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Trafficking in Women for the Purpose of Sexual Exploitation

The role of law in the process of trafficking from the Lao
People's Democratic Republic to Thailand.

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Summary

Trafficking is a growing problem in the whole world, also in Asia. Additionally, more attention has been drawn to the problem due to the ill treatment of many women, especially in the sex sector. Despite the huge amounts of people, mostly women and children, being trafficked every year and the attention drawn to the problem, there has not until recently been a universal definition of trafficking, when the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime was adopted. Although criticised by some, the definition seems to be generally accepted.

The problem of trafficking is newer in the Lao PDR than in many other countries, due to the country being closed until the 1990's. Three years ago no development cooperation projects concerning trafficking were established in the Lao PDR, now there are twelve, and the Lao government today not only admits the existence of trafficking, but also participates in trying to improve the situation.

However, in the Lao PDR there is a capacity problem. The lack of knowledge and education on all levels both in general and concerning legal issues in particular worsens the situation. The existing laws are vague and the enforcement of them both unsystematic and weak. Corruption is another large scale problem in the Lao PDR affecting trafficking.

Most women in the Lao PDR who are trafficked, are trafficked to Thailand. Thailand is prosperous compared to the Lao PDR and the neighbouring country has a demand for cheap labour. Many women leave the Lao PDR voluntarily, due to lack of possibilities in the Lao PDR, and thereafter become exploited at a later stage in the trafficking process. The unemployment rates are very high in the Lao PDR and the standard of living in Thailand better.

The status of international law is unclear in the Lao PDR and the ratified international conventions are not being properly enforced and are in most cases not followed up. Implementing the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children would therefore, at the moment, not improve the situation of trafficking of women from the Lao PDR to Thailand. However it could probably draw more attention to the problem of trafficking to and in the country. Before implementation it is necessary to improve and enforce national laws as well as clarifying the role of international law in the Lao legal system.

Preface

This graduate thesis would have been impossible to write without being in the Lao PDR. I would like to thank all people helping me during my Minor Field Study carried out during two months in the Lao PDR, meeting me and providing me with information and documents, as well as further contacts. I would especially like to thank my contact person at UNICEF, Camilla Lindström, who has been very helpful.

Abbreviations

ARCPPT	Asia Regional Cooperation to Prevent Trafficking in Women and Children
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
GAATW	The Global Alliance Against Traffic in Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IOM	International Organisation for Migration
LAO PDR	Lao People's Democratic Republic
MoLSW	Ministry of Labour and Social Welfare
MOU	Memorandum of Understanding
NGO	Non-Governmental Organisation
PPA	Participatory Poverty Assessment
UNIAP	United Nations Inter-Agency Project on Trafficking in Women and Children in the Mekong-Sub Region
UNICEF	United Nations Children's Fund

1 Introduction

Trafficking is a large scale problem in almost all parts of the world, thus also in Asia. In the Lao People's Democratic Republic¹ the problem is more recent than in other parts of Asia, due to among other things, the Lao PDR being closed for so long and the last decade's development. The Lao PDR borders five countries, it is a very diverse country, both in nature and population, it is very poor, the labour-market is almost non-existent and the economic development is slow in comparison with for example Thailand, which are all reasons why women are being trafficked. With the Mekong River forming a natural border between the Lao PDR and Thailand, it is almost an impossible task trying to prevent crossing for illegal purposes as well as voluntary illegal crossings.

Trafficking in women not only involves abuse in the country of destination, but also very limited ability to obtain assistance from the government in the country of origin. In some cases trafficking includes debt bondage, no wages and illegal sex work. It involves insecurity and lack of basic human rights, depriving trafficked women of their fundamental freedoms. Additionally many women are treated as criminals. Hence the complex issue of trafficking touches upon human rights law, migration law and criminal law, as well as labour law and women's law. In the context of law, from which perspective this thesis is written, there is a problem with the legal instruments not being able neither to prevent the massive problem of trafficking, nor protect trafficked women. It is important to emphasise that legal efforts alone will not be enough to improve the situation of trafficking; however it is one important measure trying to improve the situation.

1.1 The purpose of the study

The purpose of the study will be to investigate the *role of international and national law in the process of trafficking from the Lao PDR to Thailand*. It is most certain that the process of trafficking exists between the two neighbours, many women becoming victims of trafficking in the Lao PDR every day. In most cases the Lao women are trafficked over the border to Thailand where an unknown amount of them are sold and later come into the hands of local men as well as domestic sex tourists and to some extent also tourists from all over the world.² Somehow the process of trafficking has to stop and it would be very interesting to know what is actually done in the Lao PDR to protect these women from being trafficked for the purpose of sexual exploitation and the role of law in that process. What legal instruments are there to protect them, i.e. *prevent* that they are being trafficked? Does the government in the Lao PDR simply deny the existence

¹ Hereinafter the Lao PDR.

² Anderson, Bridget; Davidson O'Connell Julia, 2002, *Trafficking – a demand led problem? Part 1: Review of Evidence and Debates*, p. 27.

of international legislation and the clear violations of human rights that trafficking involve or do they take all possible measures to improve the situation and implement international law correctly and effectively as well as improve national legislation concerning trafficking? There is a new Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime; would an implementation of such a protocol improve the situation of Lao women being trafficked to Thailand?

Trafficking involves not only abuses in the country of destination, but also a limited ability to obtain assistance when trafficked. Therefore I will also look at the problem of *protection* of trafficked victims within the process. Prevention and protection measures are very closely linked and protection of the trafficked women can also be seen as a preventive measure. It would for example be more difficult for traffickers to operate if witness protection was given to the trafficked women so that the traffickers could be prosecuted, which in turn, hopefully, would lead to fewer traffickers operating.

1.2 Delimitations

My study will have a focus on women and thereby exclude trafficked children. Due to the complexity of trafficking, covering trafficked children would include legislation which would be too far reaching for the scope of this thesis. However a clear limitation not including children, i.e. usually those under the age of 18, is not possible, partly because work focusing on trafficking cover both women and children and use phrases like “young women”. Men will not be included as most adult trafficked victims are women³ and more women than men today go abroad in Asian countries in search of a livelihood.⁴ In addition, most investigations carried out in the Lao PDR concern women and children.

Women are trafficked not only for the purpose of working in the sex industry. As a matter of fact this is not even the most common form of exploitation, at least not in the Mekong sub-region⁵, where the most common form of trafficking is voluntary migration in combination with the person being exploited in the labour market at a later stage in the process.⁶ It seems to be acknowledged that not a very large amount of Lao women are

³ Chamberlain, James R., 2001, *Trafficking in Women and Children in the Lao PDR – Initial Observations*, Report for Ministry of Labour and Social Welfare, Division of Trafficking in Women and Children/UN Inter-Agency Project, p. 8.

⁴ Skrobanek, Siriporn; Boonpakdi, Nattaya; Janthakeero, Chutima, 1997, *The Traffic in Women, Human Realities of the International Sex Trade*, p. 13.

⁵ The Mekong Region covers the following countries; China, Myanmar, Thailand, the Lao PDR, Cambodia and Vietnam.

⁶ Marchall, Phil, UN Inter-Agency Project on Trafficking in Women and Children in the Mekong Sub-region, 2001, *Globalization, Migration and Trafficking: Some Thoughts from the South-East Asian Region*, no page numbers.

trafficked into the sex industry as contrary to Burmese women who are frequently trafficked into and exploited in such business. My theory, however, is that this is due to the fact that there is a profound reluctance discussing such matters as sex and prostitution in the Lao PDR, that the women might not be sexually exploited in the first phase of the process, but eventually are and that the issue has not been fully investigated. Additionally, worldwide, many of the women who are trafficked for domestic labour are being sexually exploited as well,⁷ a reality also for young Lao women who work in domestic services.⁸ In addition, Lao women working in factories in Thailand complain about sexual abuse.⁹ Trafficking for the purpose of sexual exploitation is the form of trafficking that has received most attention,¹⁰ something many scholars consider wrong, as an excessive focus on the sex sector tend to overlook abuses in other sectors.¹¹ Nonetheless it is the form of trafficking where women are generally most exploited and it is very discriminatory which is why I have chosen to delimit my thesis to this form of exploitation.

It is important to note that it is a problem to distinguish trafficking from the smuggling of migrants. Trafficked victims are according to legislation in force afforded greater protection than smuggled migrants, which puts a larger financial burden on the authorities than would the status as a smuggled migrant do. Hence authorities may identify irregular migrants as having been smuggled rather than trafficked. On the contrary, if all irregular migrants are seen as victims of trafficking, the problem can be handed over to organisations working with trafficking and the government does not have to worry. Border patrols generally find it hard even to distinguish trafficked girls from the general population.¹² The lack of knowledge on how to make a distinction worsens the situation of trafficking and the fact that trafficking in women is part of the larger pattern of migration makes the situation very difficult. The problems of distinction will be dealt with further on in the thesis.

As most women in the Lao PDR are trafficked to Thailand, serving as the economic axis in the region, women trafficked from the Lao PDR to Thailand will be the focus of my thesis. Accordingly trafficked Lao women to other surrounding countries are not within the scope of this thesis neither will women trafficked within the borders of the Lao PDR, as my thesis is very closely linked to international issues of trafficking and the Protocol to

⁷ Raymond, Janice G., 2002 "The New UN Trafficking Protocol", *Women's Studies International Forum*, Vol. 25, Issue 5, p. 493.

⁸ Bessey, Allan, 2002, *The Repatriation of Women and Girls to Laos*, Unpublished report for IOM, p. 17.

⁹ SCUK, 2003, *Migrant Children and Youth in Lao PDR. Migration along the border to Thailand*, Draft report to be published by Save the Children UK, the Lao Youth Union and the Ministry of Labour and Social Welfare, p. 36.

¹⁰ For example the Trafficking Convention from 1949 focuses only on trafficking for the purpose of sexual exploitation.

¹¹ Thorbek, Susanna, and Pattanaik, Bandana (eds.), 2002, *Transnational prostitution, Changing global patterns*, p. 218.

¹² Brown, Louise, 2001, *Sex Slaves, the trafficking of women in Asia*, p. 72.

Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime and thereby excluding trafficking within one nation.

1.3 Method and Material

This graduate thesis is based on a Minor Field Study, financed by a Scholarship from Sida, the Swedish International Development Cooperation Agency, carried out September-November in the Lao People's Democratic Republic.

The main focus in the first theoretical part will be on the latest legislative source, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, as it contains a new crucial, universal definition on trafficking, which is being used also by organisations in the Lao PDR despite the country not being a State Party to the protocol. The protocol also gives a good understanding of the process of trafficking and difficulties involved in protection and prevention efforts. Due to the fact that the Protocol is very new, there is still neither much literature analysing the instrument nor any legal decisions concerning the protocol. There are, however, many other important human rights instruments relating to trafficking and there is also the Convention for the Traffic in Persons and of the Exploitation of the Prostitution of others from 1949, which has been ratified by the Lao PDR, although without being important in practice.

It has not been a difficulty to find literature on the subject of trafficking in general and trafficking as such in the Lao PDR. The finding of literature concerning trafficking in the Lao PDR from a legal perspective has, however, been somewhat of a challenge. Most development cooperation projects carried out relevant to trafficking are focusing on socio-economic factors and there are few projects concerning legal aspects of trafficking. Additionally, the legal system in the Lao PDR is not well developed and the status of international law in the country is unclear. Only a few national instruments have been translated into English.

The field study consists of interviews with government representatives and also information from international organisations working with trafficked women in the Lao PDR, and to some extent also in Thailand. Examples of organisations are the United Nations Inter-Agency project on Human Trafficking in the Mekong sub-region (UNIAP) and the United Nations Children's fund (UNICEF), that have several projects regarding trafficking in the region.

The interviews were semi-structured and they all lasted for about one hour, in a few cases a little bit more. To verify the information I got I met with

different representatives from the same project in some cases. Camilla Lindström, my contact person, has also given me continuous information.

There are not as many actors working with trafficking in the Lao PDR as there would be in a bigger or more developed country, which has to be considered when taken notice of the fact that not more than 12 interviews were conducted. Nonetheless I was provided with a wide range of useful information. Additionally I was able to get hold of Lao legislation and other documents and literature as well as material from surveys carried out in the Lao PDR, and I could visit the Gender Resource Information and Development Centre and I had the possibility to participate in video showings etc.

Due to the political situation in the Lao PDR being a one party state with, among other things, limited freedom of expression and the fact that there are only a few actors and it is a small country, the interviewees would like not to be quoted. As I wish to fulfil this obligation, chapter 5 on the actual situation in the Lao PDR will not contain any footnotes if the information is not from elsewhere than from the interviewees.

1.4 Outline

First of all, my thesis is divided into two parts, of which the first one is theoretical and the second part is composed of information from the actual field study.

The theoretical part will start to give the reader an essential background in order to understand the problem of trafficking. It contains an introduction as to trafficking in general, a short presentation of the Lao PDR and an overview of the problem of trafficking in the Lao PDR, its causes and existence (Chapter 2). In chapter 3 international legal instruments relevant to this thesis are presented. First the historic development and human rights documents relevant to trafficking are described, where after the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime is the subject of discussion. The first part of the thesis ends with chapter 4, which presents national legislation of the Lao PDR and Thai legislation of interest for the process of trafficking of Lao women to Thailand.

The second part of the thesis, chapter 5, exclusively deals with the role of law in the process of trafficking from the Lao PDR to Thailand. The conventions to which the Lao PDR is a State Party and their meaning for the process of trafficking from the Lao PDR are subject of analysis as well as the question of whether Lao law is in accordance with international obligations. Furthermore there is an in-depth look at the actual process of trafficking and questions concerning law enforcement and corruption, the governments' role and cooperation and the sex sector in Thailand are

discussed. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime and the possibility of a ratification and implementation of the document in the Lao PDR is assessed in the end of chapter 5.

