

Human Trafficking for Sexual Exploitation: The Framework of
Human Rights Protection

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Abstract

The thesis examines the current anti-trafficking framework with particular emphasis on the development of human rights protection. The study analyses legal responses to human trafficking at 2 levels: International and National measures. The research is structured into 8 chapters, proceeding from general background of human trafficking to the development of the framework of human rights protection. From the literature review, it is found that human trafficking is a multi-faceted problem, which needs a more comprehensive approach to tackle it. Despite the recognition of all forms of human trafficking, trafficking for sexual exploitation, in which the majority of trafficked persons are young women, is the focus of this study.

The thesis concludes that the Protocol to Prevent, Suppress, and Punish Trafficking in Persons fails to adopt a comprehensive human rights approach. The core commitment of the Protocol is rather to prevent and prosecute human trafficking than to protect and identify the victims of human trafficking. This considerably undermines the effectiveness of trafficking intervention at all levels. Likewise, Thailand, a country of origin, and the UK, a destination country, have adopted/amended their anti-trafficking laws in line with the Trafficking Protocol. The thesis, however, finds that such countries have considerably failed to address the effective protection framework in their national agendas.

In response to the fight against human trafficking, the thesis calls for the amendment of the Trafficking Protocol moving towards the development of comprehensive framework of human rights protection. The suggested framework imposes legal obligations seeking to guarantee the effective identification of victims, non-criminalisation, non-discrimination and non-refoulement of victims of trafficking. In addition, the promotion of participation of states, NGOs, other member of civil society and individuals becomes integral parts to the suggested framework. All of which are to ensure the effective intervention and to develop best practice.

Abbreviations

ACPO	Association of Chief Police Officer
ASEAN	Association of South East Asian Nations
AIC	The Asylum and Immigration (Treatment of Claimants, etc) Act 2004
ATP	The Anti-Trafficking in Persons Committee
CATW	Coalition against Trafficking in Women
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEOP	The Child Exploitation and Online Protection Centre, the British Government
C.E.T.S.	Council of Europe Treaty Series
CHASTE	Churches Alert to Sex Trafficking Across Europe
CHR	The United Nations Commission on Human Rights
CMP	The Coordinating and Monitoring of Anti-Trafficking in Persons Performance Committee
COE	Council of Europe Convention on Action against Trafficking in Human Beings
COMMIT	Coordinated Mekong Ministerial Initiative against Trafficking
CRC	Convention on the Rights of Child
CROP	Coalition of the Removal of Pimping
CSEC	Commercial Sexual Exploitation of Children
CWD	The Child Juvenile and Women Division, the Royal Thai Police
DEVAW	Declaration on the Elimination of Violence against Women
DFID	The Department of International Development, the British Government
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
EU	European Union

FCO	The Foreign and Commonwealth Office, the British Government
FGM	Female Genital Mutilation
GAATW	Global Alliance against Trafficking in Women
GCIM	The Global Commission on International migration
GMS	The Greater Mekong Sub-Region
GRETA	Group of Experts against Trafficking in Human Beings
HRC	The Human Rights Council
ICC	International Criminal Court
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (International Convention on Migrant Workers)
IGOs	Inter-Government Organizations
IHRN	The International Human Rights Networks
ILC	The International Law Commission
ILM	International Legal Material
ILO	International Labour Organisation
IMM	Inter-Ministerial Meeting
IOM	International Organization for Migration
ICTY	International Criminal Tribunal for the Former Yugoslavia
L.N.T.S.	League of Nations Treaty Series
MFA	The Ministry of Foreign Affairs, the Royal Thai Government
MSDHS	The Ministry of Social Development and Human Security, the Royal Thai Government
MOU	Memoranda of understanding
NIA	The Nationality Immigration and Asylum Act 2002

NCPSTIP	The National Committee for Prevention and Suppression of Trafficking in Persons
NCS	The National Crime Squad (NCS), the British Government
NCIS	The National Criminal Intelligence Service, the British Government
NCWA	The National Commission on Women's Affairs
NGOs	Non-Government Organisations
NNT	National News Bureau of Thailand
NOCHT	The National Operation Center, the Royal Thai Government
NSCSEC	The National Sub-committee on combating sexual exploitation of children
OHCHR	Office of the United Nations High Commissioner for Human Rights
OISC	The Office of the Immigration Services Commissioner
OP/SOC	Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography
OSCE	Organization for Security and Cooperation in Europe
RTG	The Royal Thai Government
SAARC	South Asian Association for Regional Cooperation
SPA	The Sub-Regional Plan of Action
SAPS	Structural Adjustment Programs
SOA	The Sexual Offence Act 2003
SOCA	The Serious Organised Crime Agency (SOCA), the British Government
SOM	The Senior Official Meeting
STV	Foundation against Trafficking in Women
VDPA	The Vienna Declaration and Programme of Action
VCCR	Vienna Convention on Consular Relations
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UK	The United Kingdom

UKBA	The United Kingdom Border Agency, the British Government
UKP2	Operation Pentameter 2, the British Government
UKHTC	United Kingdom Human Trafficking Centre, the British Government
UN	United Nations
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Refugees
UNIAP	United Nations Inter-Agency Project on Human trafficking in the Greater Mekong Sub-Region
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
U.N.T.S.	United Nations Treaty Series
US	United States of America

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- 1910 International Convention for the Suppression of the White Slave Traffic, 3 L.N.T.S. 278, 4 May 1910, (entered into force 21 June 1915)
- 1919 Covenant of the League of Nations, 225 CTW 195, 28 April 1919, (entered into force 10 January 1920)
- 1921 International Convention for the Suppression of Traffic in Women and Children, 9 L.N.T.S. 416, 30 September 1921, (entered into force 15 June 1922)
- 1926 the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention, 60 L.N.T.S. 253, 25 September 1926, (entered into force 9 March 1927)
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Chapter 1

Introduction

This study considers legal responses to human trafficking for sexual exploitation developed from the adoption of the Trafficking Protocol until May 2009. This topic requires consideration of a range of issues. These are, for example, human trafficking as a problem of migration, as a problem of prostitution and as a problem of the law itself. In terms of anti-trafficking measures, a lack of conceptual clarity amongst the aforesaid issues is arguably, likely to cause state's reluctance to protect trafficked persons, whose legal status is yet unclear. In addition, confusion exists over the terms used- irregular, illegal and undocumented migration. There is also confusion between human trafficking and the smuggling of migrants. The lack of reliable data on the extent and severity of the problem has made the law making process of anti-trafficking measures even more difficult especially in the implementation of best practice at all levels.¹

The challenge of this topic is to create common understanding of these problems in the human trafficking discourse and to gain legal momentum in advancing protection measures under the current anti-trafficking approach.

¹ See, for example, Kangaspunta K. "Mapping the inhuman trade: preliminary findings of the database on trafficking in human beings" (2003) 3 *Forum on Crime and Society* 83-87, Laczko F. and Gramegna M. "Developing better indicators of human trafficking" (2003) 10 *The Brown Journal of World Affairs* 179, Laczko F. and Gozdzia E. (eds.), 'Data and Research on Human Trafficking: Introduction' in Laczko F. and Gozdzia E. (eds.), *Data and Research on Human Trafficking: a Global Survey*, (International Organization for Migration: Geneva, 2005), pp.7-16 and Nicola D.A., 'Researching into Human Trafficking Issues and Problems', in Lee M.(ed.), *Human Trafficking*, (Devon: Wilan Publishing, 2007), pp.49-72

The introductory chapter presents the background to this study, including the aims and objectives. Further, it introduces the research theme, which positions research questions against unresolved issues towards the creation of a more comprehensive anti-trafficking framework at both international and national levels. It finally discusses terminology and research methods adopted in this thesis.

1.1 Background to the Study

Since the 1990s, the magnitude of human trafficking at a global level has been increasing and has transformed from being synonymous with the campaign against the white slave trade to a multi-faceted problem. The scale and volume of human trafficking at all levels is still scattered due to rough assessments and lack of sufficient evidence. It is estimated that, at a global level, the number of women trafficked for sexual exploitation can range from as small a number as 13,809 cases² to the very large number of 1.39 million people.³ Such data discrepancy illustrates that the understanding of human trafficking for sexual exploitation amongst concerned organisations is perceived differently.

At a global level, human trafficking is recognised as a transnational crime in which women and children have become the majority victims for

² Electronic Correspondence from Mr. Richard Danziger of the IOM Counter Trafficking Service (23/03/10). The figures referred to by IOM are only the victims who have been voluntarily assisted under the IOM Counter Trafficking Service: Return and Reintegration Assistance during 1999-2009.

³ ILO estimates that there are at least 12.3 million adults and children in forced labour, bonded labour and commercial sexual servitude at any given time. Of this number, 1.39 million people are victims of commercial sexual servitude, both transnational and within countries in United State of America Department of State, *Trafficking in Persons Report: June 2009*, (Washington DC: Dept of State, 2009), p.8

sexual exploitation.⁴ The current legal framework of human trafficking, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, hereafter the Trafficking Protocol,⁵ takes a criminalistic approach in which prosecution and suppression are primary measures being implemented in the fight against human trafficking. Yet, the law does leave protection and assistance for those trafficked to the sole discretion of the state.

Most trafficked persons find it difficult to get help or assistance from states in which their legal status is considered to be that of irregular migrants, together with other barriers i.e. culture and language difficulties. Their fundamental human rights have been of less concern than the prosecution and suppression of trafficking offences. They are likely to be subjected to such control measures if unable to prove their innocence as victims of human trafficking. The lack of a human rights approach adopted under the Trafficking Protocol is a cause for concern in this study.

Besides calling attention to human trafficking at an international level, this study considers the problem of human trafficking at domestic levels. A large number of vulnerable young women are being targeted for in- country human trafficking as well as transnational human trafficking. For example, in Thailand, the number of young women are being trafficked internally from Northern Thailand and from ethnic hill tribes due to poverty, lack of education,

⁴ See discussion in Chapter 3, Section 3.6 and 3.7, pp 97-117 and see also, the United Nations Convention against Transnational Organized Crime, 2225 U.N.T.S. 209, 15 November 2000, entered into force 29 September 2003 [hereafter, the Transnational Organized Crime Convention]. There are currently 147 states parties to the Transnational Organized Crime Convention

⁵ 2237 U.N.T.S. 319, 15 November 2000, entered into force 25 December 2003

and lack of citizenship.⁶ These young women are also considered as potential victims of transnational human trafficking. Likewise in the UK, internal trafficking problems occur when young women- some as young as 12- are forced into the UK sex industry. A targeted young woman is vulnerable to issues of family abuse, disruption of education and drug abuse, for instance.⁷

The author contends that the lack of understanding of the current situation of human trafficking causes some adverse effects to the development of the anti-trafficking measures. The author argues that the Trafficking Protocol has not seriously taken a human rights approach. Rather, the issue has been treated as equivalent to the smuggling of migrants to avoid imposing obligations of protection on states. In some cases, it is more likely for local authorities in many states to treat human trafficking as narrower problems as immigration or prostitution. Such state practice poses a critical challenge for this study to remove conceptual ambiguities to advance the human rights perspective.

Finally, a critical examination is offered of the knowledge deficiency in migration approaches, and other issues such as equality and social justice. The study further offers an insight into the current anti-trafficking framework which has, as yet, failed to address substantive content of human trafficking. Many assume that root causes of human trafficking are common vulnerable factors, such as persistent poverty, low education, gender and racial

⁶ United States of America Department of State, *Trafficking in Persons Report: June 2007*, (Washington: United State Department of State, 2007), pp.197-198

⁷ See the work from relevant organisations such as CROP (Coalition of the Removal of Pimping), CHASTE (Churches Alert to Sex Trafficking Across Europe), and UKHTC (United Kingdom Human Trafficking Centre)

discrimination. However, a number of research studies indicate otherwise. It may be argued that generalisation of vulnerability to human trafficking could lead to omission of other prominent factors in different local or regional contexts. This also causes inappropriate programmes and interventions as well as ineffective approaches to fight against human trafficking.

1.2 Thesis: Aim and Objectives

This thesis critically explores legal measures that seek to end human trafficking. In practice, prosecution and suppression alone are shown to be insufficient to reduce human trafficking. The existing anti-trafficking framework, whether at international or national levels, arguably fails to respond to the long term prevention of human trafficking and protection of human rights of trafficked persons. The current regime lacks comprehensive protective provisions. The study thus considers a change in the legal response to human trafficking for sexual exploitation from a criminalistic to a human rights approach. It further considers the development of comprehensive protection provisions. In addition, the research seeks to ensure that the following issues are to be taken into consideration:

First, this study revisits and examines more closely social approaches to the issue of human trafficking. This thesis aims to explore the complexity surrounding human trafficking, striving for a balance between theory and practice and mapping out issues that should be put forward for the creation of a comprehensive approach.

Second, some existing and unresolved problems of modern day slavery, poverty, gender inequality, social justice and human rights issues are closely explored. This is to ensure that a better protection framework is developed taking into account these problems in order to promote a more practical approach. It will be argued that the anti-trafficking framework should be harmonised between prevention, prosecution and protection measures to keep a proper balance between the interests of nations and protection of trafficked persons.

Finally, the thesis goes beyond the international boundary to the national agenda. It aims to identify adverse effects, which could reduce the effectiveness of the anti-trafficking law at national levels. The thesis finally evaluates contributing factors for best practice in combating human trafficking.

1.3 Research Theme

According to the thesis statement offered earlier, the Trafficking Protocol is the latest international instrument dealing with transnational human trafficking. It is this Protocol, supplementing the Transnational Organized Crime Convention, in which criminal provisions are prominent and has become a means to end human trafficking. However, the author claims that the Trafficking Protocol has failed to promote the protection of human rights of victims of trafficking. This Protocol seems to be a problem rather than a remedy, since more trafficked persons are being targeted as criminals- whereas traffickers, real criminals go unpunished and still reap the profit of trafficking. The failure to recognise those suffering from all forms of

exploitation therefore indicates the inadequacy and ineffectiveness of the Trafficking Protocol.

The research concerns human trafficking for sexual exploitation. Particular reasons are behind the choice of study. This is primarily because 'sexual exploitation' preys on arguably the most vulnerable group, young women and children, and it has become arguably the worst form of trafficking.

"During these eight months, I had to take every client that wanted me and had to work everyday, even during my menstruation. The mama also made me and the other women work for her during the day and wouldn't allow us to eat much saying we would get too fat. I was like a skeleton during that time. While I was in "tact" [under contract, or in debt], the mama paid for everything except for my health care and birth control pills. This was all added to my debt"

Pot, twenty-seven years old trafficked person, from *Owed Justice: Thai Women Trafficked into Debt Bondage in Japan*, 2000

In addition, the study considers gender justice. Human trafficking for sexual exploitation is selected because of its gender-specific nature. Although the population of trafficked persons for sexual exploitation cuts across age and gender, this study is demarcated by the substantial phenomenon of trafficking in young women.⁸ It is noted that trafficking in children needs particular legal provisions on child-specific remedies and therefore is outside the scope of this study. Apart from the reasons given

⁸ See, for example, Askola H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, (Oxford: Hart Publishing, 2006), Beeks K. and Amir D., *Trafficking and the Global Sex Industry*, (Oxford: Lexington Book, 2006), Brown L., *Sex Slaves: The Trafficking of Women in Asia*, (London: Virago Press, 2000), Kempadoo K., Sanghera J. and Pattanaik B., *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*, (London: Paradigm Publishers, 2005)

above, human trafficking for sexual exploitation involves a number of unresolved issues surrounding the Trafficking Protocol. For example, the persistent debates of the issue of consent and the definition of exploitation will also be dealt with in this research.

It is important for this study to examine the relationship between slavery and human trafficking. The research argues that human trafficking should be universally accepted as violation of human rights. However, slavery and human trafficking are different in nature and have been dealt with by different legal intervention. The research seeks to develop legal principles

Finally, the research is premised on the development of a human rights protection framework. Most trafficked persons are in ambiguous situations, due to their unclear legal status, especially in destination countries. Once they are trafficked, they are easily victimised by their intermediary and then re-traumatised by repressive laws. A victim-friendly approach and human rights protection are proposed to remedy this injustice.

1.4 Research Questions

In order to research the thesis set out earlier in this chapter, the following questions need to be answered:

First, what are the factors making people vulnerable to widespread human trafficking for sexual exploitation and how are they acknowledged and addressed by the international community?

Secondly, how has the issue of human trafficking been considered by the international community and to what extent have international instruments been developed as measures to tackle contemporary human trafficking?

Thirdly, does the principal international legal instrument, the Trafficking Protocol, adequately accommodate the human rights protection of trafficked persons and how far-reaching are protection provisions under the current anti-trafficking framework?

Finally, to what extent are trafficked persons adequately and appropriately provided protection and assistance under the scope of the Trafficking Protocol in different national jurisdictions? A related issue is whether domestic anti-trafficking measures either specific or as a part of other relevant provisions i.e. immigration, prostitution or criminal code, adequately and sufficiently provide a comprehensive and effective approach to tackle human trafficking?

1.5 Terminological Clarification

Within this research, the term “human trafficking” is understood in line with the definition of trafficking under the Trafficking Protocol.⁹ It can be

⁹ Article 3 (a) of the Trafficking Protocol, 2237 U.N.T.S. 319

concluded that the transnational crime of human trafficking consists of the three following elements:

The act: this is the recruitment, transportation, transfer, harbouring or receipt of persons.

The method: this is the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, and the abuse of power or of a position of vulnerability. This also includes the giving or receiving of payments or benefits to achieve the initial consent of a person having control over another person.

The purpose: this is the exploitation of others for sexual purposes, for forced labour or services, for slavery or practices similar to slavery such as servitude or the removal of organs.

The legal definition of human trafficking in International law is distinguished from that of smuggling of migrants,¹⁰ although it is not absolute and somehow overlaps. For the purposes of this analysis, it is critical to clarify such differences. The working definition of human trafficking in this study is therefore established to mean to 'the illicit trade in people, especially young women, involved in any acts or attempted acts under the Trafficking Protocol, by all methods necessary to overcome trafficked persons' volition for the

¹⁰Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 U.N.T.S.507, 15 November 2000, entered into force 28 January 2004 [hereafter, the Smuggling of migrants Protocol]. Art.3 (a) of the Smuggling of Migrants Protocol, smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident

purpose of sexual exploitation'. The volition of trafficked persons has an extensive meaning covering a situation, for instance, where a dutiful daughter is trafficked, due to her family obligations to pay off the family debt. As in some societies, Brown states, 'girls are expected to pay back their breast money milk'.¹¹

Although the term of exploitation is not entirely absent from the vocabulary of International law,¹² the term "sexual exploitation" is yet undefined in the Trafficking Protocol as well as other relevant legal instruments. Therefore, this thesis seeks to find out how states address the term "sexual exploitation" under domestic laws¹³ and how much further and deeper is such term being interpreted in domestic laws. In this study, the author suggests that the scope of sexual exploitation becomes fluids and should be extended beyond trafficked persons' consent, stipulated under the Trafficking Protocol. This is because of contradictory positions of law between the legal and illegal- and complex migration practices which have increased the higher risk of sexual exploitation for those being trafficked as well as migrant sex workers.

1.6 Methodological Discussion

This legal research is conducted to provide an insight into legal responses to human trafficking at two levels: international and national. At

¹¹ Brown L., *Sex Slaves: the Trafficking of Women in Asia*, (London: Virago Press, 2000), p.34

¹² Marks S., *International Law on the Left: Re-Examining Marxist legacies*, (Cambridge: Cambridge University Press, 2008), p. 282

¹³ See further discussion in Chapter 4, Section 4.6, especially Section 4.6.4-4.6.5, pp. 156-169 and Chapter 5, Section 5.5, especially Section 5.5.1, pp.187-197

international level, the study reveals and explains how the issue of human trafficking is initiated and influences the international community, individual states and lives of people, especially those trafficked. At national levels, the study elaborates how such law functions, and is interpreted and perceived by different societies, which vary in culture and legal systems. The legal research is further conducted to critically examine the current protection framework under the two main Treaties: the Transnational Organized Crime Convention and the Trafficking Protocol.

The research explores whether the current anti-trafficking framework is instrumental towards the protection of trafficked persons whose legal status is yet unclear. In addition, the legal status of a trafficked person could also present controversy over various national legal responses. That is to say, some states recognise trafficked persons as 'economic migrants', whereas others may consider them as those who are in need of protection due to the wrongful exploitation. The research ultimately searches for a better understanding of the phenomenon, seeks to identify problems surrounding the principal law and further develops a more effective and comprehensive framework of human rights protection towards best practice.

In this connection, the study adopts the research methodology which combines the following approaches: doctrinal analysis, qualitative research, involving social science methodology, and comparative legal methods. Human trafficking is a dynamic and complex social phenomenon. The aims of this study therefore go beyond the pure analysis of legal doctrine of human trafficking and encompass interdisciplinary research methods. However, the

tension between different research methodologies adopted is always taken into account. The researcher's tasks are to identify the pros and cons of such particular approaches and to address the most appropriate methodology, based upon the research objectives of a chapter.

The methodological discussion begins with the elaboration of the doctrinal analysis, in other words, a black-letter approach.¹⁴ In this research, the doctrinal analysis is significant to illustrate how the legal principle of human trafficking, the anti-trafficking law, is adopted in international and domestic laws. However, the qualitative method is undertaken to investigate a variety of contextual factors shaping 'law in action' concerning different functions of law as a social phenomenon.¹⁵ Despite the juxtaposition of doctrinal analysis and the qualitative method that are rarely used together, such combined methods can arguably strengthen the analysis and findings of this study. Finally, a comparative legal method is adopted to analyse and compare legal perceptions, meanings of human trafficking, originating from two or more national laws or legal systems to provide a better understanding of the subject studied.¹⁶

Doctrinal Analysis: Characteristics, Techniques and Materials

This approach focuses on the currency of law that creates rules and principles comprising the substantive content of legal doctrine. Furthermore, it is concerned with analysis of how such legal doctrine has been developed

¹⁴ Mc Conville M., and Chui W.H., *Research Methods for Law*, (Edinburgh: Edinburgh University Press, 2007), p.4

¹⁵ Salter M. and Mason J., *Writing Law Dissertations: an Introduction and Guide to the Conduct of Legal Research*, (Essex: Longman, 2007), p.138

¹⁶ See Mc Conville M., and Chui W.H., *Research Methods for Law*, (Edinburgh: Edinburgh University Press, 2007), p. 3

and applied. In other words, the approach provides an in-depth analysis of legal reasoning and interpretation. Being based upon a strictly legalistic manner, the doctrinal analysis denies the contamination of all supposedly non-legal factors i.e. political values.

This research methodology adopts analytical techniques, enabling the researcher to deploy her interpretative and legal reasoning skills in a strictly legalistic manner. Slater and Mason concluded that 'the doctrinal analysis seeks to provide a detailed and highly technical commentary upon, and systematic, exposition of, the content of legal doctrine. The doctrine is interpreted as if it is a separate, independent and coherent system of rules.'¹⁷

Since this approach is confined to the analysis of 'law in nature', identification of source materials is necessary. Concerning legal materials or sources, two types of legal materials are recognised. Firstly, primary sources are those authoritative records of law made by law-making bodies such as parliaments, courts, government departments or other statutory authorities. Secondly, secondary sources of law are those publications, which refer and relate to the law, while not being themselves primary sources. In general, secondary data can be obtained from legal commentaries, legal textbooks, journal articles, case citations, case digests and legal dictionaries.¹⁸

Central to doctrinal analysis, primary sources at national and international levels are of great importance to reveal legal principles, to

¹⁷ See Salter M. and Mason J., *Writing Law Dissertations: an Introduction and Guide to the Conduct of Legal Research*, (Essex: Longman, 2007), p. 49

¹⁸ Watt R., *Concise Legal Research*, 5th ed., (Sydney: Federation Press, 2004) pp.1-2

interpret and reason meanings that underlie legal principles and to provide clear explanation of the legal provisions. Unlike national laws, international law has its own principles concerning primary sources of law. Article 38 of the Statute of the International Court of Justice enumerates the general principles of law recognised by civilised nations and constitutes traditional sources of international law, examined as follows:¹⁹

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states, for example, law-making treaties or treaty contracts.

2. International custom, as evidence of a general practice accepted as law, for example, state practice or *opinio juris*.

3. The general principles of law recognised by civilised nations, for example, the principle of good faith and the principle of estoppel.

4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law, which is subject to the provisions of Article 59.

In this research, two main treaties constitute primary sources of international law: the Transnational Organized Crime Convention and the Trafficking Protocol. In addition, a study of early international documents on human trafficking, customary international law and judicial decisions certainly benefits the better understanding of how the anti-trafficking legal paradigm

¹⁹ See further discussion in Van Hoof G.J.H., *Rethinking the Source of International Law*, (The Netherlands: Kluwer Law and Taxation Publishers, 1983), pp.131-138

has been constructed and has shifted from time to time. Furthermore, exposition and analysis can be collected from various secondary sources of law, for example, textbooks, journal articles including web-based research to focus on the subject, area of study, and evaluate the effectiveness of the law. To reduce any potential bias, information is assessed, triangulated and selected. The selected information is eventually used to identify general and specific questions and develop the conceptual framework of the study.

Qualitative Research: the Investigation of Law in Action

This research adopts qualitative research encompassing social science methodology, enabling the researcher to develop a realistic framework of the law's relationship to society. Qualitative research also helps to provide a means of understanding external forces and effects beyond an ambit of legal discourse.²⁰ This is commonly referred to as 'law in context'. Hence, to conduct more effective legal research, social science methodology is used so long as it is instrumental and provides substantial insight. In stark contrast to doctrinal analysis focusing on purely legalistic manners, qualitative research views law as a social phenomenon and investigates the movement of law, in other words, law in action.

In relation to human trafficking, a number of social approaches are reviewed, for instance, migration approaches. The research adopts documentary research methods to examine and construct the conceptual framework of this study. Since human trafficking is interdisciplinary by nature,

²⁰ Rubin E.L. "Law and the methodology of law" (1997) *Wisconsin Law Review* 553-557

the anti-trafficking law is studied and interpreted by integrating approaches of history, sociology, economics, culture and policy. The historical analysis is employed to illustrate how human trafficking has developed throughout the history of human migration as well as the legal history. Finally, the content analysis reveals how the anti-trafficking law actually functions in society.

Comparative Legal Method

The research employs a comparative legal method, which generally seeks the analysis of and compares legal perceptions i.e. meanings of human trafficking, originating from two or more national laws of legal systems to provide a better understanding of the subject studied.²¹ Applying this to International law, the use of a comparative legal method generally assists in the discovery, elucidation and application of the general principles of law, which international and occasionally national courts are directed to apply.²² Not only does the comparative legal method contribute to the approach, it goes beyond the stage of investigation into actual applications- the elaboration of rules of substantive law.²³

In this research, the comparative legal method is undertaken to study legal perception (s) and meaning (s) of human trafficking under international law and national laws: the UK and Thai law. Moreover, the study seeks to compare and examine the functional equivalence of the law, concept,

²¹ Salter M. and Mason J., *Writing Law Dissertations: an Introduction and Guide to the Conduct of Legal Research*, (Essex: Longman, 2007), p. 3

²² Ibid, p. 24

²³ Kiss A.C, 'Comparative Law and Public International Law', in Butler W.E., *International Law in Comparative Perspectives*, (The Netherlands: Kluwer International, 1979), pp. 41-48

institution or principles as comparable factors.²⁴ In this connection, two questions are taken into account:

Whilst different states- especially between a country of origin and destination country- tackle the problem of human trafficking differently, what are the basic elements that should be incorporated into any anti-trafficking legislation? In other words, how should international law on human trafficking formulate legal elements which enable states to function and deal with human trafficking as a global issue? Next, how or by what means should the anti-trafficking law, as a unified law in a supra-national context be interpreted and adopted by a society, seeking how best to regulate and fulfil the rule under scrutiny in one society, and achieve the point, so-called a *praesumptio similitudinis* – a presumption that the practical results tend to be similar? ²⁵

Despite the advantages of the methodologies adopted in this study, some problems are discussed. Since the doctrinal analysis requires the conduct of the research taken in a strictly legalistic manner, this leaves a gap in knowledge about how law actually functions in society. The researcher contends that qualitative method enables the scope of human trafficking to be broadened beyond the ambit of law and to draw the connection between law and society, including the application of law in different societies. However, it is necessary for the researcher to ensure a balanced justification of methods used and to be aware of criticisms that relate to qualitative methods. Finally, problems of languages and terminology, cultural differences and ethnocentric

²⁴ See further detail of comparative legal method in De Cruz P., *Comparative Law in a Changing World*, 3rd ed., (London: Routledge-Cavendish, 2007), pp. 233, 236-238

²⁵ Ibid, p. 239

issues should be taken into account when conducting comparative legal research.

1.7 Countries of Study

National case studies on legal responses to human trafficking for sexual exploitation in Thailand and the United Kingdom are selected due to the following reasons. First, these countries are already recognised as states of origin (Thailand) and destination countries (the United Kingdom) for trafficked persons. Thailand can also be considered as both a transit and destination country. The UK has recently been recognised as a transit country. However, the increased number of Thai women being trafficked for sexual exploitation in Europe, including the UK, and worldwide remains a significant issue for recognising Thailand as a country of origin. Likewise, the fast growth of the UK sex industry, where the demand issue of male clients for non-British sex workers has become more apparent, together with its strong economy, qualifies the UK as one of the most desirable destination countries.

Secondly, it is based on the researcher's interest, because Thailand is her host country, where human trafficking for sexual exploitation has become a prominent problem for the country. Moreover, gender based discrimination and structural problems of unequal economic development in Thailand are arguably significant conditions to constitute human trafficking for sexual exploitation. Likewise, the UK is selected because the problem of human trafficking in this country has become a serious issue. The worst forms of exploitation, for instance, labour and sexual exploitation, have been regularly

discovered. In addition, the British government has recently made attempts to tackle problems of all forms of human trafficking by amending and developing more effective and adequate anti-trafficking measures.

1.8 Organisation of the study

Chapter 2 discusses debates and controversies over human trafficking

Chapter 3 deals with relevant international instruments concerning the phenomenon of human trafficking, with a particular elaboration of the current anti-trafficking framework.

Chapter 4 discusses the national case study of Thailand, as a country of origin and its legal and policy responses to human trafficking for sexual exploitation.

Chapter 5 focuses on the national case study of the UK, as a destination country, and its legal and policy responses and migration policies to trafficking for sexual exploitation.

Chapter 6 critically analyses the international legal framework of human rights protections.

Chapter 7 is the conclusion and recommendations for tackling human trafficking for sexual exploitation.

Chapter 8 analyses the framework of human rights protection as the way forward to enhance the effectiveness of the anti-trafficking framework.

Chapter 2

Debates and Controversies over human trafficking

2.1 Introduction

As stated in chapter 1, the issue of human trafficking for sexual exploitation remains without conceptual clarity and is still an issue of concern.²⁶ Human trafficking is recognised as a social phenomenon, which can be traced back to the mid-nineteenth century. The term “trafficking” was first used interchangeably in the campaign against the white slave trade, in other words, the prostitution of young white women. However, in the contemporary debate, human trafficking is no longer treated as simply as the issue of prostitution.

On the contrary, human trafficking is a social phenomenon, which has become rather complex and has been tied to a myriad of on-going debates, for instance, migration, prostitution, transnational organised crime and human rights. Contemporary human trafficking is somewhat a multi-dimensional threat which needs further clarification. Chapter 2 thus offers critical insights into common understandings of all the above debates, and provides adequate responses to the multi-faceted problem of human trafficking.

2.2 Organisation of Chapter Two

As stated earlier, human trafficking is nothing new in human history. The term “trafficking” was first used interchangeably with the prostitution of

²⁶ See Chapter 1, pp.2-5

young white women.²⁷ However, the understanding of human trafficking in the contemporary world has changed. This chapter therefore considers an historical analysis of human trafficking as a point of departure. Chapter two provides an insight into the transition from human trafficking for the sole purpose of prostitution, the white slave trade, to a multi-faceted problem.

Currently, the multi-faceted problem of human trafficking can be viewed in various forms, depending on how states respond to the problem. Trafficking can be classified as transnational organised crime if a state aims to tackle and suppress organised criminal groups.²⁸ Such issue can also be viewed as migration issue- irregular or undocumented or illegal migration, if a state is to prevent an influx of irregular migration by imposing stricter immigration laws and policies.²⁹ In addition, human trafficking can be discussed as a form of human rights violation, which is the focus of this thesis. Since enslavement is involved, human trafficking is also classified as a modern form of slave trade.³⁰

Amongst the various forms, chapter two mainly analyses, debates and considers controversies over the human trafficking in migration discourse. A

²⁷ For a general background of the feminist movement in the mid-nineteenth century see Barry K., *The Prostitution of Sexuality: The Global Exploitation of Women*, (New York: New York University Press, 1995), pp.91-121 and Jeffreys S., *The Idea of Prostitution*, (North Melbourne: Spinifex Press, 1997), pp.7-34

²⁸ See general discussion in Truong T., *Human Trafficking and Organised Crime*, ISS Working Paper 339, (The Hague: Institute of Social studies, 2001) and Schloenhardt A. "Organized crime and the business of migrant trafficking: an economic analysis" (1999) 32 *Crime Law and Social Change* 203 and the Transnational Organized Crime, 2225 U.N.T.S. 209

²⁹ See general discussion in Mameli P.A. "Stopping the illegal trafficking of human beings: how transnational police work can stem the flow of forced prostitution" (2002) 38 *Crime Law and Social Change* 67-80, Stalker P. "Migration trends and migration policy in Europe" (2002) 40 *International Migration* 151-179

³⁰ See in general Bales K., *Disposable People: New Slavery in the Global Economy*, (London: University of California Press, 1999)

series of contemporary migration approaches are discussed as reasons for migration, which are arguably no different amongst all types of migration, including human trafficking. Within migratory flows, human trafficking can be recognised as irregular, illegal or undocumented migration. Yet, there is no clear academic consensus over the terms “irregular”, “illegal” and “undocumented” which are variously used. The author considers that such terms indicate different levels of the socio-legal status of migrants. It is important for this chapter to elaborate such terms and identify the most appropriate term to be used in the entire study.

The chapter then goes on to analyse forms of irregular migration: human trafficking and smuggling of migrants’ concerning similarities and differences of the two phenomena. The distinction between the two phenomena is significant for the development of law and policies towards effective reduction of human trafficking and smuggling of migrants. Finally, the chapter also discusses root causes of human trafficking for sexual exploitation, in which the majority of trafficked persons are young women. The author argues that one of the root causes of human trafficking for sexual exploitation lies in the link between gender inequality, labour exploitation and migration.

2.3 Human Trafficking: An Historical Perspective of the White Slave Trade

As stated earlier, the term trafficking can be traced back to the mid-nineteenth century. It was used interchangeably with the campaign against

the prostitution, known as the white slave trade. The term white slave trade first appeared in the feminist campaign for the repeal of the Contagious Disease Acts between 1864 and 1869 in Britain. The leading British feminist activist, Josephine Butler spearheaded the campaign against the regulation of brothels. She claimed that prostitution must be abolished and the law should punish more those who profited from prostitution, such as procurers, pimps and the state, not the prostitute herself.³¹

However, the regulation of prostitution tended to force those prostitutes to undergo screening examinations for venereal disease. If a woman were found to be free of venereal disease, she would then be officially registered and issued a certificate identifying her as a clean prostitute. Yet, if suspected of being or having been, infected a prostitute was to put in a specially designated ward called "pseudo medical prisons for whores".³² Butler and the abolitionist feminists believed that the regulation of prostitution adversely affected women, as it tended to criminalise prostitutes. The strategy for the campaign against the traffic in women was to repeal the Contagious Disease Acts as state mechanisms, which represented an unequal and immoral sexual double standard and caused sexual slavery of women.

The Acts were finally repealed in 1886, but the campaign against

³¹ Barry K., *The Prostitution of Sexuality: the Global Exploitation of Women*, (New York: New York University Press, 1995), pp.91-121

³² Such as The Percey Case- Mrs. Percey and her daughter were both identified as public prostitutes. In fact, she was working in a musical theatre on a military base. She was ordered to have a surgical examination. As a result, she was fired from her job and was evicted from her residence. In desperation, with no place to live and work, Mrs. Percey threw herself into the Basingstoke Canal, in Barry K., *The Prostitution of Sexuality: the Global Exploitation of Women*, (New York: New York University Press, 1995), p.93

prostitution had been continuing for the elimination of prostitution of girls and young women, the so-called social purity campaign.³³ The term “white slave trade”, in the campaign, referred to the abduction and transport of young white women for prostitution. It is noted that in Butler's campaign, the white slave trade was used interchangeably as prostitution and traffic in women.

In term of legal history, the term “white slave trade” first appeared at the 1902 Paris Conference, where the International Agreement for the Suppression of the White Slave Traffic was initially drafted and accordingly was adopted in 1904 by 13 states.³⁴ Yet, the term white slave trade was criticised as it was limited to the fight against trade in innocent white women for sexual exploitation. Arguably, prostitution during that period coincided with an increasing number of non-white migrant prostitutes.³⁵ As a result, the term trafficking in women and children was proposed to resolve the confusion during the 1921 International Conference on trafficking held in Geneva where the new measure on trafficking was adopted.³⁶ Since then, the term trafficking in women and children had been replaced and remains the universal language.

³³ Masika R. (ed.), *Gender, Trafficking and Slavery*, (Oxford: Oxfam Focus on Gender, 2002), p. 22.

³⁴ 1 L.N.T.S. 83, 18 May 1904, entered into force 18 July 1905 [hereafter, the 1904 White Slave Traffic Agreement]. Original state signatories were Belgium, Denmark, France, Germany, Italy, the Netherland, Portugal, Russia, Spain, Sweden-Norway, Switzerland, and the United Kingdom in Bassiouni M.C. “Enslavement as an international crime” (1991) 23 *New York University Journal of Law and Politics* 464

³⁵ Doezeema J. “Loose women or lost women?: the re-emergence of the myth of white slave trade in contemporary discourse of trafficking in women”(2000) 18 *Gender Issues* 26

³⁶ Jeffreys S., *The Idea of Prostitution*, (North Melbourne: Spinifex Press, 1997), pp.14-15 and see also The 1921 International Convention for the Suppression of the Traffic in Women and Children, 9 L.N.T.S. 416, 30 September 1921, entered into forced 15 June 1922 [hereafter, the 1921 Trafficking in Women and Children Convention]

Despite the contribution to the campaign against the traffic in women, the disadvantage of Butler's campaign and the abolitionist feminist was the sole focus on forced prostitution. It is argued that such disadvantage later caused long- standing problem amongst feminists and became an on-going debate of the contemporary human trafficking issue.³⁷ The debate between free and forced prostitution has become a controversial issue in human trafficking discourse, which adversely affects better practice in tackling human trafficking for sexual exploitation at all levels.³⁸

The author concludes that contemporary human trafficking has become a prominent problem with a wide range of issues. For instance, human trafficking is not all about the trafficking-prostitution nexus, but all forms of exploitation through the threat or use of force, coercion or violence for certain exploitative purposes in the course of migration.³⁹ The next section will discuss contemporary human trafficking, which has radically changed its face from being the trade in white slaves to being various forms of modern day slavery.

³⁷ Barry K., *The Prostitution of Sexuality: the Global Exploitation of Women*, (New York: New York University Press, 1995), pp. 98-99

³⁸ There are a significant number of contributions concerning debates on prostitution in relation to human trafficking for sexual exploitation. Please see, for example, Nandita S. "Anti-trafficking rhetoric and the making of a global apartheid" (2005) 17 *NWSA Journal* 88-111, Munro V., 'Exploring Exploitation: Trafficking in Sex, Work and Sex Work' in Munro V.E. and Della Giusta M., *Demanding Sex: Critical Reflections on the Regulation of Prostitution*, (Ashgate: Aldershot, 2008), pp.83-97, Doezenia J. "Ouch! Western feminists: wounded attachment to the third world prostitute" (2001) 67 *Feminist Review* 16-38, and Outshoorn J. "The political debate on prostitution and trafficking of women" (2005) 12 *Social Politics* 141-155

³⁹ Report of the Special Rapporteur on *Trafficking in Women, Women's Migration and Violence against Women*, Ms. Radhika Coomaraswamy, submitted in accordance with the Commission on Human Rights at fifty-sixth session, *E/CN.4/2000/68*, 29 February 2000, Para.10

2.4 Human Trafficking and Slavery

From a history of the white slave trade, human trafficking represents only trade in innocent young white women to serve as prostitutes. Yet, in our time, human trafficking has now mixed with other types of exploitation, for instance construction, domestic work and agricultural estates. Despite having been considered as a pinnacle of exploitation, slavery has a very specific meaning within the ambit of the international law of slavery, discussed later in chapter 3.⁴⁰

Slavery is the practice that can be tracked back in the 19th century where it has been outlawed by a number of international documents.⁴¹ However, its face in the 21st Century is more complex than it was, as slavery has been used expansively covering various illegitimate practices. These are, for example, forced labour, debt bondage, child labour and human trafficking.⁴² The more vulnerable and marginalised i.e. young women are more likely to be targeted.⁴³ In connection with slavery, contemporary enslavement can be described in a number of ways as being:

1) Forced to work through the threat or use of violence;

⁴⁰ Chapter 3, pp. 77-81

⁴¹ It has been estimated that between 1815 and 1957 some 300 international agreements were implemented to suppress slavery in Report of Office of the United Nations High Commissioner for Human Rights, Mr. David Weissbrodt and Anti-Slavery International on Abolishing Slavery and Its Contemporary Forms, *HR/PUB/02/4*, Para.5. Please see also, Bales K. and Robbins P.T. "No one shall be held in slavery or servitude: a critical analysis of international slavery conventions" (2001) 2 *Human Rights Review* 18-45. By contrast, there are 79 separate international instruments and documents that address the issues of slavery, the slave trade, slave-related practices, forced labour and their respective institutions, in Bassiouni M.C. "Enslavement as an international crime" (1991) 23 *New York University Journal of Law and Politics* 454

⁴² Ibid, in *HR/PUB/02/4*, Paras. 30-149 and Rassam Y.A. "Contemporary forms of slavery and the evaluation of the prohibition of slavery and the slave trade under customary international law" (1999) 39 *Virginia Journal of International Law* pp.304-352

⁴³ Ruggiero V. "Trafficking in human beings: slaves in contemporary Europe" (1997) 25 *International Journal of Sociology of Law* 238-241 and Goodey J. "Migration, crime and victimhood: responses to sex trafficking in the EU" (2003) 5 *Punishment and Society* 419-421

- 2) Owned or controlled by an employer, in other words, a slaveholder through mental, physical, threatened abuse;
- 3) Dehumanised, treated as a commodity or even bought and sold as property and
- 4) Physically constrained or having restrictions placed on freedom of movement and freedom to change employment.⁴⁴

In connection with modern day slavery, human trafficking is often combined with debt bondage, which vulnerable people are likely to be lured or tricked into. Persistent poverty and lower social status, due to less education and marginalisation, are factors which place vulnerable people more prone to human trafficking. Desperation about money for survival is likely to be taken advantage by those who exploit and abuse, i.e. smugglers and traffickers. Debt bondage is a practice that is always utilised to vulnerable people, as a means to lure or trick vulnerable people into trafficking rings.

