94.
traffickers tired of waiting after five months and withdrew their assistance to return home; without their evidence, the case collapsed.\textsuperscript{197} In a more recent case, which involved several Vietnamese women (who had in fact been willing participants in their "trafficking"), the women agreed to act as witnesses, but were unsatisfied with the services offered to them, and decided to return home.\textsuperscript{198} According to the authorities, arrangements can now be made for women to go home, and then return to Hong Kong when the case comes to court, with all travel and hotel expenses paid,\textsuperscript{199} which may be attractive to some women, although some might be lost in the process. An alternative proposal, which might offer more of an incentive for women to co-operate with the authorities, would be the flexibility to issue a temporary, for example a six month or one year, employment visa for women who agree to act as witnesses, or indeed who require a longer-term stay on humanitarian grounds (see further below), enabling them to work or receive vocational training or education in Hong Kong for the duration of the investigation and court proceedings and, in appropriate cases, more long-term.

Nevertheless, it is imperative that any such arrangements are supplementary to the protection and assistance generally offered to victims of trafficking. That is, the core range of services must continue to be offered to victims, regardless of whether they agree to co-operate with authorities. This is an important word of caution, given the existence of certain temporary resident schemes which preclude women who are not willing to act as witnesses from claiming even a core range of services after a short period of time, such as the \textit{European Commission Proposal for a Council Directive on short term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities.}\textsuperscript{200}

\textsuperscript{197} A late 1980s case reported to the author by Catholic Diocesan Pastoral Centre for Filipinos, January 2000, see Emerton, \textit{supra} note 9, at 40.
\textsuperscript{198} Trafficking Meeting, \textit{supra} note 94.
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} Council Directive, COM (2002) 71/F, of Apr. 4, 2002, allowing victims only a thirty-day contemplation period in which to decide whether or not to cooperate with the authorities, during which time they have access to housing, medical and psychological care and free legal assistance. If they do decide to cooperate and are deemed "useful" to the authorities, they are granted a six-month renewable residence permit, which gives them access to work, vocational training and education in addition to the other services. For a detailed analysis see Ryszard Piotrowicz, \textit{European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers}, 14 (2 & 3) \textit{INT’L J. REFUGEE L.} 263 (April 2002) and
Probably of greater importance than these incentives is the level of support and protection afforded to women who agree to act as witnesses during the court proceedings. Under the Trafficking Protocol, states are required (albeit in very weak language) to provide victims with information\footnote{TRAFFICKING PROTOCOL, supra note 16, at art 6(2)(a) (states must ensure that victims are provided “in appropriate cases” with “information on relevant court and administrative proceedings”).} and counselling\footnote{Id. at art 6(3)(b) (states must ensure that victims are provided, again only “in appropriate cases,” with “counselling and information, in particular as regards their legal rights,” [emphasis added]). See also WASHINGTON CONFERENCE RECOMMENDATIONS, supra note 126 (recommending the establishment of a “victim advocate” program, offering victims a guide and advisor throughout court proceedings.).} to guide them through the court proceedings, as well as to ensure that trafficking victims’ views and concerns can be presented and considered at appropriate stages.\footnote{Id. at art. 6(2)(a)(b).} The ARIAT Action Plan and the Trafficking Protocol also emphasize the need to protect women’s physical safety,\footnote{ARIAT ACTION PLAN, supra note 73, at Strategic Areas for Action: Protection (2); TRAFFICKING PROTOCOL, supra note 16, at art. 6(5). The language used in the Trafficking Protocol again dilutes this requirement, with states only being required to “endeavour to provide” for the physical safety of victims while in their territory. See HONG KONG VICTIM’S CHARTER (1996), §§ 5 & 8, available at <http://www.info.gov.hk/police/aa-home/english/residents/charter.htm>, last visited March 27, 2004.} which takes on particular significance for those who agree to act as witnesses. Both legal support and witness protection are available to all victims in Hong Kong as a matter of general policy,\footnote{TRAFFICKING MEETING, supra note 94.} although the witness protection program has never been called upon in the context of trafficking cases to date.\footnote{Id.}