Finally chapter 6 analysis and gives conclusions of previous findings.

2 Background

2.1 Trafficking

2.1.1 General

During the past decade there has been a substantial increase in the growth of trafficking in people worldwide, but also a bigger interest for the phenomenon. It is a complex issue which often contains many interrelated problems, such as prostitution, slavery-like practices, forced labour, migration and human rights violations. It can involve abduction or deception by a trafficker who benefits from the actual exploitation, but this is not always the case.

Trafficking occurs both within countries and between two or more countries. There are no exact numbers of how many persons are trafficked, numbers ranging from 700 000 to four million yearly in the world.¹³ The vast majority of the victims are women and children.¹⁴

Simplified, trafficking is a process where people are moved from one place to another with the means of threat or the use of force, abduction, coercion, fraud, deception, or abuse of power etc for the purpose of exploitation. The threat can occur at any time of the process. Examples of forms of exploitation are prostitution, sexual exploitation, forced labour and slavery. The definition of trafficking will be discussed in detail in chapter 3.5.

2.1.2 Root causes of trafficking

There is not only one root cause of trafficking, rather as many causes as there are cases of trafficking. Also the reasons for trafficking vary with whose opinion you hear. For example, the Special Rapporteur on violence against women identifies the primary causative factor of trafficking as the lack of rights afforded to women,¹⁵ while the principles and guidelines of trafficking from the High Commissioner on Human Rights identifies the demand market as the main causative factor¹⁶.

¹³ Ginzburg, Oren, 2003, *Questions and Answers to Trafficking*, p. 3.

¹⁴ Chamberlain, p. 8.

¹⁵ E/CN.4/2000/68, Report of the Special Rapporteur on Violence against Women, Ms. Radhika Coomaraswamy, *Integration of the Rights of Women and the Gender Perspective*, p. 19, note 54.

¹⁶ E/2002/68, Report of the United Nations High Commissioner for Human Rights and the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, p. 3.

It has been observed that the process of globalisation have led to rising unemployment and increased poverty in many parts of the world, which has in turn led many people to migrate to those places where there is a demand for cheap labour. These persons are often vulnerable and risk becoming exploited. Crossing the border affords an opportunity to get a job, an alternative which often lack in the country of origin.

Strict sexual codes, a high degree of control of females and rigorously male-dominated societies are reflected by a regular supply of trafficked women to the sex trade.¹⁷ Trafficking occurs because there is a large demand for cheap purchased sex. The consumers (the demand market) of commercial sexual services would most likely rather buy sexual services from a young woman than an elderly man, and this is why the workforce in the commercial sex industry predominantly is made up of women.¹⁸ As local women in the country of destination generally do no longer enter the business of prostitution to the same extent due to social stigma or awareness of the health risks the unmet demand will instead be filled by foreign women.¹⁹

Domestic violence, drug addiction and/or a range of social exclusionary social practices and policies based on discriminatory beliefs about gender, race, ethnicity, caste and/or sexuality are also reasons identified as causing trafficking.²⁰

Furthermore, in Thailand for example, many groups, sometimes including government and law and order officials, have an interest in maintaining the sex sector as it generates money to them and to the country.²¹

2.2 History and social structure of the Lao PDR

Asia is the biggest continent in the world and it is also very diverse. The Lao PDR is, situated north east of Thailand and bordering five nations, also very diverse, both in nature and population. Among the 5.4 million people there are approximately 230 different ethnic minorities.²²

The Lao PDR is one of the poorest countries in Southeast Asia and poverty is common to the whole country. On the Human Development Index, in the group of least developed countries, UNDP places the Lao PDR at number 143 out of 173 countries²³ and in 1998, 41% of the population lived below the poverty line, which amounts to 1.9 million people. Newer indications

¹⁷ Brown, p. 25.

¹⁸ Anderson; Davidson O'Connell, p. 30-33.

¹⁹ Skrobanek; Boonpakdi; Janthakeero, p. 14.

²⁰ Anderson; Davidson O'Connell, p. 30-33.

²¹ Lim, Lin Lean, (ed.), 1998, *The sex sector: The economic and social bases of prostitution in Southeast Asia*, p. 2.

²² Participatory Poverty Assessment (PPA) Lao PDR, 2001, Report by Asian Development Bank, State Planning Committee, National Statistic Centre, Vientiane, p. 42.

²³ UNDP, Human Development Index, 2003, <http://undplao.org>, visited 2003-12-12.

show that poverty is falling. The poverty rates are higher in the northern parts of the country than in the southern parts and therefore poverty is a distinctive ethnic problem as the northern uplands are inhabited largely by ethnolinguistic minorities. Poverty is also more of a rural than an urban problem. There is not much information on gender aspects of poverty. However women, generally speaking, work more than men do, especially in poorer villages.²⁴ There are a few linkages between poverty and socio-economic factors. For example poorer families tend to be larger than non-poor families and concentrated in areas where the infrastructure is less developed and households with illiterate heads are disproportionately poorer. Furthermore there are indications that poverty is becoming a bigger problem in the urban areas due to the country becoming more commercialised and because of the economic growth. Poverty does not take the form of hunger rather it is a new form of poverty caused by ill-advised government policies. During the 90s the poverty situation improved and this process is continuing, although the pace is slow.²⁵

The Lao PDR is a member of the ASEAN and together with Cambodia the least developed country in the organisation. The strategy with a growth based on rice will neither suffice as a basis for sustained growth, nor will it be enough to reduce poverty or meet the needs of rapid and continued integration of the Laotian economy in the region. The Lao PDR has applied for membership in the World Trade Organisation.²⁶

Although the Lao PDR has developed economically over the last decade, the political system has remained almost unchanged since forming a new regime in 1975. The country continues to have only one legal political party – Lao People's Revolutionary Party and the army remains part of the political society playing a significant role in politics. The majority of the party members also have a military background. The civil society is not separated from the state, but instead organised by various mass organisations and although it is suggested in the constitution, the party and the state are not separated. Despite the development and economic reforms during the last decade there are no indications that the political regime will fundamentally change.²⁷

Media is controlled by the government and used by the authorities as an instrument for information of government policies and decisions. Therefore media cannot go beyond what the authorities consider is politically acceptable.

There are plenty of international non-governmental organisations that are active in the Lao PDR, most of them engaged in service delivery. National non-governmental organisations are not yet allowed, instead people are

²⁴ PPA, pp. 43, 128.

²⁵ Sida, 2003, *Country Analysis – Lao PDR*, pp. 5-6.

²⁶ Sida, pp. 10-12.

²⁷ Sida, pp. 12-15.

organised in mass organisations that are strongly affiliated to the Party, for example the Lao Women's Union.²⁸

The Lao PDR has a poor public administration – the system lacks a clear framework for administrative accountability, effective mechanisms for policy development and co-ordination and it lacks domestic resources. Additionally the systems for public service are inefficient and the staff is often under-qualified. The Party is in control of most administration, run by a small elite core of leaders. The bad administration hurts the poor who remains isolated from the mainstream and generally do not understand government policies and only have a vague idea of what the government is.²⁹

The legal system is very week in the Lao PDR, the basic problem being that of political interference in legal matters. There seem to be little understanding of the principle of separation between the judiciary and executive branch of the government.³⁰ Many professionals working in the legal system have none or only very basic legal training. Even on higher political level the understanding of what changes are needed in order to improve the legal system is questionable. The changes are slow, however, there are changes and the government appears to be committed to improving the legal sector. Freedom of expression, freedom of the press and freedom of assembly and association are all severely restricted. So are the civil and political rights, thus personal freedoms and integrity are vastly under the State's control.³¹ The legal system will be further dealt with below.

2.3 Trafficking in the Lao PDR

2.3.1 General

The history of the Lao PDR with closed borders and the last decades development towards economic reform and opening of borders are reasons why the problem of trafficking is newer in the Lao PDR than in for example Thailand. However, trafficking being a newer problem, it is not a smaller one. Trafficking is increasing rapidly in the Lao PDR as well as in the whole Mekong sub-region. It is nonetheless difficult to say exactly how many women are trafficked from the Lao PDR.³²

Women from the Lao PDR are mostly trafficked to Thailand and end up working as prostitutes, domestic workers or in the agricultural sector. In a few cases Thailand serves only as a transit country for Lao women going to

²⁸ Sida, p. 17.

²⁹ Sida, pp. 18-19, 21-22.

³⁰ Sida, p. 66.

³¹ Sida, pp. 22-25.

³² Ginzburg, p. 3.

Malaysia.³³ Trafficking does also exist within the Lao PDR, girls being trafficked from rural to urban areas for prostitution.³⁴

It is not possible to say how many of the Lao women who are trafficked that end up in the sex industry, however, the sex industry does not seem to be the destination for the majority of the women from the Lao PDR. Generally many women migrate knowing that they will work in the sex industry where they are exploited at a later stage; others find themselves there against their will. Common problems in the sex industry include debt bondage, withholding of travel documents and wages, beatings, sexual assaults, confinement, psychological abuse and corrupt officials. If women trafficked into the sex industry try to press charges against the traffickers it may result in their own arrest for prostitution.³⁵ This will be dealt with further below.

2.3.2 Possible reasons for trafficking from the Lao PDR

Poverty gives raise to many problems, one of them being human trafficking. Poverty is however not the primary reason why Lao women are trafficked. The non-existent labour market, the economic development and the fact that the Lao PDR borders five countries also contribute to trafficking, as well as many other things.

While the geographical position of the Lao PDR can be beneficial to the country in forms of trade, tourism, communication and development, it also places the country in a vulnerable position when it comes to trafficking.

Market integration and substantial economic growth have had beneficial impact in some countries. However, the larger benefits have not come to the countries lacking physical and human capital (the Lao PDR) to the same extent as to countries having those attributes (Thailand) and already existing differences between countries have grown. The economic disparity between the Lao PDR and its neighbours, especially Thailand, stimulates not only development, but also migration and transnational trafficking in women.³⁶

The closeness to Thailand in form of information through media about what the possibilities there are and a desire to experience for real what can be seen on Thai TV and be heard through Thai Radio is contributing to the problem of trafficking, as many women in the Lao PDR are in search for better opportunities. The unemployment rates in the Lao PDR are high,³⁷ and the career choices available are very few. Surveys have shown that trafficking is more common in the area around the Mekong River where the

³³ Interviewee, Vientiane 2003.

³⁴ UNICEF; Ministry of Labour and Social Welfare, 2001, *How I got here, Commercial Sexual exploitation of children in Lao PDR*, p. 12.

³⁵ GAATW, 1999, *Human Rights in Practice, A guide to Assist Trafficked Women and Children*, p.13.

³⁶ UNICEF; Ministry of Labour and Social Welfare p. 8-9 and Marchall.

³⁷ UNICEF; Ministry of Labour and Social Welfare p. 8-9.

river forms the border with Thailand and the access to information is better. However it has to be taken into account that more surveys concerning trafficking have been carried out in the provinces along the Mekong. Thailand is accessible also because of linguistic and cultural similarities and surveys have shown that social distance is more important than physical distance. For some women it is a dream to become rich that make them go. Others are encouraged by their parents to go, or at least the parents do not stand in their way. In other cases women have seen their friends go and either want to come along or are convinced to do so.³⁸

Some women are lured into prostitution³⁹ for example by agents who go to villages asking for girls who want to work in a shop or a restaurant without telling them that the work will include prostitution. Some young women come back to their village and recruit their friends. The primary motive for going is usually the money they can earn either to support themselves and their families, or to improve their life-style. In some cases younger women are encouraged by family members due to family poverty.⁴⁰

Of course there is also the demand market of trafficking – without a market the better opportunities to earn money and get a job would cease and many women would probably not be trafficked. In Asia the demand for commercial sexual services comes from local and migrant men, businessmen, domestic tourists and to a lesser extent, foreign tourists.⁴¹ Where it is cheap to buy sex there will also be more buyers, a bigger market and a need for women.⁴² The market is economically successful not only for the Thai economy,⁴³ but also, the unemployment rates in the Lao PDR are probably lower than they would have been without the migration.

In the Lao PDR there seem to be a consensus that lack of alternative opportunities in the country, such as employment, as well as the social closeness to Thailand are the main reasons causing trafficking from the Lao PDR to Thailand. Yet, in Asia there is also a certain grade of social exclusionary practices and policies based on discriminatory beliefs about gender and sexuality that can be identified as causing trafficking.⁴⁴ In addition there is a social acceptance in Thailand of men buying sexual services.⁴⁵

³⁸ Chamberlain, pp. 3, 11, 17.

³⁹ Approximately 10% according to a recent study carried out by UNICEF.

⁴⁰ UNICEF; Ministry of Labour and Social Welfare, p. 21.

⁴¹ In a survey carried out by the Coalition against Trafficking in Women 1995, in Thailand approximately 4.6 million Thai men and 500 000 foreign tourists visit prostitutes annually, Lim, p. 9.

⁴² Anderson; Davidson O'Connell, p. 39.

⁴³ Lim, p. 131.

⁴⁴ Anderson; Davidson O'Connell, p. 46.

⁴⁵ Lim, p. 132.

3 International legal instruments

Until 2000 there were several international legal instruments concerning trafficking of which none were very effective. 2000, however, the United Nations Convention against Transnational Organised Crime and its first two protocols were adopted⁴⁶, of which the first one, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the Palermo Protocol), is of great importance for this study to be able to understand the process of trafficking. The convention was ratified by enough countries for it to enter into force as of the 29 of September 2003. So far there are 45 State Parties to the Palermo Protocol and it will enter into force on the 25th of December 2003.