The author argues that debt bondage renders an indebted labourer extremely vulnerable status. Once indebted, a bonded labourer is more likely to be forced or coerced to work to pay off the debt or, in some cases, even work without pay. For instance, an indebted young Thai woman, trafficked and forced to work in a Japanese brothel, took contraceptive pills everyday to prevent her debt. She had also to serve as many clients as she could to pay off her debt. Yet the debt had never been paid off but it constantly increased, due to costs charged to the woman for accommodation, food and medical

⁴⁴ Bales K., *Disposable People: New Slavery in the Global Economy*, (London: University of California Press, 1999), p.50

treatment.⁴⁵ The situation as such arguably constitutes an exploitative practice that amounts to slavery.

It is noticeable that in cross-border migration, many enslaved persons are likely to fall into the category of irregular migrants. The irregular status of migrants makes them more vulnerable to human rights violations and abuses. In addition, most trafficked persons may have difficulty in seeking assistance, due to lack of knowledge of local languages, customs and law in destination countries. They are voiceless and powerless in protecting themselves from such coercive and exploitative conditions. The next section discusses migration approaches towards debates and controversies over human trafficking, in which irregular migration becomes the main analysis.

2.5 Migration Approaches: Reasons behind Decisions Being Made for Human Migration

From the discussion above, it can be seen that human trafficking is no longer the trafficking-prostitution nexus, nor a form of the white slave trade. It is a multi-faceted problem cutting across various social problems i.e. migration, prostitution, slavery, and labour exploitation, in which force, coercion and violence have become significant elements. In this section, the author discusses and explains decisions for migration, based upon migration approaches and discusses how such approaches relate to irregular migration including human trafficking.

⁴⁵ Dinan K.A. "Migrant Thai women subjected to slavery-like abuses in Japan" (2002) 8 *Violence against Women* 1124 and see also Nelson K.E. "Sex trafficking and forced prostitution: comprehensive new legal approaches" (2002) 24 *Houston Journal of International Law* 554-557

In world history, from the Ancient Greeks to the age of globalisation, human migration has been an outstanding social phenomenon.⁴⁶ People have migrated both voluntarily and forcibly due to several reasons, for instance, demographic growth, climatic change, warfare, conquest, the formation of nations, the emergence of states and empires, as well as, the development of production and trade.⁴⁷ However, since the post cold war period, patterns of population migration have markedly changed,⁴⁸ due to the impact of globalisation;⁴⁹ causing the transformation of political and economic systems and the development of transport, technology, and communication. The author concludes that the above factors have accelerated the fast growth of international migration.

According to Stalker, international flows in the age of globalisation have not only been increasing in volume, but have also been changing in character. Migrants can move back and forth easily and can keep in regular contact with their homes, even if they are on the other side of the globe.⁵⁰ The changes in size and volume have led to the more inherent complexity and uncertainty of international migration. Some migration scholars such as Salt, Skeldon and Findley argue that existing migration theories are insufficient to explain new contemporary movements.⁵¹

⁴⁶ Spencer S., *The Politics of Migration: Managing Opportunity, Conflict and Change*, (Oxford: Blackwell Publishing, 2003), p. 39.

⁴⁷ Castles S. and Miller M., *The Age of Migration: International Population Movements in the Modern World*, 3rd ed, (London: The Guildford Press, 2003), p. 48.

⁴⁸ Massey D., *Worlds in Motion: Understanding International Migration at the End of the Millennium*, (Oxford: Oxford University Press, 2005), pp. 2-16

⁴⁹ Stalker P., *Workers without Frontiers: The Impact of Globalization on International Migration*, (London: Lynne Rienner Publishers, 2000), pp. 2-10

⁵⁰ Ibid, p.7

⁵¹ Siddique M.A.B.(ed.), *International Migration into the 21st Century*, (Cheltenham: Edward Elgar, 2001), p. 2

A larger number of people are involved in international migration, but no one knows exactly how many people migrate or are forced to migrate each year. According to IOM Report 2008, in 2005, there were some 190 million international migrants, which was nearly two and a half times the figure in 1965. It is estimated that the number of migrants is likely to be in excess of 200 million.⁵² Of these numbers, some may be true volunteers whilst others may not. Moreover, contemporary human migration has become gendered; men and women do migrate more independently. As a result, a single, coherent theory of international migration may be inadequate and inappropriate to explain such considerable changes, but a combined and well-explained approach may be required.⁵³

It can be said that reasons for migrations in contemporary migration vary and are complex. This section considers migration approaches in a wide range of disciplines. Discussion will draw upon the following approaches: economic theories of migration- such as neoclassical economics, and the household approach, Marxist political economy or historical-structural approach of migration, and the World migration system approach.

2.5.1. The Neo-Classical Approach

The neo-classical approach describes reasons for (international) migration, based upon the basic assumption of wage differentials between

⁵² International Organization for Migration, *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*, (Geneva: IOM World Migration Report Series, 2008), p. 2

⁵³ Massey D. et al. "Theories of international migration: a review and appraisal" (1993) 19 *Population and Development Review* 432

receiving and sending areas, and utility maximisation of individual migrants.⁵⁴ This approach is also known as the push-pull factor⁵⁵ or individualistic human capital.⁵⁶ According to the neo-classical approach, migration takes place due to geographical differences in the supply of and demand for labour in sending and receiving areas. In this connection, wage differentials become the main determinant for individual's decision for (labour) migration. In addition, there are additional push factors (in sending areas) for example, labour surpluses, economic inequality, low equilibrium wages, and other socio-economic factors. By contrast, a number of pull factors in receiving areas are, for example, labour shortages, high equilibrium wages, economic stability and employment opportunities.⁵⁷

However, the neo-classical approach has been criticised in a number of following ways. The approach simply explains reason for migration based solely upon economic determinants of migration. These are, for example, income differentials and differences in employment opportunities between sending and receiving areas.⁵⁸ It also fails to explain other root causes, potentially become reasons for people migration e.g. gender-based discrimination, violence, and coercive practices in sending areas. The approach also fails to acknowledge the migration flow from the West to the

⁵⁴ Arango J., 'Theories of International Migration' in Joly D., *International Migration in the New Millennium: Global Movement and Settlement*, (Aldershot: Ashgate, 2004), p.18

⁵⁵ Skeldon R., *Migration and Development: A Global Perspective*, (Essex: Longman, 1997), pp.20-22

⁵⁶ Castles S. and Miller M., *The Age of Migration: International Population Movements in the Modern World*, 3rd ed., (London: The Guildford Press, 2003), p. 21.

⁵⁷ Arango, J., 'Theories of International Migration' in Joly D., *International Migration in the New Millennium: Global Movement and Settlement*, (Aldershot: Ashgate, 2004), p.22

⁵⁸ Massey D. et al., "Theories of international migration: a review and appraisal" (1993) 19 *Population and Development Review* 432

East to reap other benefits i.e. the cheaper cost of living or employment opportunities.⁵⁹

2.5.2. *The New Economics or Household Approach*

The limitation of the neo-classical approach introduces a new related economic approach on migration to counteract an exclusive concentration on individual motivations for migration. This concept is based on the household unit as a social institution, since it organises resources, recruits and allocates labour in a combination of reproductive and productive tasks.⁶⁰ This approach argues that a household has become a decision maker not an individual, especially, during the economic transformation from subsistence to a more commercial based life. The household, a larger unit of decision making, has used migration via internal and international routes, to maintain economic well-being of all members.⁶¹ Unlike the neo-classical approach, this approach assumes that decisions for migration made by the household are survival strategies for risk-minimisation not income-maximisation.⁶²

Due to unstable economic conditions during structural transformation of economies, the household seeks to cope with unexpected incidents by assigning different members of the family to work domestically and abroad to

⁵⁹ For example, common migration motives for thousands of Westerners moving to Thailand were a preference for Thai lifestyle and culture, low living cost, a warm climate and readily-available attractive sexual partner in Howard R.W. "The migration of Westerners to Thailand: an unusual flow from developed to developing word" (2009) 47 *International Migration* 193

⁶⁰ Stark O. and Bloom D.E. "The new economics of migration" (1985) 75 *The American Economic Review* 174-175

⁶¹ Massey D. et al. "Theories of international migration: a review and appraisal" (1993) 19 *Population and Development Review* 436

⁶² Skeldon R., *Migration and Development: A Global Perspective*, (Essex: Longman, 1997), p.22

minimise the risk. If those who work in the domestic economy fail to support the family, the household still maintain well-beings from remittances.⁶³ However, it is argued that the household approach as well as the neo-classic approach fail to explain uneven development as one of the root causes of migration, which address wealth disequilibrium between the West and the rest of the world, the rich and the poor, men and women under the new World order.

Further, it is contended that the household approach under-estimates the importance of gender and migration.⁶⁴ The female migrant workers are still unvoiced and marginalised.⁶⁵ This approach is unable to explain why more women, often the homemaker, have recently been selected as the representative of the household to work internationally. It is unclear what makes the household decide to choose them and not their male counterparts. Are these decisions being made to serve and support such coercive power of the global capitalist restructuring?

2.5.3 The Historical-Structural Approach

From the mid to late 1970s, the attention of migration scholars shifted towards the historical-structural approach.⁶⁶ This approach stems from a

⁶³ Stark O. and Bloom D.E. "The new economics of migration" (1985) 75 *The American Economic Review* 175

⁶⁴ For example Skeldon R., *Migration and Development: A Global Perspective*, (Essex: Longman, 1997), p.23

⁶⁵ Chant S.H.(ed.), *Gender and Migration in Developing Countries*, (London: Belhaven Press, 1992), pp.22-24 and Kofman E., Phizacklea A., Raghuram P., and Sales R., *Gender and International Migration in Europe: Employment, Welfare and Politics*, (London: Routledge, 2000), pp.26-27

⁶⁶ Massey D. et al., *Worlds in Motion: Understanding International Migration at the End of the Millennium*, (Oxford: Oxford University Press, 2005), pp.3-4

variety of critical political theory, for instance dependency theory, colonialism, center-periphery framework.⁶⁷ In addition, a key insight of the historical structural approach draws specifically on the perspective of Marxist political economy.⁶⁸ This approach adopts a critique based on the broader structural transformation, which has radically changed socio economic and political structures.⁶⁹ The historical-structural approach argues that an unequal distribution of economic and political power in the global capitalist society is a result of the existing structure of exploitation between different classes and groups.⁷⁰ Thus, this approach radically denies the freedom and the free choice of individual and group movement.⁷¹

Within the relationship between international migration and structural transformation of socio-politics and economics, the Marxist political economy theory argues that some influential factors put greater constraints on free choice of individual movement. These include the emergence and expansion of the capitalist mode of production, unequal development within and between countries, maldistribution and malrecognition of the migrant labour force- as a result of the existing structure of exploitation and harsh immigration control in more powerful societies.⁷²

⁶⁷ Wood C.H. "Equilibrium and historical-structural perspectives on migration" (1982) 16 *International Migration Review* 301

⁶⁸ Castles S. and Miller M., *The Age of Migration: International Population Movements in the Modern World*, 3rd ed., (London: The Guildford Press, 2003), pp.25-26

⁶⁹ Wood C.H. "Equilibrium and historical-structural perspectives on migration" (1982) 16 *International Migration Review* 301-303

⁷⁰ Sassen S., *The Mobility of the Labour Capital: A Study in International Investment and Labor Flow*, (Cambridge: Cambridge University Press, 1990), pp.1-12

⁷¹ Castles S. and Miller M., *The Age of Migration: International Population Movements in the Modern World*, 3rd ed., (London: The Guildford Press, 2003), pp.26

⁷² Wood C.H, "Equilibrium and historical-structural perspectives on migration" (1982) 16 *International Migration Review* 303

Despite a focus on uneven development and capital interests, this approach arguably ignores individual responses to structural constraints, rationality and selectivity for migration, which are parts of a complex picture of migration.⁷³ A lack of conceptual continuity between the decision process at individual levels and structural changes, which link with migration, is problematic. The author argues that the one-sided analysis of the historical structural approach may fail to explain the complexity and uncertainty of contemporary migration. As a result, the migration system theory, also known as the world theory, is introduced for an integration of existing approaches.

2.5.4. *The World Migration System Approach*

The limitations of the above-mentioned approaches suggest that an integrated approach would be more helpful. The world migration system approach combines significant factors of each approach- be they international relations, political economy, collective actions and institutional factors-which result in new faces of international migration. This approach explains that migration is a natural outgrowth of disruptions and dislocations that inevitably occur in the process of capitalist development.⁷⁴

Moreover, migratory movement is viewed as a national-global interaction, of which macro-meso-micro structures are intertwined.⁷⁵The

⁷³ Ibid, pp.306-308

⁷⁴ Massey D. et al., *Worlds in Motion: Understanding International Migration at the End of the Millennium*, (Oxford: Oxford University Press, 2005), p. 44

⁷⁵ Based on economic principles, macro structures refer to large –scale institution factors such as socio-economic structure at both national and global levels, whereas micro structures mean informal social networks such as households, community and friendship of migrants.

author argues that the national-global interaction represents migration as a part of globalisation, yet at the expense of colonised countries- less developed countries and Third World countries. Critically speaking, the World migration system approach contributes a conceptual framework, based on global political economy across space between sending and receiving countries.

However, this approach has been criticised as steering 'a Eurocentric bias and establishing dependency upon the West'.⁷⁶ In other words, economic globalisation is the process of centralisation geographically controlled by major cities (mostly those in the West) and by hegemonic capitalist development.⁷⁷ Human migration is therefore an integral part of global capitalist expansion penetrating less developed areas and non-capitalist based, yet in control of resources- materials and labour. Human migration also represents disadvantages for those who have least negotiation power in the global economic development.

In short, from the above discussion, reasons for migration described by these approaches are arguably being taken from normal situations, where regular forms of migration have been a feature of World population mobility. However, the rises of stricter border controls and repressive immigration policies against non-nationals have made migration more difficult for those

Meso-structures embrace intermediate mechanisms between macro-micro structures, for example, organizations, groups or individual assisted migration and settlement, see Castles S. and Miller M., *The Age of Migration: International Population Movements in the Modern World*, 3rd ed., (London: The Guildford Press, 2003), pp.27-28

⁷⁶ Skeldon R., *Migration and Development: A Global Perspective*, (Essex: Longman, 1997), pp.26-27

⁷⁷ Sassen S., *Globalization and Its Discontent*, (New York: New Press, 1998), pp.x-xxiv.

who have least negotiation power. Non-nationals who have failed to meet the entry criteria set by destination countries are deemed to enter into countries via irregular means giving rise to smuggling of migrants and human trafficking.⁷⁸

The author argues that reasons for migration have also become determinants for irregular migration. However, such determinants have been used as illegitimate channels for abuses and exploitation by unlawful mediators such as traffickers and smugglers. The next section elaborates debates and controversies over irregular migration as a major problem in migration discourse. It will then analyse the distinction between human trafficking and smuggling of migrants, which is instrumental to the law making-process of the Transnational Organized Crime Convention and its supplementary Protocols, the Trafficking Protocol and the Smuggling of Migrants Protocol.

2.6 Human Trafficking: Debate and Controversies over Irregular Migration

Evidence suggests that in 2009, world population stood at 6.8 billion.⁷⁹ Of these numbers, about 200 million are the World international migrants, which accounted for 3 percent.⁸⁰ It is also expected that the number of World international migrants will continue to increase, not only those being recorded

⁷⁸ Caraway N. "Human Rights and existing contradictions in Asia-Pacific human trafficking politics and discourse" (2006) 14 *Tulane Journal of International and Comparative Law* 299

⁷⁹ United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects: The 2008 Revision. Highlights*, (New York: United Nations, 2009), p. 1

⁸⁰ United Nations Development Programme (UNDP), *Human Development Report 2009, Overcoming Barriers: Human Mobility and Development*, (New York: Palgrave Macmillan, 2009), p. 2

as regular migrants, but also those who are irregular, illegal or undocumented migrants whose number are yet underreported. This section thus considers irregular migration which undoubtedly has become a hotly debate issue in legal and political discourse since the early 1970.

Irregular migration, as opposed to regular migration, is a social phenomenon which illustrates the failure of migration management in the dynamic global economy. The author contends that the rise of irregular migration has been a negative impact of states' responses to ineffective and inappropriate control of migration through their repressive immigration measures. In other words, irregular migration is nothing other than a by-product of national laws made to control migration and labour exigencies.⁸¹

In response to fast growing international migration, several countries arguably fail to capture push-pull factors of migration which are rather complex, subtle and decisive. These are, for instance, the fast growth of transnational process of goods, technologies and services of labour migrants beyond controls of states and the dynamic of internal societies, states and domestic markets in relation to the development of the global economy and cross-border links.⁸²

⁸¹ Kostakopoulou D., 'Irregular Migration and Migration Theory: Making State Authorization Less Relevant' in Bogusz B. and Cholewinski R. et al. (eds.), *Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), p.42

⁸² Massey D. et al., *Worlds in Motion: Understanding International Migration at the End of the Millennium*, (Oxford: Oxford University Press, 2005), pp 3-7 and 12-14

For example, in Europe, migration policies have been controlled by national governments since the mid 1980s.⁸³ Despite an increased demand for labourers in the 3-Ds jobs: Dirty, Difficult (or demanding) and Dangerous work,⁸⁴ foreign labour migration is rarely regulated but tacitly tolerated. Low-skilled migrant workers have been viewed as unwanted and as a threat to identity, political stability and welfare of the host country.⁸⁵ When seeking to work abroad via regular channels, their opportunities to work tend to be low because of strong barriers, restrictive rules and regulations, which create tensions of labour migration.⁸⁶ Such tension has markedly increased the influx of irregular migrants and contributed to the outbreak of human trafficking and smuggling of migrants.

In many cases, the migration of low-skilled migrants is restricted and is seen as a significant danger.⁸⁷ Since opportunities for regular migration of low-skilled labour remain limited, it is more likely that this group of migrants will opt to migrate irregularly. They may eventually fall into the hands of unlawful intermediary i.e. traffickers or smugglers to facilitate them in crossing borders. The author argues that the distinction between regular and irregular (undocumented or illegal) forms of migration is increasingly important for migration management. The boundary between them is far tighter and

⁸³ Stalker P., "Migration trends and migration policy in Europe" (2002) 40 *International Migration* 153 and see also Stalker P., *Workers without Frontiers: the Impact of Globalization on International Migration*, (London: Lynne Rienner Publishers, 2000), pp.11-18

⁸⁴ International Labour Migration, *Asian Labour Migration Issues: Challenges in an Era of Globalization*, International Migration Papers 57, (Geneva: ILO, 2002), p.3. In this report, 3-D jobs are classified as bottom-wage jobs, undesired jobs or precarious

⁸⁵ Mitsilegas V., 'Measuring Irregular Migration: Implications for Law, Policy and Human Rights' in Bogusz B. and Cholewinski R. et al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), pp.29-30

⁸⁶ Appleyard R. "International migration policies: 1959-2000" (2001) 39 *International Migration* 14

⁸⁷ Bigo D., 'Criminalisation of Migrants: The Side Effect of the Will to Control the Frontier and the Sovereign Illusion' in Bogusz B. and Cholewinski R. et al. (eds.), *Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), pp. 63-65

restricted.⁸⁸ It can be concluded that irregular migration is a reaction to rigid immigration policies and has now become the major problem in migration management.

As mentioned earlier, irregular migration is a by-product of national laws. Thus, the term irregular migration variously refers to condition of entry, stay and employment in which the immigration status of migrants does not conform, for one reason or another, to the norms of the country in which they reside.⁸⁹ In migration studies, the term irregular migration is used interchangeably between illegal and undocumented migration. Despite sharing similarities, the author argues that each term represents a different meaning, which is complex in legal and policy practice. In addition, different states may perceive each term differently, which make it difficult to draw the line between such terms.

2.6.1 Irregular Migration: The Most Appropriate Term

The increased number of irregular migrants, including smuggled migrants and victims of trafficking has become a concern of the international community. Within the boundary of irregular migration, different terms, that are illegal and undocumented migration, have been interchangeably used

⁸⁸ Skeldon R., *Migration and Development: A Global Perspective*, (Essex: Longman, 1997), p.59

⁸⁹ Kostakopoulou D., 'Irregular Migration and Migration Theory: Making State Authorization Less Relevant' in Bogusz B. and Cholewinski R. et al. (eds.), *Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), p.42-44

without justification. The author suggests that those terms are imprecise and highly contested across disciplines and finally lead to ambiguities of migration practice and relevant laws and policies. Due to lack of academic consensus on the term used for illegal, irregular and undocumented migration, irregular migration is the preferred term used in this study for the following reasons.

First, the term undocumented migration is seen as transgression of a state's legal order. It is the author's view, that this term is used when migrant's documents have changed especially before, between and after crossing borders. Both trafficked people and smuggled migrants may be classified as undocumented migrants, when a migrant's documents are confiscated by their traffickers or smugglers. In some cases, the term undocumented migration may be used when migrants cease to fulfil conditions or possess necessary authorisation concerning entry, residence and employment.⁹⁰

Second, similar to the term undocumented, the term illegal migration, in the author's view, immediately stigmatises a migrant as a criminal, who violates state sovereignty. According to Guild, an illegal migrant is "a foreigner arriving clandestinely on to the territory of a state; staying beyond his or her permitted period of entry and residence; working when not permitted to do so or in a manner inconsistent with his or her immigration status".⁹¹ If s/he breaches immigration or employment law, a migrant is seen as having committed offences rather than being offered assistance and protection.

⁹⁰ Ibid, p.44

⁹¹ Guild E., 'Who is an Irregular Migrant?', in Bogusz B. and Cholewinski R. et al. (eds.), *Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), pp.3-4

Whilst the terms undocumented, irregular, illegal migration are viewed equally, many states tend to use illegal migration as the most preferred term. It is argued that the term illegal migration may increase pressures on states for the control of immigration to prevent an influx of irregular migration.⁹² Restrictive immigration practice cannot and will never stop irregular movement of people across borders. A number of women, children and men globally trafficked has increased each year, despite the variation of various reports. For instance, according to the UN. GIFT. Report 2009, the aggregate number of victims identified in 71 selected countries grew from about 11,700 in 2003 to about 14,900 in 2006.⁹³

Irregularity of migration is arguably a cause of vulnerability of migrants. Various peculiar channels that people use for their movement are considered as illegitimate activities that violate state sovereignty. Many states have claimed that illegal migration has disrupted a state's attempts to combat human trafficking and to eliminate smuggling people. However, it is the author's view that illegal activities and channels used for migration are somehow too complex to deal with, if states still neglect the root causes of irregular migration flows.

Various forms of irregular migration, such as smuggling of people and human trafficking, have been brought into international political debates and

⁹² See general discussion of the politicisation of migration in EU. in Askola H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, (Oxford: Hart Publishing, 2006), pp.69-80

⁹³ United Nations Office on Drugs and Crime, Global Report on Trafficking in Persons, *Human Trafficking: A Crime that Sham Us All*, (Vienna: UN.GIFT., UNODC, 2009), p.48

become key issues in contemporary international migration.⁹⁴ It can be said that irregular migration, human trafficking, and smuggling of migrants are mutually connected. Human trafficking and smuggling of migrants demonstrate similarities and differences. The following questions regarding the two phenomena are raised for further discussion.

- 1) To be classified as irregular migration, in what way does “people smuggling” differ from “trafficking in human beings”?
- 2) What are the common provisions which international law and national law should include or develop in legislation and immigration policies towards the two phenomena?
- 3) To what extent are protection measures for victims being considered under state’s responses to smuggling of migrants and human trafficking? Do such provisions cover or capture the need of protection between the two different phenomena?

2.6.2 The Distinction between Smuggling of Migrants and Human Trafficking

Despite similarities, human trafficking and smuggling of people are essentially different. The distinction between trafficking and smuggling is the purpose of movement. Smuggling normally takes place when people are facilitated to move across borders. Smugglers are to assist migrants in return

⁹⁴ Castles S. "Towards a sociology of forced migration and social transformation" (2003) 37 *Global Refugees* 13

for material benefits. Their relationship ends when migrants are moved across borders and to destination points.⁹⁵ In contrast, trafficking is the movement of people with intentional exploitation of people to reap continuing profits. Traffickers control victims of trafficking physically and financially. Such differences also result in differing legal responses at both international and national levels.⁹⁶ In short, smuggled migrants are considered as criminal, whilst trafficked people are victims.

The distinction between the two categories needs further discussion as to the scope of each term and to the extent of legal protection provided. Despite being considered as criminal, smuggled migrants should be provided basic human rights protection.⁹⁷ In this connection, the author offers a more flexible approach in dealing with smuggling of migrants as criminal offences against individual smuggled migrants. This is because, in reality, more often the boundary between human trafficking and smuggling of migrants overlaps. These issues are somewhat interrelated, especially in the complex situation of international migration.

For instance, smuggled migrants may become victims of trafficking, if some forms of exploitation are involved in their movement. The author contends that considering broader human rights violations, smugglers and traffickers are not different since both exploit and take advantage of smuggled

⁹⁵ Gallagher A. "Human rights and the new UN Protocols on trafficking and migrant smuggling: a preliminary analysis" (2001) 23 *Human Rights Quarterly* 995-8 and see also Art.3 (a) of the Smuggling of Migrants Protocol

⁹⁶ See further discussion in Chapter 3: Section 3.6.3, pp.103-105

⁹⁷ Obokata T. "Smuggling of human beings from a human rights perspective: obligations of non-state and state actors under international human rights law" (2005) 17 *International Journal of Refugee Law* 399-402

migrants and victims of trafficking, who have less negotiation power. In addition, a state's responses to immigration measures rely solely on the notion of state security, but ignore the human rights requirement. The author concludes that legal responses to human trafficking as well as smuggling of migrants have shown lack of accountability. The promotion and development of human rights protection must be recognised under legal regimes dealing with all forms of irregular migration to relax tensions of migration.

However, it is the author's view that legal responses towards the two phenomena are different in essence. The common understanding over the two phenomena is significant for a state in making adequate and appropriate provisions for the reduction of human trafficking and smuggling of migrants. There are three key factors when considering resemblances and differences between the two phenomena.

Firstly, in terms of movement,⁹⁸ smuggled migrants are moved irregularly through the assistance of smugglers. The purpose of smuggling of migrants is facilitative - to fulfill a contract to move people across borders, in return for material benefits.⁹⁹ The relationship between a smuggled migrant and a smuggler is unequal and will end at the destination country. In contrast, the movement of trafficked persons is based on deception and coercion and is for the purpose of exploitation throughout the trafficking process to reap

⁹⁸ Art.3 (a) of the Smuggling of Migrants Protocol, 2241 U.N.T.S. 507

⁹⁹ Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (Leiden: Martinus Nijhoff Publishers, 2006), pp.21-22, Bales K., *Understanding Global Slavery: A Reader*, (London: University of California Press, 2005), p.132 and Lee M. (ed.), *Human trafficking*, (Devon: Willan Publishing, 2007), pp.10-11

profits.¹⁰⁰ The profit in trafficking does not come from the trafficking itself, but from the sale of trafficked person's sexual services or labor or both within a country or across borders.¹⁰¹

Secondly, in terms of victimisation, smuggled migrants are not considered as victims but criminals due to their violation of national immigration law.¹⁰² On the contrary, trafficked persons are identified as the victim under international law as well as national law. This is because the end result of trafficking is exploitation throughout the process of trafficking.¹⁰³ Trafficked people are usually employed in sweatshops, domestic services or sex-related industries (especially in the case of trafficking of women and children). All of which are extremely low paid and otherwise feature unlawful working conditions.

Thirdly, in terms of the knowledge of movement and the consent to migration,¹⁰⁴ it is assumed that smuggled migrants know about their movement. International law views that smuggled migrants are complicit with their smugglers in their process of movement.¹⁰⁵ On the contrary, human trafficking is identified as non-consensual and entails lack of knowledge. Victims of trafficking should therefore be entitled to protection and assistance.

¹⁰⁰ Art.3 (a) of the Trafficking Protocol, 2237 U.N.T.S. 319 and Gallagher A. "Human rights and the new UN Protocols on trafficking and migrant smuggling: a preliminary analysis" (2001) 23 *Human Rights Quarterly* 984-988

¹⁰¹ Gallagher A. "Trafficking, smuggling and human rights: trick and treaties" (2002) *Forced Migration Review* 383

¹⁰² Twomey P. "Europe's other market: trafficking in people" (2002) 2 *European Journal of Migration and Law* 9-11

¹⁰³ Bales K., *Understanding Global Slavery: A Reader*, (London: University of California Press, 2005), pp.132-135

¹⁰⁴ Ibid, pp.130-131

¹⁰⁵ Twomey P. "Europe's other market: trafficking in people" (2002) 2 *European Journal of Migration and Law* 6-10

It is noted that, however, in some cases, trafficked persons may know about their journey, yet this is only a part of the story. Some states may treat such knowledge of movement as consent to migration, in which the author contends that such knowledge should be nullified and overridden by coercion, deception leading to the end result of exploitation.¹⁰⁶

The growing phenomenon of human trafficking as well as smuggling of migrants is noted as the dark side of globalisation.¹⁰⁷ Globalisation, as Castles stated, is *"a process of unequal participation in a fairly structured global economy, society and the polity; it is rather a system of selective inclusion and exclusion of specific areas and groups, which maintain and exacerbate inequality"*.¹⁰⁸ The development of media, technologies and transport has enhanced an on-going capitalist economy and accelerated free movement of goods and services, including skilled migrants.¹⁰⁹

However, it is debatable that globalisation has empowered and only benefited those who have socio-economic power to gain more power. It has, in turn, coerced those who have less socio-economic power to have less or no power through the development of tools for exploitation. In spite of this, migration of low-skilled migrants is regressive and discriminatory.¹¹⁰ The author contends that contemporary international migration represents the

¹⁰⁶ Gallagher A. "Trafficking, smuggling and human rights: trick and treaties" (2001) *Forced Migration Review* 383-384

¹⁰⁷ Md. Shahidul Haque, 'Ambiguities and Confusions in Migration-Trafficking Nexus: A Development Challenge' in Beeks K. and Amir D.(eds.), *Trafficking and the Global Sex Industry*, (Oxford: Lexington Books, 2006), pp.3-10 and see also Sassen S., *Globalization and Its Discontent*, (New York: New Press, 1998), pp.5-10

¹⁰⁸ Castles S. "Towards a sociology of forced migration and social transformation" (2003) 37 *Global Refugees* 16

¹⁰⁹ Sassen S. "Women's burden: counter-geographies of globalisation and the feminisation of survival" (2002) 71 *Nordic Journal of International Law* 256

¹¹⁰ Castles S. and Miller M., *The Age of Migration: International Population Movements in the Modern World*, 3rd ed., (London: The Guildford Press, 2003), pp.94-102

coerciveness of economic globalisation. In many cases, poorer people, whether they fall into the category of smuggled people or trafficked people, tend to leave their homes as their socio-economic survival strategy.

It is therefore important to all states to revisit their immigration measures towards irregular migration. The author urges changes to intervention on irregular migration beyond the simple dichotomy of regular and irregular migration. The dynamic of political, socio-economic and demographic dimensions should be included when considering migration in the age of globalisation. The next two sections will discuss specific issues concerned with the human trafficking discourse: forced migration and labour migration, in relation to modern day human trafficking.

2.7 Human Trafficking as a Form of Forced Migration

As mentioned previously, the trafficking phenomenon is classified as a form of irregular, undocumented or illegal migration. However, there is no clarity on which term can best describe the nature of trafficking. The terminology depends on who is describing the trafficking phenomenon. For instance, the authority may describe human trafficking as illegal, whilst academics and practitioners may be reluctant to define human trafficking as illegal, preferring instead the terms irregular or undocumented. Such contextual ambiguity does not only affect the limitation of migration practice but it also causes those groups of migrants to be more vulnerable. Their basic human rights are compromised due to a narrow focus on immigration law and immigration status under national and international law.

Various forms of population movement can also be classified by reference to the issue of consent: voluntary and forced migration.¹¹¹ Force or coercion is also considered as an element of trafficking. Forced migration and human trafficking are arguably interrelated issues. This is because human trafficking is always involved with all forms of force and all kinds of exploitation -violence, ill treatment, basic human rights violations, and enslavement.¹¹² Jobs that trafficked persons are eventually offered are those which allow exploitation, for instance, domestic services, sweatshops, agriculture and sex related jobs.

However, forced migration is described when migrants are forced to leave their homelands due to various reasons, for example political instability, economic crises, war crimes or environmental degradation. These persons include refugees, asylum seekers, and internationally displaced persons, including victims of trafficking.¹¹³ Similar to forced migrants, trafficked persons are vulnerable due to economic disparities, gender inequality, political violence and restrictive immigration policies. It is noted that the majority of trafficked persons are women and girls, especially those coming from areas with male dominant societies.

2.8 Human Trafficking as a Problem of Labour Migration

Unlike the white slave trade in the mid 19th Century, human trafficking in the 21st Century involves various forms of force, coercion and exploitation:

¹¹¹ Bales K., *Understanding Global Slavery: A Reader*, (London: University of California Press, 2005), pp.130-132

¹¹² International Labour Organization, *A Global Alliance against Forced Labour*, a global report under the follow-up to the ILO Declarations on Fundamental Principles and Rights at Work, the International Labour Conference 93rd Session, 31 May -16 June 2005, Paras. 39-42 and 217-248

¹¹³ Castles S. "Towards a sociology of forced migration and social transformation" (2003) 37 *Global Refugees* 14-15

sexual exploitation and labour exploitation.¹¹⁴ The author contends that the impact of unequal development between the rich and poor countries has widened disparities and empowered the rich to gain economic power and advantage at the expense of the poor.¹¹⁵ The migration of low-skilled or unskilled labourers from the South to the North or the feminisation of migration well manifests this argument.¹¹⁶

Despite an increasing demand for labour to foster the economic growth of the rich countries, the migration of (unskilled) labour is rather considered as unwanted and is stigmatised as a threat to society. Their economic contribution to a state's competitive advantages in the global economy is not recognised and such economic value is never redistributed. The author contends that economic restructuring in the rich countries is a proximate cause of (low-skilled) labour migration. This shift- from industrial based to service based sectors- has sharply increased the demand for cheap labour, both local and foreign labour.

Under the push-pull equation, the international wage differentials and greater socio-economic opportunities have played a part in pulling labour from the poor countries. On the contrary, unequal development has obviously caused socio-economic losses in many poor countries such as economic downturn, high unemployment rates, persistent poverty, ongoing government

¹¹⁴ Bales K., *Understanding Global Slavery: A Reader*, (London: University of California Press 2005), p.134

¹¹⁵ Sassen S., *Globalization and Its Discontent*, (New York: New Press, 1998), pp.xxv-xxvii

¹¹⁶ See general discussion in Piper N. "Feminization of labour migration as violence against women: international, regional and local nongovernmental organization responses in Asia" (2003) 19 *Violence against Women* 723-742 and Rosewarne S. "Globalisation and the recovery of the migrant as subject: "transnationalism from below" (2004) 15 *Capitalism Nature Socialism* 37-39

debts and perhaps adverse affects of debt service programs such as Structural Adjustment Programs (SAPs).¹¹⁷ As a result, an influx of labour migrants has been drawn out from their own country and become involved in a chain of labour migration. For example, more than 6.6 million migrants are from East and Southeast Asia and this figure may even have increased following the 1997 economic crisis.¹¹⁸

Although there is a need for informal or low skilled labour to serve economic growth in many rich countries, the channel for migration of (low-skilled) labour is limited. This contradiction has been constrained by restrictive immigration control. For example, many EU member states have introduced tougher immigration policies for non-European citizens, known as 'fortress Europe'.¹¹⁹ As a result, a surge in the number of migrant labourers has been diverted to perilous forms of migration: human trafficking and smuggling of migrants. These two forms are now recognised as drastic changes in the nature of labour migration, giving rise to more abusive and exploitative practice in what the author calls "the circuit of exploitation in the neo-liberal global economy".

Moreover, the author notes that the global economic restructuring has signaled the growth in various service sectors i.e. domestic work, sweatshops and the sex sector. Females in poor countries have become a major source of

¹¹⁷ Sassen S. "Women's burden: counter-geographies of globalisation and the feminisation of survival" (2002) 71 *Nordic Journal of International Law* 259-263

¹¹⁸ Marshall P., *Globalisation, Migration and Trafficking: Some Thoughts from the South East Asian Region*, a paper presented to the Globalisation Workshop UN Inter-Agency Project on Trafficking in Women and Children in the Mekong Sub-Region, Kuala Lumpur, Malaysia, 8 - 10 May 2001, pp.1-2

¹¹⁹ See general discussion of the EU immigration policies in Stalker P. "Migration trends and migration policy in Europe" (2002) 40 *International Migration* 151 and Askola H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, (Oxford: Hart Publishing, 2006), pp.73-80

exported labourers, in response to an increasing demand for those types of labour in rich countries. The increasing number of female labour migrants is referred to as “the feminisation of migration”.¹²⁰ However, the paradox of the feminisation of migration is a new chapter of labour exploitation. Women and their labour are the target of exploitation and they have become victimised in the structural change of the global economy, due to unequal gender relations.

2.8.1 The Feminisation of Labour Migration: A Proximate Cause of Exploitation in the Global Labour Market

In the history of labour migration, men traditionally formed the majority of migrant workers, whereas women joined men mainly for the purpose of family reunification.¹²¹ However, in our times, gender has significantly become a determining factor. It has greatly impacted upon different reasons, routes and outcomes of migration between male and female migrants. Women move around far more independently. The number of female labour migrants is now almost half of all labour migrants.¹²² Due to considerable change in the number of women involved in migration, this section analyses the cause of the feminisation of migration, its turning point and the conditions and

¹²⁰ Piper N. “Feminization of labour migration as violence against women: international, regional and local nongovernmental organization responses in Asia” (2003) 19 *Violence Against Women* 723 and see also Agustin L.M. “A migrant world of services” (2003) 10 *Social Politics International Studies in Gender, State and Society* 377-396

¹²¹ Kofman E. “Global gendered migrations: diversity and stratification” (2004) 6 *International Feminist Journal of Politics* 645-646 and Rittich K., ‘Feminization and Contingency: Regulating the State of Work for Women’ in Conaghan J. et al. (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, (Oxford: Oxford University Press, 2002), pp.122-124

¹²² International Organization for Migration, *World Migration 2005: Cost and Benefits of International Migration*, (Geneva: IOM, 2005), pp.13-18 and see also International Organization for Migration, *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*, (Geneva: IOM World Migration Report Series, 2008), p.528

characteristics of jobs and work which female labourers have always been offered.

Since 1960s, the growth in number of female labourers, known as “the feminisation of labour migration”, has become a major concern in international labour migration. The number of women in migration has been increasing rapidly and now exceeds that of men, particularly for jobs in domestic services and sex-related industries.¹²³ There are a number of factors giving women and young girls employment opportunities in the global labour market. These are: a downturn of formal work in the industrial sector and the rise of informal work in the global market, together with the rise of consumerism allowing commoditised body and sex as acceptable practices.¹²⁴

The author sees the feminisation of labour migration is a process that is discounted rewards which has caused female migrants to be placed in a more vulnerable, abused and easily exploited position. Evidently, a number of female migrants are still confronting gender inequality, segregation and violence throughout the process of labour migration. The majority of them are still engaged in jobs that are deeply gendered, low skilled and unwanted such

¹²³ Kofman E. et al., *Gender and International Migration in Europe: Employment, Welfare and Politics*, (London: Routledge, 2000), p.1, Piper N. “Feminization of labour migration as violence against women: international, regional and local nongovernmental organization responses in Asia” (2003) 19 *Violence against Women* 727 and see general discussion in Ehrenreich B. and Hochschild A.R., *Global Women: Nannies, Maids and Sex Workers in the New Economy*, (London: Henry Holt and Co., 2004)

¹²⁴ Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998) and Marjan W., and Lap-Chew L., *Trafficking in Women: Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution*, (GAATW/STV: Utrecht, The Netherlands, 1997)

as domestic services and sex-related industries.¹²⁵ This study aims to discover factors that make the experience of women in migration different from that of men.