Further procedural measures can be taken to make witnesses feel more secure during the court proceedings, particularly if they fear retaliation by their traffickers against themselves or their families (although somewhat surprisingly, given international experience on this issue, the Hong Kong police report that it is extremely rare for persons trafficked into Hong Kong to fear such retaliation).\footnote{Id.}

calls on states – albeit “in appropriate cases and to the extent possible under its domestic law” – to protect the privacy and identity of trafficked persons, including by keeping legal proceedings confidential,\textsuperscript{208} although no comparable provision is found in the ARIAT Action Plan. Hong Kong’s Criminal Procedure Ordinance already contemplates a range of protections for the privacy and identity of witnesses, which could usefully be drawn upon in trafficking cases. First, witnesses are no longer required to give their addresses in court, and the court may also order that no question be put to a witness if the answer might lead to the disclosure of the name or address of the witness.\textsuperscript{209} Second, the court may permit the proceedings to take place in closed court, if it appears to the court that it is necessary to do so in the interests of justice, public order or security.\textsuperscript{210} Finally, the witness may be permitted to testify from outside the court by way of live video-link, if deemed to be a “witness in fear”\textsuperscript{211} (although apparently this has never been requested by any trafficking victims to date).\textsuperscript{212} These protective measures should be drawn upon more frequently to maximize the protection of a victim’s privacy and identity in the court proceedings. In addition, sensitization of prosecutors and the judiciary in the circumstances of victims of trafficking,\textsuperscript{213} as well as the appropriate procedural responses, would enhance protection in this area. Indeed, the ARIAT Action Plan makes specific reference to the need to train judges and prosecutors in its general provision on training.

\textsuperscript{208} Trafficking Protocol, \textit{supra} note 16, at art. 6(1).

\textsuperscript{209} Criminal Proceedings may be held in camera and non-disclosure of identity of witnesses in certain cases, Cap. 221 Criminal Procedure Ordinance, § 123(2) (1998).

\textsuperscript{210} Id. at § 123(1).

\textsuperscript{211} Id. at § 79B(4) (defining such a witness in § 79B(1) as a “witness whom the court hearing the evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence.”) \textit{See also Washington Conference Recommendations, supra} note 126.

\textsuperscript{212} Trafficking Meeting, \textit{supra} note 94.

\textsuperscript{213} In one case against a trafficker in 1999, the judge had reportedly said to the witness that he “didn’t for one minute believe her evidence” that she had been brought to work as a prostitute against her will. However, it is difficult to assess the legitimacy of this comment out of the context of the court proceedings. \textit{See} Lydia Ho, \textit{Scolding for Police as Five Cleared of Prostitution Case, SCMP}, November 24, 1999, at 5.
Measures where it is unsafe for victims of trafficking to return home

Finally, as recommended under the Trafficking Protocol\textsuperscript{214} and implicitly in the ARIAT Action Plan,\textsuperscript{215} Hong Kong should also permit women to remain in Hong Kong longer if it would be unsafe for them to return home (regardless of whether or not they are willing to cooperate with the authorities). Indeed, this would also be in line with Hong Kong's obligations under the Convention against Torture, which contains a prohibition on states from returning a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture (\textit{refoulement}).\textsuperscript{216} Unfortunately, however, Hong Kong is not bound by the \textit{Convention Relating to the Status of Refugees} (1951). Therefore, there is no channel for victims of trafficking to obtain asylum in Hong Kong. Nevertheless, the United Nations High Commissioner for Refugees maintains a presence in Hong Kong for the screening and placement of asylum seekers and in appropriate cases,\textsuperscript{217} trafficked women should be informed accordingly.\textsuperscript{218} This is particularly pertinent given a recent UK immigration decision granting asylum to a woman who had been trafficked into the UK from Ukraine.\textsuperscript{219} Interestingly, the Hong Kong authorities state that their experience is that women trafficked into Hong Kong rarely (if ever) fear returning to their home country and generally wish to return home as soon as possible.\textsuperscript{220} Nevertheless, proper extended-stay measures should be put in place, should the need arise. The "T visa" might offer one model. This

\textsuperscript{214} Trafficking Protocol, \textit{supra} note 16, at art. 7.

\textsuperscript{215} ARIAT Action Plan, \textit{supra} note 73, at Strategic Areas for Action: Protection (2) (states are urged to provide "physical safety for trafficked persons, and appropriate consideration to humanitarian and compassionate factors, \textit{including in the process of determining their status}" [emphasis added]).

\textsuperscript{216} Trafficking Protocol, \textit{supra} note 16, at art. 3.

\textsuperscript{217} Note that this would be of limited application, as Mainland Chinese women (who represent the majority of women entering into Hong Kong for the purpose of prostitution) cannot seek asylum in Hong Kong, as it is part of the PRC.


\textsuperscript{219} \textit{See Sec'y of State for the Home Dep't v Lyudmyla Dzhgun}, No. CC-50627-99 (U.K. Imm. A. Trib. 2000) (holding that the woman belonged to a "particular social group" for the purposes of the Refugee Convention, and that she had a well-founded fear of future persecution in Ukraine).

\textsuperscript{220} Trafficking Meeting, \textit{supra} note 94.
American visa allows victims of severe forms of trafficking to remain and work in the United States, if it is determined that they would suffer "extreme hardship involving unusual and severe harm" if returned to their home countries, and for their status to be adjusted to permanent residency after three years. However, the T visa is subject to the holder complying with any reasonable request to co-operate in the investigation and prosecution of their traffickers, which might be difficult in some circumstances.