3.1 Historical development

Already 1904 there was an attempt to suppress white slave trade, which meant cross-border movement of women for an immoral purpose, meaning that the women had to be prostitutes to be regarded as trafficked. In-country movement was included in a convention six years later⁴⁷ neither containing a definition of trafficking nor was it recognised as trafficking if the women consented to the situation. In 1921 the Convention for the Suppression of the Traffic in Women and Children was adopted without the restriction to white slave traffic and broadening the scope including trafficking in children of both sexes. Another convention, International Convention for suppression of the Traffic in Women of Full Age, which required State Parties to punish persons who trafficked women of full age irrespective of the woman's consent, was concluded in 1933. None of the Conventions included a definition of trafficking.⁴⁸

3.2 The 1949 Trafficking Convention

In 1949 the four abovementioned conventions were consolidated into one convention, the United Nations Convention for Suppression of Traffic in

⁴⁶ United Nations Convention against Transnational Organised Crime; Protocol to Prevent, Suppress and punish trafficking in persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, hereinafter the Palermo Protocol; Protocol against Smuggling of Migrants by Land Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, adopted by resolution A/RES/55/25 of 15 November 2000. The Convention entered into force 29 September 2003.

⁴⁷ International Convention for the Suppression of White Slave Trade of 1910.

⁴⁸ E/CN.4/2000/68, notes 18, 19.

Persons and the Exploitation of the Prostitution of Others,⁴⁹ which had an even stronger link to slavery and prostitution than the previous conventions.⁵⁰ The convention has however been inefficient both in protecting the rights of women and combating trafficking. Its enforcement mechanisms have not been effective and the convention does not have a human rights approach.⁵¹ The convention is of importance here, as the Lao PDR is a State Party to it and thereby bound by all its articles, although they have made a reservation not being bound by article 22 of the convention. This will be developed in chapter 3.2 and chapter four.

The Trafficking Convention does not contain a definition of trafficking and by focusing only on trafficking for prostitution it excludes all other possibilities, for example trafficking for marriage or trafficking for other sex work than prostitution. This can be seen in article 1 of the convention, which spells out that the State Parties to the convention shall punish a person who, to gratify the passion of another: (1) procures, entices or leads away for the purposes of prostitution, another person, even with the consent of that person; (2) exploits the prostitution of another person, even with the consent of that person. Thus the novelties compared to before were that the *exploitation itself* now became punishable as well as national and international trafficking irrespective of the victim's *consent*.

The Trafficking Convention of 1949 does not mention the victims' access to law and contains only a few protection provisions in a rather weak language. Instead it focuses on punishment of the procurers, persons exploiting prostitution and brothel owners. However, the convention obliges the State Parties to undertake measures to provide for social, medical and legal measures to end prostitution and rehabilitate the victims.⁵²

Due to the fact that *all* abovementioned conventions failed to include a clear definition of trafficking, it seems as if it was up to the states to decide who should be considered trafficked and thus be granted protection. In the documents referred to, the focus was rather on preventing trafficking than on providing protection for the trafficked persons.

3.3 Human Rights documents and the Rome Statute of the International Criminal Court

It shall be noted that there are several other conventions than pure trafficking conventions and documents that are relevant to combating

⁴⁹ United Nations Convention for Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, approved by the General Assembly resolution 317 (IV) of 2 December 1949, entry into force 25 July 1951, hereinafter the Trafficking Convention, which has not attracted widespread support.

⁵⁰ Thorbek; Pattanaik, p. 218.

⁵¹ E/CN.4/2000/68, note 22.

⁵² ESCAP, 1999, *1998 Regional Conference on Trafficking in Women, Regional and International Mechanisms, Initiatives and Prospects*.

trafficking and protecting women who risk being trafficked or have been trafficked. It has been stated that it is essential that State Parties adhere to *all* human rights instruments in order to combat trafficking and protect its victims. At the Fourth World Conference on Women the Beijing Platform of Action was adopted,⁵³ which calls specifically for action to “strengthen the implementation of all relevant human rights instruments in order to combat and eliminate, including through international cooperation, organised and other forms of trafficking in women and children, including trafficking for the purposes of sexual exploitation, pornography, prostitution and sex tourism”.⁵⁴

The Slavery Convention from 1926⁵⁵ and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices to Slavery from 1956⁵⁶ are two human rights conventions that are relevant to trafficking. The first Convention obliges the state parties to abolish all forms of slavery and slavery-like conditions and the supplementary convention widens the definition of slavery. Slavery is explicitly mentioned in the Palermo Protocol article 6 and as well as forced labour it is closely linked to trafficking. The violence perpetrated against trafficked women has also been compared with torture and cruel or inhuman treatment⁵⁷ in violation of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.⁵⁸

The United Nations Declaration on the Elimination of Violence against Women⁵⁹ sets out an internationally agreed definition of violence against women as “any acts of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion of arbitrary deprivation of liberty, whether occurring in public or private life”. The definition, as stated in article 2 of the declaration, includes the traffic in women and forced prostitution.⁶⁰

⁵³ The Beijing Platform of action is a broad statement of principles which was consensually adopted by governments as a declaration by the 1995 Fourth World Conference on Women.

⁵⁴ Beijing Platform of action, 1995, Strategic Objective I.1. *Promote and protect the human rights of women, through the full implementation of all human rights, especially the Convention on the Elimination of All forms of Discrimination against Women*, United Nations 1996, note 230.

⁵⁵ The Slavery Convention, entry into force 9 March 1927.

⁵⁶ The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices to Slavery, adopted by Conference of plenipotentiaries convened by Economic and Social Council resolution 608 (XXI) 30 April 1956, entry into force 30 April 1957.

⁵⁷ E/CN.4/2000/68, note 39.

⁵⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations, resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

⁵⁹ Declaration on the Elimination of Violence against Women, adopted by the General Assembly of the United Nations, resolution 48/104 of 20 December 1993.

⁶⁰ ESCAP, Regional Conference Bangkok 1999.

The Rome Statute of the International Criminal Court⁶¹ links trafficking to slavery-like practices and hence states that trafficking should not be limited to prostitution and “immoral purposes”. According to article 7.1 of the statute, enslavement, defined in article 7.2 (c) as meaning “the exercise of any or all of the powers attaching to the right of ownership over a person and including the exercise of such power in the course of trafficking in persons, in particular women and children” is a crime against humanity.

There are other human rights conventions and declarations that can contribute to improving the situation of a trafficked person regarding human rights abuses, such as the International Covenant on Civil and Political Rights⁶², the Universal Declaration of Human Rights and several other Conventions containing the right of a person not to be discriminated against. The Convention on Elimination of all forms of Discrimination Against Women⁶³ is a very important document and will be dealt with separately below.

There are also, in some cases, Bilateral and Regional Arrangements on migration, labour exchange programs and trafficking. Examples of such can be seen in the case of the Lao PDR and Thailand, see chapter 4.3 on bilateral agreements.

3.4 The Convention on the Elimination of all forms of Discrimination Against Women

The Convention on the Elimination of all forms of Discrimination Against Women entered into force 1981 and includes a provision on trafficking. Article 6 states:

“State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution in women.”

Although neither trafficking in itself nor the constituted expression “exploitation of prostitution” are defined in the article, the article can serve as supplementary means of interpretation to specific trafficking documents. The General Recommendation No. 19 on violence against women of the Committee on the Elimination of Discrimination Against Women, although not an internationally agreed definition, gives some explanation of what could be meant by “exploitation of prostitution” by stating that in addition

⁶¹ The Rome Statute of the International Criminal Court, adopted 17 July 1998, A/Conf. 183/9.

⁶² The International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations, resolution 2200 (XXI) of 16 December 1966, entry into force 23 May 1976, hereinafter the ICCPR.

⁶³ Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the General Assembly of the United Nations, resolution 34/180 of 18 December 1979, entry into force 3 September 1981, hereinafter CEDAW.

to the established forms of trafficking, there are “new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organised marriages between women from developing countries and foreign nationals”.⁶⁴ The Special Rapporteur on violence against women means that the Committee’s General Recommendation by this statement goes farther in defining the exploitation of prostitution than does CEDAW.⁶⁵

The General Recommendation No. 19 requires State Parties to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women.⁶⁶ Further the recommendation emphasises the vulnerability of those women who are in prostitution and their need of equal protection against rape and other forms of violence despite their legal, maybe unlawful, status.⁶⁷ Additionally the recommendation acknowledges that specific preventive and punitive measures are necessary in order to overcome trafficking and sexual exploitation.⁶⁸

Article 1 of CEDAW protects victims of trafficking by broadly defining discrimination as including not only gender-based violence that is directed against a woman because she is a woman or that affects women disproportionately, but also gender-based violence which impairs or nullifies the enjoyment by women of other human rights and fundamental freedoms under general international law or under other human rights conventions.⁶⁹

3.5 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime was adopted in November 2000 and will be the first international legally binding document with a coherent definition of Trafficking when it enters into force on the 25th December 2003. It is this definition that states and also, where appropriate, intergovernmental organisations and non-governmental organisations are urged to follow according to the UN Guidelines and Principles on Human Rights and Human Trafficking.⁷⁰

⁶⁴ General Recommendation No. 19, 11th session 1992, *Violence against women*, note 14.

⁶⁵ E/CN.4/2000/68, note 28.

⁶⁶ General Recommendation No. 19, note 13.

⁶⁷ General Recommendation No. 19, note 15.

⁶⁸ General Recommendation No. 19, note 24(g).

⁶⁹ Article 1 CEDAW and General Recommendation No. 19, note 6.

⁷⁰ E/2002/68/Add 1.

Article 37 paragraph 4 of the Convention against Transnational Organised Crime states that to become a State Party to either of the protocols the state first has to ratify the Convention. Additionally the same article states that the protocols shall be interpreted together with the convention.

The protocol has been criticised in many ways. Firstly for the definitional problems concerning the non-existing distinction between smuggling and trafficking as well as the relationship between trafficking and legal systems of labour import and export. Secondly the protocol has been criticised for the confusion between trafficking for prostitution and the actual rights and wrongs of prostitution.⁷¹ Thirdly it has been said not to be favourable in a human rights perspective, partly because it is an amendment to the Convention against Transnational Organised Crime negotiated by the UN Commission on Criminal *Crime Prevention* and Criminal Justice⁷² and not to a proper human rights document. The Special Rapporteur on violence against women even views the protocol as a failure of the international human rights community to fulfil its commitment to protect the human rights of women.⁷³ Those who argue that trafficking should be seen from a human rights perspective are often also suspicious of governments' and law enforcements agencies' interest in trafficking when terms like "organised crime" and "illegal immigration" are used discussing issues of trafficking.⁷⁴

The protocol is not as most of its precedents limited to women and children, thus it includes men, who are also subject to trafficking. However, the phrase "especially women and children" emphasises that the weight is put on women and children.

According to article 4 of the Palermo Protocol, the protocol is applicable only where the offences are transnational in nature and involve an organised criminal group. These concepts are defined in articles 2 and 3 of the Convention against *Transnational Organised Crime*. An organised criminal group shall mean, according to article 2(a), a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the convention in order to directly or indirectly obtain financial or other material benefit. Article 3 of the convention excludes movements within a state from the concept "transnational in nature" if not substantial parts of the preparations, planning, direction or control or the effects occurred in another state. The offence is also transnational in nature if the organised criminal group engages in criminal activities in more than one state (article 3(2) a-d).

⁷¹ Anderson; Davidson O'Connell, p. 7.

⁷² General Assembly resolution 53/111 of 9 December 1998 established an open-ended intergovernmental Ad Hoc Committee of the UN Commission on Criminal Crime Prevention and Criminal Justice.

⁷³ E/CN.4/2000/68, note 7.

⁷⁴ Anderson; Davidson O'Connell, pp. 14-15.

Article 2 of the protocol sets out the purpose of the protocol, which is to *prevent* and combat trafficking in persons and when doing that paying particular attention to women and children and also to *protect* and assist victims and to promote co-operation among states.

3.5.1 Defining trafficking

The definition of “Trafficking in persons” is set out in article 3 of the protocol:

- (a) “*Trafficking in persons*” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The definition contains three different elements, all of which have to be present to constitute trafficking. The first element is that of an *action*, an improper movement, the second element is that the action is taken for *improper means* (threat etc) and it all has to occur for the purpose of *exploitation* (an improper purpose), the third element.

The action consists in recruiting, transporting, transferring, harbouring, or receipting a person, i.e. moving the person from one state to another.

The second element is the means of threat or the use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of the person being controlled by another person. The abuse of a position of vulnerability refers to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.⁷⁵ It can be discussed what is a real and acceptable alternative. Neither the article nor the interpretative notes mention when the improper means shall be carried out. Hence it seems as if they can be carried out at any time during the process.