2.8.2 Gender in Migration Practices

Whilst persistent poverty and lack of economic opportunities affect many women and children, as dependants in the household unit they suffer from such poverty to a greater extent. This can be well explained by gender inequalities in a household unit. The division of labour in the family unit is highly segregated between male-breadwinner (productive) and female-homemaker (reproductive).¹²⁶ As followers, women perform their homemaker and carer roles which are considered as 'reproductive and least economic contribution' to family and communities. Their roles are therefore excluded by the productive labour market.¹²⁷

In addition, women also lack human development opportunities such as job training and education, as a tool of economic development.¹²⁸ They are marginalised from socio-political and economic reforms. This makes them

¹²⁵Piper N. "Feminization of labour migration as violence against women: international, regional and local nongovernmental organization responses in Asia" (2003) 19 *Violence Against Women* 727 and see general discussion in Ehrenreich B. and Hochschild A.R., *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (London: Henry Holt and Co., 2004)

¹²⁶ Kofman E. "Global gendered migrations: diversity and stratification" (2004) 6 *International Feminist Journal of Politics* 645

¹²⁷ Rittich K., 'Feminization and Contingency: Regulating the State of Work for Women' in Conaghan J. et al. (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, (Oxford: Oxford University Press, 2002), pp.122-124

¹²⁸ Global Commission on International migration (GCIM), *Migration in an Interconnected World: New Direction for Action*, (Geneva: The GCIM, October, 2005), pp.58-59

more subordinated and vulnerable in the global labour market.¹²⁹ However, the shortage of unskilled labourers especially in rich countries, a downturn of formal work in the industrial sector and the rise of informal work worldwide has raised labour market problems contributing to migration. As stated earlier, the rise of informal work has given new employment opportunities to women and young girls. More women now migrate to fill such high demand for informal work. However, the nature of work, which is less recognised in terms of economic development, does not contribute to women's empowerment.¹³⁰

The author argues that the economic misrecognition of female labour at the local and global level has also a negative impact on migration of female labour.¹¹⁷ This issue has become prominent in academic debate. The author begins with gender inequality, which hierarchically segregates women and their labour from (male) economic redistribution. The feminisation of labour migration inevitably represents a higher level of vulnerability of women, especially when they decide to move across borders. This may lead them into the hands of unlawful employers, traffickers, smugglers or creditors in debt bondage. Arguably, women and young girls are the most preferred labour for informal sectors. They are easily controlled, forced and exploited both physically and mentally due to their vulnerability, especially with their irregular status in receiving countries.

¹²⁹ Kofman E. "Global gendered migrations: diversity and stratification" (2004) 6 *International Feminist Journal of Politics* 647-648 and see also Sassen S. "Women's burden: counter-geographies of globalisation and the feminisation of survival" (2002) 71 *Nordic Journal of International Law* 259-263

¹³⁰ Rittich K., 'Feminization and Contingency: Regulating the State of Work for Women' in Conaghan J. et al. (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, (Oxford: Oxford University Press, 2002), pp.125

2.8.3 *The Feminisation of Migration in the World of Male Domination*

Economic globalisation reveals that the rise of consumerism has spread widely throughout the World. Accentuated by a multi-level patriarchal society, the commoditisation of the human body and sex is acceptable and has become very popular.¹³¹ Such conditions are also arguably ripe for trafficking in women for sexual exploitation.¹³² Although there is almost no reliable data on the number of trafficked women for sexual exploitation, it depends on sources of the figures and the method of estimation.

The reason for women's migration may vary. Some women may migrate on their own will. However, others may be selected by their family for migration. For instance, in Asia migration decisions are usually made by families rather than the individual to maximise household income and survival chances. In addition, more women in the male-dominated family may have been sent or sold as labour to work for their family because they are often more reliable than their male counterparts in sending remittances.¹³³ In the case of a female headed-family, it is the woman who is willing to migrate and

¹³¹ Long L.D. "Anthropological perspectives on the trafficking of women for sexual exploitation" (2004) 42 *International Migration* 10 and 14-16 and Angathangelou A.M. and Ling L.H.M. "Desire industries: sex trafficking, UN peacekeeping and the neo-liberal World order" (2003) 10 *The Brown Journal of World Affairs* 133

¹³² Piper N. "Feminization of labour migration as violence against women: international, regional and local nongovernmental organization responses in Asia" (2003) 19 *Violence Against Women* 726-728

¹³³ Castles S. and Miller M., *The Age of Migration: International Population Movements in the Modern World*, 3rd ed., (London: The Guildford Press, 2003), p.25

accept any job to support her dependents. Thousands of Thai women migrate to Japan in the hope of making money to provide financial support to their family could be one of the well manifest examples.¹³⁴

The author argues that economic restructuring towards a service based industry in many developing countries has also shrunk opportunities for male employment. Increased financial responsibilities now rest on female breadwinners. Meanwhile, the growth of consumerism has led to an overwhelming presence of women in the sex sector, domestic labour and the commercial marriage market. The feminisation of labour migration shows us the persistent problems of gender inequality in the world of male domination. This is because the jobs women are given remain deeply gendered, unregulated, misrecognised and unprotected by (paternalistic) laws and policies.¹³⁵

Since the feminisation of labour migration results in discounted rewards from mainstream economic activities and paternalistic law, the author contends that female labourers are experiencing gender disparities. To draw further attention to the complex experiences of female labourers, especially, those trafficked women, an integrative gender approach is suggested for a critical analysis of gender and migration.¹³⁶

¹³⁴ Dinan K.A. "Migrant Thai women subjected to slavery-like abuses in Japan" (2008) 8 *Violence Against Women* 1113-1114

¹³⁵ Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998), p.117-136 and Marjan W., and Lap-Chew L., *Trafficking in women: Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution*, (GAATW/STV: Utrecht, The Netherlands, 1997)

¹³⁶ For example, Piper N. "Feminization of labour migration as violence against women: international, regional and local nongovernmental organization responses in Asia" (2003) 19 *Violence Against Women* 723

2.8.4 *The Incorporation of Gender Lenses into Migration Discourse*

As discussed in previous sections, gender has become a determining factor in the decision for labour migration and has greatly impacted different reasons, routes and outcomes of migration between male and female migrants. The author concludes that female labourers are confronting gender inequality and segregation. In addition, it is the author's view that female migrants are more likely to be offered jobs that remain deeply gendered i.e. domestic work in which they more suffer sexual harassment, sexual and gender based violence.

Since global restructuring of the economy has not only affected rigid socio-economic inequality, it is argued that it has perpetuated disparity between men-women, the rich-the poor, and the West-the rest. The author considers that the exclusion of women's experiences in migration in existing migration approaches has the greatest disadvantages for the analysis of the feminisation of labour migration. A migrant woman may migrate to seek an occupation that would give an independent income, whilst others may decide to leave their countries, because of particular conflicts in gender relations, for instance, a breakdown of family or a pre-marital pregnancy.¹³⁷ Sometimes, they may migrate to escape gender-discrimination, based on gender and a woman's sex role in the family and community under the patriarchal system.¹³⁸

¹³⁷ Sharpe P.(ed.), *Women, Gender and Labour Migration: Historical and Global Perspectives* (London: Routledge, 2001), pp.7-8 and Piper N. "Feminization of labour migration as violence against women: international, regional and local nongovernmental organization responses in Asia" (2003) 19 *Violence against Women* 726

¹³⁸ Kofman E., Phizacklea A., Raghuram P. and Sales R. (eds.), *Gender and International Migration in Europe: Employment, Welfare and Politics*, (London: Routledge, 2000), pp.21-43

In this regard, Oishi describes that an integrative gender approach should be divided into four levels of analysis: super state i.e. the impact of globalisation; macro-state i.e. national immigration policies; meso-society i.e. social factors that impact women and men differently, and micro-individual which is the autonomy of women in migration.¹³⁹ Such approach encloses different determinant factors of migration, be they socio-economic, political relations which migrants: male and female confront differently. The more understanding of the current trend of gender and migration can therefore socially and economically empower women.

2.9 Conclusion

This chapter concludes that human trafficking is not a new social phenomenon. Back in the mid-nineteenth century, the term was used to describe the white slave trade, the prostitution of young white women. However, contemporary human trafficking is no longer a single-faceted problem, but a multi-faceted one, cutting across myriad social problems, for instance, migration, human rights and transnational organised crime. This chapter considers human trafficking as a migration issue.

From the study, the reasons for migration are based on various factors, for instance a socio-economic factor and gender relations. However, in contemporary migration, a fundamental change in migration patterns, both in scale and size, including the growing problem of irregular migration, has

¹³⁹ Oishi N., *Women in Motion: Globalization, State Policies and Labour Migration in Asia*, (California: Stanford University Press, 2005), pp.11-13. Oishi describes her four levels of analysis based upon the world system approach: supra state, macro-state, meso-society and micro factors and see also Kofman E. "Global gendered migrations: diversity and stratification" (2004) 6 *International Feminist Journal of Politics* 649-650

caused human migration to become more complex. Chapter 2 analyses human trafficking in migration discourse and considers such a phenomenon as one of the forms of irregular migration. In addition, the author concludes that despite the many terms used to describe human trafficking i.e. irregular, illegal or undocumented migration, "irregular migration" is considered as the most appropriate term to be used in the entire study.

The chapter further discusses various forms of human trafficking in the context of modern day slavery, forced migration and labour exploitation. Human trafficking can be also viewed as a form of forced migration since force, coercion and exploitation are considered as the main elements of human trafficking. In addition, it can be viewed as a form of labour exploitation, from which more female labourers have suffered.

Yet, an increased number of female migrants does not indicate a better bargaining power for women in the course of migration. It is found that women migrants are still confronting with lower social status, gender discrimination and injustice both in source and receiving countries. This chapter recognises that gender inequality has adversely affected lives of female migrants. Women who have the least negotiation power are more vulnerable to exploitation and abuse. Moreover, stricter border control is an influencing factor in which vulnerable female labour may opt for irregular modes of migration to reach a destination.

Female migrants, who are desperate for work, are more susceptible to being tricked into human trafficking rings and falling into the hands of criminal traffickers. Traffickers will use whatever means necessary to ensure that

trafficked persons will work for them to reap a high profit. These means include violence and threats, including using force and practice similar to slave-like conditions and enslavement. This chapter therefore concludes that human trafficking is the end result of exploitation, which represents force and enslavement throughout the course of migration.

In the following chapters, the study discusses legal responses to human trafficking. There will be three main areas discussed, elaborated and critically analysed. These areas are the legal responses to human trafficking under international law (chapter 3), domestic laws in the country of origin and the receiving country (chapter 4 and chapter 5), the current legal protection regime under international law (chapter 6), conclusion and recommendation (chapter 7) and human rights protection as the way forward (chapter 8).

Chapter 3

International Legal Responses to Human Trafficking

3.1 Introduction

From the discussion in chapter two, it can be seen that human trafficking is not a new concept, but can be traced back to the mid-nineteenth century. However, contemporary human trafficking is more complex and is recognised as a multi-faceted issue, cutting across a wide range of social aspects. These are migration (labour migration), crime, human rights, gender inequality and development. Chapter two considers human trafficking from the perspective of migration and the downside of contemporary international migration in the age of globalisation.

Chapter two also made the point that the growth in the number of trafficked persons is a result of stricter border controls, now being implemented in many destination countries. A number of migrants may seek assistance from intermediary agents or their network family, relatives, friends and acquaintances and opt for irregular modes of migration when crossing borders. Moreover, irregular migration has increased the chances for those smugglers or traffickers to abuse and exploit their victims. The plight of such migrants has come to the attention of the international community.

To combat such activities, a transnational organised crime framework has been introduced under the current international law, the Transnational Organized Crime,¹⁴⁰ and its supplement Protocols: the Trafficking Protocol,¹⁴¹ and the Smuggling of Migrants Protocol.¹⁴² In relation to human trafficking, the Transnational Organized Crime Convention and the Trafficking Protocol are analysed and critically examined in this chapter.

3.2 Organisation of Chapter 3

Chapter 3 deals specifically with international legal responses to human trafficking in all forms of the exploitation, with a particular focus on sexual exploitation. Despite the adoption of the Trafficking Protocol, the law on human trafficking is an inadequate and inefficient tool to capture the multi-faceted problem of human trafficking. For example, when the human trafficking phenomenon is described in the migration approach, the term trafficking indicates an irregular movement as so does smuggling. As discussed in chapter 2, the terms human trafficking and smuggling of migrants are overlapping issues and not clearly distinguished. In addition, the terms irregular, illegal or undocumented, used to describe both trafficked victims and smuggled migrants are inappropriate, misleading and insufficient to draw the line between these two phenomena.¹⁴³

¹⁴⁰ See note 4 in Chapter 1, p.3

¹⁴¹ See note 5 in Chapter 1, p.3

¹⁴² See note 10 in Chapter 1, p.10

¹⁴³ See Chapter 2: Section 2.6.2, pp.45-49

This study claims that the ambiguity of terms used to describe migrants- whether they are trafficked persons and smuggled migrants- may have resulted in varying degrees of protection. Moreover, the conditionality of the terms “illegal”, “irregular” and “undocumented” is socially and legally constructed. These may also lead to the ambiguity of legal and policies towards those labelled under such terms. In addition, protection and assistance provided for irregular migrants especially trafficked persons vary from time to time and differ from one jurisdiction to another, depending upon the recognition of state towards irregular migration, including human trafficking. The author contends; however, that the collective meaning of being an illegal migrant for all forms of irregular migration results in no protection by law. Indeed, it usually leads to expulsion due to the breach of one of state laws such as immigration law.¹⁴⁴

To assist in the analysis, this study prefers the use of irregular migrants in describing trafficked persons, since it is almost ethically neutral and less emotive. At least, it does not ignore the dignity of human beings nor pre-judge the status of migrants. Due to radical changes in international migration since the 1990s, human trafficking is not only a migration issue, but is also a multi-dimensional problem. Human trafficking has been dealt with by a number of

¹⁴⁴ For example, according to the UK Immigration Act 1971, s.33 (1), as amended by the Asylum and Immigration Act 1996, Sch. 2, para.4.: an ‘illegal entrant’ is a person a) unlawfully entering or seeking to enter in breach of a Deportation Order or of the immigration laws, or b) entering or seeking to enter by means which include deception by another person, and includes a person who has entered as mentioned in paragraph (a) or (b) above. This will be discussed later in Chapter 5: the national case study: United Kingdom

international instruments. Such legal instruments have yet failed to address effective measures on human rights protection.¹⁴⁵

Moreover, tackling human trafficking arguably results in the divergence of theory and practice. Whilst we call for more effective protection measures, most trafficked persons are often viewed as offenders of criminal or immigration laws rather than treated as irregular migrants, whose experiences of migration are perilous. This thesis argues that the existing international framework on human trafficking has proved ill-equipped and inappropriate to deal with the current situation of human trafficking. Such ineffectiveness of legal intervention has also resulted in the weakness of international co-operation for the protection of trafficked persons. It is therefore necessary for this study to revisit and re-appraise legal norms on the issue of human trafficking.

Due to the length of the legal history of human trafficking, chapter 3 considers legal responses to human trafficking in a chronological order. To understand the shift in the human trafficking paradigm from a white slave trade to that of a transnational organised crime, the chapter begins with an examination of human trafficking and its evolution in international law from the mid–nineteenth century to the outbreak of World War II. This part will also examine legal responses to human trafficking from the establishment of the

¹⁴⁵ Piotrowicz, R., 'Irregular Migration Networks: the Challenge Posed by People Traffickers to States and Human Rights Protection', in Bogusz B and Cholewinski R. et al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), p.140

United Nations to the end of the Cold War. The chapter will then analyse legal responses to human trafficking after the Cold War period.

The chapter finally considers the Transnational Organized Crime Convention and the Trafficking Protocol as the main analysis. The chapter examines the scope, purposes and application of these instruments. During the drafting process, the Trafficking Protocol was arguably one of the most controversial and hotly debated Protocols considered by the Ad Hoc Committee at the United Nations. The Trafficking Protocol is considered as the first international document that defines trafficking.¹⁴⁶ The Protocol is based on a transnational organised crime framework. This basis is critically discussed as being an inadequate one for victim protection.

3.3 Human Trafficking: The Early International Instruments

Despite being extensively used in a number of current international instruments, the term trafficking firstly came in to common use, when the feminist movements were fighting against forced prostitution and the traffic in persons, the so-called white slave trade, in Europe and later in the United States in the mid-nineteenth century.¹⁴⁷ Following which, trafficking in persons has been recognised as an international challenge. Prior to the First World War, trafficking was addressed in the following international legal responses. These international instruments were the 1904 White Slave Trade

¹⁴⁶ Gallagher A. "Human rights and the new UN Protocols on trafficking and migrant smuggling: a preliminary analysis" (2001) 23 *Human Rights Quarterly* 984-988 and Ditmore M. and Wijers M. "The negotiations on the UN Protocol on trafficking in persons: moving the focus from morality to actual conditions" (2003) 4 *Nemesis* 80-83

¹⁴⁷ See Chapter 2: Section 2.3, pp. 23-26

Agreement,¹⁴⁸ the 1910 International Convention for the Suppression of the White Slave Traffic,¹⁴⁹ the 1921 Traffic in Women and Children Convention,¹⁵⁰ and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age.¹⁵¹

3.3.1 Human Trafficking: International Feminist Movements against the White Slave Trade

From the mid-nineteenth century until the early decades of the twentieth century, international feminist movements used the term “trafficking” to campaign against white slave trade.¹⁵² Such campaigns were extensive, lengthy, international, and surprisingly successful.¹⁵³ These later led to the first congress on the White Slave Trade, held in London in 1899, and followed by two diplomatic conferences, held in Paris in 1902 and in 1910. During this period, the first international legal instrument, the 1904 White Slave Trade Agreement was ratified in May 1904. It was also the first time that the problem of forced prostitution was considered as a matter of international law.¹⁵⁴

¹⁴⁸ See note 34 in Chapter 2, p.25

¹⁴⁹ Hereafter the 1910 White Slave Traffic Convention, 3 L.N.T.S. 278, 4 May 1910, entered into force 21 June 1915

¹⁵⁰ 9 L.N.T.S. 416, 30 September 1921, entered into force 15 June 1922

¹⁵¹ Hereafter the 1933 Traffic in Women Convention, 53 U.N.T.S.50, 11 October 1933, entered into force 24 August 1934

¹⁵² The term white slave trade was rooted from the French term ‘Traite des Blanches’, which related to ‘Traite des Noirs’-the Negro-slave trade in the nineteenth century, in Derk A., *From White Slaves to Trafficking Survivors: Notes on the Trafficking Debate*, a working paper presented to the Conference on Migration and Development, Princeton University, May 4-6, 2000, p.2 and see also Demleitner N.V. “Forced prostitution: naming an international offence” 1994 (18) *Fordham International Law Journal* 164-165

¹⁵³ Jeffreys S., *The Idea of Prostitution*, (Melbourne: Spinifex Press, 1997), p. 7.

¹⁵⁴ Ibid, pp. 11- 12

It can be concluded that the 1904 White Slave Trade Agreement was to eliminate the sale of women and girls for prostitution. This Agreement defined trafficking for prostitution as a moral problem related to the condition of slavery, in other words, the white slave trade.¹⁵⁵ The law also distinguished between pure and innocent women and former prostitutes. To abolish the white slave trade, the law emphasised on international cooperation. In this connection, all state parties were committed to collect information regarding the procurement of women and girls for immoral purposes abroad¹⁵⁶ and were obliged to provide protection for female victims, who were forced into prostitution rather than to punish the procurers.¹⁵⁷

However, the 1904 White Slave Trade Agreement proved inadequate, due to the limitation of its substantive content. The law was not racially neutral since the term white slave trade was not sufficient broad to cover women of all colours.¹⁵⁸ Moreover, the law only covered trafficking offences, which occurred internationally, whereas internal trafficking matters were excluded.¹⁵⁹ Finally, the Agreement was ineffective as it failed to criminalise the procurement of women and girls for prostitution, and failed to strengthen the punishment of procurers as a tool to eradicate the white slave trade.

¹⁵⁵ Bassiouni M.C., "Enslavement as an international crime" (1991) 23 *New York University Journal of Law and Politics* 445

¹⁵⁶ Art.1 and 2 of the 1904 White Slave Trade Agreement, 1 L.N.T.S. 83

¹⁵⁷ Art.3 and 4 of the 1904 White Slave Trade Agreement, 1 L.N.T.S. 83, provide, for example, shelter to female victims of trafficking and repatriation of victims should they desire it and see also Demleitner N.V. "Forced prostitution: naming an international offense" (1994) 18 *Fordham International Law Journal* 167

¹⁵⁸ Report of the Special Rapporteur on *Trafficking in Women, Women's Migration and Violence against Women*, Ms. Radhika Coomaraswamy, submitted in accordance with the Commission on Human Rights at fifty-sixth session, E/CN.4/2000/68, 29 February 2000, Para. 18

¹⁵⁹ Art.3 of the 1904 White Slave Trade Agreement, 1 L.N.T.S. 83 and see also Farrior S. "The international law of trafficking in women and children for prostitution: making it live up to its potential" (1997) 10 *Harvard Human Rights Journal* 214

In 1910, the White Slave Traffic Convention was adopted and ratified by thirteen countries.¹⁶⁰ The law strengthened anti-trafficking efforts by criminalising the procurement of women and girls into prostitution. Under this Convention, the parties were bound to punish any person who hired, abducted, enticed or procured any woman *under the age of twenty*, even with her consent for immoral purposes. States parties were also obliged to punish those who used violence, threats, fraud or any compulsion on a woman over *twenty-one* to accomplish the same purpose, notwithstanding that the offence was committed in different countries.¹⁶¹ However, the 1910 White Slave Traffic was criticised as it only addressed the fight against trafficking into forced prostitution.¹⁶²

3.3.2 Human Trafficking in the Period of the League of Nations (1919- 1945)

The international feminist movement since the WWI had persistently encouraged the drafters of the Covenant of the League of Nations to take action against the traffic in women and children within the League's Mandate.¹⁶³ The League held a conference on trafficking in 1921 and

¹⁶⁰ Original state signatories to the 1910 White Slave Traffic Agreement were Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland, and the United Kingdom in Bassiouni M.C. "Enslavement as an international crime" (1991) 23 *New York University Journal of Law and Politics* 464 and see also Demleitner N.V. "Forced prostitution: naming an international offense" (1994) 18 *Fordham International Law Journal* 168

¹⁶¹ Art.1 and Art.2 of the 1910 White Slave Traffic Agreement, 3 L.N.T.S. 278

¹⁶² Nelson K.E. "Sex trafficking and forced prostitution: comprehensive new legal approaches" (2002) 24 *Houston Journal of International Law* 553-554

¹⁶³ Art. 23 of Covenant of the League of Nations, 225 CTW 195, 28 April 1919, entered into force 10 January 1920, committed the League to action against the traffic in women and children, in Report of the Special Rapporteur on *Trafficking in Women, Women's Migration and Violence against Women*, Ms. Radhika Coomaraswamy, submitted in accordance with the Commission on Human Rights at fifty-sixth session, E/CN.4/2000/68, 29 February 2000,

appointed the Traffic in Women Committee.¹⁶⁴ As a consequence, the 1921 Traffic in Women and Children Convention was adopted and was originally signed by thirty-three states.¹⁶⁵ The Convention sought to strengthen the protection provisions of its former treaties: the 1904 White Slave Trade Agreement and the 1910 White Slave Traffic Convention. The Convention also changed the prevalent terminology from white slave traffic to include women and young girls of all colours.

Several new points were also raised under this Convention. For instance, in case of non – forcible recruitment for prostitution, the 1921 Traffic in Women and Children Convention extended the age limit of a victim from twenty to twenty one years of age.¹⁶⁶ Moreover, the law was the first international instrument that extended the protection to male minors who have been trafficked.¹⁶⁷ The Convention encouraged states parties to take actions on legislative and administrative, especially by licensing and supervising of employment agencies to protect emigrant and immigrant women and children seeking employment abroad.¹⁶⁸

To enhance the effectiveness of combating trafficking in women of all ages, an Advisory Committee on the Traffic in Women and Children was

Para. 19 and see also Jeffreys S., *The Idea of Prostitution*, (North Melbourne: Spinifex Press, 1997), pp.12-14.

¹⁶⁴ Jeffreys S., *The Idea of Prostitution*, (North Melbourne: Spinifex Press, 1997), p.165

¹⁶⁵ Demleitner N.V. "Forced prostitution: naming an international offense" (1994) 18 *Fordham International Law Journal* 170

¹⁶⁶ Art.5 of the 1921 Traffic in Women and Children Convention, 9 L.N.T.S. 416 and See Nelson K.E. "Sex trafficking and forced prostitution: comprehensive new legal approaches" (2002) 24 *Houston Journal of International Law* 554

¹⁶⁷ Emerton R., *Trafficking of women into Hong Kong for the purpose of prostitution: preliminary research findings*, an occasional paper No.3, University of Hong Kong, February 2001, p. 4

¹⁶⁸ Art.6 and Art.7 of the 1921 Traffic in Women and Children Convention, 9 L.N.T.S. 416

appointed to provide general supervision over the execution of the Convention. States parties were required to report periodically.¹⁶⁹ The committee discussed ways to make the legal instrument more efficient. As a result, the 1933 Traffic in Women Convention was adopted for which states parties were obliged to punish persons who procured, enticed or lead away women of all ages in another country. However, the law still excluded the trafficking in women within national boundaries. According to the Convention, a woman's consent was not a defence to the crime of trafficking.¹⁷⁰ In addition, a number of issues were going to be discussed: for instance, the abolition of state regulation of prostitution and criminalisation of procurers, brothel owners and pimps. However, the discussions were superseded by the outbreak of World War II.

3.4 The 1949 United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others

Following the conclusion of the Second World War, the United Nations was established with very broad aims. These were to maintain international peace and security, to develop friendly relations among nations, to solve international problems of an economic, social, cultural or humanitarian character and to promote human rights.¹⁷¹ Having been considered as a social problem, the issue of trafficking was taken over by the United Nations. The previous four legal instruments on trafficking were consolidated into the 1949

¹⁶⁹ Demleitner N.V. "Forced prostitution: naming an international offense" (1994) 18 *Fordham International Law Journal* 170

¹⁷⁰ Art.1 of the 1933 Traffic in Women Convention, 53 U.N.T.S. 50 see also Nelson K.E. "Sex trafficking and forced prostitution: comprehensive new legal approaches" (2002) 24 *Houston Journal of International Law* 554

¹⁷¹ Evans M.D. (ed.), *International Law*, (Oxford: Oxford University Press, 2003),p. 291 and see also Charter of the United Nations, 1 U.N.T.S. 16, 24 June 1945, entered into force 24 October 1945, Chapter 1, Art.1

United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.¹⁷²

The author notes that the 1949 UN Trafficking Convention shed new light on the issue of trafficking. It was recognised as the first international instrument that addressed trafficking in a gender-neutral term to include all persons regardless of sex, age and race. Under the Convention, states parties were bound by three areas of obligations: prohibition, prevention and protection obligations. First, states parties were bound by a general anti-trafficking principle, that is, the prohibition of trafficking for sexual exploitation.¹⁷³ Secondly, states parties agreed to specific enforcement measures and were required to take actions in cooperative administration and enforcement activities with others. Lastly, states parties were obliged to take all appropriate measures to eliminate causes leading to human trafficking i.e. rehabilitation and social supports.

According to the obligation to prohibit human trafficking, states parties were required to eliminate trafficking for sexual exploitation and exploitation of prostitutes. Instead of criminalising prostitution, this Convention aimed to prohibit all third-parties acts. These acts were procurement, enticement

¹⁷² Hereafter the 1949 UN Trafficking Convention, 96 U.N.T.S. 271, 21 March 1950, entered into force 25 July 1951 and see also Art. 28 of the 1949 Trafficking Convention supersedes the 1904 White Slave Trade Agreement, the 1910 White Slave Traffic Convention, the 1921 Traffic in Women and Children Convention and the 1933 Traffic in Women Convention. All of which shall be considered terminated, when all of their signatories have ratified the 1949 UN Trafficking Convention

¹⁷³ Art.1 of the 1949 UN Trafficking Convention, 96 U.N.T.S. 271, punishes any person who "procures, entices or leads away, for purposes of prostitution, another person or exploits the prostitution of another person, even with the consent of that person". It is noted that this provision resembled the 1910 White Slave Traffic Convention to punish procurers and made the offence, including preparatory, attempt and intentional acts, punishable even if it is committed domestically.

and leading away of another person, for purposes of prostitution or exploitation of prostitution of another person, even with the consent of that person.¹⁷⁴ The prohibition includes prosecution of brothel owners, pimps and clients.¹⁷⁵

To suppress and prevent human trafficking for sexual exploitation, the 1949 UN Trafficking Convention incorporated a number of provisions, already presented in early international instruments. For instance, under the Convention, a trafficking offence was extraditable.¹⁷⁶ States parties were bound to establish a system of cooperation in exchange of information regarding human trafficking.¹⁷⁷ To prevent human trafficking, states parties were required to take appropriate measures in connection with immigration and emigration procedures and to supervise employment agencies.¹⁷⁸ Moreover, they were required to take action for the prevention of prostitution through rehabilitation and social adjustment of victims of prostitution under education, health, social, economic and other related services.¹⁷⁹

Although the law resolved potential ambiguities such as race and gender-neutral language and the meaning of punishment and consent, it is the author's view that the 1949 UN Trafficking Convention is comparatively weak. In particular, the law did not define the term "prostitution" and

¹⁷⁴ Art.1 of the 1949 UN Trafficking Convention, 96 U.N.T.S. 271

¹⁷⁵ Art.2 of the 1949 UN Trafficking Convention, 96 U.N.T.S. 271

¹⁷⁶ Art.8 of the 1949 UN Trafficking Convention, 96 U.N.T.S. 271

¹⁷⁷ Art.14 and 15 of the 1949 UN Trafficking Convention, 96 U.N.T.S. 271

¹⁷⁸ For instance, Art. 17 and 20 of the 1949 UN Trafficking Convention, 96 U.N.T.S. 271

¹⁷⁹ Art.16 of the 1949 UN Trafficking Convention, 96 U.N.T.S. 271

“exploitation” nor distinguish between forced and voluntary prostitution.¹⁸⁰ The lack of clarity remains unresolved and has later created a hot debate over the notion of free and forced prostitution during the drafting process of the latest international instrument, the Trafficking Protocol.

The author contends that the 1949 UN Convention was ineffective in connection with protection measures, especially when the immigration status of trafficked persons was identified as irregular. Although trafficked persons were granted procedural rights, enabling them to proceed against traffickers,¹⁸¹ the irregular status of trafficked persons may have caused difficulty in exercising these rights. This is because victims would have likely been deported before the investigation took place.¹⁸² Without the presence of a witness (a victim of trafficking), this would have likely resulted in low level of prosecution of trafficking. Despite the focus on prosecution and punishment of traffickers and third-parties involved in prostitution, it is more likely that a number of trafficked victims may have suffered the burden of criminalisation in other areas of law i.e. immigration.

The 1949 UN Trafficking Convention attracted comparatively few states to support it. Official records showed that there were 81 state parties.¹⁸³ It may be because the Convention failed to define trafficking for other purposes, for example, trafficking in persons for forced marriage or for begging and working

¹⁸⁰ Sullivan B. “Feminism and new international law” (2005) 5 *International Feminist Journal of Politics* 68-69

¹⁸¹ Art.5 of the 1949 UN Trafficking Convention, 96 U.N.T.S. 271

¹⁸² Art.19 of the 1949 UN Trafficking Convention is considered as a big threat to a victim whose immigration status was irregular. This is because, under the clause ‘expulsion is ordered in conformity of law’, a victim was likely to be deported even before the investigation took place.

¹⁸³ As at 30 April 2009, For further information <http://treaties.un.org/>

in sweatshops, which are now high on the international agenda. Moreover, it failed to recognise various root causes of trafficking, for instance, persistent poverty and other socio-economic factors, related to unequal gender relations.¹⁸⁴ Finally, the 1949 UN Trafficking Convention contained a mild reporting mechanism. It also failed to establish an independent supervisory body with authority to monitor legal implementation and to take actions on enforcement of the 1949 Convention's provisions.¹⁸⁵ The lack of an effective report mechanism will arguably have a negative impact on the overall legal implementation and enforcement, including the adherence of states parties to take action against human trafficking. This point will be discussed later in chapter 8.¹⁸⁶

3.5 International Legal Responses addressing Human trafficking

Although the original treaties on human trafficking mentioned in the previous section were aimed at crime suppression and prosecution, contemporary human trafficking is rather a dynamic issue and widely discussed in a number of international legal discourses, ranging from slavery, a crime against humanity, forced labour migration, human rights and transnational organised Crime. This section examines international responses to human trafficking, which has been adopted and addressed in a number of international documents. The section starts with the analysis of human trafficking as modern day slavery. As a preliminary observation, there is a

¹⁸⁴ Farrior S. "The international law of trafficking in women and children for prostitution: making it live up to its potential" (1997) 10 *Harvard Human Rights Journal* 215

¹⁸⁵ Report of the Special Rapporteur on Trafficking in Women, Women's Migration and Violence against Women, Ms. Radhika Coomaraswamy, on submitted in accordance with the Commission on Human Rights at fifty-sixth session, *E/CN.4/2000/68*, 29 February 2000, Paras. 22-26

¹⁸⁶ See in Chapter 8: Section 8.5.5, pp.328-331

striking difference between the international legal discourse on slavery on the one hand, and that on human trafficking, on the other hand.

3.5.1 Human Trafficking in the Context of Modern Day Slavery

Despite the universal illegalisation of slavery, chapter 2 argues that slavery continues to persist in more underground forms. In our time, slavery has been used expansively to include various institutions and practices, for example, human trafficking, debt bondage and forced labour, reconceived as modern day slavery. Although modern day slavery is as much as unconstitutional as it was in the past, it is rather complex, hidden and involved with a greater degree of violence, force, coercion and exploitation and has become the basic struggle for international human rights norms.¹⁸⁷

The proposition of the genuine right to ownership, which constitutes *de jure* slavery (in law), no longer exists in modern day slavery. The author contends that the elements i.e. the use of forced or other forms of coercion, control over another person are substantial to prove the existence of *de facto* (in fact) slavery. For instance, one person exercises power over another through control of a person's identity- passport or travel documents and forces her or him to work without pay, uses violence against the vulnerability of such person and enforces sexual or labour exploitation to a large extent.

¹⁸⁷ Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), p.13

However, the existence of *de facto* slavery has become a debate of legal interpretation and intervention, including state practice with regard to human rights protection of victims of trafficking. More often, individuals who are deemed to hold criminal liability go unpunished. In connection with the *de facto* slavery, the following questions arise:

1) what are the elements used in determining whether or not such practice is subject to slavery? and 2) when they are ambiguous situations, what is the evidence that can facilitate states to bring action against individuals who hold criminal liabilities for exercising power over another by the control or the use of force, akin to slavery? To answer such questions, an historical analysis is offered.

Slavery was condemned in the early nineteenth century when the 1815 Declaration Relative to the Universal of the Slave Trade was adopted.¹⁸⁸ Slavery is unanimously agreed as the practice that must be prohibited. Since then, there have been a number of international documents on slavery which outlaw slavery and associated practices. The principal international law concerning slavery lies in the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926¹⁸⁹ and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery Convention of 1956.¹⁹⁰

¹⁸⁸ Declaration Relative to the Universal of the Slave Trade, 63 Consolidated Treaties Series 473, 8 February 1815 and see general discussion on international law against slavery in Report of Office of the United Nations High Commissioner for Human Rights, Mr. David Weissbrodt and Anti-Slavery International on Abolishing Slavery and Its Contemporary Forms, *HR/PUB/02/4*, Para.1

¹⁸⁹ Hereafter the 1926 Slavery Convention adopted under auspices of the League of Nations, 60 L.N.T.S. 253, 25 September 1926 entered into force 9 March 1927, see also Allain J. "The definition of slavery in international law" (2009) 52 *Howard Law Journal* 244

¹⁹⁰ Hereafter the 1956 Supplementary Convention, 226 U.N.T.S. 3, 7 September 1956, entered into force 30 April 1957

According to the 1926 Slavery Convention, slavery is defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.¹⁹¹In this regard, the 1926 Slavery Convention required states parties to progressively suppress the slave trade¹⁹² and work towards the abolition of slavery in all its forms.¹⁹³The scope of legal intervention on slavery was extended by the adoption of the 1956 Supplementary Convention. Other than the prohibition against slavery, the 1956 Supplementary Convention aimed at abolishing institutes or practices held similar to slavery, whether or not they are covered by the 1926 definition of slavery.¹⁹⁴These are debt bondage, serfdom, forced marriage and child exploitation.

Other than the two Conventions concerning slavery discussed above, the provision on the prohibition of slavery has been included in a number of international human rights documents. For instance, the Universal Declaration of Human Rights, adopted by the General Assembly in 1948 provides that “no one shall be held in slavery or servitude. Slavery and slave trade shall be prohibited in all their forms”.¹⁹⁵ In addition, Art.8 of the

¹⁹¹ Art.1(1) of the 1926 Slavery Convention, 60 L.N.T.S. 253 and Allain J., “The definition of slavery in international law” (2009) 52 *Howard Law Journal* 251

¹⁹² According to Art.1(2) of the 1926 Slavery Convention, 60 L.N.T.S. 253, the slave trade is defined as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves”

¹⁹³ Art.2 of the 1926 Slavery Convention

¹⁹⁴ Art. 1 (a) -(d) of the 1956 Supplementary Convention, 226 U.N.T.S. 3 and see general discussion in Allain J., *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations*, (Leiden: Martinus Nijhoff Publishers, 2008), pp 18-23 and Gallagher A., ‘Using International Human Rights Law to Better Protect Victim of Human Trafficking: the Prohibition on Slavery, Servitude, Forced Labour and Debt Bondage’ in Sadat L.N. and Scharf M.P., *The Theory and Practice of International Criminal Law: Essays in Honor of M.Charif Bassiouni*, (Leiden: Martinus Nijhoff Publishers, 2008), pp.403-404

¹⁹⁵ Hereafter UDHR, UNGA Res. 217A (III), 10 December 1948, Art.4

International Covenant on Civil and Political Rights reiterate Art.4 of UDHR to prohibit against slavery and slave trade, which is a non-derogable.¹⁹⁶

Slavery is recognised as the practice that shocks the conscience of humanity in which state practice and *opinio juris* are unequivocal. Rassam notes that no state dares assert that it does not have an international legal obligation to outlaw slavery.¹⁹⁷ The universal character of the prohibition against slavery is recognised as one of the most well-established customary rules, a legal obligations *erga omnes*,¹⁹⁸ that has attained the status of *jus cogens*, holding the highest hierarchical position amongst all other norms and principles. It should be noted further that legal obligation *erga omnes* is not considered as a cause of or a condition for a crime's inclusion in the category of *jus cogens*, but a consequence of a given international crime having risen to the level of *jus cogens*. The *jus cogens* nature of slavery is thus deemed to be pre-emptory and non-derogable, through consistent state practice and *opinio juris*, by most states.¹⁹⁹

¹⁹⁶ Hereafter ICCPR, 999 U.N.T.S.171, 16 December 1966, entered into force 23 March 1976 and see also Art 4(2) of ICCPR. As of 30 April 2010, there are 165 State Parties

¹⁹⁷ Rassam A.Y. "Contemporary Forms of Slavery and the Evolution of the Prohibitions of Slavery and the Slave Trade under Customary International Law" (1999) 39 *Virginia Journal of International Law* 311

¹⁹⁸ Gallagher A., 'Using International Human Rights Law to Better Protect Victim of Human Trafficking: the Prohibition on Slavery, Servitude, Forced Labour and Debt Bondage' in Sadat L.N. and Scharf M.P., *The Theory and Practice of International Criminal Law: Essays in Honour of M.Charif Bassiouni*, (Leiden: Martinus Nijhoff Publishers, 2008), p.406. The basis for legal obligations *erga omnes* is derived from the *Barcelona Traction Case*. The ICJ recognised that legal obligations *erga omnes*- the obligations of a state towards international community as a whole are the concern of all states and should be drawn from obligations arising *vis a vis* another state in the field of diplomatic protection. Legal obligations *erga omnes* derive from, for instance, the principles and rules concerning the basic human rights of the human person, including the protection from slavery and racial discrimination, in *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, [1970] ICJ rep 3, pp.32-34

¹⁹⁹ According to the provisions of the Vienna Convention on the Law of Treaties, *jus cogens* is a peremptory norm of general international law (Art.53) and a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (Art.50), 115 U.N.T.S. 331, 23 May 1969, entered into force 27

The author notes that substantive content of the prohibition against slavery- both in the provisions of international documents and customary international law- remain intact to the 1926 definition of slavery- the powers attaching the right of ownership. The question; however, arises as to whether the prohibition of slavery should be expansively interpreted to include human trafficking. The author contends that, as a matter of law and practice, this claim becomes unsubstantiated. It is difficult to see how human trafficking for which slavery is recognised as one of the example practice for exploitation could fall within the legal parameter of slavery, unless the power of attaching the right of ownership is exercised.²⁰⁰

3.5.2 Human Trafficking and a Crime against Humanity

The development in international criminal law since an airing at Nuremberg²⁰¹ to the recently concluded of the Rome Statute of the International Criminal Court has reflected the interrelationship between the issues of slavery, slave trade, enslavement including trafficking in persons.²⁰²

January 1980 and see also Bassiouni M.C. "International crimes: *jus cogens* and *obligatio erga omnes*" (1996) 59 *Law and Contemporary Problems* 67-68

²⁰⁰ A number of characters for which the power attaching to the rights of ownership is exercised give rise to slavery: 1) the individual of servile status may be made of the object of purchase; 2) the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law; 3) the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour; 4) the ownership of the individual of servile status can be transferred to another person; 5) the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it; 6) the servile status is transmitted *ipso facto* to descendants of the individual having such status in Allain J., "The definition of slavery in international law" (2009) 52 *Howard Law Journal* 262-266

²⁰¹ Charter of the International Military Tribunal, 82 U.N.T.S. 279, 8 August 1945, hereafter the Nuremberg Charter and see also Bassiouni M.C., *Crimes against Humanity in International Criminal Law*, (Leiden: Martinus Nijhoff Publishers, 1993), pp.1-40

²⁰² Hereafter the Rome Statute, 2187 U.N.T.S. 90, 17 July 1998, entered into force 1 July 2002. As of 30 April 2010, there are 111 states parties

Due to the violation of human security, human trafficking is regarded as a crime against humanity which ranks amongst 'the most serious crimes of concern to the international community as a whole'- *delicta juris genuim*.²⁰³

This section thus offers the analysis of the legal intervention of human trafficking within the international criminal law.