Additional recommendations

Aside from direct measures to prosecute traffickers and to protect victims of trafficking, it is also imperative to raise awareness among the media and the public of the issues involved in trafficking and its human cost, as expressly advocated in the ARIAT Action Plan and less directly so in the Trafficking Protocol. One positive outcome might be to alert the general public, and clients in particular, to potentially abusive situations and encourage them to report any suspect cases. This could be further strengthened by establishing a free confidential telephone hotline (as indeed recommended by the ARIAT Action Plan), both to provide assistance to women and to take calls from clients and other witnesses, who should be allowed to remain anonymous. Alternatively, an existing hotline service could be expanded for these purposes. This would need to be widely publicized in different languages and in different media, including, for example, leaflets for visitors entering Hong Kong and television, radio and

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222 ARIAT Action Plan, supra note 73, at Overarching Area 2: Cooperation with international organizations, non-governmental organization, the private sector, civil society and media.
223 Trafficking Protocol, supra note 16, at art. 9(2) (calling on states to undertake mass media campaigns to prevent and combat trafficking itself, whereas the ARIAT Action Plan more broadly recommends states to sensitise media to the issues and encourage them to write articles on trafficking, as well as publicising hotlines and services for victims). See ARIAT Action Plan, supra note 73, at Overarching Area 2.
224 ARIAT Action Plan, supra note 73, at Strategic Areas of Action: Protection (2).
225 Indeed it is reported that a high percentage of the calls to the US trafficking hotline come from witnesses, with the women often being isolated and unable to report abuse, see Hyland, supra note 161, at 48.
226 For example, two NGOs offer 24 hour hotlines to sex workers, and two refuges offer 24 hour hotlines for victims of domestic violence.
poster campaigns in the known sex districts. Examples of such trafficking hotlines are to be found in the United States, Ukraine, Kyrgyzstan and Cambodia.227

Finally, the Security Bureau, which is currently responsible for coordinating the various agencies working against trafficking, might find a national action plan on trafficking of benefit to its work, as adopted, for example, in the Philippines.228 However, what would be particularly valuable at this time would be the creation of a dedicated research and "think-tank" on the issue of trafficking into Hong Kong. Ideally, this could take the form of an independent National Rapporteur on Trafficking, as established in the Netherlands in April 2000,229 whose role would be to research and inform the government on the extent and nature of the problem of trafficking into Hong Kong, to consider the effectiveness of existing laws and policies, and to make annual recommendations.

**CONCLUSION**

As noted at the beginning of this paper, for the last three years, Hong Kong has been categorized as a Tier 1 country in the United States Department of State's "Trafficking in Persons Report."230 While there is no doubt that Hong Kong's anti-trafficking laws and policies are some of the strongest in the region, this categorization is probably due as much to Hong Kong's strong rule of law tradition, its effective anti-corruption measures,

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230 *Supra* note 18 and accompanying text.
and its well-organized immigration and law enforcement agencies, as to the specific action it has taken against trafficking. Much work still remains to be done.

Hong Kong's current criminal offence of trafficking is largely redundant and rarely called upon, despite the flexibility allowed by its broad definition of trafficking. Traffickers are able to reap huge profits, with minimal risk of prosecution and comparatively light penalties on conviction. Arguably, the adoption of a narrower definition of trafficking for the purpose of prostitution, in line with more contemporary understandings of the nature of trafficking, might better target the more pernicious forms of trafficking occurring in Hong Kong and heighten awareness of the gravity of this crime.

More important, given the huge numbers of non-local women arrested and prosecuted or repatriated for working as prostitutes, is the need to strengthen measures for identifying victims of trafficking, such as through increased police and immigration training and a hotline to report abuse; and for the authorities to more proactively and systematically offer the range of services to victims of trafficking which are so strong on paper, but so rarely called into play in practice. In addition, measures urgently need to be taken to encourage women to act as witnesses, to help increase the prosecution rate against traffickers. Incentives might be one option, but more critically, action needs to be taken to maximize witnesses' sense of security during the court proceedings, both in terms of protecting them physically and emotionally, and in terms of protecting their identities and privacy. Full use of the powers to confiscate the assets of traffickers and to grant compensation to their victims might act as a further deterrent to those who engage in this highly profitable trade.

Finally, concerted efforts should be made to urge China, and through it Hong Kong, to become party to the Trafficking Protocol, legally binding themselves to many of the promises they have already made under the ARIAT Action Plan. This would demonstrate their firm commitment to fighting this pernicious trade and, most of all, to protecting and assisting those women caught up in it.