The third necessary element for it to fall under the definition of trafficking is that the purpose of the previous elements set forth is exploitation. The second sentence in the paragraph explains that the exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of

⁷⁵ Interpretative notes for the official records (travaux préparatoires) of the negotiation of the Palermo Protocol, A/55/383/add 1, note 63.

sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The latter forms of exploitation are defined in respective relevant document.⁷⁶ The concepts of “exploitation of the prostitution of others” and “sexual exploitation” are described in the General Recommendation No. 19 to CEDAW (se above Chapter 3.4 on CEDAW). It is important to note that the protocol addresses the exploitation of the prostitution of others or other forms of sexual exploitation only in the context of trafficking in persons and that it is up to the State Parties to regulate prostitution in their respective domestic laws.⁷⁷ Thus every country, those criminalising prostitution as well as those legalising prostitution, can ratify the Palermo Protocol. It shall be clarified that trafficking with the outcome of prostitution in a country of destination where prostitution is legalised is still trafficking. Leaving it up to the states to conclude whether states should or should not regulate prostitution was done due to the fact that no international consensus could be reached. This has been criticised and is a debated issue. Some scholars argue that “neutrality is achieved on the expense of precision” and that the absence of clarity allow conflicting interpretations of the protocol, meaning that with the definition in the protocol, those cases where adults work freely and voluntarily in the sex industry cannot be defined as trafficking.⁷⁸

Subparagraph (b) of article 3 states that the *consent* of a victim of trafficking in persons to the intended exploitation where any of the means set forth in paragraph (a) have been used should be irrelevant. The interpretative notes of the protocol indicate that the subparagraph is not intended to impose any restrictions on the right of the accused persons to a full defence and presumption of innocence. Neither should it be read as imposing on the victim a burden of proof.⁷⁹ Hence the paragraph strengthens the position of the victim during the legal proceedings. The inclusion of subparagraph (b) on consent has been criticised by some, who argue that many women do chose to *migrate*, either legally or illegally, but women are never trafficked with consent and it is therefore a mistake to speak of “trafficking with consent”. The use of violence, deception, intimidation and other abuses which are central to the definition of trafficking are not consented to.⁸⁰ During the deliberations of a definition of trafficking other groups⁸¹ maintained that it was important to include consent in the paragraph so that all victims of trafficking would be protected, not only those who can prove that they have been forced into trafficking, which they meant could lead to situations where a woman’s past experience in prostitution is equated with a presumption of consent. A definition including consent, not limited to forced or coerced trafficking was

⁷⁶ Forced Labour is explained in the Forced Labour Convention, Convention No. 29, adopted 28 June 1930 by the General Conference of the International Labour Organisation, entry into force 1 May 1932; Slavery is explained in the Convention Against Torture etc.

⁷⁷ A/55/383/add 1, note 64.

⁷⁸ Anderson; Davidson O’Connell, pp. 7-8, 17-18, 48.

⁷⁹ A/55/383/add 1, note 68.

⁸⁰ GAATW, 1997, *Practical Guide to Assisting Trafficked Women*, p. 5.

⁸¹ A small group of NGOs organized by the International Human Rights Law Group.

further strongly recommended by the Working Group of Contemporary Forms of Slavery and the Sub-Commission on the Promotion and Protection of Human Rights.⁸² The countries that had legalised or regulated prostitution as a legitimate labour and economic sector on the other hand insisted on restricting the definition only to those women who could prove that they had been forced into trafficking.⁸³

3.5.2 Distinguishing trafficking from the smuggling of migrants

It is a problem that many countries equate illegal migration with trafficking in women, as a distinction is essential in order to combat trafficking. Hence, if a trafficked woman is not accepted to be a victim of trafficking, but a smuggled individual, she will not receive adequate protection in the receiving state which will put her in a very vulnerable position where she is an easier target for traffickers. Such policies may thus even cause or contribute to trafficking.⁸⁴ The reason for states to identify a trafficked victim as a smuggled migrant is that the latter person requires, according to international law, fewer protection measures from the state than do victims of trafficking and therefore such a definition is a cheaper alternative for the country in question. The Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organised Crime⁸⁵ does not, as opposed to the Palermo Protocol article 7, require State Parties to consider adopting legislative or other appropriate measures that permits victims of trafficking to remain in their territory, either temporarily or permanently.⁸⁶

To combat illegal immigration many countries adopt stronger and stronger anti-immigration policies, an approach which may not always be compatible with the protection of human rights as it can restrict freedom of movement.⁸⁷ Laws and policies on immigration designed to combat illegal migration or migrant smuggling by adopting stronger anti-immigration policies may even contribute to trafficking as it lessens access to legal measures which can put the trafficked person in a vulnerable position. Illegal immigrants are not strongly protected and cannot get a legal migrant work and risk being trafficked to a third country because of their vulnerable position.⁸⁸ With the absence of legal systems that facilitate movement

⁸² E/CN.4/Sub.2/2000/L.22, United Nations Working Group on Contemporary Forms of Slavery and United Nations Sub-Commission on Human Rights, note 41.

⁸³ Raymond, Janice G., 2002, “The New UN Trafficking Protocol”, Women’s Studies International Forum, Vol. 25, Issue 5, pp. 494, 495.

⁸⁴ E/CN.4/2000/68, note 46.

⁸⁵ Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, hereinafter the Smuggling Protocol.

⁸⁶ Protocol against Smuggling of Migrants by Land, Sea and Air compared with the Palermo Protocol.

⁸⁷ E/CN.4/2000/68, note 43.

⁸⁸ E/CN.4/2000/68, notes 61, 62., Anderson; Davidson, O’Connell, p. 8.

between countries, illegal migration might continue to grow and thereby also the number of unprotected people.⁸⁹

Article 3 of the Palermo Protocol defining trafficking does not explicitly mention the close link between the smuggled migrants and the victims of trafficking. However, in a comparison between the Smuggling Protocol and the Palermo Protocol, the difference between the two categories can be read out. The Smuggling Protocol article 3 defines smuggling as:

“the procurement of illegal entry of a person into a State Party of which the person is not a national or permanent resident, against a financial or other material benefit”

It can be seen that the procurement is done in order to obtain, directly or indirectly, financial or other material benefit from the actual movement, not in order to harm the person being smuggled but simply facilitate border crossing for that person. The crime of the smuggler is against the state of destination. Trafficking is on the other hand based on the *exploitation* in the country of destination and the profit comes from the actual exploitation, i.e. selling for labour or, as relevant for this study, sexual services. The crime of the trafficker is against the migrant as an individual.⁹⁰

The broad definition of migrant smuggling could almost apply to all immigrants whose transport has been facilitated for a small financial or material cost, which leads to the conclusion that almost all trafficked victims can be identified as smuggled migrants, however not the trafficked victims entering the country of destination legally being exploited in a later stage.

3.5.3 Protection

Chapter 2, articles 6, 7 and 8 of the Palermo Protocol concerns protection of the victims of trafficking before, during and after the legal proceedings. Article 6 concerns assistance and protection of victims of trafficking, article 7 the status of the victims in the receiving state and finally article 8 concerns repatriation of victims.

The first paragraph of article 6 states that every State Party to the convention shall protect the privacy and identity of victims of trafficking, including by making the legal proceedings confidential. This could protect the victim from retaliation from the trafficker for having reported the crime. However, the state is pledged to keep the legal proceedings confidential only “in appropriate cases” and “to the extent possible under domestic law”, statements which make the provision very weak.

⁸⁹ Marchall.

⁹⁰ Ginzburg, p. 7., and Anderson; Davidson, O’Connell, p. 20.

The provision further stipulates an obligation of the states to provide for information to the victims on relevant court and administrative proceedings as well as assistance to enable the victims' views and concerns to be presented and considered at appropriate stages of the criminal proceedings in a manner not prejudicial to the rights of the defence (paragraph 2 (a) and (b)). Adherence to such obligations could strengthen the position of the victims and ensure that the victims are not revictimised or discriminated against in the investigations and prosecution of crimes.⁹¹ Unfortunately this paragraph is as weak as the preceding paragraph, stating an obligation for the state to act only in appropriate cases.

According to paragraph 3 of article 6 each State Party shall consider implementing measures to provide for physical, psychological and social recovery of victims of trafficking, including, in appropriate cases, cooperation with non-governmental organisations, other relevant organisations and other elements of civil society. These measures shall, in particular cases, include appropriate housing, counselling and information, in particular as regards their legal rights, medical, psychological and material assistance and employment, educational and training opportunities. The obligation, requiring only a duty to "consider" implementing the measures, is strengthened by obligations in CEDAW pledging that measures taken to protect women from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers. This applies also to victims of trafficking.⁹²

Paragraph 4 of article 6 pledge states to take into account the age, gender and special needs of victims of trafficking in persons while the next paragraphs oblige states to endeavour to provide for the physical safety of victims when they are within its territory (paragraph 5) and that it is for the State Parties to ensure that its domestic legal system contains measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered (paragraph 6).

The weak nature of article 6 results in that states can act in more or less whatever way they prefer or be totally passive. However, the ICCPR could strengthen the position of the victim during the criminal proceedings, by guaranteeing a fair and public hearing by a competent, independent and impartial tribunal established by law (article 14), provided the state is a party to that convention.

The assistance set forth in article 6 is applicable to both the receiving state and the state of origin of the victims, but only as regards victims who are in their respective territory.⁹³

⁹¹ Beijing Platform of Action, Strategic Objective I.2., *Ensure equality and non-discrimination under the law and in practice*, note 232(l).

⁹² General Recommendation No. 19, note 24(p).

⁹³ A/55/383/Add.1, note 71.

Article 7 concerns the status of the victims of trafficking in the receiving states. According to the article each State Party to the protocol shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently (paragraph 1). Article 7 thus tries to strengthen the position of the victim in the receiving country, as many trafficked persons are identified as illegal immigrants and therefore often sent back to their country of origin, the reality also for many trafficked persons working within the sex sector in a country where such activity is illegal. While considering the possibilities of implementing measures as stated in paragraph 1, the state shall additionally take into account humanitarian and compassionate factors (paragraph 2), a statement that suggests a human rights approach. However, the language in article 7 is not mandatory and the country in question can choose to act only in appropriate cases (paragraph 1). Again the victims' position will be uncertain and the trafficked person may not dare to report the crime to the authorities in fear of deportation.

Article 8 concerns repatriation of victims of trafficking. The State Party of which a victim is a national or in which the person had the right of permanent residence at the time of entry into the receiving State Party shall facilitate and accept safe return of that person without undue or unreasonable delay. According to the interpretative notes to the Palermo Protocol the words "permanent residence" means long-term residence, but not necessarily indefinite residence. The paragraph should be interpreted as being without prejudice to any domestic legislation regarding either the granting of the right of residence or the duration of residence.⁹⁴

If the receiving state requests it, the state of origin shall verify whether the trafficked person is a national of that state or have permanent residency in that state (article 8.3). This is to ensure that a return of the person shall not be undertaken before the nationality or right of permanent residence has been verified.⁹⁵ Furthermore, in order to facilitate the return of a victim of trafficking the state of origin shall agree to issue travel documents or other necessary authorization to enable the person to travel to and re-enter territory (article 8.4).

The return shall, according to paragraph two of article 8, be undertaken with "due regard for the safety of that person" (i.e. the victim of trafficking), although without clarifying what is the meaning of such a phrase, neither in the paragraph nor in the interpretative notes. However, as the provision is situated under the protection part of the protocol, it seems as if it is supposed to protect the victim of trafficking from dangers threatening the person. Hence the person should be protected from revictimisation, the risk of being confronted with criminal proceedings for having worked in prostitution and the risk of having to pay fines for having left the country of origin without permission. State Parties to the convention are, according to

⁹⁴ A/55/383/Add.1, note 72.

⁹⁵ A/55/383/Add.1, note 74.

article 9.1(a) of the protocol, obliged to establish policies, programs and other measures to protect victims of trafficking, especially women and children, from revictimization.

Paragraph 2 of article 8 not only states that the return shall be safe, but also the return shall be with due regard for the status of any legal proceedings related to the fact that a person is the victim of trafficking and the return shall preferably be voluntary. These words “preferably voluntary” shall however not be understood to place any obligation on the State Party returning the victims.⁹⁶

It is important to note that article 8 shall be applied without prejudice to any right afforded to victims of trafficking by any domestic law in the receiving State Party (paragraph 5), meaning that the rules set out in the article are only minimum standard rules and domestic law prevail only when such rules improves the situation for the trafficked victim. On the contrary, paragraph 6 stipulates that bilateral or multilateral agreements or arrangements that, in whole or in part, governs the return of trafficked victims shall prevail if in conflict with article 8, no matter if they improves the situation of the victim or not. According to the interpretative notes, the reference to agreements or arrangements include both agreements that deal specifically with the subject matter of the Protocol and more general agreements including provisions dealing with illegal immigration. Furthermore, paragraph 6 should not be without prejudice to any other obligations under customary international law regarding the return of migrants.⁹⁷

3.5.4 Prevention, cooperation and other measures

Chapter 3 of the Palermo Protocol deals with prevention, cooperation and other measures not dealt with earlier on in the protocol. In this case article 9, which exclusively deals with prevention, is of most interest. It stipulates that State Parties shall establish comprehensive policies, programmes and other measures to prevent and combat trafficking and to protect victims of trafficking, especially women and children, from revictimization. Hence, for example, states of origin are obliged to take measures to prevent that trafficked victims upon return are confronted with criminal charges and adopt policies to decriminalise acts of leaving the country. What is meant by the words that the state has to take “other measures” is not specified or developed in the interpretive notes.

The parties to the protocol shall, according to paragraph 2 of the same article, endeavour to undertake such measures as research, information and mass media campaigns to combat trafficking. These efforts shall, as appropriate, include cooperation with non-governmental organisations,

⁹⁶ A/55/383/Add.1, note 73.

⁹⁷ A/55/383/Add.1, notes 76-77.

other relevant organisations and other elements of civil society. Campaigns in favour of trafficked women could however be problematic, as they may contribute to the immobilization of women, i.e. restriction of their free movement, or entrenchment of harmful stereotypes when they seek to warn women of potential dangers of trafficking.⁹⁸

Paragraph 4 states that State Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity. Paragraph 5 urges states to adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children that lead to trafficking.

Article 10 points out the importance of cooperation within the state between different authorities, such as law enforcement and immigration authorities. The importance of training of relevant officials is also highlighted.

3.5.5 Discrimination

Article 14.2 of the protocol deals with discrimination and emphasises the importance of the whole protocol to be applied in a way that is not discriminatory. The interpretation and application of the measures set forth in the protocol shall be consistent with internationally recognised principles of non-discrimination, among these the provisions in CEDAW.