In an outstanding case, *Prosecutor V. Kunarac, Kovac & Vokovic*, the Trial Chamber and the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that human trafficking falls within the concept of crime against humanity.²⁰⁴ In legal history, the definition of crime against humanity was first articulated since wartime²⁰⁵ and had been developed through multilateral negotiations of the draft of the Rome Statute. Crime against humanity reads as the acts that include, for example, murder, extermination, enslavement, deportation, imprisonment, torture, rape or sexual slavery and other inhuman acts.²⁰⁶

To determine whether the above acts constitute crime against humanity, the ICTY held that the following elements of crime are to be met.

²⁰³ Obokata T. "Trafficking of human beings as a crime against humanity: some implications for the international legal system" (2005) 54 *International and Comparative Law Quarterly* 445

²⁰⁴ *Prosecutor V. Kunarac, Kovic & Vokovic*, Case No. IT-96-23 and IT-96-23/1-T, ICTY Trial Judgement, 22 February 2001 and Case No.IT-96-23 and IT-96-23/1-T, ICTY Appeal Judgement, 12 June 2002, hereafter the *Kunarac Case*

²⁰⁵ Art.6 (c) of the Nuremberg Charter, 82 U.N.T.S. 279, reads Crimes against Humanity: namely, murder, extermination, *enslavement*, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

²⁰⁶ Art.7 (1) (a)-(k) of the Rome Statute, 2187 U.N.T.S. 90

1) There must be an attack, whether widespread or systematic. Such attack is a course of conduct that involves the commission of acts of violence, even if it is a single or multiple commissions.²⁰⁷

2) Such attack must be directed against the civilian population who becomes the primary object of the crime. In this regard, civilian population are all persons who are not members of the armed forces and other legitimate combatants.²⁰⁸

3) Similar to the principle of international criminal law, the element of *mens rea*, criminal intent, is required to constitute crime against humanity. To satisfy the *mens rea* element, the perpetrator must have had the intent to commit the underlying offence or offences which s/he is charged. That is, the perpetrator must know that committed acts are part of the attack against civilian. In this regard, the perpetrator can be either those state or non-state.²⁰⁹

4) The attack is not limited to the conduct of hostiles but encompasses the situation of mistreatment of persons taking no active part of hostiles.²¹⁰ Hence, there is no requirement for the existence of an armed conflict. Crime against humanity can be committed either during times of peace or civil strife.²¹¹

In the *Kunarac* case, there was a charge for enslavement, in relation to the treatment of women and children. The ICTY established the link between

²⁰⁷ *Prosecutor V Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-T, ICTY Trial Judgement, 22 February 2001, Para. 415

²⁰⁸ *Ibid*, Para. 425

²⁰⁹ Obokata T. "Trafficking of human beings as a crime against humanity: some implications for the international legal system" (2005) 54 *International and Comparative Law Quarterly* 451-452

²¹⁰ *Prosecutor V Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-T, ICTY Trial Judgement, 22 February 2001, Para. 416

²¹¹ Robinson D. "Defining crimes against humanity at the Rome Conference" (1999) 93 *American Journal of International Law* 46

the notion of slavery and enslavement stipulated under customary law and relevant treaties, for instance, the 1926 Slavery Convention. The ICTY held that the *actus reus* of the enslavement is identical to that of slavery- the exercise of any or all of the power attached to the right of ownership over a person. The ICTY concluded that indications of enslavement include the elements of control and consent.

According to the ICTY, the element of control is not decisive but depending on circumstances, for instance, control of someone's movement, of physical environment, physiological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.²¹² In connection to the issue of consent, there appears the correlation between the issue of control and consent. Although, from the evidentiary point of view the issue of consent is significant, the consent or free will of a person will be rendered irrelevant by, for example, the threat or use of force and coercion or other forms of control.²¹³ Further, indications of enslavement include subsequent exploitation which will be discussed in connection to human trafficking.

As discussed in the previous section, trafficking may be treated as slavery only when traffickers themselves exercise the right of ownership over trafficked victims. Human trafficking is thus not recognised as having substantive content of prohibition of slavery and nor has achieved the status

²¹² *Prosecutor V Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-T, ICTY Trial Judgement, 22 February 2001, Paras. 542-543

²¹³ *Ibid*, Para.542

of *jus cogens*. In addition, despite the wrongful practice of human trafficking, the obligation to prohibit human trafficking has not yet been identified as the obligation *erga omnes*, that is; an obligation owed by states to the international community as a whole to protect human rights.²¹⁴ To ensure trafficked victim afford human rights protection and those traffickers are punished, the author argues the elements of human trafficking crime such as the use of physical control or psychological coercion and violence against the vulnerability of persons could amount to the condition of enslavement which can be elevated to crime against humanity.

3.5.3 Human Trafficking and Forced Labour

As discussed in chapter 2, human trafficking is also a form of forced labour migration.²¹⁵ This is because, most trafficked persons are controlled and forced into easily exploited working conditions such as domestic services, sweatshops, agriculture and sex related jobs. The growing phenomenon of human trafficking for forced labour has become one of international concerns. Other than international human rights instruments,²¹⁶ forced labour has been systematically addressed in some specific thematic treaties under the auspice of the International Labour Organization (ILO).²¹⁷

²¹⁴ *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, [1970] ICJ rep 3, Paras.33-34

²¹⁵ See Chapter 2: Section 2.7, pp.49-51

²¹⁶ For instance, Art.23 of the UDHR proclaims that everyone has the right to work, to free choice of employment and to just and favourable condition of work, and Art.8 of the ICCPR, 999 U.N.T.S. 171, makes direct reference to forced or compulsory labour in connection to the prohibition on the slavery and servitude which reads as "no one shall be required to perform forced or compulsory labour"

²¹⁷ ILO is the first specialised agency of the United Nations, found in 1919. The original text of International Labour Organization Constitution was established in 1919 and entered into force on 28 June 1919. However, it is noted that that the ILO Constitution has been frequently modified since its first adoption. The latest version is the Instrument of Amendment of the

Through its works, the ILO has actively responded to core labour standards seeking to eliminate the continuity of migration-human trafficking nexus, that is; forced labour, the abuse of migrant workers, discrimination at work and child labour. The ILO works also focuses on the protection of fundamental rights labour rights. In connection with human trafficking, the ILO adopted two Conventions aiming at the prohibition and elimination of forced or compulsory labour. These are: the ILO Convention No.29 concerning Forced or Compulsory Labour Conventions,²¹⁸ and the ILO Convention No.105 concerning the Abolition of Forced Labour.²¹⁹ Both of which arguably provide helpful adjunct setting a minimum labour standard below which states parties should not fall, but can favourably grant higher standards of protection of workers under domestic law.²²⁰

The ILO Convention No.29 was the first international document which articulates the definition of forced labour,²²¹ referred to as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”²²² Such definition focuses on involuntary labour, by the use of coercion or force, and retains the link between forced labour and slavery conditions. The ILO Convention No. 29 requires states parties to abstain from all form of forced or compulsory labour

Constitution of the ILO, 1972, adopted by International Labour Conference, 57th Session, Geneva, 22 June 1972 and entered into force on 1 November 1974. As of 30 April 2010, there are 183 member states of the ILO

²¹⁸ Hereafter, the ILO Convention No.29, 39 U.N.T.S. 55, 26 June 1930, entered into force 1 May 1932. As of 30 April 2010, there are 174 State Parties

²¹⁹ Hereafter, the ILO Convention No.105, 320 U.N.T.S. 291, 25 June 1957, entered into force 17 January 1959. As of 30 April 2010, there are 169 State Parties

²²⁰ Art. 19(8) of the ILO Constitution

²²¹ It is noted that forced or compulsory labour is the term that appeared in the 1926 Slavery Convention. Art.5 of the 1926 Slavery Convention, 60 L.N.T.S. 253, requires state parties to adopt all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery

²²² Art. 2 (1) of the ILO Convention No. 29, 39 U.N.T.S. 55

and to act in order to suppress all forms of forced labour within the shortest possible period.²²³ Moreover, each state party is required to ensure that the illegal exaction of forced or compulsory labour is an offence punishable which is really adequate and strictly enforced under domestic law.²²⁴

Furthermore, to improve working conditions and practice throughout the World, the ILO Convention No.105 was adopted to abolish any form of forced or compulsory labour in specific circumstances: forced labour used for political or economic development purposes or as a means of labour discipline or of discrimination and as a punishment for strike action.²²⁵ The Forced Labour Conventions apply to works or services exacted by all levels of employers such as governments, public authorities, private bodies and individuals. To take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery, the ILO Conventions concerning forced labour should be read in conjunction with other international human rights document i.e. the provision under the 1926 Slavery.

3.5.4 Human Trafficking as Human Rights Issues

Human trafficking is, by its nature, seen as a clandestine movement of people. It is also noted that such issue has been regarded as having an inescapable link to human rights violation.²²⁶ In addition, since the second half

²²³ Art. 1(1) of the ILO Convention No.29, 39 U.N.T.S. 55. Yet, certain types of work are excluded from being subjected to forced labour. These are military service for work of purely military character, normal civic obligations, work of prisoners convicted in a court of law and working under the control of a public authority, work in emergency cases such as wars or other calamities and minor communal services (Art.2 (2))

²²⁴ Art.25 of the ILO Convention No.29, 39 U.N.T.S. 55

²²⁵ Art.1 and 2 of the ILO Convention No.105, 320 U.N.T.S. 291

²²⁶ Piotrowicz R., 'Trafficking of Human Beings and Their Human Rights in the Migration

of the twentieth century, human trafficking has been widely addressed in a wide range of existing international and regional human rights instruments.²²⁷ It has also been of interest to a number of international human rights organisations and a variety of UN counter-measure strategies, ranging from specialist rapporteurs, and programmes of action to conferences, plans and Declarations.²²⁸

Human trafficking arguably exists in both non-legally and legally binding human rights documents. For instance, the United Nations Declaration on the Elimination of Violence against Women was adopted in 1993.²²⁹ In relation to human trafficking, the DEVAW defines various forms of violence related to exploitation and trafficking in women and forced prostitution of which women are protected.²³⁰ In addition, the DEVAW calls for states to exercise due diligence to prevent, investigate and punish acts of violence against women whether such acts are perpetrated by states or private persons.²³¹ However, as a non-legally binding instrument, the author

Context' in Cholewinski R., Perruchoud R., and MacDonald E., *International Migration Law: Developing Paradigms and Key Challenges*, (The Hague: T.M.C. Asser Press, 2007), p.275 and Lee M., 'Introduction: Understanding Human Trafficking', in Lee M.(eds), *Human Trafficking*, (Devon: William Publishing, 2007), p.9

²²⁷ See, for example, In Europe, the Council of Europe Convention against Trafficking in Human Beings (2005), C.E.T.S. No.197, 16 May 2005, entered into force 01 February 2008. In the Americas, the Inter-American Convention on International Traffic in Minors, 33 I.L.M. 721, 18 March 1994, entered into force 15 August 1997. In South Asia, SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002 by South Asian Association for Regional Cooperation (SAARC)- consisting of Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. In South East Asia, ASEAN Declaration against Trafficking in Persons, particularly, Women and Children, 29 November 2004- ASEAN consists of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, The Philippines, Singapore, Thailand and Vietnam

²²⁸ Twomey P. "Europe's other market: trafficking in people" (2000) 2 *European Journal of Migration and Law* 4-5.

²²⁹ The United Nations Declaration on the Elimination of Violence against Women, UNGA Res 48/49, 20 December 1993, hereafter, DEVAW

²³⁰ Art.2 and Art.3 of the DEVAW

²³¹ Art.4 of the DEVAW

argues that it becomes less effective in terms of enforcement and legal intervention towards the international human rights protection.

With regard to the relevant treaties to human trafficking, the Convention on the Elimination of All Forms of Discrimination against Women, the major United Nations treaty governing women's status, was adopted in 1979.²³² CEDAW focuses primarily on the elimination of discrimination against women. The Convention also aims to eliminate all forms of violence against women and of exploitation such as sexual exploitation or sexual harassment.²³³ In addition, CEDAW obliges states parties to take all measures including legislation to end abuses and discrimination against women.²³⁴ This includes the suppression of all forms of trafficking in women as well as the exploitation of the prostitution of women.

Although the Convention itself does not address violence against women directly, the Committee on the Elimination of Discrimination against Women adopted General Recommendations.²³⁵ It is noted that unlike CEDAW, General Recommendations are not binding instruments, but are designed to recommend states parties' obligations which are not mentioned in the

²³² Hereafter CEDAW, 1249 U.N.T.S. 13, 18 December 1979, entered into force 3 September 1981. As of 30 April 2010, there are 186 states parties to CEDAW

²³³ See Introduction and Preamble and Art. 1 of CEDAW, 1249 U.N.T.S. 13 and see also Corrigan K. "Putting the brakes on the global trafficking of women for the sex trade: an analysis of existing regulatory schemes to stop the flow of traffic" (2001) 25 *Fordham International Law Journal* 155

²³⁴ Art.6 of CEDAW, 1249 U.N.T.S. 13

²³⁵ Hereafter the CEDAW Committee. According to Art. 17, 20 and 21 of CEDAW, the Committee on the Elimination of Discrimination against Women is established to formulate a broad recommendation, monitor the implementation of the CEDAW, examine reports submitted by states parties and provide annual report to the General Assembly through the Economic and Social Council (ECOSOC) of the Progress of states parties regarding implementation of CEDAW

Convention itself.²³⁶ In relation to violence against women, General Recommendation No.19 defined gender-based violence as form of discrimination which is detrimental to women's ability to enjoy rights and freedom on the basis of equality with men.²³⁷

The General Recommendation No.19 also addressed an inescapable link between human trafficking and violence against trafficked women. It is also argued that the root causes: poverty, unemployment and war or armed conflict, are likely to increase opportunities for trafficking and new forms of sexual exploitation. Such root causes are incompatible with the equal enjoyment of rights by women and with respect for their fundamental rights and human dignity. Thus, women are pushed into a high risk of violence and abusive practices.²³⁸

The General Recommendation No.19 drew upon states to take measures to eliminate discrimination against women by any person.²³⁹ It also sought to attach responsibility to state, not only for its own acts of violence against women but for violence against women committed by private persons where a state fails to act with due diligence to prevent violations of rights, to investigate and punish acts of violence, and for providing compensations.²⁴⁰ In addition, the General Recommendation No.19 called for the adoption of specific preventive and punitive measures to combat trafficking in women and

²³⁶ Merry S.E. "Constructing a global law-violence against women and the human rights system" (2003) 28 *Law and Social Inquiry* 952

²³⁷ Committee on the Elimination of Discrimination against Women, "Violence against Women", General Recommendation No.19 (eleventh session, 1992), CEDAW/C/1992/L.1/Add.15, Paras. 11-12

²³⁸ Ibid, Paras.13-16

²³⁹ Art.2(e) of the CEDAW, 1249 U.N.T.S.

²⁴⁰ Committee on the Elimination of Discrimination against Women, "Violence against Women", General Recommendation No.19 (eleventh session, 1992), CEDAW/C/1992/L.1/Add.15, Para. 9

sexual exploitation.²⁴¹ State parties are recommended to report all information regarding legal, preventive and protective measures as well as the effectiveness of such measures to ensure the empowerment of women.²⁴²

Not only women but also minors make up the majority of victims of trafficking. The problem of child trafficking has been part of the history for our time. The Convention on the Rights of the Child accounts for the first international treaty which establishes an embracing prohibition on child trafficking.²⁴³ Since 1989, when it was adopted, the CRC has been ratified by almost all United Nations member states.²⁴⁴ According to the CRC, the well-being of children is of utmost interest to state parties. Several provisions contained therein are applicable to help curb trafficking in children for prostitution, especially provisions concerning child labour and sexual exploitation. States parties are required to give child victims special protection.²⁴⁵

The CRC contains a number of provisions applicable to the issue of trafficking. For example, Article 35 of CRC calls for prevention of the abduction of, sale of or traffic in children for any purpose or in any form. In addition, states parties are obliged to protect children from all forms of discrimination and required to protect children from sexual exploitation and

²⁴¹ Ibid, Para. 24 (g)

²⁴² Ibid, Para. 24 (v)

²⁴³ Hereafter the CRC, 1577 U.N.T.S. 3, 20 November 1989, entered into force 2 September 1990

²⁴⁴ As of 30 April 2010, there are 193 states parties to the CRC.

²⁴⁵ Bhabha J., 'Children, Migration and International Norms', in Aleinikoff A. and Chetail V. (eds.), *Migration and International Legal Norms*, (The Hague: T.M.C Asser Press, 2003), p.219

abuse, including prostitution and pornography.²⁴⁶ However, the phenomenon of child trafficking has significantly increased since the 1980s. Children are more vulnerable and are now at greater risk of trafficking for sexual exploitation.

The root causes of trafficking in children are multiple and complex. Some of the more frequently cited causes are poverty, lack of employment opportunities, low social status of a girl child and a general lack of education and awareness as well as inadequate legislation and weak law enforcement.²⁴⁷ In order to achieve the purpose of the CRC in tackling child trafficking, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children Child Prostitution and Child Pornography was adopted in 2000 supplementing the CRC.²⁴⁸

The OP/SOC provides states parties with detailed requirements to end sexual exploitation and abuse of children. It calls for states parties to prohibit the sale of children, child prostitution and child pornography²⁴⁹ and to ensure any related acts and activities are fully covered under criminal law.²⁵⁰ In addition, the OP/SOC strengthens the international legal obligation of state parties to criminalise violations of child rights and to protect the rights and interests of child victims of trafficking. In this connection, the OP/SOC obliges

²⁴⁶ Art 2 and Art.34 of CRC, 1577 U.N.T.S. 3

²⁴⁷ Report of the Special Rapporteur, *on the Sale of Children, Child Prostitution and Child Pornography*, MS Ofelia Calcetas- Santos, submitted in accordance with Commission on Human Rights at fifty-fifth session, *E/CN. 4/1999/71/Add.1*, 27 January 1999, Para. 49

²⁴⁸ Hereafter OP/SOC, 2173 U.N.T.S. 222, 25 May 2000, entered into force 12 February 2002. As of 30 April 2010, there are 137 states parties to OP/SOC

²⁴⁹ Art.1 of OP/SOC, 2173 U.N.T.S. 222

²⁵⁰ Art.3 of OP/SOC, 2173 U.N.T.S. 222

states parties to provide child victims with legal and support services in any interaction with the criminal justice system.²⁵¹ As a means of combating child trafficking which is often transnational activities, the OP/SOC values cooperation amongst states parties in assisting each other towards the prevention, investigation and prosecution of offences.

The issue of human trafficking has also been discussed in a wide range of international organisations through conferences, programmers of action, plan and specialist rapportuers appointed to special issues. For instance, the 1993 World Conference on Human Rights was held in Vienna, Austria. Following which, the Vienna Declaration and Programme of Action was adopted by 171 states.²⁵² The VDPA was adopted to promote and protect human rights as a matter of priority for the international community. It also focuses on human rights of women and of child as an inalienable, integral and indivisible part of the UDHR. In relation to the issue of trafficking, the VDPA defines international trafficking as a form of gender-based violence and calls for the elimination through international and national legislations.²⁵³

During the Fourth World Conference on Women in Beijing, China in 1995, considered to be the largest conference on women's issues, human trafficking was also issued.²⁵⁴ The conference focused on women in migration for which human trafficking was also discus, including other areas of

²⁵¹ Art.8 of OP/SOC, 2173 U.N.T.S. 222

²⁵² The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, *U.N. Doc. A/CONF.157/23*, 12 July 1993, hereafter the VDPA

²⁵³ Ibid, Para.18

²⁵⁴ Report of The Fourth World Conference on Women, Beijing, 4-15 September 1995, *A/CONF.177/20/Rev.1*, Paras.112-123 and Para.224

concern.²⁵⁵ The Beijing Declaration and Platform for Action was adopted to reaffirm the commitment to the goals set out in CEDAW and the Women's Declaration, for instance. In the connection to human trafficking, the Beijing Declaration calls upon governments to take appropriate measures to fight against violence against women.²⁵⁶ It also aimed at strengthening the protection of the rights of women and girls over existing laws and combating traffickers through the purview of criminal law.

Moreover, as a part of the UN reporting mechanism, the UN Special Rapporteur is appointed to play its role in monitoring tasks relating to human rights issues and make its annual report to the United Nations Commission on Human Rights (CHR). In connection with human trafficking, in 2004, the 60th session of the CHR appointed the first Special Rapporteur on Trafficking in Persons, Especially, Women and Children for an initial three-year period (2004-2007).²⁵⁷

²⁵⁵ The areas of concern are women and poverty, education and training of women, women and health, violence against women, women and arm conflict, women and the economy, women in power and decision making, institutional mechanisms for the advancement of women, human rights of women and the media, women and the environmental, and the girl child, in Report of The Fourth World Conference on Women, Beijing, 4-15 September 1995, *A/CONF.177/20/Rev.1*, Paras. 47-285

²⁵⁶ Ibid, Annex 1

²⁵⁷ Report of the Sixtieth Session of the United Nations Commission on Human Rights (CHR), 15 March-23 April 2004, *E/2004/43 - E/CN.4/2004/127*, (especially, Ch.I.37, p.13, Ch.II Sect. A Resolution 2004/45, 55th Meeting, 19 April 2004 pp 157-161, Ch.II Sect's Decision 2004/110, p. 330 and Ch.XII, paras. 408-411, pp. 420-42), which was endorsed by the Economic and Social Council, in its decision 2004/228. Ms Sigma Huda of Bangladesh served as the first Special Rapporteur on Trafficking in Persons, Especially Women and Children. The Special Rapporteur was invited to submit annual reports to the Commission together with recommendations on measures required to uphold and protect the human rights of the victims. The Commission requested the Special Rapporteur to respond effectively to reliable information on possible human rights violations with a view to protecting the human rights of actual or potential victims of trafficking and to cooperate fully with other relevant special rapporteurs, in particular the Special Rapporteur on violence against women, and to take full account of their contributions to the issue. The Commission also requested the Special Rapporteur to cooperate with relevant United Nations bodies, regional organizations and victims and their representatives. See further information <http://www2.ohchr.org/english/issues/trafficking/index.htm> and

By the Human Rights Council (HRC) Resolution 8/12, the mandate of the Special Rapporteur is extended for another three years from 2008-2011.²⁵⁸ Since assumed the office on 1 August 2008, the Special Rapporteur has published a number of reports including mission-specific addenda.²⁵⁹ The annual report was also submitted to HRC and the General Assembly in 2009.²⁶⁰ It provided a global perspective of the trafficking phenomenon and its trends, forms and manifestations. The Special Rapporteur highlighted that “trafficking in persons results in cumulative breaches of human rights and this correlation needs to be recognised in any intervention effort. To tackle human trafficking, the strategies must be people-centered approach.”²⁶¹

In addition, the Special Rapporteur suggested that international, regional and national strategies for tackling human trafficking should rest on the 5Ps- Protection, Prosecution, Punishment, Prevention and Promotion (of international cooperation) and the 3Rs- Redress, Rehabilitation and Reintegration of victims. Yet, more works and reports are required on the

<http://daccessddsny.un.org/doc/UNDOC/GEN/G04/162/00/PDF/G0416200.pdf?OpenElement> [accessed on 30 June 2010]

²⁵⁸ Report of the Human Rights Council on its Eighth Session, *A/HRC/8/52*, 1 September 2008, Part.1. It is noted that Human Rights Council was created by the Resolution adopted by the U.N. General Assembly, at its sixtieth session, 72nd plenary meeting, on 15 March 2006 with the main purpose of addressing situations of human rights violations and making recommendations on them, *A/Res/60/251*, 3 April 2006. Ms. Joy Ngozi Ezeilo of Nigeria serves as the second U.N. Special Rapporteur on Trafficking in Persons, Especially Women and Children. She took her office in August 2008

²⁵⁹ See for example, Report of Trafficking in Persons, especially Women and Children, submitted to the Human Rights Council on its eleventh session, *A/HRC/11/L.6*, 12 June 2009 and Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Ms. Joy Ngozi Ezeilo, Addendum. Mission to Belarus submitted in accordance with the Human Rights Council on its fourteenth session, *A/HRC/14/32/Add.2*, 23 April 2010

²⁶⁰ See, Report of the Special Rapporteur on Trafficking in Women, Women's Migration and Violence against Women, Ms. Joy Ngozi Ezeilo, submitted to the Human Rights Council on its tenth session, *A/HRC/10/16*, 20 February 2009 and United Nations, Trafficking in Persons, especially women and Children, noted by the General Assembly at its sixty-fourth session, *A/64/290*, 12 August 2009

²⁶¹ Report of the Special Rapporteur on Trafficking in Women, Women's Migration and Violence against Women, Ms. Joy Ngozi Ezeilo, submitted to the Human Rights Council on its tenth session, *A/HRC/10/16*, 20 February 2009, pp.25-26

above frameworks for further clarification. The Special Rapporteur also called for states to take further actions to combat human trafficking. States are urged to ratify relevant international instruments such as the Trafficking Protocol, including the adoption of standard norms i.e. Principles and Guidelines on Human Rights and incorporate them into domestic laws.

Finally, international cooperation is imperative for improving protection of and non-conditional assistance to ensure all trafficked victims access to available supports and assistance. With regard to the development of best practice, law enforcement officials should be adequately and regularly trained with clear emphasis on the human rights based approach of victims, including issues of child and gender sensitivity. Awareness-raising programmes should be put in place to encourage officials to recognise their important roles in prevention, prosecution of human trafficking and protection of trafficked victims.²⁶²

Despite the proliferation of international human rights instruments relating to human trafficking up to 2000, most of them are not yet effectively implemented, especially provisions on state parties' obligations to adopt protection measures, enforcement mechanisms and state co-operation to tackle human trafficking. The interpretation of the extent of human trafficking depends upon individual states, resulting in growing divergence and inconsistency in implementation and practice in different state parties. The next section analyses the Transnational Organized Crime Convention and its

²⁶² United Nations, Trafficking in Persons, especially women and Children, noted by the General Assembly at its sixty-fourth session, *A/64/290*, 12 August 2009, Paras.90-100

supplementary Protocols: the Trafficking Protocol and the Smuggling of Migrants Protocol. It should be noted, however, that such instruments are not human rights instruments, but anti-criminal legislations.

3.6 Human Trafficking: A Transnational Organised Crime Perspective

Human trafficking as a form of transnational organised crime has become another important aspect of contemporary human trafficking.²⁶³ Due to the low risk of detection but high in profits and minor penalties, human trafficking is considered to be the third most profitable activity for organised crime groups, after drugs and arms trafficking.²⁶⁴ In addition, increasing mobility and declining international restrictions on the movement of capital, goods and services have facilitated the growth of transnational activities both legal and illegal.²⁶⁵

Globalisation has created economic opportunities across borders, but harsher immigration policies in many destination countries have arguably obstructed the freedom of movement of potential migrants. Compounded by persistent poverty and socio-economic disparities in host countries, many potential migrants have become potential victims of illegal migration business. The involvement of transnational organised crime groups in human trafficking and the smuggling of migrants has become more apparent to the international

²⁶³ Bell R.E. "Sex trafficking: a financial crime perspective" (2001) 9 *Journal of Financial Crime* 168

²⁶⁴ Shelley L. "Trafficking in women: the business model approach" (2003) 10 *The Brown Journal of World Affairs* 121

²⁶⁵ Schloenhardt A. "Organized crime and the business of migrant trafficking: an economic analysis" (1999) 32 *Crime, Law and Social Change* 219

community.²⁶⁶ In 2000, due to the growing problem of transnational organised crimes, the UN adopted the Transnational Organized Crime Convention as the principle international instrument to fight against all forms of such crimes.

3.6.1 The Transnational Organized Crime Convention: The Process of Treaty-Making

The growing and worsening problem of transnational organised crime had enhanced the need for strengthening international cooperation against this problem. In 1998, on the recommendation of the Commission on Crime Prevention and Criminal Justice and the ECOSOC, the UNGA established an open-ended intergovernmental ad-hoc committee. The Ad-Hoc Committee was assigned to develop a new comprehensive international legal instrument on transnational organised crimes, including human trafficking and the smuggling of migrants.²⁶⁷ It was considered to be the first attempt of the international community in treaty-making for state cooperation to such issues.

The negotiations of the Ad Hoc Committee on the Convention and its additional Protocols, taken place in Vienna in which over 125 states participated, lasted for eleven sessions from January 1999 to October 2000.²⁶⁸

At the eleventh session, the Ad Hoc Committee finalised its work on the draft

²⁶⁶ Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), pp.29-32

²⁶⁷ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions, *U.N. Doc. A/55/383*, 3 November 2000

²⁶⁸ Vlassis D., *Overview of the Provisions of the United Nations Convention against Transnational Organized Crime and its Protocols*, a paper presented at the 119th International Training Course Visiting Expert's Papers, Resource Material Series No.59 and Ditmore M. and Wijers M. "The negotiations on the UN Protocol on trafficking in persons: moving the focus from morality to actual conditions" (2003) 4 *Nemesis* 79.

of the Convention and the supplementary Protocols. At the 55th session of the UNGA, the report on the draft Convention and its supplementary Protocols was submitted, in accordance with Resolution 54/126 for consideration and action.²⁶⁹

In November 2000, the Transnational Organized Crime Convention and its two supplementary Protocols (the Trafficking Protocol and the Smuggling of Migrants Protocol) were adopted at the 55th session of the General Assembly and opened for signature in Palermo, Italy, in December 2000. In accordance with Article 38 (the provision of entry into force), the Transnational Organized Crime Convention entered into force on 29 September 2003. As of 30 April 2010, 147 states have ratified to the Convention.²⁷⁰

3.6.2 *The Transnational Organized Crime Convention: Legal Application*

To be bound under the Convention and its supplementary Protocols, a state must ratify the Transnational Organized Crime Convention, before ratifying one or any of its supplementary Protocols.²⁷¹ Overall, the Convention can be divided into five areas of application: criminalisation, international cooperation, technical cooperation, witness protection and implementation. In addition, the Convention's provisions apply *mutatis mutandis* to its Protocols

²⁶⁹ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions, *U.N. Doc. A/55/383*, 3 November 2000, Para.7

²⁷⁰ See further information, <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>

²⁷¹ Art.37 (2) of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

in which the Protocol's provisions will have the same essential meaning or effect as in the Convention- unless necessary modification is required.²⁷²

According to the Convention, five offences, whether committed by individual or corporate entities, are criminalised to eliminate transnational criminal activities.²⁷³ These offences are: any acts participated in by an organised criminal group,²⁷⁴ money laundering,²⁷⁵ corruption,²⁷⁶ obstruction of justice,²⁷⁷ and serious crimes.²⁷⁸ In terms of the Convention's application, there are two prerequisites required.

First, an offence must be involved with an organised criminal group. An organised criminal group is broadly defined as "a structure or 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 in order to obtain, directly or indirectly, a financial or other material benefit".²⁷⁹ In addition, the

²⁷² Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions. Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, *U.N. Doc. A/55/383/Add.1*, 3 November 2000, Paras. 62 and 87

²⁷³ Art.10 (liability of legal persons) and see also Gallagher A. "Human rights and the new UN Protocols on trafficking and migrant smuggling: a preliminary analysis" (2001) 23 *Human Rights Quarterly* 978

²⁷⁴ Art. 5 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁷⁵ Art.6 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁷⁶ Art.8 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁷⁷ Art.23 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁷⁸ Art.3.1 (b) of the Transnational Organized Crime Convention and Art 2 (b) of the same Convention, Serious Crime is defined as conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty

²⁷⁹ Art. 2 (a) of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209. it can be noted that the Transnational Organized Crime Convention does not provide a definition of an organised crime, but it is understood as serious crime, committed by organised criminal groups, see discussion in Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), p.30

Interpretative Notes (*Travaux Préparatoires*) clarify further that in a broader term, “other benefit” shall include sexual gratification.²⁸⁰

Secondly, an offence must have some kind of a transnational aspect. For example, a trafficking offence has to be committed in more than one state. The offence can be committed in one state but substantially planned, directed or controlled in another state or in one state but involving an organised criminal group operating in more than one state. It may be committed in one state but having substantial effects on another state.²⁸¹ The author concludes that under this Convention, a trafficking offence is by the provision of the Trafficking Protocol a transnational crime.

The author contends that legal actions against transnational organised crime may become less effective if there is lack of communication and cooperation between law enforcement officials of states. Furthermore, the lack of uniformity between national legislations, especially, those relating to the Convention would render cross border cooperation more difficult. As a result, the Transnational Organized Crime Convention aims to strengthening and improving state cooperation in a number of areas of interventions e.g. mutual legal assistance,²⁸² investigations,²⁸³ judicial proceedings,²⁸⁴ and extradition.²⁸⁵

²⁸⁰ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions. Addendum. Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, *U.N. Doc. A/55/383/Add.1*, 3 November 2000, Para. 3

²⁸¹ Art.3.2 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁸² Art.18 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁸³ Art. 19 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁸⁴ Art.21 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁸⁵ Art.16 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

The Convention also aims to increasing working capacities of concerned government agencies and officials i.e. law enforcement and criminal justice systems.²⁸⁶ In order to enhance the effectiveness of intervention, states parties are required to develop specific training programmes, pertinent to the problem of law enforcement towards the fight against transnational organised crimes.²⁸⁷ The author, however, notes that as parts of capacity-building programmes, concerned agencies and officials should be adequately trained in respect of identification, protection to and assistance of trafficked victims.²⁸⁸

In addition, the Convention establishes provisions concerning witness protection to ensure a witness or a victim-witness physical protection, relocation, the right to privacy and confidentiality of identity of victim.²⁸⁹ States shall grant all the victims of the offences covered under the Convention a right to protection and assistance, including the right to compensation and restitution, yet subject to domestic laws.²⁹⁰ The author argues that such non-binding obligation to protect rather render protection measures less effective at domestic levels where views on protection are divergent and depends solely upon the sole discretion of states.

As part of implementation, the Convention mandates a conference giving opportunities to states parties to promote, review and improve working

²⁸⁶ Vlassis D., *Overview of the Provisions of the United Nations Convention against Transnational Organized Crime and its Protocols*, a paper presented at the 119th International Training Course Visiting Expert's Papers, Resource Material Series No.59, p.457

²⁸⁷ Art. 29 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁸⁸ See Chapter 8, pp.309-315

²⁸⁹ Art.24 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁹⁰ Art.25 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

capacities to combat transnational organised crimes.²⁹¹ Each state party is required to provide a regular report to the Conference with information regarding programmers, plans and practice as well as legislative and policy measures to facilitating measures e.g. exchange of information, technical assistance and cooperation with international and non-governmental organisations.²⁹²

3.6.3 Argentina and the US Proposals: The Origin of the Trafficking Protocol

In January 1999, the first session of the Ad Hoc Committee was held in Vienna to discuss a preliminary draft of the proposed Transnational Organized Crime Convention. The Ad Hoc Committee based its work on the document containing the draft Transnational Organized Crime Convention and on proposals and contributions submitted by governments.²⁹³ In its first meeting, the Ad Hoc Committee also invoked the idea of separate Protocols, pertaining to the need for specific offences in which the Convention could not meet.²⁹⁴ These offences are human trafficking and the smuggling of migrants, which are pertinent to this study.

The issue of human trafficking was initially proposed by the representatives from Argentina and United States and was focused on

²⁹¹ Art.32.1 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁹² Art. 32.3 (a-e) and 32.5 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

²⁹³ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions. Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, *U.N. Doc. A/55/383/Add.1*, 3 November 2000, Para. 25

²⁹⁴ *Ibid*, Paras.25-28

combating international trafficking in women and girls. Argentina and the United States undertook to produce the combined text to serve as the basis for future consideration and discussion of the draft Trafficking Protocol.²⁹⁵ The background of the initial proposals for the Trafficking Protocol and the Smuggling of Migrants Protocol can be traced back to the 1997 session of the UN Commission on Crime Prevention and Criminal Justice.²⁹⁶ While Argentina was introducing its interest on the issue of trafficking in minors, there had been an attempt by the government of Austria to present its initial proposal for a legal instrument on the issue of smuggling of migrants, which was later joined by Italy.²⁹⁷ The main reason for the idea of the separate Protocols was to draw a distinction between the smuggling of migrants and the trafficking in persons.

As stated in chapter 2,²⁹⁸ the concept of smuggling of migrants and human trafficking is linked and interrelated to a certain degree. For example, both are classified as irregular migration and assisted by intermediary agents. Nevertheless, they are fundamentally different and require some distinguishable legal interpretations, applications and responses. The author concludes that whereas the smuggling of migrants is a violation against a state's sovereignty, human trafficking is a violation of human rights for which trafficked victims should be granted human rights protection from states. The consideration of all articles of the draft Trafficking Protocol as well as the

²⁹⁵ Ibid, Para. 27

²⁹⁶ Report of the Secretary General, *Measures to Prevent Trafficking in Children*, E/CN.15/1997/12 and see also Gallagher A. "Human rights and the new U.N. Protocols on trafficking and migrant smuggling: a preliminary analysis" (2001) 23 *Human Rights Quarterly* 982

²⁹⁷ Ibid, Gallagher A., p. 983

²⁹⁸ See discussion in Chapter 2, pp. 45-49

Smuggling of Migrants Protocol took place from the second session – eleventh session of the Ad Hoc Committee. At the 55th session of the General Assembly, the draft Trafficking Protocol was approved and submitted for consideration and further action in accordance with resolution 54/126.²⁹⁹

3.7 The Trafficking Protocol: Overview³⁰⁰

3.7.1. *The Trafficking Protocol: Historical Review*

Since the Ad Hoc Committee adopted the revised text of the draft trafficking protocol in its 1st session, in 1999, a number of issues had been raised regarding the scope of legal intervention on human trafficking. During the first reading of the draft Trafficking Protocol, the question arose whether trafficking in women and children or trafficking in all persons should be addressed in the Protocol.³⁰¹ As stated above, the initial drafts of the Trafficking Protocol only discussed trafficking in women and children which occurred internationally.³⁰²

However, by recommendation of informal consultations during the 6th session of the Ad Hoc Committee, the draft of Trafficking Protocol was revised

²⁹⁹ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions, *U.N. Doc. A/55/383*, 3 November 2000, Paras.33 and 118

³⁰⁰ As of 30 April 2010, there are 129 state parties to the Trafficking Protocol, 2237 U.N.T.S. 319

³⁰¹ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions, *U.N. Doc. A/55/383*, 3 November 2000, Para.34

³⁰² The US government introduced the draft protocol to combat international trafficking in women and children, supplementary to the Transnational Organized Crime Convention, while the Argentina government introduced the draft elements for an agreement on the prevention, suppression and punishment of international trafficking in women and children

and covered international trafficking in all persons, regardless of race, gender, and age. Notably, the majority of trafficked people are women and children. In resolution 54/126, the General Assembly subsequently agreed to broaden the Trafficking Protocol to cover trafficking in persons, especially women and children.³⁰³

Pursuant to the General Assembly Resolutions 53/111,³⁰⁴ the attention of the Ad Hoc Committee was focused on a comprehensive legal instrument on combating transnational organised crime. The highest priority would be given to the signature, ratification and entry into force of the Convention. As a result, the draft Trafficking Protocol was considered as an optional Protocol, supplementing the Convention and covering specific offences. Moreover, as an optional Protocol, it needed to ensure a convergent approach which should be consistent with the Convention and is compatible and applicable to the general provisions of the Convention.

3.7.1 The Trafficking Protocol: Purposes, Scope of Application and Technical Issues

To fight against human trafficking, the Trafficking Protocol establishes the following purposes: to prevent and combat trafficking in persons; to protect and support the victim of trafficking, paying particular attention to

³⁰³ Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions, *U.N. Doc. A/55/383*, 3 November 2000, Para.54 and see also Progress Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *U.N.Doc. A/AC.254/30-E/CN.15/2000/4*, 29 March 2000, Para.34.

³⁰⁴ United Nations, *Transnational Organized Crime*, Resolution, adopted by General Assembly, *A/RES/53/111*, 20 January 1999

women and children and to promote and facilitate interstate cooperation in the fight against trafficking in persons.³⁰⁵ In conjunction with the Transnational Organized Crime Convention, the Trafficking Protocol further mandates three principles.³⁰⁶

First, to become a party to the Trafficking Protocol, a state is required to be a party to the Convention.³⁰⁷ Second, provisions of the Trafficking Protocol must be interpreted, and be consistent with the provisions of the Convention.³⁰⁸ The author notes that the principle *mutatis mutandis* is emphasised as a core principle in the Trafficking Protocol, for which it makes all core provisions under the Protocol similar to those under the Convention. However, it can be noted that the *mutatis mutandis* principle shall have no effect when the Trafficking Protocol contains specific provisions which are disparate.³⁰⁹ Third, offences established in accordance with the Protocol should also be regarded as offences established in accordance with the Convention.³¹⁰

As stated above, offences established in the Convention cover a range of criminal activities involved in the element of transnationality and organised crime. In this connection, all provisions of the Trafficking Protocol shall be

³⁰⁵ Art.2 of the Trafficking Protocol, 2237 U.N.T.S. 319

³⁰⁶ United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, (New York: United Nations, 2004), Paras.16-17.

³⁰⁷ Interpreted in relation to Art. 32.2 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

³⁰⁸ Art. 1.1 of the Trafficking Protocol, 2237 U.N.T.S. 319, reads in conjunction with Article 37.4 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

³⁰⁹ Vlassis D., *Overview of the Provisions of the United Nations Convention against Transnational Organized Crime and its Protocols*, a paper presented at the 119th International Training Course Visiting Expert's Papers, Resource Material Series No.59, p.460

³¹⁰ Article 1.3 and Art. 5 of the Trafficking Protocol, 2237 U.N.T.S. 319

implemented in conjunction with the Convention. The nature of transnationality and organised crime must be ensured as international minimum requirements.³¹¹ In addition, elements of crimes under the Transnational Organized Crime Convention must be taken into consideration when interpreting the provisions under the Trafficking Protocol. Any national legislation adopted in relation to the Trafficking protocol should also ensure that all minimum standards specified in the Convention and Protocol are fulfilled. Such point is to be discussed further in chapter 4 and chapter 5

It is the author's view that the minimum requirement could be extended when and where appropriate. Trafficking should not be treated as a sole international matter since such problem also occurs internally for which the prerequisites under the Convention are not always present i.e. the involvement of an organised crime group. Hence, a trafficking that is beset entirely within a country should be taken into account under domestic laws concerning human trafficking. With regard to protection, those international norms, for instance, the principle of non-discrimination and non-refoulement should be addressed to ensure that the Trafficking Protocol is to be implemented in consistent with other international obligations to human rights protection

3.7.3 The Definition of Trafficking in Persons: The Most Controversial Debate

Throughout the negotiations, all participants, for instance, international organisations, representatives of states and NGOs mediated in searching for

³¹¹ Art 34.4 of the Transnational Organized Crime Convention and see also United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, (New York: United Nations, 2004), Paras.16-17

a mutually acceptable text as being a significant part of the treaty-making process. However, diverse notions of what constitutes trafficking had become the central debate during the Protocol deliberation in Vienna. The discussion surrounding the definition of trafficking to be included in the Trafficking Protocol proved to be the most controversial issue.³¹² This two-year-long debate had been widely discussed on elements of trafficking.

For example, concerning trafficking as the transport of people combined with exploitative conditions, the International Organization for Migration (IOM) proposed a definition of trafficking, based on the idea of illegal or fraudulent entry in combination with some form of illicit profit-bearing activities exacted from a trafficked person.³¹³ However, the most striking issue during the drafting process was the debate on the definition of human trafficking amongst representatives of women's organisations. The debate was focused on at least two ideas. That is, whether the extent of trafficking could be limited to conditions of force, coercion and other similar means or whether voluntary, but with exploitation should be included in the definition.³¹⁴

³¹² Raymond J.G. "The new UN Trafficking Protocol" (2002) 25 *Women's Studies International Forum* 493 and Ditmore M. and Wijers M. "The negotiations on the UN Protocol on trafficking in persons: moving the focus from morality to actual conditions" (2003) 4 *Nemesis* 79

³¹³ According to the IOM's Mandate, trafficking occurs when: a migrant is illicitly engaged (recruited, kidnapped, sold, etc.) and or moved, either within national or across international borders; intermediaries (traffickers) during any part of this process obtain economic or other forms of exploitation under conditions that violate the fundamental human rights of migrants, see further information on IOM Programmes on Counter-Trafficking <http://www.iom.int/jahia/Jahia/counter-trafficking>

³¹⁴ See, for example, Raymond J.G. "The new U.N. Trafficking Protocol," (2002) 25 *Women's Studies International Forum* 493, Ditmore M. and Wijers M. "The negotiations on the U.N. Protocol on trafficking in persons: moving the focus from morality to actual conditions" (2003) 4 *Nemesis* 79, Chuang J. "Redirecting the debate over trafficking in women: definitions, paradigms, and contexts" (1998) 11 *Harvard Human Rights Journal* 65 and Abramson K. "Beyond consent toward safeguarding human rights: implementing the United Nations Trafficking Protocol" (2003) 44 *Harvard International Law Journal* 473

Initially, the definition of trafficking was proposed by the International Human Rights Networks (IHRN), led by the Coalition against Trafficking in Women (CATW), which proposed to abolish all forms of human trafficking for prostitution- whether or not the element of force is involved.³¹⁵ The IHRN views all women engaged in prostitution are exploited and innocent. In their view, prostitution *per se* is a violation of women's human rights and thus consent should be irrelevant in the case of trafficking for prostitution.³¹⁶

Such view was opposed by the Human Rights Caucus, organised by the Global Alliance against Trafficking (GAATW),³¹⁷ arguing that the element of force is a substantive content to the prohibition against all forms of human trafficking. Therefore, sex trafficking exists only when women are forced and coerced into prostitution. Contrary to the IHRN, the Human Rights Caucus sees sex work (prostitution) and trafficking as different issues. Prostitution is viewed as work and therefore, women can freely choose to engage in prostitution and their right of self-determination should be respected. Instead of treating anti-trafficking as equal to anti-prostitution, the Human Rights

³¹⁵Raymond J.G. "The new UN Trafficking Protocol" (2002) 25 *Women's Studies International Forum* 493

³¹⁶ Askola, H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, (Oxford: Hart Publishing, 2006), p.33 and Ditmore M. and Wijers M. "The negotiations on the UN Protocol on trafficking in persons: moving the focus from morality to actual conditions" (2003) 4 *Nemesis* 82

³¹⁷ According to GAATW, human trafficking includes all acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, harbouring or receipt of a person, involving the use of deception and coercion including the use or threat of force or the abuse of authority or debt bondage, for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slave-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage, in Global Alliance against Traffic in Women, *Human Rights in Practice: A Guide to Assist Trafficked Women and Children*, (Bangkok: GAATW, 2001), p.11

Caucus works towards the inclusion of human rights protection for all trafficked persons.³¹⁸

The author notes that the conceptual controversy amongst women's organisations was an historical and political consequence, which had been deeply divisive both in terms of definition and problem solving and had made it extremely difficult to reach agreement. As discussed earlier, the main debate was whether trafficking should be defined to include only forced prostitution or extended to voluntary prostitution. The Ad Hoc Committee later found sufficient consensus on the definition of trafficking, in which the ideas of IRHN gained more supports from most participants.³¹⁹ Agreement was finally reached on Article 3 of the Trafficking Protocol, in which trafficking consists of three separate elements:

- 1) An action, consisting of recruiting, transportation, transfer, harbouring or receipt of persons;
- 2) By means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of either power or of a position of vulnerability, giving or receiving payments or benefits to obtain the consent of a person;

³¹⁸ Ditmore M. and Wijers M. "The negotiations on the UN Protocol on trafficking in persons: moving the focus from morality to actual conditions" (2003) 4 *Nemesis* 81 and Chuang J. "Redirecting the debate over trafficking in women: definitions, paradigms, and contexts" (1998) 11 *Harvard Human Rights Journal* 79-86

³¹⁹ See, for example, Abramson K. "Beyond consent, toward safeguarding human rights: implementing the United Nations Trafficking Protocol" (2003) 44 Ditmore M. and Wijers M. "The negotiations on the U.N. Protocol on trafficking in persons: moving the focus from morality to actual conditions" (2003) 4 *Nemesis* 79, Chuang J. "Redirecting the debate over trafficking in women: definitions, paradigms, and contexts" (1998) 11 *Harvard Human Rights Journal* 65, and Gallagher A. "Human rights and the new UN Protocols on trafficking and migrant smuggling: a preliminary analysis" (2001) 23 *Human Rights Quarterly* 975

- 3) For the purpose of exploitation including at a minimum, 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 international legal definition of trafficking arguably provides a useful guideline for a state to develop its national anti-trafficking law. According to the Trafficking Protocol, it is central and mandatory obligation of all state parties to criminalise human trafficking.³²⁰ In this regard, a non-party state is also encouraged to adopt the agreed definition and establish a human trafficking offence in its concerned national law.³²¹ Each state is required to employ any conduct and incorporate specific provisions listed in the Convention and the Protocols set as international minimum requirement in which states may opt to go beyond it.

According to the agreed definition, trafficking is now acknowledged as a process of moving people within and between countries.³²² In the case of adults, trafficking needs the use of means specified in the Protocol e.g. force, coercion and deception to rendering consent irrelevant and that cannot be used as a defence. However, in case of child trafficking, only just moving them with an intended purpose of exploitation is sufficient to constitute human

³²⁰ Art.5 of the Trafficking Protocol, 2237 U.N.T.S. 319

³²¹ See the analysis of Chapter 4: Section 4.6.4, at pp. 160-161. Although Thailand has not yet ratified the Trafficking Protocol. However, it adopted and has recently implemented its anti-trafficking law which is consistent to the Trafficking Protocol

³²² Despite the requirement of a transnational nature of any offence established under the Convention and its supplementary Protocols, Art. 34.2 of the Transnational Organized Crime Convention, requires each state party to adopt a trafficking offence in its domestic law, independently of its transnational nature. In addition, Art.2 of the COE recognises internal trafficking as well as transnational trafficking, C.E.T.S.. No.197, 16 May 2005, entered into force 1 February 2008 and see also Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S 197, May 16, 2005, [hereafter the Explanatory Report], Para.7. See further discussion in Chapter 8, pp.311-312

trafficking. Despite embracing all forms of trafficking, the definition has yet shown some limitations. A number of legal terms related to the three separate elements of human trafficking have left undefined which need further clarifications.

In this regard, a state shall seek consultation from the reading of the Travaux Préparatoires (the Interpretative Notes) for development as to how legal terms were discussed and developed during the treaty's negotiations. Amongst which, the term 'exploitation' is yet ill-defined. After a year-long debate on the term 'exploitation' including the exploitation of the prostitution of others and other forms of sexual exploitation, still, the UN Commission on Crime Prevention and Criminal Justice was unable to reach the agreement upon such term. The Travaux Préparatoires clarify the term 'exploitation of the prostitution of others and other forms of sexual exploitation' only addressed in the context of the Trafficking Protocol, yet leaving rooms for state parties to the interpretation of such term in domestic laws.³²³ Without much analysis on such term, both the Trafficking Protocol and the Travaux Préparatoires, in return, provide very little guidance to the applicability and intervention of the Trafficking Protocol on this matter.

The author contends that the term "exploitation" is very complex, highly politicised and subjective. The lack of analytical clarity over the context of exploitation- leaving room for questions of what conduct constitutes exploitation and where dividing lines lies between exploitation and others- , is

³²³Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions. Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, *U.N. Doc. A/55/383/Add.1*, 3 November 2000, Para.64

deemed problematic, let alone addresses, practical consequences.³²⁴ Together with the distinction between trafficking and smuggling of migrants in which, in reality, these phenomena are often interrelated, all mentioned above have increased the risk of incorrect identification.³²⁵ Many (adult) trafficked victims remain misidentified and are prosecuted as criminals against immigration or prostitution laws, should they fail to prove that they are forced or coerced to work against their will. The author argues that such state practice could give rise in itself to human rights violation and calls for the interrogation of the extent, nature and context of means specified and that of the term exploitation. All of which should be articulated expansively covering interrelated socio-economic factors.

3.7.4 The Protection of Trafficked Persons: The Relatively Weak Provisions

The Trafficking Protocol is divided into four main areas: the general provisions (Article 1-5), the protection provisions (Article 6-8), the prevention, cooperation and other measures (Article 9-13) and the final provisions (Art.14-20). To reach the ultimate goal of the Trafficking Protocol, states parties are obliged to the following measures: prevention, prosecution of trafficking and protection of victims of trafficking, known as the Anti-Trafficking Framework.³²⁶ As a criminal based treaty, the Protocol undoubtedly comes under criticism, especially its protection provisions which do not create strong legal obligations on states parties. This Section is an overall assessment of the protection provisions.

³²⁴ Munro V.E. "Of rights and rhetoric: discourse of degradation and exploitation in the context of sex trafficking" (2008) 35 *Journal of Law and Society* 259-262

³²⁵ See further discussion in Chapter 8: Section 8.5.1., pp.311-315

³²⁶ Art. 2 of the Trafficking Protocol (a purpose clause), 2237 U.N.T.S. 319 and see further discussion in Chapter 8: Section 8.3-8.5, pp.292-334

The author argues that the current protection framework under the Trafficking Protocol overall is not comprehensive and, as a consequence, fails substantially to provide effective responses to the needs of trafficked victims. This claim can be substantiated by the following reasons. First, the Protocol itself illustrates very little interest to the protection of victims which is not taken as a starting point of counter-trafficking measures. The Trafficking Protocol offers very limited protection to and assistance of trafficked victims subjected to endeavour of states. For example, Article 6 of the Trafficking Protocol requires states parties to take basic measures, for example, the protection of the privacy and identity of the victim of trafficking under the domestic law,³²⁷ and the protection of any information in relevant court proceedings regarding the victim.³²⁸

In addition, the language used in protection provisions is not mandatory, but optional. States parties are only required to endeavor to provide basic protection for trafficked persons who are therefore not absolutely guaranteed the same standard of protection.³²⁹ Moreover, any other measures, concerning social supports i.e. housing, education, medical and counseling are optional. Likewise, opportunities for trafficked persons to remain in the country where they have found either temporarily or permanently are at the discretion of states parties.³³⁰

Although a victim has a significant role as a witness, the lack of effective witness protection provisions may result in the lack of incentives of a victim to cooperate with law enforcement officials to testify against traffickers.

³²⁷ Art.6.1 of the Trafficking Protocol, 2237 U.N.T.S. 319

³²⁸ Art.6.2 of the Trafficking Protocol, 2237 U.N.T.S. 319

³²⁹ Art.6.5 reads in conjunction with Art.7.1 of the Trafficking Protocol, 2237 U.N.T.S. 319

³³⁰ Art.6.3 and Art.7 of the Trafficking Protocol, 2237 U.N.T.S. 319

It is the author's view that where a trafficked victim decide to proceed against traffickers as a witness of a trafficking offence, witness protection provisions under the Convention should be taken into consideration.³³¹ With regard to the repatriation of trafficked persons, both a country of origin and of destination are required to cooperate to ensure a safe return that is without unreasonable delay.³³² However, the author's major concern for the return of trafficked victims is that their vulnerabilities in host countries may cause re-trafficking for which a state should take into consideration in its prevention measures.

3.7.5 The Prevention and Punishment of Human Trafficking: Law Enforcement and Border Control

To combat human trafficking, the Trafficking Protocol establishes a set of prevention and cooperation provisions, which are both legislative and policy-oriented measures.³³³ States are required to establish policies, programmes, and other measures for prevention of human trafficking and protection of victims from further re-victimisation.³³⁴ Such measures rely heavily upon inter-state cooperation i.e. information exchange regarding the travel documents and the fraudulent use of travel documents.³³⁵ Moreover, states parties should also provide adequate training for law enforcement officials, who are working on the prevention of trafficking in persons, the prosecution of traffickers and the protection of victims of trafficking.³³⁶

³³¹ Art.24 and Art.25 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

³³² Art.8 of the Trafficking Protocol, 2237 U.N.T.S. 319

³³³ Art.9-13 of the Trafficking Protocol, 2237 U.N.T.S. 319

³³⁴ Art.9 of the Trafficking Protocol, 2237 U.N.T.S. 319

³³⁵ Art.10.1 and Art.12 of the Trafficking Protocol, 2237 U.N.T.S. 319

³³⁶ Art 10.2 of the Trafficking Protocol, 2237 U.N.T.S. 319

As part of prevention measures, states are required to adopt effective measures on border controls. However, the author argues that stricter border control is considered less effective but the holistic approach on preventive measures should be developed as a way to address the root causes of human trafficking i.e. the socio-economic inequality, including gender, disparity, poverty and the lack of opportunities. To combat human trafficking, the issue of demand should be taken into consideration by states to adopt programmes to discourage demand i.e. educational programmes and socio-economic initiatives. The author argues that without concerns about such root causes of human trafficking, prevention and prosecution alone are doomed to failure. Finally, the author calls for the development of the comprehensive anti-trafficking framework which focuses particularly on the human rights protection framework will be discussed in chapter 8.³³⁷

3.8 Conclusion

The Trafficking Protocol is recognised as the latest international legal instrument dealing with contemporary human trafficking. The Protocol is focused on all forms of trafficking including sexual and labour exploitation. Moreover, it is the first legal instrument which defines the international definition of trafficking in persons. However, such definition has failed to respond to the complexity of human trafficking. In addition, some legal terms are not yet defined i.e. the term “exploitation” which results in practical difficulties.

³³⁷ See Chapter 8: Section 8.5, pp.309-334

Despite a strong desire to combat human trafficking, it must be concluded that the current anti-trafficking framework is far from being a comprehensive and effective approach. The Trafficking Protocol is a suppression and prevention legal instrument rather than a protection tool. Due to the language used, provisions on victim protection are relatively weak. To combat human trafficking, the human rights dimensions need to be addressed for which the Trafficking Protocol fails to effectively make such provisions. Effective national responses towards the human rights of trafficked persons will be another step forward and should not be underestimated. The convergence between international and national laws on human trafficking is of paramount importance in eliminating human trafficking.

The next chapter will discuss national legal responses to human trafficking in a country of origin. Although Thailand is not a party to the Transnational Organized Crime Convention nor the Trafficking Protocol, Thailand adopts its Anti-Trafficking in Persons Act B.E.2551 (2008) for which it is important to see as to how Thailand tackles human trafficking problem. In addition, Thailand is selected since it has faced a chronic problem of human trafficking within and across the country. Gender inequality and structural problems i.e. unequal economic are considerably the root causes which potentially constitute conditions for human trafficking for sexual exploitation in Thailand.

Chapter 4

National Responses to Human Trafficking in a Country of Origin: A Case Study of Thailand

4.1 Introduction

In the previous chapter, human trafficking was shown to be a major concern of the international community. Chapter 3 stated that the Transnational Organized Crime Convention and its supplementary Protocol: the Trafficking Protocol of 2000 were adopted as the main legal regime to combat transnational human trafficking. The underlying assumption under this legal regime is that human trafficking, recognised as a transnational criminal activity, must be criminalised.³³⁸ The Trafficking Protocol, read in conjunction with the Transnational Organized Crime Convention, calls for international co-operation and national responses to fight against human trafficking.

This emphasises that international law on human trafficking such as the Trafficking Protocol and other relevant international instruments cannot be effectively implemented without co-operation at national levels. Hence, chapter 4 and chapter 5 will examine national responses to the problem of

³³⁸ See discussion in Chapter 3: Section 3.5.3., pp.85-87 and 3.6., pp.97-105 and see, for example, general discussion in Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), pp.29-32, and Piotrowicz R., 'Trafficking in Human Beings and Their Human Rights', in Cholewinski, R., Perruchoud R. and MacDonald E., *International Migration Law: Developing Paradigms and Key Challenges*, (The Hague: T.M.C. Asser Press, 2007), pp.278-281 and 287-288

human trafficking both in a country of origin and in a destination country, respectively.

4.2 Background of the Study: Thailand as a Selected Country of Origin

It can be said that human trafficking at national levels can be tackled by effective domestic laws pertaining to the problem. This chapter selects a nation case study, primarily based on the following criteria: the scale of human trafficking for sexual exploitation, the typical categorisation of the country selected and the development of legal responses and policy initiatives to the problem of human trafficking. Considering these criteria, Thailand is chosen as the case study of human trafficking for sexual exploitation in the country of origin.

Despite there being no definite categorisation of status,³³⁹ Thailand is typically classified as a state of origin where Thai people mainly, young women, have been trafficked into more developed countries, for instance, Japan, Australia, Germany, the United States and the United Kingdom for sexual exploitation. As an economic hub in the Greater Mekong Sub-Region (GMS), Thailand is the ideal market for human trafficking within the region. It has been considered as a destination country for trafficked persons: men, women and children from neighbouring countries such as Myanmar, Lao, Cambodia and Vietnam. Various purposes include working in the commercial

³³⁹ Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), p.39

sex industry, fishery and agriculture.³⁴⁰ Recently, the country has been recognised as a transit country for those from the Former Soviet Bloc Countries and Latin America who have been trafficked into Thailand or via Thailand to third countries.³⁴¹

Concerning the problem of human trafficking in Thailand, there is no clear evidence of Thailand's first exposure to the problem of human trafficking. However, in the early 1980s, the issue of human trafficking came into the public agenda and the start of the fight against human trafficking when five victims of internal trafficking were burnt to death while confined in brothels in the south of Thailand.³⁴² Compounded by the growth of sex tourism in the South East Asia region since the 1980s, Thailand has experienced the accumulated problem of human trafficking, mingled with the growth of its sex industry.³⁴³

Despite the recognition of all forms of human trafficking, the author argues that the growth of the global sex industry is the most significant cause contributing to the current situation of human trafficking in Thailand. This is

³⁴⁰ United Nations Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-Region (UNIAP), *Human Trafficking in Thailand: Data Collation and Integration of Selected Human Trafficking Information*, (Bangkok: UNIAP, 2007), pp.10-14

³⁴¹ Gallagher A., 'Human Rights and Human Trafficking in Thailand: A Shadow TIP Report', in Beeks K. and Amir D (eds.), *Trafficking and Global Sex Industry*, (Oxford: Lexington Books, 2006), p.143 and see also information of human trafficking in Thailand in a web resource for combating human trafficking, visit <http://www.humantrafficking.org>

³⁴² International Organization for Migration, *ASEAN and Trafficking in Persons: Using Data as a Tool to Combat Human Trafficking*, (Geneva: IOM, 2007), p.84 and Gallagher A., 'Human Rights and Human Trafficking in Thailand: A shadow TIP report', in Beeks K. and Amir D.(eds.), *Trafficking and Global Sex Industry*, (Oxford: Lexington Books, 2006), p.144 and see general information in Skrobanek S., Boonpakdee N. and Jantateroo C., *The Traffic in Women: Human Realities of the International Sex Trade*, (London: Zed Books, 1997)

³⁴³ Skrobanek S., *Human Trafficking: from Vertical to Horizontal Journey*, a paper presented to the Human Rights Challenge of Globalisation: Asia Pacific-US: The Trafficking in Persons, Especially Women and Children, Hawaii, November 13-15, 2002, p.2

because Thailand is a country in South East Asia, where (sex) tourism was developed and has been flourishing in conjunction with prostitution since the early 1980s. One of the claims concerning the growth of Thai sex tourism was that it originated with the Rest and Recreation (R&R) programme for American's soldiers, when off military duty during the Vietnam War from 1957 to 1975.³⁴⁴

The large scale of the human trafficking problem in Thailand has come to the attention of the Royal Thai Government (RTG), other government agencies and local Non-Government Organisations (NGOs). Since the death of the victims of trafficking confined in the brothel in the 1980s mentioned above, the country has actively responded and has made efforts to combat human trafficking, especially, for sexual exploitation. As the member of the international community, the RTG has adopted a number of international instruments, pertinent to the problem of human trafficking, excluding the latest series of international laws on human trafficking: the Transnational Organized Crime Convention and the Trafficking Protocol.³⁴⁵

Within the country, the RTG has also enacted several anti-trafficking laws, which can be traced back to the year 1928. The new law on anti-trafficking, so-called the Anti-Trafficking in Persons Act B.E.2551 (2008), was

³⁴⁴ Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), pp.158-160 and 167-172 and Lim L. (ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998), pp.133-138 and Brody A., 'Prostitution in Thailand: Perceptions and Realities', in Gangoli G. and Westmarland N. (eds.), *International Approaches to Prostitution: Law and Policy in Europe and Asia*, (Bristol: Policy Press, 2006), pp.191-194

³⁴⁵ Thailand signed the Transnational Organized Crime Convention and the Trafficking Protocol on 13 Dec 2000 and 18 Dec 2001, respectively. However, as of 30 April 2010, it has not yet ratified these legal instruments

adopted on 30th January 2008. The Act came into force after 120 days from the date of its publication in the Government Gazette (5 June 2008). In this chapter, the author elaborates the scope of legal application of the Anti-Trafficking in Persons Act B.E.2551 and policies, pertinent to the problem of human trafficking. It also compares the said law to the previous law, Measures in Prevention and Suppression of Trafficking in Women and Children Act B.E. 2540, in relation to protection provisions.

It is the author's view that the Anti-Trafficking in Persons Act B.E.2551 (2008) is an asset for this study as it provides an opportunity to examine the scope of application and analyse the effectiveness of the law towards the development of a comprehensive approach to fight against human trafficking. Moreover, the examination of current initiatives, plans, projects and programmes on combating human trafficking for sexual exploitation illustrates the advantages and disadvantages of the current laws and policies on human trafficking. Finally, the author assesses and considers what constitutes best practice in tackling human trafficking in Thailand.

4.3 Organisation of Chapter 4

Chapter 4 is divided into four sections. Section one focuses on prostitution and human trafficking: an historical perspective. It is the author's assumption that human trafficking, especially for sexual exploitation is closely linked to the growth of prostitution in Thailand. This section starts with a brief history of prostitution in the early age- the Ayutthaya period- to show how the trade in women was initially formed and how prostitution in Thailand exists today. The author argues that polygamy; *the Sakdina* system and law are

potential factors to promote unequal gender relations, which perpetuates gender discrimination, including prostitution in Thailand. This section then discusses prostitution in the modern era, and the end of the regulation of prostitution.

Section two will analyse the paradigm shift in legal responses to prostitution and human trafficking. This section will also discuss the growth of sex tourism and the global sex industry during the period of Thai economic restructuring and the outbreak of the Vietnam War. The growth of the Thai sex industry as well as sex tourism has caused Thai women to migrate internally and internationally. Section two explores the root causes and debates around human trafficking for prostitution. Section three then examines legal and policy responses to human trafficking and prostitution. The analysis is central to the current anti-trafficking legal framework, with particular focus on prosecution, prevention, protection and cooperation. This section also elaborates on the Anti-trafficking in Persons Act B.E. 2551 (2008) and compares it with the previous legal framework. Section four is the chapter's conclusion, including recommendations to tackle human trafficking.

4.4. Prostitution and Human Trafficking: An Historical Perspective

4.4.1. Prostitution in Thailand in the Early Age: Polygamy, the Sakdina System and the Law

There is no clear evidence as to when prostitution became widespread in Thailand. Early reports on the issue of prostitution in Thailand were based on the European travellers in the 17th and 18th centuries, for example, Simon

de la Loubère, a French diplomat in the late 1600s.³⁴⁶ According to the reports, commercial prostitution first appeared in South East Asia in the late 1600s and emerged in Siam³⁴⁷ around the 17th century. During this period, only some kinds of prostitution probably existed such as maids or slaves who were prostituted to noble men.³⁴⁸

In the Western mind, the emergence of prostitution in Thailand had been closely linked to the polygamous marital system, and Sakdina social system or Thai feudalism.³⁴⁹ Under these systems, gender relations arguably played an important role cutting across different classes, based on socio-economic power in society.³⁵⁰ It is the author's conclusion that women's roles in general were subordinated and controlled by polygamy, Sakdina, and beliefs and double standards between women in different classes.

During the Ayutthaya kingdom (1350-1767),³⁵¹ the Sakdina system, analogous to the feudal society in Western countries, tied society together with social rank based on land distribution, and created sharp class and gender differentiation.³⁵² It was derived from the Hindu concept of 'Shakti'- the

³⁴⁶ Jeffrey L.A., *Sex and Borders: Gender, National Identity and Prostitution Policy in Thailand*, (Vancouver: UBC Press, 2002), p.4, Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), p.148 and Turton A., 'Thai Institutions of Slavery', in Watson J.L. (ed.), *Asian and African Systems of Slavery*, (Oxford: Blackwell, 1980), pp.252

³⁴⁷ The previous name of Thailand; it was changed to Thailand in 1939.

³⁴⁸ Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), pp 146-149.

³⁴⁹ Ibid, pp.139-157. Notably, slavery in Thailand was not an absolute system but based on Sakdina System

³⁵⁰ Jeffrey L.A., *Sex and Borders: Gender, National Identity and Prostitution Policy in Thailand*, (Vancouver: UBC Press, 2002), p.4

³⁵¹ The Ayutthaya Kingdom is the second capital of Siam, following the Sukhothai Period (1230-1448), established in the 14th century

³⁵² Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), pp.144-145

power of resources and energy.³⁵³ The Sakdina system was a hierarchical system of the population through land allocation. In this system, there were four ranks of people: *Khunnang* (the aristocrats), *Phra* (monks), *Phrai* (serfs) and Slaves (*Thasi*).³⁵⁴ Among the four ranks, slave was the lowest rank of the Sakdina system. However, the author notes that a slave under Sakdina System is different from the definition of slave in modern day slavery.³⁵⁵ That is slaves could be used as a legal substitute for corvée labour- a form of unfree as well as unpaid labour under the feudal system.³⁵⁶

Compounded by polygamy and the Sakdina system, gender and sexuality cutting across class differentiation were seriously controlled under male and state authority. For instance, women, in general, played their reproductive roles in the family. However, social class differentiation also indicated the sexual double standards of women in different classes. That is, elite women were prohibited premarital sexual intercourse to create and sustain the image of a good woman. On the other hand, women in a lower class seemed to have less control over their sexual behaviour and were labelled as 'bad women'.³⁵⁷ *Phrai* or slave women were easily sold into debt bondage or given away as gifts by their husbands, fathers or masters.

Not only did the socio-economic system affect gender relations, but the

³⁵³ Ibid, p.143

³⁵⁴ Turton A., 'Thai Institutions of Slavery', in Watson J.L. (ed.), *Asian and African Systems of Slavery*, (Oxford: Blackwell, 1980), pp.252-253

³⁵⁵ Ibid, pp. 255-272 and Bales K., *Disposable People: New Slavery in the Global Economy*, (London: University of California Press, 1999), pp.34-79

³⁵⁶ Turton A., 'Thai Institutions of Slavery', in Watson J.L. (ed.), *Asian and African Systems of Slavery*, (Oxford: Blackwell, 1980), p. 281

³⁵⁷ Jeffrey L.A., *Sex and Borders: Gender, National Identity and Prostitution Policy in Thailand*, (Vancouver: UBC Press, 2002), p.4

author argues that the Thai law, called the Three Seal Laws, the Pramuan Kotmai Rachakan Thi Nung (the legal code of Rama I),³⁵⁸ also encouraged gender inequality through the empowerment of male and state authority. The Three Seals Law was observed under the reign of Rama I (1782-1809) of the Rattanakosin Kingdom. The law also incorporated the remaining laws in the Ayudhya kingdom, of which some ninety percent of legal materials were lost during the Burmese conquest in the 18th century.³⁵⁹ The Three Seals law was considered as a comprehensive body of legal text and was recognised as the classic Thai law.³⁶⁰

In connection with gender inequality, the author concludes that women had been adversely affected by the intervention of the Three Seals Law. For instance, women had overall fewer civil rights as well as social and economic rights. Women with no legal protection had no right to make a complaint about sexual molestation. Married women convicted of an adulterous offence, lost all rights to property and were subjected to the death penalty or public shaming.³⁶¹ The Thai Seals Law seemed to give more rights and authority to men: husbands, fathers or masters. Both elite and non-elite women were exposed to violence against women, though different in forms and levels. The author considers that the Three Seals Law is arguably a rigid paternalistic

³⁵⁸ Hook M.B. "The Indian-derived law texts of South East Asia" (1978) 37 *Journal of Asian Studies* 206

³⁵⁹ Reynolds F.E. "Civic religion and national community in Thailand" (1977) 36 *Journal of Asian Studies* 272

³⁶⁰ Hook M.B. "The Indian-derived law texts of South East Asia" (1978) 37 *Journal of Asian Studies* 206 and Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), p.146

³⁶¹ Ibid, Truong, p.147

law, consolidated by the culture of polygamy and constituted women's subordination.

Under the Three Seals Law and polygamy in society, men were allowed to buy women in financial difficulty to become wives of the third category. The categories of wives were ranked as follows: *Mia Klang Muang* or parental – consent wife, *Mia Klang Nok* or minor wives and *Mia Klang Thasi* or a slave wife, acquired through purchase or indebtedness.³⁶² It was the first time too that the status of a prostitute was defined in a Thai legal text. The prostitute was found and defined in the section of family law as *Ying Nakorn Sopaene*, someone in a vulnerable legal and economic position.³⁶³ Historically speaking, prostitution from the Ayutthaya Kingdom to the early Rattanakosin Kingdom (Rama I-V) was legally subject to registration.³⁶⁴

Theravada Buddhism has played a significant role in Thailand since 1200 AD.³⁶⁵ Buddhism has been unified in the everyday life of most Thai people. Not only serving as guidance for Thai polity and religious practices, *Theravada Buddhism* was also used as the foundation of the classic Thai laws, including the Three Seals.³⁶⁶ *Theravada Buddhism* provides a cultural core for Buddhists via the two doctrines: *karma* (the embodiment of physical,

³⁶² Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), p.146

³⁶³ Hantrakul S., *Prostitution in Thailand*, a paper presented at the Women in Asia Seminar Series, Monash University, Melbourne, 22-24 July 1983, p.6

³⁶⁴ Boonchalaksi W. and Guest P., 'Prostitution in Thailand' in Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998), p.130

³⁶⁵ Pipat K.P. "Gender and sexual discrimination in popular Thai Buddhism" (2006) 1 *Journal for Faith, Spirituality and Social Change* 69

³⁶⁶ Reynolds F.E. "Civic religion and national community in Thailand" (1977) 36 *Journal of Asian Studies* 268

verbal and cognitive actions of past lives) and *atman* (the transmigration of the eternal soul).³⁶⁷ However, the doctrine of *Karma* has long been the subject of a critical debate of gender relations and women's status.³⁶⁸

Popular Buddhist philosophy indicates that men are karmically superior to women and that being born as a woman underlies the inferiority and impurity of *karma* in past lives.³⁶⁹ As for prostitution, it is believed that prostitutes are born in imperfect *Karma* and are suffering, due to their demerit (wrong actions) from the past lives.³⁷⁰ Despite claims about the growth of prostitution in Thailand and its relation to *Buddhism*³⁷¹ throughout the history of prostitution in Thailand, the author concludes that popular beliefs, social practices in gender relations and law have perpetuated prostitution for which it has been playing one of the major sectors in Thai economic development.

4.4.2 Prostitution during the Modernisation Period: the End of Regulation of Prostitution

Prostitution during this period continued to flourish.³⁷² At the beginning of the Rattanakosin Kingdom, the immigration of Chinese workers was also a

³⁶⁷ Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), p.132

³⁶⁸ See, for example, Pipat K.P., "Gender and sexual discrimination in popular Thai Buddhism" (2006) 1 *Journal for Faith, Spirituality and Social Change* 69 and Muecke M.A. "Mother sold foods, daughter sells her body: the cultural continuity of prostitution" (1992) 35 *Social Science Medicine* 891

³⁶⁹ Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), pp.133-135

³⁷⁰ Muecke M.A. "Mother sold foods, daughter sells her body: the cultural continuity of prostitution" (1992) 35 *Social Science Medicine* 893-894

³⁷¹ For example, Brody A., 'Prostitution in Thailand: Perceptions and Realities' in Gangoli G. and Westmarland N., *International Approaches to Prostitution: Law and policy in Europe and Asia*, (Bristol: The Policy Press, 2006), pp.198-199

³⁷² Boonchalaksi W. and Guest P., 'Prostitution in Thailand' in Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO,1998), p.130

factor contributing to the growth of prostitution. Prostitutes at this period served both their local and foreign clients. Because of the large scale of immigration, brothels were geographically situated in various migrant communities up to the reign of King Rama IV (1852-1868).³⁷³ During the mid 1800s, the beginning of the modernisation era, Thailand was exposed to considerable pressure to open up to Western trade and communication.³⁷⁴

The arrival of Westerners had made significant changes in Siam. To avoid colonisation by the imperial powers from the West, Rama V (Chulalongkorn) decided to reform socio-politics and the economics of Siam to become a so-called (in the eyes of the West) civilised country. The legal and political reforms and the abolition of slavery in 1905 were seen as significant tools for development. Slaves, including slave wives no longer existed. The institution of slavery was abolished, whereas freed slave women had become prostitutes for their survival in the post slavery era.³⁷⁵ However, prostitution after the emancipation of slavery was legal only through state regulation. The regulation of prostitution aimed to control and prevent sexually transmitted diseases and to increase state revenues.³⁷⁶

³⁷³ Muecke M.A. "Mother sold foods, daughter sells her body: the cultural continuity of prostitution" (1992) 35 *Social Science Medicine* 892-893

³⁷⁴ Jeffrey L.A., *Sex and Borders: Gender, National Identity and Prostitution Policy in Thailand*, (Vancouver: UBC Press, 2002), p.6. During this period, Siam was bound to the treaty between Great Britain, America and other Western powers.

³⁷⁵ Hantrakul S., *Prostitution in Thailand*, a paper presented at the Women in Asia Seminar Series, Monash University, Melbourne, 22-24 July 1983, p.6

³⁷⁶ Boonchalaksi W. and Guest P., 'Prostitution in Thailand' in Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998), p.131, Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), pp.153-154 and Jeffrey L.A., *Sex and Borders: Gender, National Identity and Prostitution Policy in Thailand*, (Vancouver: UBC Press, 2002), pp.9-11

In 1908, the Control and Prevention of Venereal Disease Act was accordingly enacted and passed by the Siamese government in 1909.³⁷⁷ Under this Act, brothels and prostitutes were controlled by the government concerning health, social order and revenues. Prostitution was regulated through a system of licensing and fees.³⁷⁸ To obtain a license, women had to prove they were free from venereal disease and voluntarily consent to engage in prostitution. Therefore, prostitution was not forced in nature under this legislation. Likewise, the brothel owners had to ensure the safety of the house.³⁷⁹ Every brothel had to hang a green lantern at the front door to indicate it was a licensed brothel, despite there being no stipulation under the Act regarding the colour of the lantern. Prostitutes in a legal brothel were subsequently known as green lantern women.³⁸⁰

Concerning the prostitution of minors, a brothel operator was also obliged to ensure that the prostitute had to be at least fifteen years of age and could not be forced.³⁸¹ The author notes that the age limit under the 1908 Act was lower than the international standard.³⁸² Although the barrier to prostitution

³⁷⁷ The Control and Prevention of Venereal Disease Act R.S.127, B.E. 2452 (1908)

³⁷⁸ Section D (3) (c) of the Control and Prevention of Venereal Disease Act R.S. 127, B.E. 2452 (1908) and see also Asia Watch and the Women's Rights Project, *A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand* (New York: Human Right Watch, 1993), pp. 20-21

³⁷⁹ Section A of the Control and Prevention of Venereal Disease Act R.S. 127, B.E. 2452 (1908)

³⁸⁰ Boonchalaksi W. and Guest P., 'Prostitution in Thailand' in Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998), pp.130-131 and pp.163-165

³⁸¹ Section A (8) (c) and (d) of the Control and Prevention of Venereal Disease Act R.S.127, B.E. 2452 (1908)

³⁸² The age limit of the early age Treaties is under twenty, even with her consent, for example, the 1910 White Slave Traffic Agreement, 3 L.N.T.S. 278, in Chapter 3, p.70

of minors was stipulated under this Act, the Penal Code of 1908³⁸³ specified that the abduction or a motive of abduction for immoral purposes of minors between 10 and 14 years of age inclusive was punishable unless it was with consent.³⁸⁴

To sum up, prostitution in Thailand since the Ayudhya period had existed as a part of the social mechanism of Thai society. It has also been a significant factor for Thai economic development. The legalisation of prostitution remained until Siam became a member of the international community and responded to the fight against the traffic in women and children and prostitution. Prostitution in Thailand subsequently shifted away from regulation to criminalisation of prostitution.

4.5 Criminalisation of Prostitution and the Elimination of Human Trafficking: Thailand's Responses to International Pressures

4.5.1 Thailand's First Attempt

During the period of modernisation, polygamy, gender inequality and the *Sakdina* system were condemned by the West as barbaric and were offered as the reason for colonisation.³⁸⁵ Siam encountered internal problems of social transformation towards civilisation. The emancipation of slaves, the socio-legal reform of the family unit based on monogamy and equality

³⁸³ The Penal Code of R.S.127 B.E. 2451 (1908), 15 April B.E. 2451 was the first Penal Code in Thailand

³⁸⁴ Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), p.154

³⁸⁵ Jeffrey L.A., *Sex and Borders: Gender, National Identity and Prostitution Policy in Thailand*, (Vancouver: UBC Press, 2002), p.7

amongst the Siamese directly affected the growth of prostitution. By contrast, the international pressures in the fight against the traffic in women (White Slave Trade) in the early nineteenth century called for state co-operation to end this traffic in women and girls for prostitution, which later influenced the reform of prostitution laws in Siam.³⁸⁶

From 1904 to 1950, Siam ratified three international documents on the traffic in women and prostitution as follows: the 1904 White Slave Trade Agreement, 1910 White Slave Traffic Convention and 1921 Traffic in women Convention. To respond to its international legal commitment, Siam enacted the Traffic in Women and Girls Act B.E.2471 in 1928 by the Royal Decree which adopted a criminalistic approach, in relation to international law.³⁸⁷ In general, the Act targeted all women and girls coming into or departing from Siam as potential victims of trafficking.³⁸⁸ According to the Act, it also empowered officials for the investigation and examination of women's migration under reasonable suspicion of trafficking.³⁸⁹ The author argues that 'reasonable suspicion of trafficking' ironically made the legal status of female migrants to or from Siam passive and vulnerable to the control of their sexuality by such Act.