3.6 Evaluation of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children

The protocol sets out a list of purposes in article 2 which are not well developed in the protocol. The provisions concerning protection of the victims (articles 6, 7 and 8) are very weak in their language stating only an obligation for the State Party to act “in appropriate cases” and “to the extent possible”. The articles on prevention and on promoting co-operation are however stronger in language.

Due to lack of consensus in the Ad Hoc Committee on Elaboration of a Convention against Transnational Organised Crime whether to define the term sexual exploitation or not in the Palermo Protocol, it was finally decided not to define the term hence leaving it up to the State Parties to the protocol how to address prostitution in their domestic laws. Thus states can

⁹⁸ E/CN.4/2000/68, note 80.

continue to criminalise prostitutes and still be parties to the protocol. Article 8 of the protocol provides for return of the trafficked person, with “due regard for the safety of that person”. What is meant by that sentence is not clarified in the interpretative notes to the protocol. However, the provision being placed under the protection part in the protocol, it should mean that the person is *protected* (positive obligation for the state to act) from being revictimized in their country of origin, i.e. being confronted with criminal proceedings in that country, presumably for having worked in prostitution. Hence, in my view, the trafficking protocol seems to be contradictory.

Additionally, the protocol does not, as an amendment to the Convention against Transnational Organised Crime, protect those women trafficked within their country. The protocol also fails to protect those women who were trafficked without the involvement of traffickers of an organised criminal group.

It is important reemphasising that the Palermo Protocol not only has definitional problems, but also that it is not a human rights document and therefore lacks a strong human rights approach which could improve the protection of the victims of trafficking. Although there are scholars arguing that the protocol does address the human rights dimension necessary for the protection of human rights,⁹⁹ they seem to be very few.

Nonetheless, finally an international definition of trafficking was agreed upon and although the protocol neither entered into force (although it will very shortly) nor is ratified by all states, the definition serves as a guideline not only for governments and authorities in countries where the protocol has been ratified, but also in non-party states. A definition of who is a victim hopefully makes it an easier task to identify those who have been trafficked, although this is difficult in practice. No identification procedures are included in the protocol and as previously mentioned states tend to be unwilling to identify an irregular migrant as a victim of trafficking as they place a greater financial burden on the state than would identification of the person as having been smuggled.

⁹⁹ Raymond, p. 493.

4 National legislation

The Lao Constitution dates from 1991 and the country has less than 50 laws, most of them from after 1991. The existing laws are often of bad quality and at times contradictory. Not all laws have been translated into English and the ones translated are not in best quality English.

The Constitution guarantees a series of human rights even if many of the guarantees are vague. Most rights are conditioned and can be restricted in law without special procedures.

Article 22 of the Constitution stipulates that all Lao citizens are equal before the law, regardless of sex, social status, education, faith or ethnicity, although ethnic minorities are in practice being discriminated against, especially the women in those groups. Article 24 of the Constitution guarantees women and men the same rights within the political, economic, cultural and social life. However, despite legal guarantees for equality between men and women, development is different for men and women, evident in social indicators in the field of health and education. To what extent violence against women exists is not known. According to article 119 of the Lao Penal Code, rape within marriage is not criminalised. Polygamy exists among some ethnic groups.¹⁰⁰

Article 27 of the Constitution guarantees freedom of movement, although it can be restricted in law. The Lao citizens also have the right to file complaints and petitions, the right to be secure and not be arrested or searched without warrant of approval by an authorised organisation, except in cases proscribed by law, according to articles 28 and 29 of the Constitution.

4.1 Status of international legislation in the Lao PDR

The status of international law in Lao law is not clear, however there are, in the Constitution, procedures relating to *adoption* of international instruments. The problem is being dealt with and the judicial process is being revised.¹⁰¹

Despite the unclear status of international law in the country, the Lao PDR has acceded or ratified a few international conventions: The International Convention on the Elimination of All Forms of Racial Discrimination, the

¹⁰⁰ Sida, pp. 22-27.

¹⁰¹ Interviewee, Vientiane, 2003.

Convention on the Rights of the Child and CEDAW.¹⁰² The Lao PDR signed the ICCPR and International Covenant on Economic, Social and Cultural Rights¹⁰³ in 2000 and has, additionally, ratified one of the eight fundamental ILO conventions, the Forced Labour Convention (Convention No. 29). The conventions are all ratified without any reservations, but no reporting for any of the ratified conventions requiring reporting have been made. However, currently work is in progress on the reports to the CRC Committee and the CEDAW Committee.¹⁰⁴

The Lao PDR became a party to the 1949 Trafficking Convention in 1978, however with the reservation that they will not be bound by article 22 of the protocol.¹⁰⁵ As stated earlier the document was never a success and as with all other international law in the Lao PDR, the status of the convention is rather unclear.

4.2 Lao legislation relevant to trafficking

There is no law in the Lao PDR that exclusively deals with the issue of trafficking in women. However, the Lao Penal Code, promulgated in 1990, contains three important articles relevant to trafficking. Firstly, article 92 of the Penal Code which punishes trafficking activities in persons by stating:

“The trade and abduction of human beings for ransom, sale or other purposes shall be punished by five to fifteen years imprisonment and fines from Kip 5,000,000 to Kip 50,000,000”¹⁰⁶

Secondly the Lao penal code article 122 which forbids prostitution by stating:

“A person engaging in prostitution is punishable by three months to one year of imprisonment by reformatory measures without privation of liberty and fines from Kip 50,000 to Kip 500,000

¹⁰² International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly of the United Nations, resolution 2106 A (XX) of 21 December 1965, entry into force 4 January 1969, hereinafter CERD, acceded by the Lao PDR 24 March 1974; Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, resolution 44/25 of 20 November 1989, entry into force 2 September 1990, hereinafter the CRC, ratified by the Lao PDR 7 June 1991; CEDAW ratified by the Lao PDR 13 December 1981.

¹⁰³ International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations, resolution 2200 (XXI) of 16 December 1966, entry into force 3 January 1976, hereinafter the ICESCR.

¹⁰⁴ Sida, p. 25.

¹⁰⁵ Article 22 states that disputes between the Parties to the Convention relating to its interpretation or application shall be referred to the International Court of Justice at the request of any one of the Parties. The Lao PDR declares that for any dispute to be referred to the International Court of Justice the agreement of all Parties to the dispute is necessary.

¹⁰⁶ 10,000 Kip is approximately 1 US dollar

Assistance or facilitation of prostitution is punishable by three months to one year of imprisonment or reformation without privation of liberty and fines from Kip 300,000 to Kip 1,000,000”

Lastly, article 123 of the penal code states that persons making a living through procuring prostitution in whatever form shall be punishable with imprisonment six months to three years and fines. If the offender makes a regular profession out of the procurement, or if the procurement involves the prostitution of female persons under legal age or the female person is under the offender’s guardianship, the offence is punishable by three to five years of imprisonment and fines.

As can be seen, sex trade and prostitution are strictly forbidden in the Lao PDR. Not only is it unlawful to assist or facilitate prostitution, but also the prostitutes are criminalised. Hence there is a risk that victims of sexual trafficking will be classified as prostitutes and therefore as wrongdoers in breach of the law and subject to punishment. The article applies not only to women working as prostitutes in the Lao PDR, but also to Lao women repatriated to the country after having worked as prostitutes in Thailand, due to the fact that according to the Penal Code article 4 the articles are applicable to commission of an offence also outside the territory of the country provided the offender is a citizen of the Lao PDR.

Article 19 of the Penal Code states that individuals committing infractions under independent circumstances of constraint and threat will not be liable of penal responsibilities. These mitigating factors may be one reason why article 122 that forbids prostitution is rarely enforced. However, the fact that charges *can* be put against a woman engaging in prostitution makes her position uncertain.

If a Lao citizen leaves the country without notifying the authorities i.e. as an illegal immigrant, the person is in breach of Lao administrative regulations.¹⁰⁷ Although not a crime according to the penal code such breaches of the regulation may result in penalties and the side-effect that victims of *trafficking* who seek to return to their country of origin may be treated and punished as illegal immigrants.¹⁰⁸

According to the Lao Criminal Procedure Law article 10, a case in the Court must be conducted openly, except in cases relating to state secrets, when you have not reached the age of sixteen or cases concerning some acts between husband and wife. From this the *e contrario* conclusion can be drawn, that cases relating to trafficking must be conducted openly, which may be one reason why victims of trafficking do not willingly report the crime.

¹⁰⁷ Administrative regulation, Decree No. 031 and the Order of Minister of Interior concerning foreigner control management No. 110/97/MoI.

¹⁰⁸ Muntarbhorn, Vtit, 1997, *The trafficking in Women and Children in the Mekong Sub-region: Law and Policy as Effective Countermeasures?*

4.3 Bilateral agreements

In October 2002 a Memorandum of Understanding,¹⁰⁹ on Employment Cooperation was signed between the Thai government and the Government of the Lao PDR (Ministry of Labour and Social Welfare). Although not yet in force and as a soft law document not containing any binding obligations for the two countries it is a step forward in the very much needed cooperation between the neighbours.

It is not a document directly related to trafficking, however, both governments in the preamble of the MOU state their concern about the widespread trafficking in human beings due to illegal employment. Additionally there is an emphasis in the document on preventive measures aiming at preventing illegal migration, illegal labour trade, child labour and trafficking.

The MOU allows for thousands of illegal Lao labour migrants currently working in Thailand to register and be formally legalised working for 2 to 4 years with proper protection and repatriation funds. This will be an alternative for people working in the informal sector risking further exploitation.¹¹⁰

As quite an ambiguous document there is a risk that the MOU could be used to crack down on legal migration due to the weak nature of the language. The MOU could also contribute to the confusion concerning the situation between labour migrants and trafficking.¹¹¹

4.4 Relevant Thai legislation

To be able to understand the situation of trafficking in the Lao PDR it is essential to comment on relevant Thai legislation. Most important is the law that affects the Lao women trafficked to Thailand, i.e. protection provisions rather than provisions on preventing trafficking and also, with relevance for this thesis, laws on prostitution and sexual exploitation. The laws of concern are the Prostitution Suppression Act of 1960, the Prostitution Prevention and Suppression Act of 1996, the Thailand Act on Measures in Prevention and Suppression of Trafficking from 1997, the Thailand Immigration Act from 1979 and lastly the Thai Penal Code Amendment Act (No. 14) dating from 1997. Thailand is not a State Party to any of the specific international legal instruments combating trafficking, but have acceded the ICCPR,

¹⁰⁹ Memorandum of Understanding, hereinafter MOU.

¹¹⁰ ILO-IPEC, 2002, *Combating Trafficking in Children and Women in the Mekong*, SELL (Sharing Experience and Lessons Learned) 8: Legal Labour Migration, pp. 4-5.

¹¹¹ Interviewee, Vientiane 2003.

ICESCR, CEDAW and the CRC.¹¹² Additionally Thailand has signed the Rome statute and the United Nations Convention against Transnational Organised Crime¹¹³.

Although many Thai laws more or less relevant to trafficking exist, all of them fail to include provisions on how to identify a trafficked victim and nowhere in the Thai legal instruments on trafficking is the problem of distinguishing a trafficked victim from a smuggled migrant being addressed. The legal instruments only protect victims already detected and identified as having been trafficked. This is a problem as in practice many trafficked victims are identified as illegal immigrants and therefore do not receive adequate protection and risk being subject to fines, imprisonment, detention or deportation for having entered Thailand illegally, according to the Thai Immigration Act articles 54, 63 and 81.

The Thai Immigration Act (section 12) stipulates that foreigners believed to enter the country for prostitution or for trafficking purposes may be denied visas. Hence the section addresses the situation where the trafficked victim has already been identified.

According to the Prostitution Prevention and Suppression Act from 1996, prostitution is still illegal in Thailand. However, prostitutes are only subject to a small fine, and in the act the focus has deliberately moved from punishing the prostitutes themselves to punishing those found guilty of procurement, trafficking, pimping, advertising or soliciting, by imprisonment or heavier fines.¹¹⁴

The Thai government has adopted a national MOU with common guidelines of practices for agencies concerned with cases where women and children are victims of human trafficking which has been in force for four years.¹¹⁵ The MOU contains provisions that strengthen the position of trafficked victims and although not binding, it is an important tool including human rights views that explicitly address cases of trafficking. Clause No. 5 of the MOU concerns cases where foreign women and children who entered Thailand legally or illegally are or fall victims of trafficking. A statement shall be taken promptly, before the woman or child shall be sent to be taken care of in a shelter. The women or children shall be given assistance and the police official shall make a proposal to the immigration officials to grant leniency to the woman or child (paragraph 3 of clause No. 5). During the

¹¹² ICCPR acceded by Thailand 29 January 1997, ICESCR acceded by Thailand 5 September 1999, CEDAW 8 September 1985 and the CRC acceded by Thailand 26 April 1992.

¹¹³ The Rome Statute of the International Criminal Court signed by Thailand 2 October 2000 and the United Nations Convention against Transnational Organised Crime signed by Thailand 13 December 2000.

¹¹⁴ Lim, p. 164.