³⁸⁶ Ibid, p.11

³⁸⁷ Skrobanek S., Boonpakdi N., and Janthakeero C., *The Traffic in Women: Human Realities of the International Sex Trade*, (London: Zed Books, 1997), p.8

³⁸⁸ Section 4 of the Traffic in Women and Girls Act B.E.2471 provided that whoever brings or causes another person to bring any women or girl child into Siam for commercial sexual intercourse; takes or causes another person to take any women out of Siam for commercial sexual intercourse; illegally receives or sells any women or girl child with the knowledge that the women or girl was brought into Siam for such purpose shall be liable to be punished with imprisonment not exceeding 7 years or fine not exceeding 1,000 Baht or both

³⁸⁹ Jeffrey L.A., *Sex and Border: Gender, National Identity and Prostitution Policy in Thailand*, (Vancouver: UBC Press, 2002), pp.12-14

In addition, the legal intervention of the Traffic in Women and Girls Act B.E.2471 was contradictory to the Control and Prevention of Venereal Disease Act, in which prostitution was legal and organised by regulations. The Control and Prevention of Venereal Disease Act had been enforced until 1960 and was repealed by the introduction of the Suppression of Prostitution Act B.E. 2503 (1960).³⁹⁰ During the reform of the prostitution law, a number of the provisions under existing laws concerning prostitution and trafficking were also revised and amended. For instance, the Penal Code was revised in 1956. Although prostitution was still legal under this Act, the procurement of women and girls for the purpose of prostitution was an offence. Concerning the age limit of consent, in response to the international standard, the Penal Code increased the age limit of consent from under 10 years of age to not less than 18 years of age.³⁹¹

In 1957, due to the international pressure for the abolition of prostitution, the draft Suppression of Prostitution Bill was proposed and was later adopted in 1960. The Suppression of Prostitution Act B.E. 2503 (1960)³⁹² took the prohibitionist legal framework. In conjunction with the 1949 Trafficking Convention, prostitution under this Act was criminalised. Any persons involved in prostitution i.e. owners, caretakers, procurers, pimps, managers of entertainment places, who allowed prostitution to take place in

³⁹⁰ Brody A., 'Prostitution in Thailand: Perceptions and Realities' in Gangoli G. and Westmarland N., *International Approaches to Prostitution: Law and Policy in Europe and Asia*, (Bristol: The Policy Press, 2006), pp.194-196 and Boonchalaksi W. and Guest P., 'Prostitution in Thailand' in Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998), p.163

³⁹¹ The Penal Code of R.S. 127 was replaced by the Penal Code B.E. 2499 (1957), Government Gazette, Vol.73, Part 95, dated 15 November B.E. 2499 (1957), Section 282

³⁹² The Suppression of Prostitution B.E. 2503 (1960), Government Gazette, Vol.2, Part 212, dated 28 November B.E.2503 (1960)

the establishment, and prostitutes were penalised but not clients. Further, the Act imposed penalties for the seduction and abduction of minors and increased the age limit of consent to 18 years.³⁹³ Prostitutes were sent to rehabilitation centres for adult education, vocational training, and counselling for alternative employment.³⁹⁴

A comparison of the punishment under the Suppression of Prostitution Act B.E. 2503 (1960) showed it was heavier than that under the Penal Code 1956. Under the Suppression of Prostitution Act, prostitutes were liable to imprisonment for not more than six months or a small fine or both.³⁹⁵ Likewise, procurers were liable for imprisonment of not more than three months or a smaller fine.³⁹⁶ The brothel owners were subject to the heaviest penalties- imprisonment of not more than one year or a larger fine.³⁹⁷ By contrast, under the Penal Code B.E.2499 (1957), prostitutes were not liable to punishment for sexual offences. However, the procurement for prostitution of girls under 18 years of age, even with their consent, was penalised with up to five years of imprisonment and a heavy fine.³⁹⁸

³⁹³ Section 8 and Section 9 of the Suppression of Prostitution Act B.E.2503 and see also Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), p.155

³⁹⁴ Section 11 of the Suppression of Prostitution Act B.E. 2503 (1960) and see also Brody A., 'Prostitution in Thailand: Perceptions and Realities', in Gangoli G. and Westmarland N., *International Approaches to Prostitution: Law and Policy in Europe and Asia*, (Bristol: The Policy Press, 2006), p.194

³⁹⁵ Section 6 of the Suppression of Prostitution Act B.E. 2503 (1960)

³⁹⁶ Section 9 of the Suppression of Prostitution Act B.E. 2503 (1960)

³⁹⁷ Section 10 of the Suppression of Prostitution Act B.E. 2503 (1960)

³⁹⁸ Section 282 of the Penal Code B.E. 2499 (1956). Section 282 was later amended by the Penal Code Amendment Act (No.14) B.E.2540, Government Gazette, Vol.114, Part 72 (a), dated 16 November 1997. The penalty under Section 282 is amended from 1-10 years imprisonment and a fine from 2,000-20,000 Baht, which are heavier than the Penal Code B.E. 2499 and than any existing laws pertinent to human trafficking

To recap, the Suppression of Prostitution Act B.E. 2503 (1960) aimed to criminalise prostitution and to reform prostitutes who were seen as in need of moral rehabilitation. The author views this Act as a discriminatory law. The law blamed females for promiscuity but not their clients.³⁹⁹ Prostitutes were penalised under this Act, even if they had been forced into prostitution. The Suppression of Prostitution Act B.E.2503 (1960) was then repealed by the promulgation of the Prevention and Suppression of Prostitution Act B.E.2539 (1996).⁴⁰⁰

Unlike the Suppression of Prostitution Act B.E. 2503(1960), the Prevention and Suppression of Prostitution Act B.E. 2539 (1996) targeted all third party acts involved in prostitution, for example, procurers,⁴⁰¹ parents or guardians,⁴⁰² owners of brothels,⁴⁰³ others involved in the business of prostitution, and clients.⁴⁰⁴ This is because the drafters recognised that the problem of prostitution in Thailand is largely a negative consequence of poverty, gender inequality and organised crime.⁴⁰⁵ Therefore, prostitutes should not be treated as criminals. To prevent and suppress prostitution as a means to end human trafficking, under the purview of criminal law, the Prevention and Suppression of Prostitution Act B.E.2539 (1996) Act

³⁹⁹ Asia Watch and the Women's Rights Project, *A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand* (New York: Human Right Watch, 1993), p. 24

⁴⁰⁰ The Prevention and Suppression of Prostitution Act B.E.2539 (1996), Government Gazette, Vol.113, Part 54 (a), dated 22 October 2539 (1996)

⁴⁰¹ Section 9 of the Prevention and Suppression of Prostitution Act B.E. 2539 (1996)

⁴⁰² Section 10 and 13 of the Prevention and Suppression of Prostitution Act B.E.2539 (1996)

⁴⁰³ Section 11 of the Prevention and Suppression of Prostitution Act B.E. 2539 (1996)

⁴⁰⁴ For example, Section 8: clients of prostitution of the Prevention and Suppression of Prostitution Act B.E. 2539 (1996)

⁴⁰⁵ Jamsutee U., 'Thai Legislation against Human Trafficking', in Asian Women's Fund (AWF), *Anti-Trafficking Law in Asia*, Expert Meeting, Tokyo, 25-27 November 2003, p.57

introduced heavy punishment through fines, imprisonment, including life imprisonment or the death penalty to third parties i.e. traffickers.

The heavier penalties were used in the case of prostitution of children despite the aim to decriminalise prostitution, street prostitution (in the case of adult sex workers) can be prosecuted for causing a nuisance to the public by soliciting or contacting customers in public areas. Street (adult) sex workers are punished should they congregate with other persons for prostitution, or establish, communicate and advertise for prostitution.⁴⁰⁶

4.5.2 Prostitution in Thailand since 1960: the Growth of Sex Tourism and the Global Sex Industry

During the modernisation era, the Thai economy had experienced many stresses and strains due to the European rules over trade and capital movement. For example, the Bowring treaty set the conditions whereby the British had full rights of residence and to purchase property in Siam.⁴⁰⁷ The lack of autonomy of the Thai economic system had caused the dependency of Thai economic development on the global economy.

Since 1960, economic development in Thailand has been exposed to a strong international orientation. Thailand announced a more open economic strategy through trade liberalisation, foreign investment in local industry, economic restructuring from agricultural to industrial exports and service

⁴⁰⁶ Section 5-8 of the Prevention and Suppression of Prostitution Act B.E.2539 (1996)

⁴⁰⁷ Phongpaichit P., *From Peasant Girls to Bangkok Masseuses*, (Geneva: ILO, 1982), p.4

sectors.⁴⁰⁸ Development policies in Thailand advocated centralisation of economic development, which rather widened the gap between the rural and urban populations. Peasant labour of a self-sufficient lifestyle was marginalised and many rural inhabitants suffered persistent poverty.⁴⁰⁹

The change of domestic policies was linked to other external factors at the global level. During the Cold War period, political constraint within South East Asia was claimed as the main reason for the US forces to intervene in Vietnam to prevent the spread of communism.⁴¹⁰ The arrival of the US Forces in this region was a clear cause of the growth of leisure and the service sectors in Thailand. During the Vietnam War, Thailand was able to increase its national income from the entertainment industry, because of the 'Rest and Recreation' programme of the US armed forces (R&R). There had been a rapid increase of entertainment places in Bangkok and Pattaya as centres most preferred by American soldiers. In addition, the demand for labour rose in cities, which were the centres for the US military bases in Thailand. It is claimed that the arrival of the US Forces had a visible effect on the growth of the sex industry.⁴¹¹

⁴⁰⁸ Boonchalaksi W. and Guest P., 'Prostitution in Thailand', in Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998) pp.133-134 and Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), pp.158-159

⁴⁰⁹ Brody A., 'Prostitution in Thailand: Perceptions and Realities', in Gangoli G. and Westmarland N., *International Approaches to Prostitution: Law and Policy in Europe and Asia*, (Bristol: The Policy Press, 2006), pp.187-188

⁴¹⁰ Ibid, pp.191-192 and see also Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), p.158 and Boonchalaksi W. and Guest P., 'Prostitution in Thailand', in Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998), p.133

⁴¹¹ Brody A., 'Prostitution in Thailand: Perceptions and Realities' in Gangoli G. and Westmarland N., *International Approaches to Prostitution: Law and Policy in Europe and Asia*, (Bristol: The Policy Press, 2006), pp.192

As stated above, the transformation of an agriculture based society into a newly industrialised society resulted in development disparities between rural areas and urban cities. The wealth in urban cities has resulted in the migration of peasant labour, flocking to Bangkok and other industrial cities. Rural-urban migration has become the phenomenon of every day life of rural people. The economic restructuring in Thailand has also given women more employment opportunities than agricultural society where women's roles were mainly restricted to caretakers. In addition, the economic transformation has contributed to the changes in the pattern of migration. The number of female migrants has increased and exceeded that of their male counterparts, largely due to demand for female factory workers.⁴¹²

Although economic restructuring has given women better opportunities, in rural societies women are rarely encouraged to attend schools and subsequently suffered from a lack of education or even illiteracy. Such women have been chosen by the household as migrants in the new economic development. However, due to lack of education, these women have been offered low paid jobs, whereas faced a high cost of urban living. The household income maximisation is less possible for female migrants. Whilst migration could not overcome persistent poverty or could not provide upward mobility, many rural women have faced the burden of being dutiful daughters. Through prostitution, the young and poorly educated chose sex related jobs to fulfil the needs of their family back home.⁴¹³

⁴¹² Skrobanek S., Boonpakdi N. and Janthakeero C., *The Traffic in Women: Human Realities of the International Sex Trade*, (London: Zed Books, 1997), p.22

⁴¹³ Ibid, p.30 and Boonchalaksi W. and Guest P., 'Prostitution in Thailand', in Lim L.(ed.), *The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia*, (Geneva: ILO, 1998), pp.132-133

The sex industry in Thailand seems to be especially viable since the social structure is traditionally based on polygamy. In addition, gender hierarchy is deeply rooted in Thai popular culture. Women are inferior to men and are valued or devalued through the 'sexual double standard', which morally and legally punishes female's sexual promiscuity but not vice versa.⁴¹⁴

Prostitution in Thailand functions to maintain polygamy based on male desires, in the context of a monogamous law. Thus, polygamy must be invisible, so too are male desires outside marriage. Solely prostitutes are blamed for this cause. Since prostitution is a dynamic issue, it could not be understood by simple explanation. The growth of prostitution in Thailand is not only based on economic or social practice but it is arguably a burden of dutiful daughters or responsible mothers or sisters.⁴¹⁵

Although the Vietnam War ended with the withdrawal of the US Forces, tourism has continued as a major industry in Thailand. It is also one of the most important sources of foreign exchange and employment generation.⁴¹⁶ Since the 1960s, tourism has had a consistent growth and has been promoted and supported by every government. Since 2008, the Thailand's tourism industry has been plagued by internal factor – the ongoing political unrest and external factors i.e. the outbreak of H1N1 epidemic and the global economic crisis. In the special cabinet meeting on 18 April 2009, the RTG, led by

⁴¹⁴ Ibid, in Gangoli G. and Westmarland N., pp.191

⁴¹⁵ Seabrook J., *Travel in the Skin Trade: Tourism and the Sex Industry*, (London: Pluto Press, 1996), pp.79-80.

⁴¹⁶ Ryan C. and Hall M.C., *Sex tourism: Marginal people and Liminalities*, (London: Routledge, 2001), p.138

Mr. Abhisit Vejjajiva, the Prime Minister, has declared tourism as a key national agenda and pillar of national economic growth.⁴¹⁷

Ironically, the author argues that the growth of tourism is a symbol of the growth of sex tourism in Thailand too. According to Truong, sex tourism in South East Asia was institutionalised when prostitution associated with American military bases was transformed into a component of the international tourism industry and became a part of development.⁴¹⁸ Tourism has become a significant issue, which has been supported and taken into consideration by every government through law and policies. For instance, in 1966, the Public Entertainment Places Act B.E.2509 (1966) was enacted not only to control public moral, to ensure that minors are not allowed access to such access, but to facilitate the growth of tourism.⁴¹⁹

The Public Entertainment Places Act served a national policy to increase state revenues from tourism. In contradiction to the Suppression of Prostitution Act 1960, the Entertainment Places Act regulated entertainment places, which included most sex sectors consisting of businesses such as nightclubs, go-go bars, massage parlours and any entertainment places.⁴²⁰

⁴¹⁷ National News Bureau of Thailand (NNT), 'Govt pushes tourism as national agenda', *News ID. 255204170063*, 18 April 2009

⁴¹⁸ Truong T., *Sex, Money and Morality: Prostitution and Tourism in Southeast Asia*, (London: Zed Books, 1990), p.136

⁴¹⁹ The Public Entertainment Places Act B.E. 2509 (1966), *Government Gazette*, Vol.88, Part 626, dated 4 October B.E. 2509 (1966)

⁴²⁰ Section 3 of The Public Entertainment Places Act B.E. 2509 (1966)- (1), place for dancing, Thai dancing, Rong-ngeng dancing which either with or without lady partner (2) place that provides food, alcohol, tea or any other drinking and partner service (3) place that has persons provide massage service and bathing service except for (a) registered Thai medical and treatment for Thai traditional massage, (b) health or beauty place permitted by the Ministry of Public Health and (c) other places as stated in the ministry regulations (4) place that provides food, alcohol, tea or other drinking with musical bands and let singers, performers or staff sitting with customers(6) other places as indicated by the ministry

The Act also allowed women, whose ages are not less than 18 years of age to work as special service girls, for example, service partners and bath service providers as stipulated in Section 3 of the Act.⁴²¹ The regulation of entertainment places was through licensing from the local police.⁴²²

Given the close relationship of many of these businesses to the sex industry, the differences between massage parlours, go-go bars and prostitution establishments are not necessarily clear. Under this Act, prostitution was not overtly permitted but it was latently accepted. However, whilst entrepreneurs were exempted from prosecution under this law, special service girls were vulnerable, as they had no protected legal status under this Act.

In short, this Act showed the ambiguity and gaps in legal intervention between two different Acts: the Suppression of Prostitution Act and the Entertainment Places Act.⁴²³ That is to say, whilst prostitution in Thailand was illegal, according to the Suppression of Prostitution Act, the country gave licenses to a number of entertainment places, related to the sex sector. Prostitution in Thailand is thus legitimate as long as it was licensed through enterprises.

regulations for example restaurant which which has prostitutes to service in the table or coffee shop that provides room for sleeping or massage service

⁴²¹ Section 16 (1) of The Public Entertainment Places Act B.E. 2509 (1966)

⁴²² Section 4 of the Public Entertainment Places Act B.E.2509 (1966)

⁴²³ Brody A., 'Prostitution in Thailand: Perceptions and Realities' in Gangoli G. and Westmarland N., *International Approaches to Prostitution: Law and Policy in Europe and Asia*, (Bristol: The Policy Press, 2006), p.195

4.5.3 *The Growth of the Global Sex Industry: the Emergence of Sex Trafficking*

The growth of the sex industry has continued to flourish in Thailand, mingled with the growth of sex tourism in the South East Asia region. Likewise, the sex trade has also boomed at the global level. It is the author's view that the widespread growth of the sex industry from national boundaries to a global level is a direct impact of integration of the global sex industry which currently makes a profit of multi-billion-US dollars throughout the world.⁴²⁴ There have been a significant number of women entering prostitution based on complex reasons cutting across socio-economic, political and cultural factors.

As stated above, the geography of the sex industry has been highly structured, in particular, in the areas which have been associated with travel centres, military bases and industrial sites such as Bangkok and Pattaya.⁴²⁵ Inevitably, the growth of the sex industry in Thailand and throughout the world has also caused migration of labour for sex purposes. In Thailand, the patterns of women migration into the sex sector can be divided into two main forms: 1) internal migration from rural areas to big cities and 2) international migration from Thailand to other countries⁴²⁶ and argued by the author, from neighbouring countries to Thailand. In general, international labour migration in the South East Asia region and so too in Thailand began in the 18th and

⁴²⁴ Sulaimanova S., 'Trafficking in Women from the Former Soviet Union for the Purpose of Sexual Exploitation' in Beeks K. and Amir D. (eds.), *Trafficking and the Global Sex Industry*, (Oxford: Lexington Book, 2006), pp.61-76

⁴²⁵ Ryan C. and Hall M.C., *Sex Tourism: Marginal People and Liminalities*, (London: Routledge, 2001), p.x

⁴²⁶ Skrobanek S., Boonpakdi N. and Janthakeero C., *The Traffic in Women: Human Realities of the International Sex Trade*, (London: Zed Books, 1997), p.22-27

19th centuries. However, the movement of people was disrupted during the Second World War and started again in the 1970's.⁴²⁷ The issue of labour migration has since become an integral part of state policies, especially for remittances, which have become important income sources of foreign exchange.⁴²⁸

In connection with internal migration, income disparities between rural and urban areas and the economic restructuring in Thailand have drawn many young peasant girls into the big cities for employment opportunities in the sex sector, since the 1960s.⁴²⁹ The author argues that persistent poverty and the growing demand for sex workers across countries have become potential factors, impelling young peasant women to migrate internationally. Both domestic migration and international migration of Thai women for the purpose of prostitution were made through several channels such as informal networks: friends, through word of mouth, relatives, mass media and agents.⁴³⁰ Different networks and agents also result in different routes of migration.⁴³¹

One of the major factors contributing to international migration was the growth of sex tourism in Thailand.⁴³² The international migration of Thai women was first exposed in the 1980s. During this period, the demand for

⁴²⁷ Phongpaichit P., 'Trafficking in People in Thailand' in Williams P. (ed.), *Illegal Immigration and Commercial Sex: The New Slave Trade*, (London: Routledge, 1999), p.75

⁴²⁸ Ibid, pp.79-81

⁴²⁹ Skrobanek S., Boonpakdi N. and Janthakeero C., *The Traffic in Women: Human Realities of the International Sex Trade*, (London: Zed Books, 1997), pp.30-31

⁴³⁰ Watanabe S., 'From Thailand to Japan: Migrants Sex Workers as Autonomous Subjects', in Kempadoo K. and Doezema J. (eds.), *Global Sex Workers: Rights, Resistance and Redefinition*, (New York: Routledge, 1998), pp.115-116

⁴³¹ Skrobanek S., Boonpakdi N. and Janthakeero C., *The Traffic in Women: Human Realities of the International Sex Trade*, (London: Zed Books, 1997), pp.37-51

⁴³² Skrobanek S., *Human Trafficking: from Vertical to Horizontal Journey*, a paper presented to the Human Rights Challenge of Globalisation: Asia Pacific-US: The Trafficking in Persons, Especially Women and Children, Hawaii, November 13-15, 2002, p.2

foreign sex workers rapidly increased in the sex industry across countries in Europe, which Skrobanek called “Germination” and later in Japan.⁴³³ Women went to Europe of their own will and through the assistance of foreign customers, without any formal intermediary agents, or recruiters. However, the migration of women has later been more formally arranged through the assistance of brokers, recruiters and agents in the migration industry. The author argues that it is likely that the number of migrant workers who arrange their migration through the assistance of intermediaries will continue to increase, as a result of the implementation of the stricter border control policy of the rich countries.

4.5.4 From Migration to Trafficking

Amongst many routes, Japan and Germany were the major destination countries for Thai women during the 1980s-1990s.⁴³⁴ However, there are now a growing number of other routes for migration of prostitutes such as the United States, Australia and the United Kingdom.⁴³⁵ The flow of migration for sex labour from Thailand to destination countries is important for this study to examine in order to determine what constitutes human trafficking and why such migration becomes human trafficking. It is contended that different cases of migration for sexual labour involve different circumstances. It is the task of

⁴³³ Skrobanek S., Boonpakdi N. and Janthakeero C., *The Traffic in Women: Human Realities of the International Sex Trade*, (London: Zed Books, 1997), p.31

⁴³⁴ See, for example, Watanabe S., 'From Thailand to Japan: Migrants Sex Workers as Autonomous Subjects', in Kempadoo K. and Doezema J. (eds.), *Global Sex Workers: Rights, Resistance and Redefinition*, (New York: Routledge, 1998), pp. 114-124, Ruenkaew P., 'The Transnational Prostitution of Thai Women to Germany: A Variety of Transnational labour migration?', in Thorbek S. and Pattanaik B., *Transnational Prostitution: Changing Global Patterns*, (London: Zed Books, 2002) and Mix R.P., 'Four cases from Hamburg', in Thorbek S. and Pattanaik B., the same title, in Part 2: Migrant Women in Prostitution

⁴³⁵ Monzini P., *Sex Traffic: Prostitution, Crime and Exploitation*, (London: Zed Books, 2005), p.112

this study to elaborate the migration-trafficking nexus and the trafficking-prostitution nexus. The author recognises that these three issues are always incorporated when discussing prostitution, migration and human trafficking.

First, not all migrant prostitutes are trafficked persons. Some of them choose to migrate and work in the sex industry to alleviate poverty back home, whilst others are coerced, lured or forced into prostitution. Secondly, the working and living conditions vary and depend on the circuit in which the activity is carried out and the way in which it is organised.⁴³⁶ Lastly, the different legal status of prostitutes such as local and migrant prostitutes has become an issue of immigration and prostitution law in some areas. The author further argues that legal ambiguity on prostitution, immigration and labour laws encourage the exploitation of prostitution and fuels human trafficking for sexual exploitation.

The migration of prostitutes has turned into lucrative trafficking when the law and policy relating to migration and prostitution have become ineffective and dysfunctional. The author argues that transnational prostitution, in other words, migration of sexual labour has become over-generalised as sex trafficking. However, the author accepts that there has been an increased number of trafficked persons forced into prostitution in various levels and means of force and coercion. Within the GMS, including Thailand, the characteristics of human trafficking are dynamic, yet some

⁴³⁶ Ibid, p.38

similar characteristics can be concluded from a number of studies of human trafficking in Thailand since the mid 1980s.⁴³⁷

In Thailand, most human trafficking cases initially start with voluntary migration.⁴³⁸ They are motivated by income differentials and better opportunities to alleviate household poverty and improve living standards. However, trafficked persons sometimes might not know or know only partially about the nature of their future work. Willing migration has been facilitated by the assistance of agents, known as traffickers. The author notes that the profiles of traffickers vary. Traffickers can be those, who are their loved ones such as their husband or boyfriend, or an acquaintance such as close friends, relatives, or strangers such as foreign brokers, through the assistance of Thai agents or organised crime groups.⁴³⁹

Although the purposes of human trafficking vary, sex trafficking has received the most attention in Thailand due to the complex and persistent problem and its profitability, which traffickers have made from persons, and the inherent serious human rights violation. The author argues that the trade in human beings must be eliminated, but not at the expense of trafficked victims. That is to say, traffickers should be punished whilst trafficked persons should be accorded protection and assistance. Moreover, to tackle human

⁴³⁷ The author studied case reports of Thai women trafficked into prostitution in Germany and Japan, see Mix R.P., 'Four cases from Hamburg', in Thorbek S. and Pattanaik B., *Transnational Prostitution: Changing Global Patterns*, (London: Zed Books, 2002) and Human Rights Watch, *Owed Justice: Thai Women Trafficked into Debt Bondage in Japan*, (New York: Human Rights Watch, 2000)

⁴³⁸ United Nations Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-Region (UNIAP), *Human Trafficking in Thailand: Collation and Integration of Selected Human Trafficking Information*, (Bangkok: UNIAP, Thailand, 2007), p.15

⁴³⁹ Skrobanek S., Boonpakdi N. and Janthakeero C., *The Traffic in Women: Human Realities of the International Sex Trade*, (London: Zed Books, 1997), pp.51-54

trafficking problems, awareness and recognition of root causes attributed to the growth of human trafficking such as demand side, persistent poverty, and legal dilemmas are required as significant factors to shape the fight against human trafficking.

4.6 Thailand's Responses to and Awareness of the Current Human Trafficking Situation and Prostitution

Thailand is a major receiving, transit and sending country for trafficking in persons, especially, for sexual exploitation.⁴⁴⁰ Since the boom in sex tourism in South East Asia in the late 1980s, Thailand has become a regional hub for the global sex industry. Transnational prostitution and sex trafficking have ever since become two phenomena, which are fluid and cause endless debates. Of all forms of human trafficking, sex trafficking in the GMS is considerably more complex. In Thailand, the patterns of sex trafficking vary depending on the world-wide growing demand for sexual services. Sex trafficking can occur at domestic, intra-regional and international level. The author notes that the supply of young women for prostitution into Thailand is made to meet the increasing demand for local prostitution.⁴⁴¹

There is considerable evidence that whilst local prostitutes opt to migrate internationally, those from neighbouring countries move across

⁴⁴⁰ United States of America Department of State, *Victims of Trafficking and Violence Protection Act 2000: Trafficking in Persons Report 2007*, (Washington DC: Dept of State, 2007), p.197

⁴⁴¹ It is estimated that between 200,000 to 300,000 foreign women are trafficked into Thailand annually for prostitution, quoted in Obokata T., *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), p.40

borders, voluntarily or involuntarily into the Thai sex industry in substitution for Thai sex workers. The widespread problem of all forms of trafficking in the GMS has come to the attention of Thailand and its neighboring countries. In response to the international attention on the fight against human trafficking, the RTG has consistently been proactive in criminalisation of trafficking through law enforcement. The RTG has made efforts in developing its anti-trafficking framework to protect and prevent trafficking in persons and to prosecute traffickers. This section elaborates the law and policies pertinent to human trafficking in Thailand.

4.6.1 State Mechanisms and Thailand's Agenda to Combat Human Trafficking during the Mid 1980s-1990s

The RTG has made, over many years, efforts to deal with human trafficking since the first disclosure of human trafficking in the late 1980s. Human trafficking has now become a national agenda, in which all stakeholders co-operate to combat all aspects of the problem in a sincere and serious manner with sympathy for trafficking victims.⁴⁴² In response to human trafficking- both internal and international problems, the RTG has established the four frameworks for tackling human trafficking: policies, law enforcement, protection and prevention measures, and international cooperation.⁴⁴³ In addition, the RTG has set up several state mechanisms in dealing with human trafficking.

⁴⁴² Excerpt from the speech of the former Prime Minister, Mr. Taksin Shinawatra at the National Conference on Human Trafficking, 6 August 2004

⁴⁴³ The Royal Thai Government, National Policy and Plan of Prevention, Suppression and Combating Domestic and Transnational Trafficking in Women and Children B.E.2548-2553 (2005-2010), (Bangkok: RTG, 2005), translated from Thai by the author

In 1996, the RTG set up the main organisations, dealing directly with the problem of human trafficking. That is the National Sub-committee on combating sexual exploitation of children (NSCSEC) under the auspices of the National Commission on Women's Affairs (NCWA). Since the problem of international trafficking in young women and minors had rapidly increased, the RTG also established the National Sub-committee for combating cross-border trafficking in women and children, under the auspices of the National Youth Bureau in 1999. Both state mechanisms work in collaboration with the RTG and all concerned agencies such as non-government organisations and international organisations. Overall, both state mechanisms are responsible for policy making, law development, state cooperation and information exchange on human trafficking and policy monitoring.⁴⁴⁴

Concerning policy frameworks on combating human trafficking, in 1996, the RTG adopted the ten-year National Policy and Plan of Action for the Prevention and Eradication of the Commercial Sexual Exploitation of Children (1997-2006), under the recommendation of the NSCSEC, the policy addressed prevention, protection and suppression measures as the anti-trafficking framework. The policy included the recovery and adjustment to normal life programmes for victims of trafficking and the establishment of structures, mechanisms and systems in the supervision, control, follow up and speeding-up of implementation of the plan.⁴⁴⁵

⁴⁴⁴ International Labour Organization, *Thailand's Country Report on Policy Mainstreaming: The Labour and Employment Perspective in Taking Action against Human Trafficking*, (Bangkok: ILO, 2005), p.4

⁴⁴⁵ The Royal Thai Government, *Thailand Country Progress Report*, a paper presented to the Post-Yokohama Mid-Term Review of the East Asia and the Pacific Regional Commitment and Action Plan against Commercial Sexual Exploitation of Children (CSEC), Bangkok, 8-10

4.6.2 State Mechanisms and Thailand's Agenda to Combat Human Trafficking: the Millennium

In response to the international community to combat human trafficking, The RTG established state mechanisms to prevent trafficking, protect victims of human trafficking and prosecute traffickers. The RTG approved the five-year National Policy and Plan on Prevention and Resolution of Domestic and Cross-border Trafficking in Children and Women (2005-2010). Such Policy serves as a guideline for governmental and non-governmental organisations to co-operate on combating human trafficking and to support policies and mechanisms on prevention, suppression, assistance, protection, recovery and reintegration at the community, provincial, national and international levels.⁴⁴⁶

In this connection, the Ministry of Social Development and Human Security (MSDHS) is the designated governmental body, dealing with the human trafficking problem.⁴⁴⁷ In 2005, the RTG also established the National Committee for Prevention and Suppression of Trafficking in Persons (NCPSTIP). It is chaired by the Deputy Prime Minister and its members, from all relevant organisations work on curbing the trafficking problem. The National Committee is responsible to ensure all anti-trafficking policies work in line with national, regional and international frameworks.⁴⁴⁸

November 2004, pp.59-60 and 78

⁴⁴⁶ Department of American and South Pacific Affairs, Ministry of Foreign Affairs, *Thailand's Efforts in the Prevention and Suppression of Trafficking in Persons*, (Bangkok: RTG, March 2009)

⁴⁴⁷ See further information, visit www.m-society.go.th/en/index.php

⁴⁴⁸ International Labour Organization, *Thailand's Country Report on Policy Mainstreaming: The Labour and Employment Perspective in Taking Action against Human Trafficking*, (Bangkok: ILO, 2005), p.4

To combat the human trafficking problem, the Cabinet Resolution on 25 January 2005 approved the Integrated Plan on Prevention and Resolution of Human Trafficking to integrate work and resources for the fight against human trafficking. The Cabinet also agreed on the establishment of the operational centres on human trafficking at three levels: provincial, national and international, hosted by the MSDHS and the Ministry of Foreign Affairs (MFA). The main objective is to form coordinated state mechanisms for anti-trafficking actions, to mobilise services and supports from different ministries, and to establish an information support system for assistance with policy making.

Under the supervision of the MSDHS, the National Operation Center (NOCHT) works closely with 75 provincial operation centers (POCHTs) throughout the country to coordinate prevention and suppression of human trafficking with relevant agencies; to raise public awareness through the various campaigns and to build network capacities of concerned authorities such as social workers and law enforcement officers. At international level, the MFA is the designated governmental body to coordinate sharing information of human trafficking between states and within Thai government agencies and to assist the victims of trafficking.⁴⁴⁹

4.6.3 Cooperation, Raising Awareness and Capacity Building to Combat Human Trafficking

The RTG has made serious efforts in combating human trafficking through co-operation amongst all relevant agencies within and across the country. Inside the country, the RTG has initiated memoranda of

⁴⁴⁹ See further information of the National Operation Center on Prevention and Suppression of Human Trafficking, visit http://www.nocht.m-society.go.th/en_index.php

understanding (MOU) as guidelines on operational coordination and implementation amongst different agencies in accordance with relevant legislation and policies. On a transnational level, the RTG has continuously strengthened its co-operation between countries within the region through bilateral MOUs and Agreements.

In this connection, the RTG signs a number of MOUs with neighbouring countries in the Mekong Sub-region such as Cambodia, Lao PDR, Vietnam, Myanmar and China. Thailand has also taken part in the regional MOU on Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) in 2004 with six countries in the GMS: Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam. In this regard, member countries are committed to translate the MOU into their national working plans and follow the outcomes. The second Sub-Regional Plan of Action (SPA) 2008-2010 has recently been endorsed at the Senior Official Meeting 5 (SOM 5) and the Second Inter-Ministerial Meeting (IMM 2), held in Beijing. The SPA 2008-2010 focuses on 7 areas of cooperation:

- 1) Training and capacity building
- 2) National plans of action
- 3) Multilateral and bilateral partnerships
- 4) Legal framework, law enforcement and justice
- 5) Victim identification, protection, recovery and reintegration
- 6) Preventive measures
- 7) Cooperation with the tourism sector

8) Management: Coordination, Monitoring and Evaluation⁴⁵⁰

At regional and international level, the RTG has coordinated with various regional and international organisations such as the International Organization for Migration (IOM), the International Labour Organization (ILO), the United Nations Inter-Agency Project on Human Trafficking (UNIAP) in the GMS and the United Nations Office on Drugs and Crime (UNODC). To ensure the effectiveness of law enforcement in the South East Asia region, the RTG has signed the Association of South East Asian Nations (ASEAN) Declarations against Trafficking in Persons, particularly Women and Children to establish its commitment in undertaking concerted efforts to eliminate human trafficking in the region.⁴⁵¹

The RTG has promoted a number of activities on raising awareness and capacity building. In the fiscal year 2008, the RTG allocated a budget of more than 25 million Baht (£450,000) to utilise such activities. As part of the capacity building, the RTG has conducted a number of training courses, workshops, and seminars regarding prevention, prosecution and protection measures of human trafficking to public and private agencies, including social workers, law enforcement- police officers; immigration officers; attorneys and judges, psychologists, and physicians. In connection with raising public awareness, the Department of Consular Affairs, the MFA, holds regular

⁴⁵⁰ United Nations Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-Region (UNIAP), *COMMIT SPA II: 2008-2010, the 2008 Annual Report*, (Bangkok: UNIAP, 2008), pp. iv-v

⁴⁵¹ ASEAN Declarations against Trafficking in Persons, adopted at the 10th ASEAN Summit, in Vientiane, Laos PDR, on 29th November 2004, see further information of the text of the ASEAN Declarations against Trafficking in Persons, visit <http://www.aseansec.org/16793.htm>

activities in conjunction with Universities and communities throughout the country for Thais planning to work abroad to prevent them from being trafficked.⁴⁵²

On 3 March 2009, the RTG in cooperation with the British Embassy, the United Kingdom Border Agency (UKBA) and IOM organised a public event to launch a human trafficking awareness brochure on “what is human trafficking?.” This event aims to raise public awareness on the problem, which is most complex and recognise the significance of other state’s cooperation in building capacities through shared experiences as keys to tackling the problem more effectively and successfully.⁴⁵³ The RTG has recognised the co-operation within and between states for information sharing and exchange to help in monitoring trends, guide development of policies and procedures and coordinate appropriate support services for victims at national and international levels.

4.6.4 The National Legal Framework on Combating Sex Trafficking

In Thailand, there have been at least three comprehensive Anti-Trafficking Acts. The first Anti-trafficking Act was adopted in 1928, in accordance with the ratification of the 1921 Traffic in Women and Children

⁴⁵² Department of American and South Pacific Affairs, Ministry of Foreign Affairs, *Thailand’s Efforts in the Prevention and Suppression of Trafficking in Persons*, (Bangkok: RTG, March 2009)

⁴⁵³ Tripathi M., ‘Thailand and UK to jointly tackle human trafficking’, *The Nation*, 04 March 2009, see further information of the human trafficking brochure <http://ukinthailand.fco.gov.uk/resources/th/pdf/pdf1/human-trafficking-brochure>

Convention.⁴⁵⁴ More than a half century later, the second comprehensive Anti-Trafficking Act- the Measures in Prevention and Suppression of Trafficking in Women and Children Act B.E. 2540 (1997) was adopted as an amended law, promulgated due to radical changes in the scope, content and severity of the human trafficking problem.⁴⁵⁵ Recently, the Anti-Trafficking in Persons Act B.E. 2551 (2008) was enacted in response to international community to fight against human trafficking in the 21st century. The latter Act was adopted and was put into force on 5 June 2008,⁴⁵⁶ marked as 'the Trafficking in Persons Prevention Day' each year.

This section examines the legal history of anti-trafficking intervention. As stated earlier, the Trafficking in Women and Children Act B.E.2471 (1928), hereafter the 1928 Anti-Trafficking Act, was outdated. The law failed to capture all forms of human trafficking. In addition, the Act was not a gender-neutral law as it excluded trafficking of men or boys. The author notes that the 1928 Anti-Trafficking Act was enacted to end human trafficking with a view to suppression rather than the protection of trafficked persons. Between the years 1960 to 1996, the national framework of anti-trafficking law mainly followed the international norms, set out under the 1949 UN Trafficking

⁴⁵⁴ Thailand ratified the 1921 Traffic in Women and Children Convention on 13 July 1922 with reservation as to the age limited prescribed in Para.(b) of the final Protocol of the 1910 White Slave Traffic Convention and Art.5 of the 1921 Traffic in Women and Children Convention, see information, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=VII-3&chapter=7&lang=en [accessed on 31 March 2010]

⁴⁵⁵ Measures in Prevention and Suppression of Trafficking in Women and Children Act B.E. 2540 (1997), Government Gazette, vol.114, Part 72 (a), dated 16 November 2540 (1997), hereafter the 1997 Trafficking in Women and Children Act

⁴⁵⁶ The Anti-Trafficking in Persons Act B.E. 2551 is published in the Government Gazette, Vol.125, Part 29 (a), dated 06 February 2551(2008)

Convention. However, Thailand is in fact not a state party to the 1949 Trafficking Convention.⁴⁵⁷

Having recognised changes in the trend of trafficking, in 1997, Thailand adopted the Measures in Prevention and Suppression of Trafficking in Women and Children Act B.E.2540 (1997) as an amendment of the previous anti-trafficking legislation, the 1928 Anti-Trafficking Act. The legal framework of this Act was the prevention and suppression of trafficking in women and children. According to the 1997 Trafficking in Women and Children Act, the buying, selling, vending, bringing from or sending to, receiving, detaining or confining any women or child for prostitution or other illegal benefits, with or without consent of the women and child are trafficking offences.⁴⁵⁸ However, in this Act, a definition of trafficking was not given nor did the scope of legal application stipulate clearly to what extent the Act shall be implemented.

In comparison to the provisions under the 1928 Anti-Trafficking Act, Section 5 of the 1997 Trafficking in Women and Children Act provided a broader scope of protection provisions. That is, boys, girls and adult women are protected, but not adult men. Moreover, the 1997 Trafficking in Women and Children Act included all forms of human trafficking other than prostitution. The author notes that consent of women and children to the trafficking was irrelevant. Similar to the 1928 Anti-Trafficking Act, the 1997 Trafficking in Women and Children Act took a criminalistic approach which

⁴⁵⁷ see further information of status of ratification, visit http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-11-b&chapter=7&lang=en [accessed on 31 March 2010]

⁴⁵⁸ Section 5 of the Trafficking in Women and Children Act B.E.2540 (1997), Government Gazette, Vol.114, Part 72(a), 16 November B.E. 2540 (1997)

included offences stipulated under the Penal Code. For instance, preparation for committing any offence of human trafficking and an attempt to commit the offence of trafficking in women and children are trafficking offences.⁴⁵⁹

The author contends the protection provisions under this Act were inadequate. Protection provisions were only based on a short-time basis, for example, food, primary shelter and repatriation to the country of origin, but not legal assistance.⁴⁶⁰ Further, repatriation of victims of trafficking to their homeland was to be done as soon as possible. Without careful evaluation of the current situation in the country of origin, the repatriation system failed to capture the problem of trafficking. It is noted that victims of trafficking are likely to be re-trafficked after repatriation. In some cases, victims escape while awaiting for repatriation.⁴⁶¹ Moreover, none of the protection provisions addressed the root causes of human trafficking. It is therefore necessary to consider the development of a comprehensive approach with a better consideration of protection measures.

It can be concluded that the 1997 Trafficking in Women and Children Act was ineffectively implemented since the Act suffered from a number of problems. The author argues that the Act focuses on suppression and prevention of trafficking, whereas failing to recognise that despite government initiatives, officials concerned have a lack of adequate knowledge of

⁴⁵⁹ Section 6 of Trafficking in Women and Children Act, B.E. 2540 (1997), Government Gazette, Vol.114, Part 72(a), 16 November B.E. 2540 (1997)

⁴⁶⁰ Section 10 of Trafficking in Women and Children Act, B.E.2540 (1997), Government Gazette, Vol.114, Part 72(a), 16 November B.E. 2540 (1997)

⁴⁶¹ Pollock J., 'Collateral Damage: Thailand', in Global Alliance against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights and the World*, (Bangkok: GAATW, 2007), pp.192 and 196

prostitution-trafficking problems. Moreover, when enforced, the lack of evidence is a major obstacle to prosecute and punish traffickers.⁴⁶² Although victims of trafficking considered as witnesses are key to criminal proceedings, the lack of witness protection, the fear of reprisal by the trafficker, and lax enforcement including corruption may result in a low level of cooperation.