¹¹⁵ Memorandum of Understanding on Common Guidelines of Practices of Agencies Concerned with Cases where Women and Children are Victims of Human Trafficking, B.E. 2542 (June 1999).

inquiry and the trial in court the police official shall provide for an official with experience in working with women or children, i.e. a social worker, psychologist or psychiatrist to participate (paragraph 7). When the trial in court is completed the woman or child shall be repatriated to the country of origin (paragraph 8) where the woman or child shall be looked after so that she/he will not enter Thailand again (paragraph 13). To be effective there is a need that the implementation of the MOU is monitored by non-governmental organisations and it can be used as a negotiating document between NGO workers and the police in order to separate trafficking victims from illegal immigrants.¹¹⁶ The MOU seems to be a good instrument, but in practice there are still many things to be improved in its implementation. There is a lack of understanding about the MOU among government officials; many of them have a bias towards trafficking and see the victims of trafficking as illegal immigrants and lawbreakers, one example being a prosecutor not wanting to repatriate women without punishing them for illegal entry.¹¹⁷

In addition to the MOU on guidelines of practices there are three MOU:s from 2003¹¹⁸ with further guidelines for government agencies and other relevant agencies and private organisations. The aim of the new guidelines is to complement the MOU from 1999 and keep abreast of present circumstances. The documents seem to have a human rights perspective.

¹¹⁶ Peruffo, Monika, interview with Skrobanek, Siriporn, 2002, *The Thai Experience: The Memorandum of understanding On Common Guidelines Of Practices In Cases Of Trafficking*, in Alliance News from GAATW, p. 38.

¹¹⁷ Sato, Mami, interview with Chetamee and Chanchavay, Foundation for Women, 2002, *Thailand's MOU in Practice: In conversation with the Foundation for Women*, in Alliance News from GAATW p. 40.

¹¹⁸ The Memorandum of Understanding on Guidelines for relevant Agencies to work together in dealing with Human Trafficking of Children and Women, the Memorandum of Understanding on operation Guidelines for relevant Private Organisations in their dealing with Human Trafficking of Children and Women and the Memorandum of Understanding on Working Procedures for the Government Agencies and Private Organisations to comply with in their dealings with Human Trafficking of Children and Women, B.E. 2546, March 2003.

5 The role of law in the process of trafficking from the Lao PDR to Thailand

This chapter is primarily composed of primary material from the conducted interviews in the Lao PDR during my Minor Field Study. Due to the political situation in the Lao PDR most of the interviewees would like not to be quoted and would like to be anonymous. In order to fulfil this request there will be a lack of footnotes in this chapter. Where the information derive from secondary material, such as surveys carried out in the Lao PDR, that will be mentioned.

As law is not an issue which attracts a lot of attention in the Lao PDR and most surveys are carried out with a socio-economic perspective, the lack of information in the area may have widened the scope of this chapter. Nevertheless the information is of value to understand the trafficking process from the Lao PDR to Thailand.

5.1 The 1949 Trafficking Convention in the case of the Lao PDR

The 1949 Convention has not caught a lot of attention lacking both a clear definition of trafficking and efficient implementing mechanisms. In the case of the Lao PDR this is not seen in the negative rather it might be the cause why it is ratified by the country.

By focusing merely on trafficking for prostitution, it has been discussed whether the convention seeks to combat forced prostitution or prostitution per se.¹¹⁹ The convention adopts a moralistic approach on the issue of prostitution but fails to take into account the changing attitudes towards prostitutes.¹²⁰ Article 1 of the Trafficking Convention criminalises people living of prostitution. The question of criminalisation of prostitution is however not a problem for the Lao PDR as they forbid prostitution in the Penal Code, article 122.

None of the conventions from before the Palermo Protocol impose a duty on State Parties to prohibit punishment or other correctional penalties upon the victims' return to the country of origin. Hence the Lao Decree No. 031, fining citizens having left the Lao PDR illegally, does not violate the 1949 Trafficking Convention.

¹¹⁹ ESCAP, Regional Conference 1998.

¹²⁰ Skrobanek; Boonpakdi; Janthakeero, p. 27.

The 1949 Trafficking Convention predominantly focuses on repressive strategies. Such strategies are, because of their simplistic nature and their congruence with a range of state interests such as immigration control, appealing to governments,¹²¹ also the Lao one, which may be one of the reasons why the Lao PDR has ratified the Convention. Governmental approaches that are predominantly limited to restrictive migration policies and stronger criminal action not only have meagre preventive effects; they also fail to meet women's interests on whose behalf the convention where supposedly drafted.

To sum up, the National Lao legislation seem to go more or less hand in hand with the 1949 Trafficking Convention, providing only for weak enforcement mechanisms and protection provisions for the victims of trafficking. The 1949 Trafficking Convention does not seem to be of particular interest among the people working with combating trafficking in the Lao PDR and hence the convention appears to be irrelevant in practice.

5.2 CEDAW in the case of the Lao PDR

There is no legal instrument that the Lao PDR has ratified which contains a definition of trafficking. CEDAW article 6 and its General Recommendation No. 19 help giving an understanding of what could be included in trafficking for sexual exploitation. That could help defining what is and what is not cases of trafficking in the Lao PDR. This possibility does however not seem to have attracted people working with trafficking in the Lao PDR.

Article 6 of CEDAW states that "State Parties shall take appropriate measures, including legislation, to suppress all forms of traffic in women". Additionally, General Recommendation No. 19 to the convention emphasises that prostitutes are especially vulnerable and tend to be marginalised because of their status. An interpretation of the statements could prohibit criminalisation of prostitutes when it comes to combating trafficking. Although the Lao Penal Code article 122 criminalising prostitutes is rarely enforced, the mere possibility that the article could be enforced and victims of trafficking being liable to penalties is then in breach of CEDAW.

5.3 The process

5.3.1 Definition of Trafficking

Neither the 1949 Trafficking Convention nor the national legislation in the Lao PDR provide for a definition of trafficking. However, there seem to be

¹²¹ GAATW, (1999) p. 45.

a consensus among people working with combating trafficking in the Lao PDR to use the definition of trafficking contained in the Palermo Protocol, as this is the definition acknowledged internationally, although the Lao PDR is not a party to the protocol.¹²²

In Thailand the definition of trafficking covers only prostitution (Thailand Penal Code article 282-284) and slavery (Thailand Penal Code article 312). This is a problem as it excludes Lao women trafficked for other forms of sexual exploitation than prostitution. Thailand is however a State Party to CEDAW which General Recommendation broadens the scope of what is seen as sexual exploitation.

5.3.2 Distinguishing trafficking from the smuggling of migrants

Distinguishing migrant Lao women from Lao women who are victims of trafficking is complicated in the case of the Lao PDR, trafficking being only one part of a larger migration pattern from the Lao PDR to Thailand. Trafficking is in most cases being defined by the nature of the exploitation in Thailand and usually starts with voluntary migration. The Lao government unfortunately does not seem to understand the difference between migration and trafficking. They worry about the fact that very many Lao people go voluntarily to Thailand and therefore tend to see all migration as trafficking, using the quite broad definition of trafficking in the Palermo Protocol and not accepting the fact that many Lao people would like to leave the Lao PDR because of, for example, lack of working possibilities in the country. This could lead to strengthening of migration policies in the Lao PDR. At the same time, migration is good for the Lao economy; without migration the unemployment rates in the country would be unaffordable.

The *identification* of trafficked Lao women as illegal immigrants is one of the major problems in the process of working with trafficking from the Lao PDR to Thailand. When identified as an illegal immigrant the person is deprived of the protection offered to trafficked victims and she/he will not be exempted from penalties for illegal entry and stay, regardless of how the person entered Thailand. Additionally the identification as an illegal immigrant has the side-effect of imposing a fine for leaving the Lao PDR illegally also on returning victims of trafficking. The problem of identification lies in Thailand.

None of the specific legal instruments relevant in a Lao context clarify how to distinguish a trafficked person from a smuggled migrant and the lack of education among police and other officials is extremely high. Additionally,

¹²² Meetings with representatives from the UNICEF, UNIAP, Ministry of Security, Ministry of Labour and Social Welfare and IOM.

in both the Lao PDR and Thailand, corruption is a big problem which contributes to the problem.

To detect women who have been trafficked from the Lao PDR to Thailand, Thai law offers only little clarification on the issue.

When not even the government knows the difference between a smuggled migrant and a victim of trafficking, it is not strange that the same lack of knowledge applies to all authorities in the country. However, a project concerning exactly this question started in the Lao PDR in April 2003, the goal being to improve the knowledge about trafficking among the police and training them to be able to identify victims of trafficking.¹²³

5.3.3 Prevention of Trafficking in the Lao PDR

The knowledge of law in the Lao PDR is incredibly low, not even the police on district level trying to enforce the law, know what the laws are. Even the few judges in the country do not have a proper legal education. Some of them are teachers and have only had some legal training.

Laws are usually negotiable in the Lao PDR and adding corruption to the low level of awareness, it is not strange that very few trafficked women dare to report the crime. That possibility does not even seem to exist in their senses. Many people see the laws as a nuisance that must be overcome in order to get on with the daily existence and the law is nothing they want to talk about.

There seem to be a greater awareness about the problem of trafficking among the officials than about enforcing the laws correctly. In a survey carried out by the Ministry of Labour and Social Welfare and the United Nations Inter-Agency Project, officials working in the villages said they attempted to educate the villagers about the risks of going to work in Thailand. However, they found that they were lacking substantive examples that they needed to convince the villagers about the dangers and they have requested assistance.¹²⁴ The survey does not show what kind of assistance they would like.

Article 10 of the Palermo Protocol points out exactly the problem of low awareness of the law, emphasising the importance of training and the cooperation within the state between different authorities, such as law enforcement and immigration authorities.

¹²³ ARCPPT, Asia Regional Cooperation to Prevent Trafficking in Women and Children.

¹²⁴ Chamberlain, p. 14.

5.3.4 The protection of Lao Women

5.3.4.1 Safe repatriation

So far there have been no cases of imprisonment and no criminal charges against repatriated women, at least not according to the Lao government, probably due to the fact that often the women have already been put in prison in Thailand. According to officials however, going to Thailand to work is illegal and when (and if) returning, the women are fined and given training (“re-education”) as a warning. This often has a negative impact on the family who cannot afford to pay the fine.

Trying to solve the problem of trafficking by fining returnees is not a good option, as it victimises the woman twice – not only is she a victim of the human rights violation of being trafficked to Thailand, but also is she a criminal in the eyes of the government when returning to the Lao PDR. Unfortunately the custom of fining returnees is strictly enforced with no exemptions and is unlikely to change.¹²⁵

Another problem concerning repatriation is the stigma that the women meet when they return to their village, especially if they left the village voluntarily. People from the village then tend to blame what happened on the trafficked women themselves and they are seen as morally suspect.¹²⁶ Repatriation without assistance to reintegrate these women into their societies or without follow-up activities is not very effective and the women might then leave their villages once more. In addition to being met with ill treatment by the people of their village, due to gender differences including the acceptance of men having many partners in the Lao PDR but not women, the police tend to have discriminatory attitudes.

In 2001 the project “Return and Reintegration of Trafficked and Other Vulnerable Women and Children between Selected Countries in the Mekong Region” was initiated by the IOM with the objective to contribute to the establishment of systematic and sustainable cross-border working arrangements for return and reintegration.¹²⁷ Approximately 200 women, mainly younger women, have officially been given assistance and repatriated to the Lao PDR and are being helped in Vientiane. In the last few years there has been an improvement concerning rescue and return of trafficked persons in the region. Governments in the region are increasingly recognizing trafficked persons as victims and not as criminals and for example in Thailand, special welfare centres to provide for victims of trafficking from other countries have been established.¹²⁸ However, many victims in the Lao PDR are still sent back directly to their villages.

¹²⁵ Chamberlain, pp. 14, 16.

¹²⁶ Brown, p. 238.

¹²⁷ Bessey, p. 2.

¹²⁸ Marchall.

It is important to emphasise that the repatriation should be safe and voluntary. Women not repatriated voluntarily are most likely to leave for Thailand over and over again. There are examples of women, although risking (further) exploitation and violation of their human rights, having been sent back and forth from Thailand to the Lao PDR up to five times. By their standard the trafficking might not have been such a negative experience in comparison to the alternative in the Lao PDR, even though many of their human rights have been violated. Returnees helped by the IOM are for example given a small loan, provided vocational training or they might be bought a sewing machine or what otherwise makes more sense. The key is that the measures should be interesting enough to prevent the returnees from going again.

5.3.4.2 Prosecution

The Lao law enforcement system is not known to be the most efficient. Recently however, (2003-09-29), the Provincial People's Court in a Lao Southern province, sentenced a woman to *three* years imprisonment for tricking young people into working in foreign countries. According to the report, the woman tried to deceive 13 local people, especially young people, on several different occasions, while receiving a commission from an agent. In addition to the three year prison term, the woman also had to pay a fine of 5 million kip¹²⁹ and was forced to pay a compensation of 7 million kip to the parents of the victims.¹³⁰ The sentence is somewhat rare, as the minimum punishment, stated in article 92 of the Lao Penal Code, is *five* years of imprisonment. Speculating why this was the outcome is difficult; however, it could be due to corruption problems, the woman being powerful or simply because of mitigating circumstances.

In comparison with the sentence of three years imprisonment for trafficking in human beings, three persons were sentenced to death (two persons) and a 15 year prison term respectively for drug trafficking in the People's Court in a northern province of the Lao PDR only a few days later. (Police and drug officials had found nearly 6 kg of heroin along with equipment from the suspects' houses in 2002.)¹³¹ Hence, although a comparison is difficult to make without proper knowledge of the cases, drug trafficking seems to be more severe than human trafficking.

The existence of previous court cases of human trafficking than the one mentioned above is rather unclear. No one really knows of any such cases, but has heard of prosecutions. In these other cases, however, the prosecuted persons alleged to be traffickers seem to have been convicted for something else rather than being a trafficker.

¹²⁹ Approximately 5 000 US dollars.

¹³⁰ Vientiane Times, No. 78, 3-6 October 2003.

¹³¹ Bangkok Post 2003-10-09 "Death in drug cases".

5.4 Law enforcement

The Lao PDR does have, as previously mentioned, provisions in the Penal Code that although not directly spelling it out, are relevant to the problem of trafficking. These provisions are not being strictly and consistently enforced, enforcement being one major challenge concerning improving the situation of trafficking in the Lao PDR. In the long run, improvements of national laws are also needed, but as there are, at the moment, relevant legal provisions that actually could be enforced in the case of trafficking, although not directly addressing that issue, the most important thing is to systematically enforce these laws. To be able to do that though, there has to be commitment from the government, as well as an end to corruption and also better knowledge of law and enforcement of laws on all levels.

The non-enforcement of the laws, as one example, is evident in a survey carried out by Save the Children UK during 2003 on migration along the border to Thailand. Village headmen were at first very reluctant to talk about migration because they felt guilty for “not enforcing the law and doing their job well”.¹³²

The failure to combat forced prostitution and trafficking effectively, which is evident in Thailand, seems to result primarily from the unwillingness to enforce the law, even the most straightforward provisions. This is however not strange, as Thai law enforcement officials routinely profit from non-enforcement of the law by extorting protection fees from brothel owners and subject trafficking victims to discriminatory and abusive treatment.¹³³

Law enforcement is important and one of the best ways to get states to provide help for women who have been trafficked. If the laws were implemented properly the immunity of traffickers and exploiters would be taken away. Not only the enforcement of the laws seem to be difficult for states however, but also to implement the appropriate law in the right area and thus enforce the laws where they have the most impact.¹³⁴ This is especially so without proper knowledge of the situation and the laws, which is a major problem in the Lao PDR. It is for example not the right solution enforcing laws that violates the freedom of movement i.e. that strengthen immigration policies when trying to combat trafficking as it may lead to trafficking being pushed further underground.

¹³² SCUK, p. 33.

¹³³ Human Rights Watch, <http://hrw.org/about/projects/womrep>, visited 2003-11-03.

¹³⁴ Marchall.

5.5 Corruption

Undoubtedly corrupt authorities play a part in facilitating the trafficking process in many countries,¹³⁵ and so is the case also in the trafficking process from the Lao PDR to Thailand. Not only do the trafficked women fear fines, imprisonment, detention and deportation for having entered Thailand illegally, but they also fear abusive treatment by the authorities both in Thailand and the Lao PDR. In a survey carried out by Transparency International, corruption was identified as a big problem in Thailand, Thailand being placed 70 of 133 countries, 133 being the most corrupt. The Lao PDR was not even included as sufficient data could not be found.¹³⁶ Some authorities in the Mekong sub-region are involved in the actual business of trafficking facilitating travel documents and protecting the traffickers¹³⁷ and officials (not all) in the Lao PDR and Thailand withdraw the money collected from fines paid by trafficked victims. Authorities in Thailand are also known for warning brothel owners of planned raids, to collaborate with exploiters or traffickers and in some cases to own the exploitative business themselves.¹³⁸ These are all reasons why trafficked women are reluctant to report the crime to relevant authorities.

The fine that Lao citizens have to pay upon return to the Lao PDR for having crossed the border illegally, which trafficked victims are not exempted from, makes many Lao people not wanting to return to their home country as they do not have money to pay the fine. However, for those who do return and are forced to pay the fine, the amount of money they have to pay is unknown and no one knows where the money goes. One report suggests that the fines imposed by the village leaders are usually about B1000, approximately 20 dollars, another report suggests that the fine is 50-100 dollars, depending on the length of the stay in Thailand.

In a study under preparation for UNICEF,¹³⁹ which will most likely be finished in January 2004, it seems as if the trafficking in the Lao PDR is more organised than was believed earlier. There are cases where police, military and even the village heads seem to be involved in the trafficking. According to villagers in a research study carried out by Save the Children UK in the northern parts of the Lao PDR there is a growing role of traffickers in the migration process.¹⁴⁰

¹³⁵ E/CN.4/1997/47, Report submitted by the Special Rapporteur on Violence against women, Ms. Radhika Coomaraswamy, *Violence against Women, its causes and consequences* Comission on Human Rights.

¹³⁶ Transparency International,

http://transparency.org/pressreleases_archive/2003/dnld/cpi2003.pressrelease.en.pdf, visited 2003-12-13, see also Bangkok Post, "Thailand ranks 70th among 133 nations", 2003-10-08.

¹³⁷ GAATW, (1999) p.13.

¹³⁸ Ginzburg, p. 10.

¹³⁹ Study carried out by Chamberlain, James, R for UNICEF.

¹⁴⁰ SCUK, p. 32.

The actual immigration offices on both sides of the border between the Lao PDR and Thailand are very corrupt, immigration officers working as traffickers themselves. The scale of corruption in Thailand is so large that it is generally admitted that police officials at all levels share the benefits or receive regular bribes for not enforcing the law¹⁴¹ and in northern Thailand police officers own brothels and they trade in girls.¹⁴² According to one interviewee a list is being made at the immigration office on the Lao side of immigration officials involved in trafficking. What is to be done with the list was not made clear.

Another problem concerning corruption is that the central level is trying to or has to protect the lower levels if they are corrupt. If one area acts in a corrupt manner, then another area has to protect that area etc. The salary being so low,¹⁴³ government officials in a way have to act in a corrupt manner to supplement their bad pay. Although this is not an excuse, it is an explanation why some officials are corrupt.

Officials having been involved in trafficking are often not being properly punished, at least not in Thailand. They have to pay a small fine applied or they are moved to another position. According to Human Rights Watch, although evidence exists that members of the Thai police and border patrol forces are directly involved in the trade, no one has ever been punished for trafficking of forced prostitution.¹⁴⁴ This is to compare with the victims of trafficking who many times are put in jail.

5.6 The Lao government's role in combating trafficking

The Lao PDR government seems fully committed to combating trafficking in women and children, which has resulted in additional financial support from outside the Lao PDR. The external funding might even be one of the reasons why the Lao government is so committed to combating trafficking. The projects seem to be donor driven with few ideas coming from the government itself.

One shall remember that work on trafficking is in its early stages in the Lao PDR and three years ago, no development cooperation projects concerning trafficking existed. Recently the government also started to cooperate with the Thai government evident in the signing of a Memorandum of Understanding between the two countries (see chapter 4.3 on bilateral agreements for details). In the Lao PDR it is the Ministry Labour and Social

¹⁴¹ Rayanakorn, Kobul, 1995, Special study on laws relating to prostitution and traffic in women, p. 22.

¹⁴² Brown, p. 201.

¹⁴³ A government salary is approximately 20 dollars per month, Camilla Lindström UNICEF.

¹⁴⁴ Human Rights Watch, www.hrw.org/about/projects/womrep, visited 2003-11-03 and Brown, p. 203.

Welfare that has the primary responsibility for reducing the incidence of trafficking of Lao nationals and is responsible for the repatriation and rehabilitation of Lao victims of trafficking.¹⁴⁵

Representatives from different projects and organisations seem to find the government cooperative, although it seems to be more difficult to implement some projects compared to others. Corruption on different levels and officials trying to protect each other tend to make the cooperation more difficult.

One very big problem remains however, at least in the context of law; the lack of knowledge concerning this issue. Lao government officials do not have much knowledge on legal issues and in fact this knowledge is not only lacking in the government, but on all levels. To be able to improve the situation of trafficking in the Lao PDR in general and law enforcement concerning trafficking in particular, the knowledge and awareness of legal issues must be raised.

5.7 Cooperation between the Lao PDR and Thailand

The cooperation between Thailand and the Lao PDR is vital. The Memorandum of Understanding is a good start; however, the cooperation has to intensify.

There is a 1730 kilometre border between the two neighbours and trying to hinder people from moving between the countries may not only be a violation of the freedom of movement but also it would be an impossible task to try to stop the flows of Lao people going to the booming country of Thailand with a high possibility of getting a job. Both countries gain on the illegal migration. Thailand gets free and cheap labour into sectors, such as the sex sector, where cheap labour is needed and without the emigration the unemployment rates in the Lao PDR would be even higher. Hence it is not only a question of lack of capacity in the Lao PDR, but there is also a lack of will to act on the Thai side. The demand side in Thailand has to be addressed, by for example changing the attitudes towards prostitution. Additionally, corruption, again, is a huge problem in both countries, which can make cooperation (in a good sense) more difficult.

The MOU signed between the two countries is a step forward. The efficiency of the document however remains to be seen.

¹⁴⁵ Bessey, p. 5.

5.8 Destination Sex Sector

The destination of an unknown number of Lao women is the commercial sex sector in Thailand, which is a growing and very large market.¹⁴⁶ It seems to be acknowledged that not a *very* large amount of Lao women are trafficked into the sex industry, the majority being trafficked to other sectors. As mentioned in the introduction however, I believe that the low number of Lao women believed to work in the sex industry or being sexually exploited in other sectors in Thailand is due to the fact that there is a profound reluctance discussing such matters as sex and prostitution in the Lao PDR. Additionally the women might not be sexually exploited in the first phase of the process, but are eventually sexually exploited and that fact has not been fully investigated. Young Lao women working in domestic services are being sexually exploited¹⁴⁷ and Lao women working in factories in Thailand complain about sexual abuse.¹⁴⁸ There are examples of Lao women working as prostitutes in brothels and massage parlours,¹⁴⁹ but the examples are not many.

The sale of sexual services in Thailand is illegal. Nevertheless the market generates money and is an important income of foreign exchange earnings. Government policies such as promotion of tourism and export of female labour from Thailand may even have indirectly encouraged the growth of prostitution and perhaps even trafficking in women into Thailand.¹⁵⁰

A question often discussed in connection with trafficking is whether to legalise prostitution and hence give prostitutes rights under standard labour legislation and recognise them as sex workers. The Palermo Protocol leaves the decision to the state and I am not going to take sides, however, the question needs to be mentioned. In those countries that recognise prostitution as a valid occupation including rights under labour laws the concern should be to ensure that prostitutes are protected from the exploitation which would make the prostitute fall into the definition of trafficking. Trafficking is always something bad as it includes exploitation and human rights violations, no matter if prostitution is legalised or not. Irrespective of the legality of the sex sector, there are women working in the commercial sex sector who are being exploited and need special protection.¹⁵¹

Although it might be a woman's choice to work within the sex sector it is important to note that many women would like to leave prostitution, but

¹⁴⁶ The Ministry of Public Health has identified 24 different types of sex establishments in Thailand, such as brothels, hotels, night-clubs, go-go bars, massage parlours, discotheques, restaurants, etc, (Venereal Disease Division, Department of Disease Control, Ministry of Public Health 1994).

¹⁴⁷ Bessey, p. 17.

¹⁴⁸ SCUK, p. 36.

¹⁴⁹ Bessey, p. 33., SCUK, p. 30.

¹⁵⁰ Lim, p. 10.

¹⁵¹ Lim, p. 17.

they do not feel as if there are any other options and although it might be some women's choice, forcing someone into the industry through trafficking is always a violation of human rights.¹⁵² Even if the woman agrees to migrate for prostitution, the deception and subsequent exploitation takes away any free choice she may have had.¹⁵³

The trafficked women working in the sex industry fear violations of many of their human rights. As example brothel owners in Thailand threaten trafficked women telling them that they will be identified as sex workers, picked up and then sold to another, worse brothel if they try to escape. Alternatively women are threatened that they will be picked up by the police and arrested for being illegal immigrants.¹⁵⁴ Trafficked women who are arrested while working in the sex industry are more likely to be detained by the authorities and they frequently suffer greater mistreatment during detention than persons trafficked into other industries.¹⁵⁵

Many countries ban selling of sex and not buying. In Thailand it is illegal both selling and buying sexual services. However, in many raids against brothels, the brothel owners might have been warned beforehand and escaped and it is the women who are punished. Banning selling sex puts already vulnerable women in an even worse situation. Without prejudice on whether to regulate the market or not, there is an indication that in order to improve the situation for the prostitutes, the laws should be changed and the prostitutes decriminalised.

The unmet demand for labour in the sex sector in Thailand is a large-scale problem. Without reducing the demand for trafficked labour into the sex industry, Lao women will continue to be trafficked into the market. A lot is to be done by the Thai government. Some suggest that putting more emphasis on protection and on the outcome of trafficking and the actual exploitation of the women rather than on prevention is the best way to combat trafficking as it is an impossible task to prevent something when there is such a market of demand and supply.¹⁵⁶

5.9 Would an implementation of the Palermo Protocol improve the situation in the Lao PDR?

The Palermo Protocol is a protocol to the Convention on Transnational Organised Crime and hence it only applies in cases where the offence involves an organised criminal group, in the convention defined as "three or more people working together to commit one or more serious crimes for material benefit". In many parts of the world human trafficking might

¹⁵² GAATW, (1999), p. 125.

¹⁵³ Skrobanek; Boonpakdi; Janthakeero, p. 42.

¹⁵⁴ Brown p. 124.

¹⁵⁵ GAATW, *Human Rights and Trafficking in Persons: A Handbook*, p. 62.

¹⁵⁶ Marchall.

consist of well organised organisations providing, buying, selling and exploiting women, but in the Mekong region trafficking rather resembles a small-scale “industry” with different operators along the way; sometimes it is the same person that facilitates migration with the outcome of trafficking and other forms of migration with less exploitative outcomes.¹⁵⁷ This implies that the protocol to the Transnational Organised Crime Convention might not be useful in this part of the world. However, lately, trafficking in the Lao PDR has shown signs of being more organised than previously thought and thus the protocol would be applicable in more cases of trafficking than previously believed provided the Lao PDR ratifies the Transnational Organised Crime Convention and the Palermo Protocol.