The volume of criminal procedures in human trafficking offences therefore remains minimal. For example, in 2005 there were only 74 convictions from cases filed in 2003 and 2004.⁴⁶³ These may be for two reasons. First, the officers (especially those at operational level) still lack a basic understanding of the distinction between trafficking and prostitution. Second, the high volume of corruption amongst government officers and a lack of co-operation amongst concerned agencies are also obstacles in trafficking crime reduction.⁴⁶⁴

At the start of the twenty-first century, human trafficking was recognised as a multi-faceted problem of our time. The international legal framework on anti-trafficking has been re-conceptualised with a broader view—that human trafficking includes all forms of exploitation. To combat human trafficking, the RTG has actively developed and amended several legislative measures pertinent to human trafficking. For instance, the Constitution of the

⁴⁶² Obokata T., *Trafficking of Human Being from a Human Rights Perspective: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), p.53

⁴⁶³ Pollock J., 'Collateral Damage: Thailand', in Global Alliance against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights and the World*, (Bangkok: GAATW, 2007), p.196

⁴⁶⁴ Jamsuttee U., 'Thai Legislation against Human Trafficking' in Asian Women's Fund (AWF), *Anti-Trafficking Law in Asia*, Expert Meeting, Tokyo, 25-27 November 2003, p.63

Kingdom of Thailand B.E. 2550 (2007)⁴⁶⁵ as the principal legislation of Thailand forbids slavery and forced labour, including discrimination on the ground of race, religion, gender, age, handicap or disability, religion, education, politics and status,⁴⁶⁶ the Labour Protection Act (No. 2) and (No.3) B.E. 2551 (2008),⁴⁶⁷ and the Child Protection Act B.E. 2546 (2003).⁴⁶⁸

On 18th December 2001, the RTG signed the Transnational Organized Crime Convention and the Trafficking Protocol, but has not yet ratified such legal instruments.⁴⁶⁹ Although Thailand is not a state party to such treaties, it has made a move towards international community to fight against trafficking in persons. Thailand established measures to combat human trafficking through its legal enforcement and policies to prevent and protect victims of human trafficking. The current legal framework, the Anti-Trafficking in Persons Act B.E.2551 (2008), hereafter the 2008 Anti-Trafficking Act, adopted and revised any existing weaknesses to tackle the 21st century human trafficking.

4.6.5 The Anti-Trafficking in Persons Act B.E. 2551: The New Law Enforcement toward Comprehensive and Effective Human Rights Protection Measures

On the 30th of January 2008, the RTG adopted the comprehensive Act to combat human trafficking, the 2008 Anti-Trafficking Act to repeal the 1997 Trafficking in Women and Children Act. The new Act came into force on the

⁴⁶⁵ Constitution of the Kingdom of Thailand B.E. 2550 was promulgated to replace the Constitution of the Kingdom of Thailand (Interim) B.E.2549. The Constitution of the Kingdom of Thailand is published in the Government Gazette, Vol.124, Part 27 (a), dated 24 August 2550 (2007)

⁴⁶⁶ Constitution of the Kingdom of Thailand B.E.2550 (2007), particularly Ch.1: General Provisions, Ch.3: Rights and Liberties of Thai People (Part 1-7)

⁴⁶⁷ Government Gazette, Vol.125, Part 39 (a), dated 27 February B.E. 2551 (2008)

⁴⁶⁸ Government Gazette, Vol. 120, Part 95 (a), dated 2 October B.E.2546 (2003)

⁴⁶⁹ See information of status of ratification, visit

http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html.

5th of June 2008 (120 days after its publication in the Government Gazette).⁴⁷⁰

Overall, the 2008 Anti-Trafficking Act is divided into 6 Chapters, establishing three main measures to combat human trafficking: prosecution of traffickers, prevention of human trafficking and protection of trafficked person. The 2008 Anti-Trafficking Act is the first Act that provides an encompassing definition of human trafficking covering all dimensions of human trafficking-related activities and criminalises all acts involved with human trafficking offences.

Similar to the Trafficking Protocol, the elements that constitute human trafficking under the 2008 Anti-Trafficking Act focus on the acts, the means and the purposes. Under this Act, any one of the following acts constitutes an offence of human trafficking: “procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person.”⁴⁷¹ Other than these acts, the law extends its enforcement to acts that support, facilitate, direct and organise others to commit a human trafficking offence, which are punished the same as those accused of a trafficking offence.⁴⁷²

In addition, human trafficking is conducted by means of the threat or use of force, abduction, fraud, deception, abuse of power, or of the giving of money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control

⁴⁷⁰ Section 2 and Section 3 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁷¹ Section 6 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁷² Section 7 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

for the end purposes of exploitation.⁴⁷³ It is argued that the definition of exploitation covers all forms of exploitation, ranging from all forms of sexual exploitation i.e. pornography, prostitution and all forms of forced labour exploitation. The author notes, the 2008 Anti-Trafficking Act treats the issue of consent irrelevant when trafficking committed by means of force or coercion. Finally, all acts of human trafficking, whether committed in or out the country are prohibited and considered as a special criminal offence under the 2008 Anti-Trafficking Act.⁴⁷⁴

To strengthen the criminalisation of human trafficking as a serious crime, the Act criminalises participating as an accomplice,⁴⁷⁵ preparing and attempting to commit human trafficking offences,⁴⁷⁶ being involved in organised crime groups for the commission of such offence.⁴⁷⁷ It is interesting to note that as a general principle of criminal law in Thailand, preparation for the commission of criminal offences is not considered as an offence, unless stipulated otherwise. However, having been considered as a serious crime, any preparatory act is an offence under the 2008 Anti-Trafficking Act. Moreover, to tackle corruptions and abuse of power, the punishment is increased two fold when a

⁴⁷³ Section 4 of the 2008 Anti-Trafficking Act states that "exploitation means seeking benefits from prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, causing another person to be a beggar, forced labour or service, coerced, removal of organs for the purpose of trade, or any similar practice resulting forced extortion, regardless of such person's consent

⁴⁷⁴ Section 11 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁷⁵ Section 9 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁷⁶ Section 8 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁷⁷ Section 10 of the 2008 Anti-Trafficking Act and, according to Section 4, an organised crime group means a structured group of three or more persons, notwithstanding being formed permanently or exiting for a period of time, and no need to have formerly defined roles for its members, continuity of its memberships or developed structure, acting in concert with the aim of committing one or more offences, with the aim to unlawfully obtain, directly or indirectly, property, or any other benefit

trafficking offence is committed by authorities.⁴⁷⁸ If the Anti-Trafficking committee, or sub-committee and those competent officers, relevant to this Act herein committed a trafficking offence, they shall be liable to the punishment three times that of the normal punishment stipulated for a trafficking offence.⁴⁷⁹

It can be said that the 2008 Anti-Trafficking Act substantially increases the penalties both through fine and imprisonment.⁴⁸⁰ The penalty is calculated based upon aggravated circumstances i.e. the ages of trafficked victims for which the penalty is heavier. Due to the increase in the illicit migration business in Thailand, the 2008 Anti-Trafficking Act stipulates that a juristic person, such as a limited company, committing a trafficking offence, shall be liable to a heavy fine.

Moreover, if such offence is caused by the order, omission or act of any responsible person for carrying out the business of a juristic person, it is liable to the punishment of both imprisonment and a fine.⁴⁸¹ Finally, any person suspected under the Act is penalised if they obstruct the prevention and suppression of human trafficking. This includes the bribery or using force to

⁴⁷⁸ Such as a member of the House of Representatives, member of the Senate, member of a Local Administration Council, Local Administrator, Government Official, employee of the Local Administration Organization, or employee of an organization or a public agency, member of a board, executive, or employee of state enterprise, an official, or member of board of any organization under the Constitution, stipulated under Section 13 (1) of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁷⁹ Section 13 (2) of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁸⁰ According to Section 52 of the 2008 Anti-Trafficking Act, a trafficker is punished by the methods of imprisonment from four to ten years and fine from 80,000 – 200,000 THB. In the case of trafficking a minor, the punishment is enhanced by an imprisonment from 6- 12 years and fine from 120,000-240,000 THB- (those whose age is over 15 years) or an imprisonment from 8-15 years and fine from 160,000 -300,000 THB (those whose age is under 15 years)

⁴⁸¹ Section 53 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

induce any authorised person under this Act, for example, the competent officials and any authorised person to do or not to do any act, contrary to the duty of such person under this Act.⁴⁸²

The Act sets up the Anti-Trafficking in Persons Committee (hereafter the ATP) as a state mechanism to formulate, direct and monitor policies on prevention, prosecution and protection measures.⁴⁸³ The ATP is chaired by the Prime Minister and works under the supervision of the MSDHS.⁴⁸⁴ To coordinate and monitor the prevention and suppression performances, the Coordinating and Monitoring of Anti-Trafficking in Persons Performance Committee (hereafter, CMP) is appointed to be responsible for monitoring operations, coordinating Plans for Actions and managing the Anti-Trafficking Funds.⁴⁸⁵

On 23 February 2009, the ATP committee held its first meeting and has approved three new regulations on the suppression and prevention of human trafficking. These are 1) Regulations on the Registration of Prevention and Suppression Non-Government Organisations, 2) Regulations on the Anti-Trafficking Fund's Financial Management and 3) Regulations on the Anti-

⁴⁸² Section 54 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁸³ Section 16 (1)-(10) of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁸⁴ Section 15 of the 2008 Anti-Trafficking Act stipulates that member of the ATP consists of the Deputy Prime Minister as a vice chairman and Ministers from 7 ministries (the Minister of Defense; the MFA; the Minister of Tourism and Sports; the MSDHS; the Minister of Interior; the Minister of Justice; the Minister of Labour. In addition, four qualified persons will be appointed by the Prime Minister selecting from experts who have had no less than seven years demonstrable professional experience in the fields of prevention, suppression, rehabilitation and international cooperation on the issues of trafficking in persons. Amongst which, not less than one half appointed from the private sector

⁴⁸⁵ Section 42 of the 2008 Anti-Trafficking Act establishes the Anti-trafficking Fund to be used as capital for the prevention and suppression of human trafficking and Section 44, for the purpose of protection of trafficked persons

Trafficking Fund's Management and Financial Report. The ATP has also set up three sub-committees to evaluate and follow up on prevention suppression and protection activities. These are sub-committees on Human Trafficking Data Collection and Classification. It is chaired by the Royal Thai Police. A sub-committee on an Assistance Programme for Workers in the Fishery Industry is chaired by the Immigration Office Bureau. A sub-committee on Monitoring the National Anti-Trafficking Action Plan is chaired by the MSDHS.⁴⁸⁶

Similar to the 1997 Trafficking in Women and Children Act, the 2008 Anti-Trafficking Act authorises a competent official to exercise the power and duties of the law enforcement, including arrest, and prosecution.⁴⁸⁷ Furthermore, where there is a reasonable ground to believe a person to be a trafficked victim, a competent officer shall use discretion to take such a person into custody for their security protection, whilst investigations continue. However, the custody shall not be over twenty-four hours and must be reported to concerned authorities i.e. police or the provincial governor without any delay. Such persons must be placed in an appropriate place and shall not be detained in a cell or prison.⁴⁸⁸

⁴⁸⁶ Ministry of Social Development and Human Security (MSDHS), *Minutes Report on Anti-Trafficking Persons Committee (ATP)*, (Bangkok: RTG, 23 February 2009), translated from Thai by the author

⁴⁸⁷ According to Section 4 of the 2008 Anti-Trafficking Act, a competent official means a superior administrative or police official including a government official holding a position not lower than level 3 of an ordinary civil servant, appointed by the Minister, from the person who possesses qualifications specified in the Ministerial Regulation, to perform the duty under this Act. Section 32 of the same Act stipulates that a competent official shall be an official under the Penal Code

⁴⁸⁸ Section 29 of the 2008 Anti-trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

In connection with the law enforcement, the Child Juvenile and Women Division (CWD), the Royal Thai Police continues to have nation wide jurisdiction to conduct anti-trafficking investigation. After the 2008 Anti-Trafficking 2008 came into force, the CWD initiated prosecution against at least 54 individuals for trafficking offences, 46 of whom are prosecuted for sexual exploitation and 8 of whom are prosecuted for being forced labour.⁴⁸⁹ It is noted that the number of prosecutions of human trafficking cases are arguably very small, especially when compared with the number of victims who have been trafficked and exploited.

Concerning protection provisions under the 2008 Anti-Trafficking Act, the author argues that the law adopts a more comprehensive human rights approach than international standard, the Trafficking Protocol. The new law guarantees a trafficked victim fundamental rights, such as food, shelter, medical treatment, education, training and physical and mental rehabilitation and legal aids, for which the RTG should offers a victim without discriminatory means.⁴⁹⁰ The 2008 Anti-Trafficking Act also recognises the complex trafficking-related issues such as migration and prostitution and guarantees that a victim will not be prosecuted against trafficking-related offences i.e. immigration and prostitution law.⁴⁹¹

The law regards a trafficked victim to be treated as the injured party under civil proceedings and s/he is therefore entitled to compensation for

⁴⁸⁹ Electronic Correspondence from Pol.Lt. Chaichana Suriyawong, on behalf of the CWD (11 March 2009)

⁴⁹⁰ Section 33 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁹¹ Section 41 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

damages. The 2008 Anti-Trafficking Act offers a victim a recovery through criminal proceedings.⁴⁹² In such a case, it is the duty of the public prosecutor to bring the claim with the criminal prosecution or any time during the trial of the criminal case.⁴⁹³ Yet, it is still questionable to what extent the issue of damages, whether material⁴⁹⁴ or moral⁴⁹⁵ damages is dealt with under the 2008 Anti-Trafficking Act, and how compensation is calculated and awarded, especially when it is a transnational claim. For this reason, jurisdiction issues become a cause for concern.

It is argued that the 2008 Anti-Trafficking Act provides more channels to a victim of trafficking to seek better access to justice. In this connection, a trafficked person is also guaranteed the right to access relevant information about a human trafficking offence, the right to safety, the right to privacy and the right to medical and social assistance. With regard to the witness protection, the law ensures that a trafficked person, who decides to give evidence against a trafficker, shall be accorded protection, before, during and after legal proceedings, for example, granted temporary residence in the Kingdom or given an opportunity for employment.⁴⁹⁶ In an exceptional case, a trafficked person may be granted a permanent residence with provisions of

⁴⁹² Section 34 of the 2008 Anti-trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁹³ Section 35.2 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁹⁴ Material damage refers to financial and pecuniary losses

⁴⁹⁵ Moral damage means other non-financial or non-pecuniary losses. They are, for instance, emotional suffering, loss of reputation or honour, pain and suffering, loss of enjoyment. See further discussion in Office for Democratic Institutions and Human Rights, *Compensation for Trafficked and Exploited Persons in the OSCE Region*, (Warsaw: The OSCE/ODIHR, 2008), pp.15-17

⁴⁹⁶ Section 37 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

reasonable security and welfare for such persons.⁴⁹⁷ The author argues that however, such protection shall also be given to members of a trafficked person's family, when necessary.

Finally, to ensure the effectiveness of protection measure, the author suggests that a victim should be identified as the earliest as possible. The identification of victim process should be implemented with due diligence and good practice. Where there are reasonable grounds to believe that trafficked persons are foreign nationals, the safe return of trafficked persons to their countries of origin or of residence should be undertaken without unreasonable delay and based on humanitarian grounds.⁴⁹⁸ In this connection, the RTG should develop effective procedures for safe and effective victim repatriation, including recovery and social reintegration with the follow-up and monitoring programmes to prevent trafficked persons from being re-trafficked. In 2008, the MSDHS and the MFA are the authorities concerned, regarding protection and assistance measures. There are 520 foreign trafficked persons, and 158 Thais being assisted by the MSDHS, whereas 409 Thai trafficked persons are being accorded protection by the Royal Thai Embassies worldwide.⁴⁹⁹

4.7 Conclusion

Human trafficking is recognised as a social problem that has prolonged in Thailand. The root causes of such problems are gender inequality, socio-

⁴⁹⁷ Section 38 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁹⁸ Section 38 reads in conjunction with Section 39 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁴⁹⁹ Department of American and South Pacific Affairs, Ministry of Foreign Affairs, *Thailand's Efforts in the Prevention and Suppression of Trafficking in Persons*, (Bangkok: RTG, March 2009)

economic disparities as a result of Thailand economic development, and the growth of the sex industry as an adverse aspect of the tourism-led-growth policy. Through the legal history of Thailand, there have been three Acts combating human trafficking. These are the 1928 Anti-Trafficking Act, the 1997 Trafficking in Women and Children Act, and the latest legislation, the 2008 Anti-Trafficking Act. This chapter critically analysed the scope of the current legislation in comparison to international standard, the Trafficking Protocol.

The 2008 Anti-Trafficking Act was adopted and came into force in 2008, which opened a new chapter of legal intervention on the human trafficking problem. It can be concluded that it is considered as a comprehensive Act covering the basic elements, in accordance with provisions of the Trafficking Protocol. The Act views human trafficking as a serious crime, which must be prohibited through suppression measures. It also criminalises all forms of human trafficking, occurring both in and out the country. In addition, the 2008 Anti-Trafficking Act takes a more protectionist approach and develops a better framework of human rights protection. A trafficked person is entitled to all fundamental rights necessary for basic needs. The Act also enhances its protection provisions with the right to compensation, the right of access to justice, witness and victim protection and the safe return of a trafficked person.

However, the author argues that the Act fails to address the definition of a victim of trafficking. The author argues that such a term should be extended to cover not only a potential trafficked person, but also members of their family. Although the Act advances its protection measure to a larger

extent, some important issues have not been taken into the Act to alleviate the human trafficking problem in Thailand. These are issues of adequate law enforcement, corruptions, understanding of human trafficking and prostitution and co-operation amongst concerned agencies. The author calls for the development of the best practice. This includes the need of policy re-appraisals, the revision and improvement of legal responses to human trafficking, and the development of other social measures to prevent human trafficking and to protect trafficked victims.

The next chapter, the national legal responses in the destination country will be considered. The United Kingdom is selected for this study because illegal immigration, including human trafficking has become a prominent problem of the UK. The worst forms of sexual and labour exploitation have been discovered recently in the UK. Moreover, being recognised as one of the top destination countries, the UK has recently adopted several measures to tackle human trafficking.

Table 1: Summary of Laws Pertinent to Prostitution and Human Trafficking since 1904

1904	Siam signed International Agreement for the Suppression of the White Slave Traffic.
1908	Siamese government enacted the first Penal Code R.S127 B.E.2451 (1908), on 15 April B.E. 2451(1908)
1909	Siamese government passed the Control and Prevention of Venereal Disease Act R.S 127, B.E. 2452 (1908)
1910	Siam signed International Convention for the Suppression of the White Slave Traffic.
1921	Siam signed the League of Nations International Convention for the Suppression of the Traffic in Women and Children
1928	Siamese government passed the National Traffic in Women and Girls Act B.E. 2471 (1928), by virtue of Royal Decree
1956	The RTG passed the Penal Code B.E. 2499 (1957), Government Gazette, Vol.73, Part 95, dated 15 November B.E.2499 (1957) which repealed the Penal Code R.S 127
1960	The RTG passed the Suppression of Prostitution Act B.E. 2503 (1960), Government Gazette, Vol.2, Part 212, dated 28 November B.E.2503 (1960)
1966	The Public Entertainment Places Act B.E. 2509 (1966) was passed Government Gazette, Vol.88, Part 626, dated 4 October B.E.2509 (1966)

- 1997 Measures in Prevention and Suppression of Trafficking in Women and Children Act B.E. 2540 (1997) was adopted Government Gazette, Vol.114, Part 72(a), 16 November B.E. 2540 (1997) which repealed the 1928 Anti-Trafficking Act
- 1997 The Penal Code Amendment Act (No.14) B.E.2540 (1997), amended the Penal Code 1957, Government Gazette, Vol.114, Part 72 (a), dated 16 November B.E.2540 (1997)
- 2000 The Government signed the Transnational Organized Crime, 2225 U.N.T.S. 209, on 13 December 2000
- 2000 The Government signed the Trafficking Protocol, 2237 U.N.T.S 319, on 18 December 2001
- 2003 The Child Protection Act B.E. 2546 (2003) was adopted, Government Gazette, Vol. 120, Part 95 (a), dated 2 October B.E.2546 (2008)
- 2007 Constitution of the Kingdom of Thailand B.E. 2550 (2007) was adopted Government Gazette, Vol.124, Part 27 (a), dated 24 August B.E.2550 (2007)
- 2008 The Anti-Trafficking in Persons Act B.E. 2551 (2008) was adopted, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E. 2551 (2008)
- 2008 The Labour Protection Acts (No.2) and (No.3) B.E.2551 (2008) was adopted, Government Gazette, Vol. Vol.125, Part 39 (a), dated 27 February B.E. 2551 (2008)

Chapter 5

National Responses to Trafficking in a Destination Country: A Case Study of The United Kingdom

5.1 Introduction

Chapter 4 considers Thailand's responses to the problem of trafficking as a country of origin. The study shows that the current measure for human trafficking, the 2008 Anti-Trafficking Act represents a more comprehensive and effective law especially in the protection provisions. However, the Act is in need of further appraisal. In this chapter, the study shifts to responses to human trafficking in a destination country, especially its current anti-trafficking policy and law. The United Kingdom is selected as the case study of trafficking in women due to some significant reasons below.⁵⁰⁰

5.2 Background: The UK as a Selected Destination Country

Evidence shows that the United Kingdom as a significant destination country. However, amongst highly developed socio-economic states, the UK also serves as a transit country. Despite unreliable figures of trafficked persons in the UK, it is reported that the majority of people trafficked into the UK for sexual exploitation are those women from Eastern Europe and the Far

⁵⁰⁰ The United Kingdom (hereafter, the UK) has its full name as the United Kingdom of Great Britain and Northern Ireland. The UK is made up of England, Scotland, Wales and Northern Ireland. As a result of devolution, some policies and services in Northern Ireland, Scotland, Wales and England are different. For further information, visit <http://www.directgov.uk>

East Asia.⁵⁰¹ In this connection, the United Kingdom has continually made efforts to counter human trafficking through political actions, anti-trafficking policy development and initiatives to improve the anti-trafficking legal framework.

The purposes of human trafficking in the UK may vary. However, concerning the scale of trafficked persons and characteristics of human trafficking, sex trafficking is likely to be a significant issue amongst concerned agencies. Over time, the demographic features of sex trafficking have changed considerably. The estimated number of trafficked persons has risen widely between concerned agencies both at national and international levels. For instance, the research carried out by the Home Office suggested that the number of trafficked women in the UK sex industry is likely to be a higher figure. In 2003, there were up to 4,000 women, trafficked into the UK sex industry.⁵⁰²

The author argues that the reason for this migration has been the result of unequal economic development. Indeed, economic globalisation has increased economic disparities between developed and developing countries. Socio-economic inequality has inevitably created conditions for migration including human trafficking. Arguably, poverty, lack of employment opportunities, gender inequality, lack of education, political instability,

⁵⁰¹ See for example, United States of America Department of State, *Victims of Trafficking and Violence Protection Act 2000: Trafficking in Persons Report 2009*, (Washington DC: Dept of State, 2009), pp.294-295 and United Nations Office on Drugs and Crime, *Trafficking in Persons: Global Patterns*, (Vienna: UNODC, 2006), p.18-20, and pp.92-93

⁵⁰² Joint Committee on Human Rights: *Human Trafficking: Updated, Twenty-first Report of Session 2006-2007* (HL Paper 179/HC 1056), (London: the Stationary Office limited, 2007), Para.2

government debts and environmental degradation are root causes of migration, including human trafficking. Other than the push factor, the author notes that much of recent research on human trafficking has focused on the demand side of human trafficking in destination countries.⁵⁰³

The growth of sex trafficking is arguably facilitated by an increased demand for sex workers in the global industry and the harsher immigration policy in destination countries. Irregular status, compounded by gender and racial discrimination in the migration process has put young migrant prostitutes into a more vulnerable status and are likely to be exploited and abused.⁵⁰⁴ Considering the UK setting, where the demand for sex workers is relatively high, it is a good start to focus on the demand-supply driven issue to tackle the human trafficking problem. The study of human trafficking in the UK thus helps with understanding the wider picture of sex trafficking.

5.3 Organisation of Chapter 5

Chapter 5 is divided into 4 sections. Section 1 deals with the phenomenon of human trafficking and the sex industry in the UK. It also focuses on the current awareness of the British government and national responses to the trafficking problem. Section 2 will consider current anti-trafficking frameworks: national laws pertinent to human trafficking. These are

⁵⁰³ See, for example, International Organization for Migration, *Is Trafficking in Human Beings Demand Driven? A Multi Country Pilot Study*, (Geneva: IOM Migration Research Series No.15, 2003)

⁵⁰⁴ International Labour Organization, *A Global Alliance against Forced Labour*, a global report under the follow-up to the ILO Declarations on Fundamental Principles and Rights at Work, the International Labour Conference 93rd Session, 31 May -16 June 2005, pp.51-52

the Sexual Offence Act 2003,⁵⁰⁵ the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.⁵⁰⁶ Further, section 2 will also consider the development of laws and policies on human trafficking. Section 3 will analyse and evaluate the current UK anti-trafficking strategy. This research may give some useful recommendations for the development of the framework of human rights protection. Finally, section 4 sets out the conclusion and recommendations.

5.4 The Phenomenon of the Human Trafficking Problem and the Sex Industry in the United Kingdom

As stated earlier, the UK is typically viewed as a destination country. However, it has increasingly served as a transit country for all forms of human trafficking. The majority of human traffic is of young women and children in the sex industry and forced labour.⁵⁰⁷ There are no clear statistics available on the scale of the sex trafficking problem. The recently updated data on the scale of women in off-street prostitution – illegal organisation and control of prostitution in England and Wales-, show that around 17,000 of the estimated 30,000 women involved in such sector are migrants.⁵⁰⁸

⁵⁰⁵ Hereafter the SOA 2003 (C.42), the Act came into force on 1 May 2004. It applies to England and Wales. By virtue of Section 142 of the Sexual Offences Act (hereafter the SOA 2003), trafficking offences also apply to Northern Ireland. However, the Act does not apply to Scotland where trafficking related offences are covered by the Criminal Justice (Scotland) Act 2003, (section 22 trafficking offence). The Criminal Justice (Scotland) Act 2003 received the Royal Assent on 26 March 2003

⁵⁰⁶ Hereafter, the AIC 2004, (C.19), the Act received the Royal Assent on 22 July 2004 and came into force 1 December 2004

⁵⁰⁷ Joint Committee on Human Rights: *Human Trafficking: Updated, Twenty-first Report of Session 2006-2007* (HL Paper 179/HC 1056), (London: the Stationary Office limited, 2007), Para.2

⁵⁰⁸ Association of Chief Police Officer (ACPO), *Setting the Record: The Trafficking of Migrant Women in England and Wales Off-Street Sector* (UK: ACPO, 2010), p 10 and 12

Of this number, approximately 2,600 migrants are being trafficking. The majority of whom (2,200) are those female migrant from Asia. Around 60 % (1,300) of the 2,200 trafficked victims from Asia are those from China. Most of the remaining 900 trafficked women are from South East Asia, primarily Thailand.⁵⁰⁹ Prostitution of migrants can be found in major cities such as London, Birmingham and Glasgow.⁵¹⁰

Human trafficking for prostitution in the UK is recognised as a controversial issue. This stems from at least two complex issues surrounding trafficking and prostitution. Human trafficking is viewed by the British Government as an aspect of a transnational crime whereby a harsher immigration policy and stricter border control are being selected as prevention measures to tackle such crime.⁵¹¹ Prostitution in the UK is arguably dichotomised. The author argues that prostitution-related offences are based on different grounds, leading to legal fragmentation. A more detailed critical analysis will be given in the following section, but it is suggested that such complexities have caused the growing problem of trafficking for sexual exploitation as well as that of labour exploitation.

5.4.1. Causes and Effects of Human Trafficking: the Failure of Global Development

As discussed in chapter 2, the majority of irregular migrants who then fall into victims of trafficking are those who have suffered from and are

⁵⁰⁹ Ibid, p.21 and p.32

⁵¹⁰ Bell R.E. "Sex trafficking: a financial crime perspective" (2001) 9 *Journal of Financial Crime* 167

⁵¹¹ See general information on The UK immigration Policy in Home Office, *Secure borders, safe haven: Integration with diversity in modern Britain*, [Cm 5387], (London: Home Office, February, 2002)

vulnerable to socio cultural and economic inequalities in the host country. Persistent poverty, family obligation and (gender) discrimination including political instability in a country of origin are significant factors from the supply side of (irregular) migration, including human trafficking.⁵¹² Although the push factors that propel the vulnerability of migrants into the hand of intermediary agents i.e. traffickers have been discussed in many studies,⁵¹³ less attention has been critically given to the growing demand for cheap and easily controlled labour and the fast growing of the global sex industry that guarantees supply to satisfy demand.

The author contends that the demand of clients for prostitution is a necessary factor for the fast growth of the global sex industry. Countries with a large sex industry, for instance, Thailand, Japan, Germany and the UK need a number of migrant prostitutes, whether or not they freely migrate. Classic sending countries of young migrant prostitutes are countries in South East Asia such as Thailand and the Philippines. Since 1990, there has been a consistent growth in the number of young women from countries in the Eastern Europe such as Ukraine, Belarus, Latvia and Russia which have now become major sending countries for women trafficked into sex industries all over the World.⁵¹⁴

⁵¹² See Chapter 2, Section 2.6, pp. 38-49

⁵¹³ See, for example, Brown L., *Sex Slaves: The Trafficking of Women in Asia*, (London: Virago Press, 2000), Chantavanich S. "Thailand's responses to transnational migration during economic growth and economic downturn" (1999) 14 *Journal of Social Issues in Southeast Asia* 159 and Masika R. (ed.), *Gender, Trafficking and Slavery*, (Oxford: Oxfam Publishing, 2002)

⁵¹⁴ Hughes D.M. "The Natacha trade: the transnational shadow market of trafficking in women" (2000) 53 *Journal of International Affairs* 635-637 and see also Chapter 4 indicates

5.4.2. *The Characteristics of the Human Trafficking Problem in the UK*

It can be argued that every case of trafficking for sexual exploitation is unique, but common experience of exploitation shared amongst trafficked persons can be found in the UK. According to the study of the Poppy Project,⁵¹⁵ trafficked women have shared similar characteristics and experiences that put them into a vulnerable status in all stages of trafficking. At the pre-departure stage, women have experienced some forms of sexual or physical violence. The majority of them have considered themselves as being economically responsible for their extended families and sought to migrate to improve their living conditions and employment.

At the travel and transit stage, women are recruited by several means; deception of employment opportunities and large amounts of wages they could earn; tricked and lured, by stranger or acquaintances. The routes into the UK are convoluted, which can be direct or transit into one of many European countries to escape detection. Once they are trafficked in the UK, trafficked persons are controlled. Many of them are in effect imprisoned. At the destination stage, the trafficker typically confiscates the travel documents of trafficked persons as a means to control movement.

The author argues that the confiscation of documents gives the trafficker two main advantages. First, due to irregular immigration status, the trafficked persons are likely to be threatened by the trafficker concerning illegal immigration prosecution. Second, trafficked persons, without legal

that women from Eastern Europe have been also trafficked to Thailand for sexual purposes, pp.120-121

⁵¹⁵ The Poppy Project, *Routes in, Routes Out: Quantifying the Gendered Experience of Trafficking to the UK*, (London: the Poppy Project, 2008), pp.6-15

status and documents, are likely to be controlled, abused and exploited by the trafficker. Finally, they are sexually exploited in abusive working conditions. A wide range of the worst form of sexual exploitation can be illustrated, for instance, the deprivation of wages (totally or partially), the control of movement (totally or partially), and the worst forms of working and living conditions.⁵¹⁶

As many trafficked persons are trafficked due to economic disadvantage in their host country, most of them easily fall into debt bondage for all expenses- travel costs before being trafficked. Although some may agree to the debt, they may not be aware of the amount of debt that is incurred after arrival, for example, charges for accommodation and living expenses.⁵¹⁷ Since they are in debt bondage, they are likely to be forced to work and they may earn nothing for themselves. To pay off the debt, they are forced to work excessive hours, even around the clock. The trafficked persons are subjected to a high level of harassment. The enslavement conditions- psychological manipulation, physical abuse, force and coercion, are often used as the mechanism of violent control.⁵¹⁸ The author argues that such elements substantially constitute slavery.⁵¹⁹

Although some trafficked persons are aware what jobs they are going to do, yet they only know the partial story. They might not be aware of the risk, which is magnified in the destination country. For instance, they are coerced

⁵¹⁶ Monzini P., *Sex Traffic: Prostitution, Crime and Exploitation*, (London: Zed Books, 2006), pp.35-36.

⁵¹⁷ Home Office, *Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in Women for Sexual Exploitation in the UK*, a Police Research Series Paper 125, (London: Home Office, 2000), p.25

⁵¹⁸ Monzini P., *Sex Traffic: Prostitution, Crime and Exploitation*, (London: Zed Books, 2006), p.44

⁵¹⁹ See also Chapter 3: Section 3.5.1, pp.77-81

and forced to work; such practices mean that they are unable to control the number of clients that they have sex with. The author contends that this powerlessness makes trafficked persons become enslaved. Unlike (free) prostitute migrants, trafficked persons are likely forced to perform unsafe and unprotected sexual services as added value to traffickers and customers.

Traffickers, who facilitate the trafficking journey, are critical to the human trafficking process. Despite various profiles of traffickers, the author concludes that traffickers range from the informal to the highly structured, from individuals to a group of people. As stated above, informal traffickers can be those who are familiar to the trafficked person such relatives, close friends, boyfriends, partners or husbands. In contrast, the highly structured traffickers are a group of people involved in a criminal organisation, be they local crime syndicates or transnational organised criminals.⁵²⁰ Whilst the Trafficking Protocol draws attention to Transnational Organized Crime, the British government acknowledges different groups of potential traffickers under its legislations.

5.4.3. Sex Trafficking: an Endless Journey of Demand- and- Supply Equation

According to Bales, human trafficking is a crime in which the victim is recognised as a product of traffickers.⁵²¹ High profits in the sex industry, which is second only to drug and arms trafficking, incentivises the trafficker.⁵²² For example, sex trafficking in the UK has considerably increased both in size and the profit taken from sex trafficking-related businesses. It is estimated that the

⁵²⁰ Obokata T., *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), pp.46-47

⁵²¹ Bales K., *Understanding Global Slavery: A Reader*, (London: University of California Press, 2005), p.155

⁵²² Bell R.E. "Sex trafficking: a financial crime perspective" (2001) 9 *Journal of Financial Crime* 168

UK sex industry generates up to £275 million a year,⁵²³ whereas the trafficker could earn on average £500 - £1000 per trafficked person a week.⁵²⁴ Moreover, sex trafficking costs less than other criminal activities, yet is more profitable in return. In addition, trafficked women are likely taking more risks than their traffickers. Once they are trafficked, trafficked persons face prosecution and are viewed as criminals who breach national laws, whilst traffickers go unpunished.

It is thus seen that sex trafficking continues to flourish at the expense of trafficked persons. Whilst the UK border control is getting more restrictive and tough, the extensive demand of male clients has given an impetus to an endless supply of young women in the sex market. Moreover, the regular channels for migration of prostituted migrants are impossible in the UK. This has apparently created more need for traffickers wishing to recruit foreign sex workers to fill the increased demand. As stated above, the irregular immigration status of trafficked persons easily puts them under the control of the trafficker. Therefore, they are more likely to end up being sexually exploited.

In the global sex industry, women, their bodies and their sexual services are being traded. It is contended that, like any economic activity, the growth of the sex market is based on the equation of demand and supply. It is further contended that the demand of male clients may vary from a preference for local prostitutes to a preference to foreign sex workers. However, the

⁵²³ Home Office, *UK Action Plan: Tackling Human Trafficking*, (UK: Home Office, 2007), p.14

⁵²⁴ House of Commons, *The Trade in Human Beings: Human Trafficking in the UK, Sixth Report of Session 2008-09: Vol.1 Report, together with Formal Minutes*, (HC 23-I), (London: the Stationary Office Limited, 2009), p.3

increase of communication channels through media and the Internet has contributed to the horizontal growth of the geography of the sex industry. For instance, the growth of sex tourism in Thailand has facilitated the emergence of other commercial sex circuits elsewhere such as in the Caribbean to meet the increased demand of clients whilst away on holiday.⁵²⁵ The sexual services of foreign women have since become advertised and are attractive to many male clients elsewhere, including the UK.

The images of pretty, exotic, submissive and cheap ethnic women, including Thais are well known and they are in high demand in the global sex industry.⁵²⁶ As discussed in chapter 4, since the growth of sex tourism in Thailand, there has been a continuous flow of young Thai women migrating for prostitution in Western Europe and Japan.⁵²⁷ Although many Thai sex workers migrate voluntarily, a significant number of Thai women have been forced into prostitution after arrival in destination countries. For example, in the UK sex trade, the numbers of women who turn to prostitution as well as those who have been trafficked for sexual exploitation have increased considerably.⁵²⁸

Although the act of prostitution (directly buying and selling sexual services) is legal, migrant prostitutes, who migrate freely, face the legal ambiguity between prostitution and immigration laws. Hence, they are placed in a dilemma. Migrant prostitutes may finally fall into the hands of pimps or

⁵²⁵ O'Connell Davidson J., *Prostitution, Power and Freedom* (Michigan: University of Michigan Press, 1998), pp.180-183

⁵²⁶ Monzini P., *Sex Traffic: Prostitution, Crime and Exploitation*, (London: Zed Book, 2006), p.33-38

⁵²⁷ See Chapter 4: Section 4.5.4, pp.145-148

⁵²⁸ Association of Chief Police Officer (ACPO), *Setting the Record: The Trafficking of Migrant Women in England and Wales Off-Street Sector* (UK: ACPO, 2010), pp.5-6

third parties involved in prostitution and end up being exploited. However, for trafficked persons, who are in debt bondage or who are forced into prostitution, the scale of exploitation is much more severe. Trafficked persons are normally forced to work without payment, are threatened and imprisoned, and depending on the organisation they are forced into work. It is the author's view that as long as clients prefer those who offer cheap sexual services, who are young and obedient, the demand for foreign women will continue to flourish. Sex trafficking exists to meet such extensive demand and to fuel the exploitation of prostitution.

5.4.4. The British Government's Awareness and Responses to the Trafficking Problem

In recent years, the fate of trafficked persons in the UK has raised a serious question regarding the British Government's awareness and responses to the current situation of human trafficking. To date, the British Government is determined to combat the trafficking of persons both domestically and globally. At the national level, as a state party to the Transnational Organized Crime Convention and the Trafficking Protocol, the UK has been committed to tackling human trafficking. The Government recognises human trafficking as a national priority. To tackle human trafficking, the British government has continually proposed and developed a comprehensive action plan. In 2006, the UK Action Plan was proposed to focus on three main areas in order to counter human trafficking in its territory:

first, prevention, second, investigation, law enforcement and prosecution and finally, protection and assistance for the victims of trafficking.⁵²⁹

At a global level, the British Government has continued to find tools to work in collaboration with the international community. For example, at the international level, the UK ratified Transnational Organized Crime Convention on 6 February 2006, and ratified the Trafficking Protocol on 9 February 2006.⁵³⁰ In addition, after serious deliberation, the British Government has ratified the Council of Europe Convention on Action against Trafficking in Human Beings 2005 (hereafter COE), which came into force on April 1st, 2009.⁵³¹

Over all, the COE focuses on prevention of human trafficking, victim identification, advancement of protection measures and the promotion of international co-operation to combat human trafficking.⁵³² It is noted that the COE is the first European Convention which recognises the protection of trafficked persons and safeguards their rights, introducing a recovery and reflection period. However, the current UK anti-trafficking framework arguably lacks a human rights dimension, especially in the protection and assistance provided to trafficked persons.

Due to the ineffective legal mechanisms to ensure protection of trafficked persons, many trafficked persons in the UK are likely to be treated

⁵²⁹ Home Office, *Tackling Human Trafficking- Consultation on Proposals for a UK Action Plan*, (UK: Home Office, 2006), p.3.

⁵³⁰ For further information on signatures of the above international documents, visit http://www.unodc.org/unodc/en/crime_cicp_signatures_convention.html

⁵³¹ The British Government ratified the Council of Europe Convention on Action against Trafficking in Human Beings (2005) (C.E.T.S. No.197) on 17 Dec 2008. As of 31 July 2010, there are 20 states which have ratified the COE

⁵³² Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S. No.197, 16 May 2005, entered into force 1 February 2008

as illegal economic migrants or criminals rather than those who are in need of protection and assistance. In addition, the protection provisions under the UK laws pertinent to human trafficking are optional and based on a discretionary basis.⁵³³ The next section will therefore analyse relevant national legislation⁵³⁴ and will assess the current national anti-trafficking framework. For the benefit of the analysis in this chapter, the international obligations under the COE will be discussed- specifically the protection provisions relevant to national laws.

5.5 The Current UK Anti-Trafficking Framework

Unlike Thailand, the UK legislation is made up of several laws pertinent to human trafficking. As a state party to the Transnational Organized Crime Convention and the Trafficking Protocol, the British Government is committed to adopt anti-trafficking measures, in accordance with the Convention and Protocol. New provisions dealing with trafficking have been adopted in different branches of law: prostitution and immigration law. These are the SOA 2003 and the AIC 2004. The SOA 2003 covers a wide range of offences of human trafficking into, within or from the UK for sexual exploitation, whereas the AIC deals with trafficking offences for non-sexual exploitation.