As the Palermo Protocol includes a universal definition of trafficking, implementation of the protocol could be beneficial to the Lao PDR. Although to some extent already used by the government and among organisations an incorporation of a common understanding of trafficking into national Lao law would put an even stronger emphasis on the matter and hence, hopefully, improve the knowledge, at least on higher levels, of who is a victim of trafficking and who is not. Additionally, using the universal definition of trafficking would make it easier to cooperate internationally to combat trafficking and especially facilitate cooperation with Thailand as there would be a common understanding of the problem.

To make implementation of the Palermo Protocol come true, the Lao PDR first have to become a state party to the convention it is supplementing. According to articles 8 and 9 of the Convention against Transnational Organised Crime measures have to be taken against corruption. Interpreted together with the protocol, corruption measures *concerning trafficking* also have to be taken. Such measures are certainly needed in the Lao PDR although such provisions could delay a ratification of the Convention and thereby the protocol in the Lao PDR. On the other hand a ratification of the Protocol would work as an incentive to do more to combat trafficking and corruption.

Although not concerning implementation of the protocol in the Lao PDR, but in Thailand, it is important to note that, for the sake of protecting women trafficked from the Lao PDR to Thailand from the risk of being immediately deported, Article 7 of the protocol recognises the need to establish a legal status for victims in the receiving country. The language is of optional character but, in case of Thailand ratifying the protocol, the Lao women would at least have the possibility of strengthened status.

Another question is whether existing Lao legislation is in conflict with the trafficking protocol and hence would ratification require amendments of the national laws. Due to the fact that the Lao national laws are very vague and that they include no provisions directly related to trafficking, there is, in the case of trafficking, not much to be amended. As the Palermo Protocol does

¹⁵⁷ Marchall.

not take sides on whether states should decriminalise prostitutes or not, the fact that Lao national legislation criminalises prostitutes is not in conflict with the provisions of the protocol. There is however the earlier mentioned decree, which obliges women to pay a fine coming back to the Lao PDR for having left the country illegally, that is in violation with the protocol.

Looking at the actual provisions in the Palermo Protocol, they would all, despite the lack of mandatory language in the provisions concerning protection, be an improvement of existing legislation in the Lao PDR if they became part of Lao law. In theory an implementation would therefore improve the situation of trafficking. In practice however, a ratification of the protocol would mean little more than just another international document not being enforced and not being followed up. Enforcing a document like the Palermo Protocol could draw international attention to the fact that the Lao government is actually committed to combat trafficking, leading to further funding to, among other things, raise capacity. Implementing the Transnational Organised Crime Convention and the Palermo protocol would be a major challenge for the Lao PDR in the future, however, first, the national laws have to be correctly enforced as well as international conventions to which the Lao PDR is already a party.

6 Analysis and conclusions

Arresting, detaining and deporting trafficked persons are unfortunately common ways of getting rid of the trafficking victims. But also, it is the result of lack of knowledge among authorities and officials. Such actions are, rather than being based on empowerment and human rights, based on a law and order approach, framed by morality and gender differences.

Firstly, restricting or banning the freedom of movement for women may not only violates the human rights of the women, but additionally, it leads women to look for other ways of crossing the border – trafficking – and pushes the movements further underground. The freedom of movement shall not be restricted, rather the borders between Thailand and the Lao PDR has to open up. Not only are there few opportunities in the Lao PDR which cannot be erased in one or two or even ten years, but also will the discrepancies between the two countries continue to grow and hence the movement. It is the responsibility of the Lao government to recognise the right of everyone to migrate in order to seek a better life or rejoin their families. If they do not, the number of trafficked victims will continue to grow.

Secondly, actions should be taken, both in the Lao PDR and in Thailand in order to decriminalise trafficked persons, regardless of their immigration status. Then the inability to distinguish between trafficked persons and smuggled persons that is so evident at least in the Lao PDR would not play such a crucial role and lead to devastating results. The existing code of fining returnees no matter if you have been trafficked or is an illegal immigrant result in further damage to the victims of trafficking who seek to return to their country of origin. The freedom of movement, as stated in the Universal Declaration of Human Rights (Article 13) includes a right to leave and return to any country, including one's own. This is one of the most fundamental freedoms.

Thirdly, instead of focusing on the victims being imprisoned, the focus should be put on prosecuting the traffickers. Although there have been a few cases concerning trafficking in the courts in the Lao PDR lately, the country unfortunately has a legal system which is fragmented and ill developed and the overall knowledge both of law and its enforcement is very poor. It is important however, that the resources are not only allocated to prosecution due to that being the easiest way to show that something actually is being done by the government in practice, but that efforts are made in all areas in order to combat trafficking. The prosecution system as well as some of the existing rather vague laws need to be revised. The lack of knowledge among authorities and officials is being worked on and additionally the crucial cooperation between different ministries has been acknowledged to be important.

Without improving the existing legal system with the unclear status of international law, ratification of the Protocol to Prevent, Suppress and Punishing Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime would not directly improve the situation of trafficking in the Lao PDR. This is a natural conclusion stemming from the inability to adhere to and follow up previous ratified international legal documents. Becoming a state party to the convention and the Palermo Protocol could however draw international attention to the Lao PDR concerning the question of trafficking which could indirectly (via further external help with capacity building and funding) help combat the problem of trafficking in women.

Were the Lao PDR to ratify the Palermo Protocol they would have difficulties to live up to the provisions. At the moment there is not only the problem of the existing legal system being unclear, but also the Lao PDR would have difficulties adhering to the Convention on Transnational Organised Crime, partly due to the gross existence of corruption in the country. Even officials are taking part in the trafficking process, along with immigration officers and other authorities. It is unjust to accuse all officials of being directly involved in trafficking, but far too many are complicit to be acceptable. It is not an excuse but one explanations can be that the salaries are very low.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children offers a long-awaited and internationally agreed definition of “trafficking in persons” which could serve as a model for national legislation and the definition, lacking another one, is being widely used. However, the definition is quite broad and there is a risk that, in countries like the Lao PDR where the level of knowledge on legal issues is not very developed, it could be used in the wrong context, i.e. either to define all trafficked victims as smuggled persons or all smuggled persons as victims of trafficking.

By dealing with trafficking and the smuggling of migrants in two separate legal instruments supplementing the Convention against Transnational Organised Crime there has been an attempt at distinguishing the two issues. In practice, nevertheless, the separation has turned out to be a difficult task, as in the Lao PDR where no one seems to know the difference between victims of trafficking and illegal immigrants leading to the further victimisation of the trafficked persons. To be able to improve the situation of trafficking the concepts of trafficking and smuggling of migrants have to be clarified and differentiated both in the Lao PDR and in the international community. Trafficking involves criminal manipulation of persons, who wish or need to migrate for a better life, but not all migration constitutes trafficking and all migrants are not victims of trafficking. Regardless of their legal status, hence if they are defined as legal migrants, illegal immigrants or victims of trafficking all should however be given their basic human rights.

Nowhere in any international legal instrument is the practical identification process being addressed. Although the Palermo Protocol touches upon the issue in article 3 by including a broader definition of what is considered to be a situation of trafficking, it does not properly solve the problem of identification. In the Lao PDR the lack of awareness of how to identify a victim of trafficking is a major problem. Before adopting clear identification procedures on the international level there is little hope that the problem will be solved nationally.

Despite criticism both of the final definition of trafficking contained in the Palermo Protocol and other issues in the protocol, it must be emphasised that there is now, for the first time, an internationally agreed definition of trafficking that is being used not only in countries that have ratified the protocol, but also in countries, such as the Lao PDR, where the protocol has not been ratified.

The final destination in the process of trafficking for an unknown amount of Lao women being trafficked is the Thai sex industry, where the women are often grossly exploited. Being a prostitute in Thailand is illegal and so is owning a brothel. However, in raids, due to corruption, the owners and pimps are warned and the women often end up in prison. The only positive thing about that would be that having been detained in Thailand, when deported; the women are not put in prison again upon return to the Lao PDR. When detained in Thailand or elsewhere or, for that matter, forced to work against their will and put in slavery-like conditions the women will live in insecurity and fear of being deported to the Lao PDR where they can be met by further victimisation having to pay fines for the illegal act of leaving their country of origin. Coming back to the Lao PDR in many cases also means being stigmatised by the villagers in the community they once left, especially if the woman has been engaged in prostitution. This situation might make the women more vulnerable to further harassments from traffickers.

Discrimination, which all human beings should be protected from as stated in several human rights documents, is both a cause and a consequence of trafficking. Women in the Lao PDR are discriminated against in society and they are discriminated against in the legal system, especially those women who have engaged in prostitution. This in addition to the woman's disbelief in the legal system and the lack of confidence in its implementation as well as experiences of corruption or abuse (sexual slavery, rape, isolation etc), it is no wonder that many women are deterred from reporting the crime and do not trust the police. Women who have been trafficked should be ensured fair treatment by the criminal justice system in order to be encouraged to act as witnesses.

Using human rights can be a powerful tool in combating trafficking in women. Therefore it is unfortunate that the concept of human rights in combating trafficking has not been strengthened by such an important

document as the Palermo Protocol, being a protocol to the Transnational Organised Crime Convention. The human rights provisions in the protocol should have been expanded and the language in many of the paragraphs should be made stronger. Luckily the most fundamental human rights are protected in other documents which states are urged to follow. Almost every country in the world is a member of the United Nations, including the Lao PDR and as such they have made a commitment to the human rights principles in the UN Charter and the UDHR, which establishes the basic human rights and fundamental freedoms guaranteed to all. Thus it is an obligation and a responsibility of the Lao PDR to ensure the basic human rights to the trafficked persons. In addition to the commitment to adhere to the basic human rights principles the Lao PDR is a State Party to CEDAW as well as to the CRC. Unfortunately appropriate action has not been taken.

The last three years there has been an enormous increase in initiatives to combat trafficking (from approximately two to twelve) in the Lao PDR and one cannot stop wondering why, despite this increase, the problem of trafficking is continuously growing in the Lao PDR. One major factor might be a growing demand in Thailand, but also, positively, the lack of appropriate legal measures and knowledge on part of the Lao government is another. However, it is clear that the Lao government is not indifferent to the problem of trafficking.

The incidents of fining and detaining victims of trafficking show that legal actions taken in the Lao PDR are not directed in the right direction. In Thailand victims of trafficking are treated as criminals and prosecuted because of their illegal status, instead of being helped, given a legal status and repatriated if that is the wish of the individual. The Lao PDR needs to adopt laws that strengthen the position of the victims and more importantly, strictly and systematically enforce the laws that already exist in the country and that can actually improve the situation of the trafficked persons, not the opposite. The Lao government urgently needs to adhere to basic human rights principles and ensure and recognise the basic human rights to all individuals, including the victims of trafficking. Strengthening the laws against trafficking could have such positive effects as promoting an understanding of trafficked persons in the Lao society and make frameworks more comprehensive, but well-drafted laws need will and commitment to be enforced. Unless police, immigration officers and other authorities are informed about the laws in the Lao PDR they cannot be expected to enforce those laws. Therefore there is a need to educate those who shall enforce the laws. Additionally, a clarification of the unclear status of international law is essential for the future improvement of the situation.

Cooperation on all levels is crucial in order to combat trafficking. Joint actions should be taken between Thailand and the Lao PDR to prevent trafficking, prosecute traffickers and protect trafficked persons. It is clear that a lot remains to be done in the Lao PDR, but in addition, action has to be taken in Thailand in order to improve the situation of women trafficked into the sex industry. Women who have been trafficked should have the

opportunity to apply for permanent residence under Thai national laws if it is not the wish of the woman to repatriate, the woman should further be provided with assistance and care.

Trafficking is not one isolated action; quite conversely it is a process where women are coerced into a position in which they believe they have no choice. Many actors are involved such as parents, traffickers, adult males, the government and the policy makers. To tackle the problem requires strong political will, both on national and international levels. Although some individuals within the Lao government have that will, only political will is not enough.

The purpose of this study has been to identify the role of law in the process of trafficking in women for the purpose of sexual exploitation from the Lao PDR to Thailand and to see what is and could be done preventively and protectively by the Lao government. The government is aware of the problem and committed to combating trafficking. However, the international theoretical framework in the Lao PDR is bad and not even the national laws are enforced properly, partly due to lack of knowledge in the field of law even on higher levels on the political arena. Law enforcement is crucial – enforcing national and international laws correctly and systematically could mean a major improvement of the situation of trafficking in the Lao PDR. It is important to emphasise that, in order to minimise the amount of trafficked victims, work has to be done not only from the perspective of law but in all areas.

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Meetings

Ms. Chanthachone Chanthakhot, Program Assistant, AusAID, Vientiane 2003-10-02.

Ms. Jane Davies, Program Officer, AusAID, Vientiane 2003-10-02.

Ms. Vimala Dejvongsa, Project Manager, Village Focus International, Vientiane 2003-10-10.

Ms. Amy Jersild, Project Manager Lao PDR, International Organization for Migration, Vientiane 2003-10-15.

Ms. Camilla Lindström, United Nations Children's Fund, Vientiane 2003-09-25.

Mr. Sverre Molland, Project Manager, United Nations Inter-Agency Project, Vientiane 2003-04-04 and 2003-09-17.

Mr. Onvong, Ministry of Labour and Social Welfare, Vientiane 2003-09-17.

Mr. Inthasone Phetsiriseng, National Project Coordinator, Mekong project to Combat Trafficking in Children and Women, International Labour Organisation, Vientiane 2003-10-01.

Ms. Lithnarong Pholsena, Manager of the project Asia Regional Co-operation to Prevent Trafficking in Women and Children, Ministry of Security, Vientiane 2003-09-23.

Ms. Bandana, Global Alliance Against Trafficking in Women, Bangkok,
Thailand 2003-10-20.

Ms. Chittaphone Santavasy, Cross-border Project Officer, Save the Children
UK, Vientiane 2003-10-15.