Apart from this legislation, there are other laws applicable to trafficking offences. For instance, the Human Rights Act 1998,⁵³⁵ the Proceeds of Crime

⁵³³ Women's Commission for Refugee Women and Children, *The Struggle between Migration Control and Victim Protection: The UK Approach to Human Trafficking*, (New York: Women's Commission for Refugee Women and Children, June 2005), p.2 and p.19

⁵³⁴ National laws and policies discussed in this section apply to England, Wales, Northern Ireland and Scotland unless otherwise stated

⁵³⁵ C.42, the Act came into force on 2 October 2000

Act 2002,⁵³⁶ the Gangmasters (Licensing) Act 2004,⁵³⁷ the Children Act 2004,⁵³⁸ which amended the Children Act 1989, the Serious Organised Crime and Police Act 2005,⁵³⁹ the Immigration, Asylum and Nationality Act 2006⁵⁴⁰ and the UK Borders Act 2007.⁵⁴¹ However, this chapter mainly discusses the SOA 2003 and the AIC Act 2004. Other measures will be dealt with to the extent that they are applicable to specific offences of trafficking for sexual and labour exploitation.

5.5.1. Sex Trafficking Offences under the British Law on Prostitution: An Ambiguous Legal Position

Trafficking for sexual exploitation has become a hot debate at international and domestic levels. As mentioned in chapter 2,⁵⁴² the term trafficking was first used in the mid nineteenth century when feminists, such as Josephine Butler, protested against the white slave trade in Great Britain. The issue of prostitution has since been interlinked to the issue of sex trafficking but this is rather problematic, especially when human trafficking-prostitution is considered in the context of law. The author argues that one of the major problems for the abolition of human trafficking is the contrasting ideas surrounding the issue of prostitution.

⁵³⁶ C.29, the Act came into force on 24 March 2003

⁵³⁷ C.11, the Act came into force on 1 October 2006

⁵³⁸ C.31, the Act came into force on 1 April 2008

⁵³⁹ C.15, the Act came into force on 1 July 2005

⁵⁴⁰ C.13, the Act came into force on 29 February 2008

⁵⁴¹ C.30, the Act came into force on 31 January 2008

⁵⁴² See Chapter 2: Section 2.3, pp.24-26

Shifts in socio-legal perspective have considerably affected changes in British law on the human trafficking-prostitution nexus. It can be said that the first British law that recognised human trafficking as an offence was the Sexual Offence Act 1956.⁵⁴³ It was the first comprehensive British legislation on prostitution but it was not anti-trafficking. However, some provisions encompass the acts of trafficking. For instance, the SOA 1956 criminalised the procurement of women to become prostitutes or to leave home or the UK with the intention of prostitution within or outside the UK.⁵⁴⁴ The act of procurement is considered as one of the core elements which constitutes human trafficking for sexual exploitation.

According to the SOA 1956, trafficking-related offences can be charged under sections 22 and 24. However, the scope of legal application only covers the trafficking in women for 'forced prostitution', as influenced by the campaign against the white slave trade. In addition, the SOA 1956 applied only to offences committed in its territory- England, Wales and Northern Ireland-, excluding Scotland in which the offence is dealt with by the Criminal Law (Consolidation) (Scotland) Act 1995.⁵⁴⁵ In terms of protective measures, the SOA 1956 mainly lacked protection provisions for those who have been affected by sexual exploitation through prostitution and trafficking. In addition, this legislation excluded the procurement of those who were already 'common prostitutes'- a woman who commits multiple acts of lewdness.⁵⁴⁶ Interestingly, the law views a prostitute as a woman only.

⁵⁴³ Hereafter the SOA 1956 (C.69)

⁵⁴⁴ Section 2 and Section 3 of the SOA 1956 (C.69)

⁵⁴⁵ C.39

⁵⁴⁶ *Morris-Lowe* [1985] 1 All ER 400. In addition, a common law definition of a prostitute was derived from the *De Munck* [1918] 1 KB 635 – a prostitute is a woman who offers her body commonly for lewdness for payment in return

At the turn of the 21st Century, the new Sexual Offences Bill was introduced to Parliament in January 2003. Historically speaking, the enactment of the Sexual Offences Bill was raised and enshrined in the review of the SOA and other relevant legislations. The law reform of the SOA was underpinned by the movement of women's organisations, both academics and practitioners, to campaign against the gender discrimination under the UK legislation on sexual offences.⁵⁴⁷ The Government report *Setting the Boundaries: Reforming the Law on Sex Offences* was introduced and put forward in the proposal for a new legal framework on prostitution.⁵⁴⁸ The aim of this report was as follows.

To provide coherent and clear definitions of sex offences, which protect individuals, especially children and the more vulnerable, from abuse and exploitation;

To enable abusers to be appropriately punished;

To be fair and non-discriminatory in accordance with the European Convention on Human Rights and Fundamental Freedoms⁵⁴⁹ and Human Rights Act 1998.

On May 1st, 2004, the Sexual Offences Bill came into force (hereafter the SOA 2003) and replaced the SOA 1956 as an amended legislation. In general, the SOA 2003 shifts the legal framework from a regulationist⁵⁵⁰ to a

⁵⁴⁷ Phoenix J. and Oerton S., *Illicit and Illegal: Sex, Regulation and Social Control*, (Devon, Willan Publishing, 2005), p.36

⁵⁴⁸ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences*, (London, Home Office, 2000), p.3

⁵⁴⁹ Hereafter the ECHR, C.E.T.S. No. 005, 4 November 1950, (entered into force 3 September 1953)

⁵⁵⁰ The regulationist argues that prostitution relies on a personal (adult) consent; therefore, it seeks to punish only where there is forced prostitution, see also Report of the Special Rapporteur on Trafficking in Women, Women's Migration and Violence against Women, Ms.

subjectivist or constructionist approach.⁵⁵¹ The SOA 2003 moves away from defining sexual offences in terms of activity or behaviour and is drafted in gender-neutral language, modernising sexual offences towards the elimination of discrimination on grounds of gender and age, with intention to provide protection for all.⁵⁵²

The SOA 2003 not only highlights the comprehensive sexual offences approach- rape, sexual assault, issues of consent-, but also introduces sex trafficking offences, stipulated in sections 57-60 of the SOA 2003. Under this Act, the scope of legal application is extended to include the offences of trafficking for sexual exploitation, committed into,⁵⁵³ within,⁵⁵⁴ and out of the UK.⁵⁵⁵ These provisions repealed Section 145 of the Nationality, Immigration and Asylum Act (NIA) 2002, which operated more as an anti-prostitution measure rather than anti-trafficking.⁵⁵⁶ The author argues that the SOA 2003 provides better protection for the most vulnerable, for example children, women and other groups of vulnerable people. The SOA 2003 also strengthens the recognition of gender and the victim's experience to a varying extent.

Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights at fifty-sixth session, *E/CN.4/2000/68*, 29 February 2000, Para.21

⁵⁵¹ This approach defines sexual as that which any reasonable person would consider sexual or that which is done with a sexual intent, see also Phoenix J and Oerton S., *Illicit and Illegal: Sex, Regulation and Social Control*, (Devon, Willan Publishing, 2005), p.33

⁵⁵² House of Commons, *The Sexual Offences Bill (HL): Policy Background*, Library Research Paper 03/61, 10 July 2003, p.36

⁵⁵³ Section 57 of the SOA 2003, (C.42)

⁵⁵⁴ Section 58 of the SOA 2003, (C.42)

⁵⁵⁵ Section 59 of the SOA 2003, (C.42)

⁵⁵⁶ Munro V.E. "A tale of two servitudes: defining and implementing a domestic response to trafficking of women for prostitution in the UK and Australia" (2005) 14 *Social and Legal Studies* 101

More importantly, the SOA 2003 defines the term “trafficking” and explicitly criminalises trafficking for sexual exploitation.⁵⁵⁷ Under the SOA 2003, trafficking for sexual exploitation is defined as ‘an arrangement or facilitation of another person’s arrival (B) in, travel within or departure from the UK’. Such arrangement is done with the intention to do, or belief that a third party will do something in respect of B that, if done, would involve commission of an offence, such as ‘causing, inciting or controlling prostitution for gain’.⁵⁵⁸ It is interesting to note that the definition of trafficking for sexual exploitation under the SOA 2003 does not require the incorporation of the elements of trafficking, as laid down in the Trafficking Protocol, i.e. the use of force, deception or force in the process of recruitment.

To commit the offence of trafficking for sexual exploitation, the SOA 2003 requires the arrangement and facilitation of people from one place to work in another place. The transportation of people does include all geographical locations: within, into and across borders.⁵⁵⁹ The offence is significantly not reliant on proving the use of force, coercion, deception or abuse of power or of a position of vulnerability,⁵⁶⁰ but consent remains an issue. In *R V Ramaj & Atesogullari*,⁵⁶¹ despite the fact that the willingness of a trafficked person was balanced by her naivety, gullibility and inexperience, the courts continued to dwell on consent which is irrelevant under the Trafficking

⁵⁵⁷ The trafficking for sexual exploitation offence under the SOA 2003 re-enacts with amendments of the offence in Section 145 of the Nationality Asylum and Immigration Act 2002 (C.41)

⁵⁵⁸ Section 57-59 of the SOA 2003, (C.42)

⁵⁵⁹ *R V Roci and R V Ismailaj* [2006] 2 Cr. App. R.(S) 15: conspiracy to arrange or facilitate the arrival into the United Kingdom of a person for the purposes of sexual exploitation and conspiracy to control prostitution for gain

⁵⁶⁰ Skrivankova K., ‘Collateral Damage: the United Kingdom’, in the Global Alliance against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights and the World*, (Bangkok: GAATW, 2007), pp.204-205

⁵⁶¹ [2006] EWCA Crime 448

Protocol. English law does, however, require the consent to be real.⁵⁶² It is a defence to non-fatal offences against the person and to all sexual offences.⁵⁶³

The SOA 2003 further extends the maximum punishment to 14 years imprisonment. The level of sentence is likely to be based on various features of the specific case, for instance, the level of coercion, the maturity of the victim, financial gains, duration and if multiple victims were involved.⁵⁶⁴ It is seen that the SOA 2003 introduces tougher controls on exploitation of prostitution. The Act prohibits causing and inciting prostitution for gain,⁵⁶⁵ regardless of whether this is achieved by force, coercion or otherwise,⁵⁶⁶ and outlaws 'controlling prostitution in any part of the world for gain' (section 53). Those who have committed these offences are liable on conviction to fines or imprisonment (6 months minimum – not exceeding 7 years) or both.⁵⁶⁷ The author contends that in case of prosecution, the 'for gain' element should be treated as an aggravating feature,⁵⁶⁸ which would increase the sentence.

⁵⁶² *Burrell V Harmer* [1967] Crime L.R. 169

⁵⁶³ Ramage S. "Human trafficking in 2008- blowing away some myths", *The Criminal Lawyer*, 2008, issue No.184, 8-11

⁵⁶⁴ *R V Maka* [2006] 2 Cr. App. R.(S) 14: sole victim but under the age for prostitution and forced into prostitution, the appellant received 9 years imprisonment under S.57 (trafficking into the UK) and 9 years imprisonment under S.58 (trafficking within the UK), total sentence of 18 years. However, in *R V Roci* and *R V Ismailaj* where adult prostitutes who came to the UK initially willing to work in the sex industry, minor level of coercion, the sentences of both cases were reduced

⁵⁶⁵ Section 52 and see also Section 54 of the SOA 2003, 'gain' means

- (a) any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services), gratuitously or at a discount; or
- (b) the goodwill of any person which is or appears likely, in time, to bring financial advantage.

⁵⁶⁶ *R V Kirk* [2000] 1 WLR 567, there was no evidence of force, coercion or corruption in a sauna offering sexual services. However, the Court of Appeal upheld that the appellant was deeply running and servicing the business as two brothels and had derived financial benefit from so doing

⁵⁶⁷ Section 52 and Section 53 of the SOA 2003, (C.42)

⁵⁶⁸ Aggravating factors specific to the sentencing of people traffickers fall into three broad categories: the age and maturity of the victim, the degree to which the victim has consented to the exploitation, and the nature and scale of the criminal enterprise, quoted in Gilbert A., "Sentencing in human trafficking cases", *The Criminal Lawyer*, 2008, issue No. 177, 4

Driven by public concerns over children, the SOA 2003 further gives specific protection to children and criminalises child prostitution and pornography as serious offences. The SOA 2003 creates specific child-related offences, for example, buying a sexual service from a child or causing, facilitating or controlling commercial sexual exploitation of a child in prostitution or pornography.⁵⁶⁹ According to this Act, children are viewed and treated as victims of abuses.⁵⁷⁰ Although some positive changes have been introduced under the SOA 2003, the author notes that the SOA 2003 fails to recognise the concept of trafficking for sexual exploitation.

The Act does not provide a working definition of sexual exploitation, when the number of voluntary economic migrants is on the rise and when the notion of choice and consent is no longer a one-sided explanation. This lack of definition is due to on-going debates surrounding the issue of trafficking and prostitution, which were critically discussed during the law-making process, positioning the legal scope of sex trafficking offences. In this connection, there have been at least three prevalent discourses on prostitution involved in the law making process throughout UK legal history.⁵⁷¹

Firstly, prostitution as a moral discourse was prevalent in the 1890s and 1900s. Prostitution was considered immoral due to historical religious belief. Prostitution was all about sinful and unchaste women. Hence, the state

⁵⁶⁹ Section 47-50 of the SOA 2003, (C.42)

⁵⁷⁰ Westmarland N., 'From the Personal to the Political: Shifting Perspectives on Street Prostitution in England and Wales', in Gangoli G. and Westmarland N. (eds.), *International Approaches to Prostitution: Law and Policy in Europe and Asia*, (Bristol: Policy Press, 2006), pp.31-33

⁵⁷¹ Brooks-Gordon B., *The Price of Sex: Prostitution, Policy and Society*, (Oxford, Willan Publishing, 2006), p.58

sought to eradicate vice and save fallen women. However, in 1980s, many women had fallen into socio-economic hardship. The lack of socio-economic opportunities was one of the significant factors leading to victimisation and exploitation. The feminisation of poverty has greatly affected women and their view of work. Sex work seemed to be another option for those who had been disadvantaged by the growth of economic development.⁵⁷²

Secondly, prostitution was a form of sexual domination. Radical feminists have insisted that women are trafficked persons as they are exploited by pimps, traffickers, brothel owners and male clients. In the 1990s, the demand by male clients had led to a growth in the sex industry. As a result, more women have been involved in prostitution to satisfy demand, not only nationals but also migrants. The issue of sexual exploitation has become the main interest of radical feminist scholars, for instance, CATW. It has also been the dominant discourse for trafficking issues up until now.⁵⁷³

Thirdly, prostitution is work. The sex/work discourse emerged in 1990 as a response to the issue of women and self-determination. The sex/work discourse manifests the distinction between voluntary and involuntary prostitution. It also suggests that women as individuals should have the right to choose their work. If they have chosen to work as sex workers, they should be accorded the protection necessary for their needs. In contrast, those who have been forced into prostitution have been victimised and exploited.

⁵⁷² Outshoorn J. "Debating prostitution in parliament: a feminist analysis" (2001) 8 *The European Journal of Women's Studies* 475

⁵⁷³ Kesler K. "Is a feminist stance in support of prostitution possible?: an exploration of current trends" (2002) 5 *Sexualities* 219-235

Trafficking for sexual exploitation is therefore very much involved with those who are forced to work, normally those who have a vulnerable status including children.⁵⁷⁴

In short, the sex work discourse is a compromise discourse, which seeks to reflect the reality of prostitution and the people involved. It does support fighting against trafficking in women for sexual exploitation as the worst form of exploitation. Yet, it is acceptable for the sex work discourse to view prostitution as work. The state should therefore recognise and provide different schemes of protection for those who consent to work as sex workers and those who are forced into the worst form of exploitation. This is because prostitution is recognised as a private activity and is difficult to investigate by the state.

It is noted that all the above discourses have not only been highly debated by different women's organisations at national level, but such debates have also long marked the battle between two camps of feminist lobbyists: GAATW and CATW.⁵⁷⁵ The discourse of prostitution as a form of sexual exploitation has received support from the international community as well as the English laws. It is concluded that the UK current anti-trafficking framework favours the sexual domination discourse, which decriminalises prostitution and focuses more on the correlation between prostitution, degradation and exploitation.⁵⁷⁶

⁵⁷⁴ See, for example Zatz N. "Sex work/Sex act: law, labour and desire in constructions of prostitution" (1997) 22 *Signs* 277 and Doezenia J., 'Forced to Choose: Beyond the Voluntary VS. Forced Prostitution Dichotomy', in Kempadoo K. and Doezenia J. (eds.), *Global Sex Workers: Rights, Resistance and Redefinition*, (New York: Routledge, 1998), pp.34-50

⁵⁷⁵ See Chapter 3: Section 3.7.3, pp.110-112

⁵⁷⁶ Munro V.E. "A tale of two servitudes: defining and implementing a domestic response to

Although a consenting sex worker is not coerced or prohibited under this Act, the law seems less interested in providing an individual sex worker with protection and assistance when needed. The underlying assumption of the SOA 2003 rather focuses on those who are innocent victims of force, coercion, abuse and sexual exploitation, than those who should have the right to self-determination, sexual autonomy and who should also be granted appropriate protection and human rights. It can be argued that the conflation between trafficking and prostitution, justified by the association with a moral order rhetoric has lost sight of the reality in which some women may have decided to migrate with prior knowledge or with some degrees of their own choice.

Due to additional coercive measures, women can become potential trafficked persons who eventually fall into the hands of traffickers, who reap a high profit, yet have relatively low risk. Without proof of innocence, trafficked women are finding it more difficult to be accorded protection and assistance and are likely to be treated as criminals who have breached another realm of law-, the law on immigration. It is accepted that migration of women may be made for a number of reasons, for example, the desire for better lives and poverty reduction and the demand-supply equation.⁵⁷⁷ The author argues that such points have never been discussed under the realm of law.

Finally, the focus on the issue of forced and voluntary prostitution seen to be cutting across immigration law and policy has made sex trafficking offences in the UK even more complex and ambiguous. That is to say, under

trafficking of women for prostitution in the UK and Australia" (2005) 14 *Social and Legal Studies* 102-103

⁵⁷⁷ Agustin L.M. "Migrant in the mistress's houses: other voices in the trafficking debates" (2005) 12 *Social Politics: International Studies in Gender, State and Society* 101-109

the SOA 2003, a prostitute, whether trafficked or not, is not the main target of criminalisation. She will be free from arrest unless her immigration status is classified as illegal migrant. In addition, when in need of protection and assistance, a heavy burden of proof lies upon the prostitute to satisfy the authorities about the involuntary nature of her migration. If this fails, the prostitute is subjected to UK immigration law, as an illegal immigrant.

5.5.2. Trafficking for Non-Sexual Exploitation Offences under the Immigration Law

A trafficking offence is pertinent to not only the law on prostitution, the SOA 2003, but also to immigration law. It can be said that the first UK law on immigration related to irregular migration is the Immigration Act 1971.⁵⁷⁸ However, this Act failed to identify trafficking acts as a violation of human rights, but viewed those who entered the UK *illegally or stayed beyond the time allowed by the leave to remain*, as illegal migrants who may face penalties (fine or imprisonment).⁵⁷⁹ Similarly, those who failed to undergo examination by immigration officers, failed to produce any information or documents in their possession, and made false statements or representations, or altered entry clearance, visas, and work permits, could be liable and might be deported.⁵⁸⁰ It should be noted, however, that the Act aimed to criminalise traffickers or smugglers through severe penalties (fine or imprisonment).⁵⁸¹

⁵⁷⁸ C.77 and see also Obokata T., *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), p.70

⁵⁷⁹ Section 24 of the Immigration Act 1971, (C.71)

⁵⁸⁰ Section 26 of the Immigration Act 1971, (C.71)

⁵⁸¹ Section 25 of the Immigration Act 1971, (C.71)

Several amendments to the UK law on immigration have been made. For example, the Asylum and Immigration Act 1996 revised the provisions relating to trafficking offences.⁵⁸² However, the author contends that trafficked people or asylum claimants did not benefit from the changes. The Act criminalised the act of facilitating illegal entry of asylum seekers.⁵⁸³ In addition, those who obtained leave to remain by deception were liable to deportation.⁵⁸⁴ Under the Immigration and Asylum Act 1999, penalties were severely increased regarding traffickers/smugglers. The illegal movement of people by any kind of transportation was also covered under this Act. More importantly, due to the rise of international migration including irregular migration, in February 2002, the British government set out a stricter immigration policy under a White Paper, *Secure Border, Safe Haven: Integration with Diversity in Modern Britain*. It proposed the suppression of trafficking and smuggling of migrants:

'We will need to be tough in tackling... the people traffickers use the misery for their own gain. To tackle illegal working, ending exploitation...and dealing with gang masters and corrupt businesses'.⁵⁸⁵

The White Paper also announced a new law on Nationality, Immigration and Asylum as a coherent strategy. Subsequently, the Nationality, Immigration and Asylum Bill was introduced in Parliament and

⁵⁸² C.49

⁵⁸³ Section 5 of the Asylum and Immigration Act 1996

⁵⁸⁴ Paragraph 1(2) of Schedule 2 of the Immigration Act 1966

⁵⁸⁵ Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, [Cm 5387], (London: Home Office, February, 2002), p.6

received its first reading on 24 April 2002 by the House of Commons⁵⁸⁶ and on 13 June 2002 by the House of Lords.⁵⁸⁷ The background of this Bill was derived from the diversity of modern British society, which has resulted in more sensitive and crucial issues on immigration control, naturalisation qualifications, and the provision of support for asylum-seekers and human rights protection. As a part of a human rights aspect under the UK law, the Bill was to recognise all international human rights standards with particular care towards those powerless and vulnerable.

In its second reading in October 2002, the Bill was amended to encompass tougher immigration procedures for those seeking asylum in the UK. For instance, seeking asylum on the grounds of a well-founded fear of persecution might be refused if they are from so-called safe countries. The applicants for asylum might be denied support if they failed to claim asylum at the earliest possible opportunity and to give a truthful and credible account of their circumstances and route of entry to the UK. Leave to remain would be granted only to those who were in need of special humanitarian protection.⁵⁸⁸ However, such proposals later failed as they had been shown to have such incompatibility with international human rights standards.⁵⁸⁹

The Nationality Immigration and Asylum Bill received the Royal Assent on 7 November 2002 and came into force in February 2003. The Nationality

⁵⁸⁶ Hansard HC, Vol.348 Cols 341-346, 22 April 2002

⁵⁸⁷ Hansard HL, Vol.636 Cols 391-401, 13 June 2002

⁵⁸⁸ Joint Committee on Human Rights, *Nationality, Immigration and Asylum Bill: Further Report. Twenty-Third report of session 2001-2002*, Report together with the proceedings of the Committee (HL177/HC 1225), (London: the Stationary Office Limited, 2002), Paras.7-9

⁵⁸⁹ Ibid, Paras.21-22

Immigration and Asylum Act 2002 (NIA) was arguably the most radical and far-reaching reform of the UK's immigration, nationality and asylum systems.⁵⁹⁰ In addition, the NIA Act 2002 incorporated a wide range of immigration issues in the UK, laid out under the White Paper, *Secure Border, Safe Haven: Integration with Diversity in Modern Britain*. Overall, the NIA Act 2002 contained 164 Sections and 9 Schedules. It was divided into 8 parts; nationality, accommodation centres, other supports and assistance, detention and removal, immigration and asylum appeals, immigration procedure, offences and general.

Within this Act, trafficking was regarded as an offence, but only that for the purpose of sexual exploitation.⁵⁹¹ The NIA Act 2002 failed to cover the wider scope of exploitation set out in the White Paper, *Secure Border, Safe Haven: Integration with Diversity in Modern Britain*.⁵⁹² The NIA Act 2002 may be seen to be lacking in a human rights protection dimension. As for human rights standards, the international human rights norms, the Recommended Principles and Guidelines on Human Rights and Human Trafficking, issued by the UNHCR, affirms that 'states have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons'.⁵⁹³

⁵⁹⁰ Stevens D. "The Nationality, Immigration and Asylum Act 2002: secure border, safe haven?" (2004) 67 *The Modern Law Review* 616-631

⁵⁹¹ Section 145 of the Nationality, Immigration and Asylum Act 2002, which was repealed by the SOA 2003

⁵⁹² Obokata T., *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), p.71.

⁵⁹³ Report of the United Nations High Commission for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, *E/2002/68/Add.1*, 20 May 2002, [Hereafter UNHCR Principles and Guideline]

Concerning human trafficking as a human rights issue, the author argues that the NIA Act 2002 failed to fulfil the UK's international obligation to protect and assist trafficked persons. As noted earlier the Trafficking Protocol extends its legal application to cover all forms of human trafficking, but the NIA Act 2002 considered only trafficking for sexual exploitation as an offence, which is punishable by 14 years imprisonment and a fine, on indictment.⁵⁹⁴ In this regard, persons trafficked for purposes other than sexual exploitation were excluded from the protection provisions under this Act, unless otherwise stated by other relevant laws.⁵⁹⁵ In addition, it is noted that in the case of sex trafficking, such trafficked persons may not be granted protection and assistance, unless the trafficked persons apply for asylum or refugee and are qualified under those criteria.⁵⁹⁶

The protection provisions under this Act apply at the discretion of immigration officers.⁵⁹⁷ The protection is granted on a case by case basis, which may undermine the human rights standard and appears ambiguous. For instance, the protection may be given solely to those who co-operate with the government as witnesses in trafficking cases.⁵⁹⁸ However, the law failed to provide effective witness protection to guarantee the security of trafficked persons and their families back home. The lack of the right to compensation may have also deterred a number of trafficked persons from bringing evidence against traffickers.

⁵⁹⁴ Section 145 (5) and section 146 of the NIA Act 2002

⁵⁹⁵ Obokata T "Human trafficking, human rights and the Nationality, Immigration and Asylum Act 2002" (2003) 4 *European Human Rights Law Review* 421

⁵⁹⁶ The NIA Act 2002, Parts 2 and 3 and Anti-Slavery International, *Human Traffic, Human Rights: Redefining Victim Protection*, (London: Anti-Slavery International, 2002), p.114

⁵⁹⁷ Stevens D. "The Nationality, Immigration and Asylum Act 2002: secure border, safe haven?" (2004) 67 *The Modern Law Review* 618-624

⁵⁹⁸ Anti-Slavery International, *Human traffic, Human Rights: Redefining Victim Protection*, (London: Anti-Slavery International, 2002), p.114

In 2004, the new Asylum and Immigration (Treatment of Claimants, etc) Bill was introduced. The Bill was to radically reshape some legal provisions regarding human rights protection (the welfare rights of immigrants). There arose some interesting points during the process of enactment. The Bill aimed to streamline the immigration and asylum appeals system. It also aimed to enhance powers of the Office of the Immigration Services Commissioner (OISC) and to provide failed asylum seekers with a connection to local activities and create a system of integration loans for refugees. Finally, it aimed to tackle sham marriages. The AIC 2004 came into force 1 December 2004.

According to sections 1-6 of the AIC Act 2004, a series of offences are clarified or amended from existing legislation and are created as new immigration offences. They include:

Assisting unlawful immigration (section 1 as an amendment of section 25 of the Immigration Act 1971)⁵⁹⁹;

Entering the UK without a passport (section 2- a new offence);

Forgery of immigration documents (section 3 as an amendment of Section 5 of the Forgery and Counterfeiting Act 1981);

Trafficking people for non-sexual exploitation (section 4-a new offence);

⁵⁹⁹ To be substituted by Section 143 of the Nationality, Immigration and Asylum Act 2002 from 10 February 2003.

Employment as liability (section 6 increasing the range of penalties allowing for imprisonment as well as a fine on conviction rather than, as before, only a fine on conviction).

Whilst the AIC Act 2004 introduces a broader view on other forms of exploitation, it does not address elements with reference to the recruitment, transportation and receipt of persons, as laid down in the Trafficking Protocol. The Act strengthens criminalisation of human trafficking by stipulating more severe penalties for trafficking offences. Traffickers could be given a maximum of 14 years' imprisonment, which is considerably higher than sentences under the SOA 2003. According to the AIC 2004, three possible elements are considered in the commission of a trafficking offence.

- (1) arranges travel into, within or out of the UK by a person with the belief or if he believes that the person has been brought into the UK to be exploited, and
- (2) intends to exploit that person or
- (3) believes that another person is likely to do so.

For the purposes of the offence, the significant element of Section 4 is exploitation, which is defined as: a person is exploited if he is, for instance:

- (1) The victim of behaviour contravening Article 4 of the ECHR (slavery or forced labour);
- (2) Subjected to force, threats or deception designed *to induce* him to *provide services or benefits* or *enable another person to acquire benefits* (emphasis supplied)

The author argues that the AIC 2004 fails to comply with its international obligation to the protection measures under the Trafficking Protocol. The AIC Act 2004 implements more repressive immigration measures rather than protection provisions. For example, the enforcement power of immigration officers is extended, such as power of arrest. Asylum seekers are likely to be detained. Such provisions may undermine the effectiveness of the anti-trafficking policy, including the British Government's international obligation to human rights protection.

The protection provisions under the AIC Act 2004 are not sufficient to give protection and assistance to trafficked persons nor have they been implemented appropriately. By mid-2007, there had been no convictions in trafficking offences under this Act.⁶⁰⁰ This might be because most trafficked persons are not willing to co-operate with the British authorities to testify against traffickers, due to fear of reprisal from their traffickers.⁶⁰¹ Despite being willing to give evidence in criminal procedures, trafficked persons are likely to be given inadequate protection and assistance such as a short-term residence permit only to cover the period of the criminal procedure. Those who are not willing to give evidence against their trafficker are likely to face repressive enforcement action, for example immediate deportation or removal.⁶⁰²

⁶⁰⁰ Skrivankova K, 'Collateral Damage: The United Kingdom', in the Global Alliance against Traffic in Women, *Collateral Damage: The Impact of Anti-trafficking Measures on Human Rights and the World*, (Bangkok: GAATW, 2007), pp.204-205

⁶⁰¹ Anti-Slavery International, *Human Traffic, Human Rights: Redefining Victim Protection*, (London: Anti-Slavery International, 2002), pp.109-110

⁶⁰² Ibid, p.109 and see also Obokata T. "Human trafficking, Human Rights and the Nationality, Immigration and Asylum Act 2002" (2003) 4 *European Human Rights Law Review* 421

Other than the SOA 2003 and the AIC 2004, human trafficking can be charged under section 29-31 of the UK Borders Act 2007, which came into force on 31 January 2008. The Act amends the previously mentioned legislation and extended the extraterritorial reach of trafficking offences. That is, anyone, of any nationality, who has committed acts comprising part of the trafficking chain, whether done inside or outside the United Kingdom, will be charged under this Act. However, the UK Border Act may conflict with the COE, regarding the protection measures, should the automatic deportation provisions (Section 32-39) be enforced.

It is important for the UK to develop sufficient support and services to ensure that trafficked persons and irregular migrants are appropriately identified and assisted under international human rights standards. This will in turn help to ensure that traffickers are effectively prosecuted due to the help of significant witnesses in trafficking cases. The ratification of the Transnational Organized Crime Convention, the Trafficking Protocol and the COE ought to ensure that the Government is willing to adopt a more comprehensive framework and implement them through effective prosecution, prevention and protection measures.

5.6 The Analysis of the National Anti-Trafficking Strategy: Where the UK Stands

The UK recognises human trafficking as an abhorrent crime,⁶⁰³ which has adversely affected the plight of thousands of people, who are still forced to live in slave-like conditions. Such inhuman criminal practices must be abolished by a living strategy, which contains updated and deliverable

⁶⁰³ Home Office, *UK Action Plan: Tackling Human Trafficking*, (London: Home Office, 2007), p.4

measures. In March 2007, the Home Office, working in collaboration with the Scottish Executive announced its National Action Plan, in which it expresses reference to a finalised version of the national consultation exercise on proposals for a UK Action Plan on Human Trafficking.⁶⁰⁴

The UK Action Plan aims to establish a platform for developing a more strategic and holistic approach in tackling human trafficking, to identify gaps in knowledge and in existing work for further development and to increase capacities of all agencies on delivery of the Government's objectives.⁶⁰⁵ In addition, a number of measures have been introduced. These include prevention, investigation, law enforcement, and protection measures. In this connection, several agencies have been established. These are, for example, the National Criminal Intelligence Service (NCIS); the National Crime Squad (NCS), which was replaced by the Serious Organised Crime Agency (SOCA) in 2006,⁶⁰⁶ and the Child Exploitation and Online Protection Centre (CEOP),⁶⁰⁷ the UK Border Agency (UKBA),⁶⁰⁸ the Metropolitan Police Clubs and Vice Unit, and the UK Human Trafficking Centre (UKHTC).⁶⁰⁹

⁶⁰⁴ Home Office, *Tackling Human Trafficking- Summary of Responses to the Consultation on Proposals for a UK Action Plan*, (London: Home Office, 2006)

⁶⁰⁵ Home Office, *UK Action Plan: Tackling Human Trafficking*, (London: Home Office, 2007), p.4

⁶⁰⁶ The SOCA was established under the Serious and Organised Crime and Police Act 2005. It is now a leading agency for law enforcement, which replaced the NCIS and NCS

⁶⁰⁷ The CEOP is a part of UK policing, dealing with the sexual abuse of children, visit www.ceop.gov.uk

⁶⁰⁸ The UKBA, established in April 2008, has now reached a full agency status to secure borders and control immigration.

⁶⁰⁹ The UKHTC became operational from 2 October 2006 and works in collaboration with the above agencies. For further information concerning relevant agencies, see also Joint Committee on Human Rights, *Human Trafficking: Updated, Twenty-first Report of Session 2006-2007* (HL Paper 179/HC 1056), (London: the Stationary Office Limited, 2007), Paras.120-131

Whilst proposals on a UK Action Plan were not a particular response to the need to protect trafficked persons,⁶¹⁰ what is new in the current national Anti-Trafficking framework is a greater focus on the human rights perspective, rather than the organised crime approach. The author argues that the determination to take a further step to protect trafficked persons is a positive consequence of the intention to ratify the COE and of the work of the Joint Committee on Human Rights.⁶¹¹ Furthermore, the UK Action Plan will move beyond human trafficking for sexual exploitation towards all forms of trafficking including labour exploitation, child trafficking as well as internal trafficking.⁶¹²

In July 2008, an update to the UK Action Plan was published as part of the commitment to keep actions/measures updated and monitored regularly. The updated version not only contains additions and selections of each of the areas of the plan (prevention, enforcement and prosecution and protection), it also identifies work undertaken in preparation for ratification of the COE. The author thus analyses the UK Action Plan in parallel to the updated version on the measures mentioned above.

Prevention Measures: A Better Understanding of the Nature and Scale of Human Trafficking

Since 2007, the Government has continued to adopt a more proactive approach in the prevention of human trafficking. The following three areas

⁶¹⁰ See further information in Home Office, *Tackling Human Trafficking- Summary of Responses to the Consultation Proposals for a UK Action Plan*, (London: Home Office, 2006), p.7

⁶¹¹ Joint Committee on Human Rights, *Human Trafficking: Updated, Twenty-first Report of Session 2006-2007* (HL Paper 179/HC 1056), (London: the Stationary Office Limited, 2007)

⁶¹² Home Office, *UK Action Plan: Tackling Human Trafficking*, (London: Home Office, 2007), pp.4-7

have been identified as key to maximising the UK's collective prevention measures:

- 1) To improve the understanding of the nature and scale of human trafficking in the UK amongst multi-agencies to be able to identify gaps in knowledge and practices
- 2) To address "potential factors" on the supply side of human trafficking
- 3) To deter the demand for human trafficking at the destination countries

In this connection, the Government recognises that to prevent human trafficking, a number of actions should be pursued through the designated agencies. Of these organisations, the UKHCT remains a central repository for the collation of data and information about human trafficking and has become a point of contact for other concerned agencies in bringing together the UK anti-trafficking policy in and out of countries.⁶¹³ Prevention measures very much focus on a holistic approach towards supply-demand reduction at source, in transit countries and in the UK as a destination.

For the supply reduction at source, the Department of International Development (DFID) continues to support long-term development programmes in source countries to fight against poverty and social exclusion as underlying reasons for making people vulnerable to exploitation.⁶¹⁴ In addition, the Foreign and Commonwealth Office (FCO) will focus on

⁶¹³ Ibid, p.8

⁶¹⁴ For Example, the Cross-Border Project against Trafficking and Exploitation of Migrant and Vulnerable Children, see more information www.savethechildren.org.uk

awareness raising and capacity building projects in source and transit countries to strengthen its international co-operation strategy in combating human trafficking.

Likewise, the Government has launched a national public awareness raising campaign to reduce the demand for prostitution, including minimising opportunities for other forms of human trafficking at destinations. The Government has also set up a bespoke website, www.blueblindfold.co.uk, posters, online advertisements and media campaigns to raise public awareness on human trafficking. In addition, the Poppy Project,⁶¹⁵ funded by the Office of Criminal Justice, the Ministry of Justice, has run campaigns and outreach programmes to make the public aware of the realities of trafficking for sexual exploitation. The awareness raising is a continuing project and will be periodically reviewed for the further development of prevention strategies. Since 2008, the Government has doubled the budget of the UKHTC to start collecting intelligence data, from its existing data, thus enabling a realistic assessment of the likelihood of trafficking problems and ensuring appropriate responses.⁶¹⁶

Investigation, Law Enforcement and Prosecution

The UK is determined to continue its proactive law enforcement efforts to combat trafficking, especially those who are traffickers. As stated above, human trafficking is viewed as a serious crime and is criminalised under the

⁶¹⁵ For more information of activities, visit <http://www.poppy.uk.com>

⁶¹⁶ Home Office, *An Update to the UK Action Plan: Tackling Human Trafficking*, (London: Home Office, 2008), pp.13-15

UK legislation such as the SOA 2003 and the AIC 2004. The anti-trafficking legislation has prescribed a maximum penalty of 14 years imprisonment. In addition, a number of pieces of legislation have recently been introduced to assist the fight against human trafficking; for example, the Serious Organised Crime and Police Act 2005, the Gangmasters (Licensing) Act 2004, and the Proceeds of Crime Act 2002.

Since 2007, the government has launched Operation Pentameter 2 (UKP2), considered to be the UK's largest anti-trafficking enforcement operation. Operation Pentameter 2 has been incorporated into the UKHTC to join force in a more effective framework for tackling human trafficking. It also aims to deliver its law enforcement achievement into 2 key areas: to establish the nature and extent of human trafficking for sexual exploitation and other forms of trafficking and to use financial attacks against organised crime. In addition, the UKP2 has outlined other operational objectives, for instance, the development of national intelligence information, and the improvement of victim protection and assistance, based on a victim-centred approach at operational levels.

During the operational phase of UKP2 in 2008-2009, the organisation had demonstrated its achievement from the law enforcement perspective. To pursue the proactive tactical delivery of raids and rescues, 164 victims of sex trafficking were recovered and rescued: 151 were adult victims and 13 were child victims. Of 93 individuals arrested on suspicion of trafficking during the operation, 67 were charged with trafficking. In relation to trafficking for sexual

exploitation, from April to June 2009, 9 were arrested on suspicion under Sections 57-59 of the SOA 2003. Only 1 (11%) was disposed by a court. As part of the UKP 2, sentences for trafficking ranged from 9 months to 11 years with the average sentence of 4 years 4 month. It is noted that although the UKP 2 has now ended, investigations are still ongoing.⁶¹⁷

Protection and Assistance of Trafficked Persons

Protection and assistance measures are central to the UK anti-trafficking strategy. The plight of trafficked persons has been recognised by the UK agencies. For example, the Home Office, working in collaboration with the voluntary sector, has launched the Poppy Project since 2003 to provide shelter, supports and services to meet the needs of individual female victims of trafficking for sexual exploitation. The Government continues to make significant progress in providing protection, assistance and supports to trafficked persons to ensure that their needs are met and trafficked persons feel empowered.⁶¹⁸

To work more effectively in the area of protection and assistance of trafficked persons, the Government has set up a multi-agency working forum to facilitate the victim-centred approach towards the best practice amongst the UK Agencies. In order to improve the effectiveness of protection measures, the Government has ensured that the early and accurate identification of

⁶¹⁷ UKHTC, United Kingdom Pentameter 2 Statistic of Victims Recovered and Suspects Arrested during the Operational Phase and UKHTC, UKHTC Statistical Quarterly Report for 1st April to 30th June 2009 in relation to Defendants Arrested for Trafficking for Sexual Exploitation in the UK, visit <http://www.soca.gov.uk/about-soca/about-the-ukhtc/statistical-data>

⁶¹⁸ Home Office, *An Updated to the UK Action Plan: Tackling Human Trafficking*, (London: Home Office, 2008), p.25

victims must be undertaken by trained front-line staff to identify real trafficked persons. The effective victim identification is significant in preventing trafficked persons from possible threats or abuses infiltrated by traffickers and re-trafficking.⁶¹⁹ Moreover, the Government has funded the Poppy Project to continue delivering protection and assistance to trafficked persons, including prevention programmes at different levels. In its five-year time span (2003-2008), 1,079 women had been referred to the Poppy Project.⁶²⁰ They have been given a wide range of services by the Project- for example, safe and secure accommodation, counselling, advocacy, access to training, and return to country of origin.⁶²¹

Despite this, the author argues that the Government still has limited capacity to give appropriate support and service for all potential trafficked persons. For example, the Poppy Project has found difficulty in helping all trafficked persons due to the limited available accommodation (approximately 35 bed spaces throughout London). Moreover, the Poppy Project is unable to provide support to trafficked persons who do not meet its criteria for admission. For example, women must have been victims of trafficking to the UK, forced into prostitution or otherwise sexually exploited within 3 months of referral, and must be over 18 years of age. The Government has attempted to encourage trafficked women to co-operate in the prosecution of traffickers by offering long-term assistance and giving special support through the criminal justice system to witness protection. The assistance also includes long-term

⁶¹⁹ See discussion in Chapter 8, pp.311-315

⁶²⁰ Eaves information sheet- Sex Trafficking, December 2008, visit http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php

⁶²¹ Home Office, *An Update to the UK Action Plan: Tackling Human Trafficking*, (London: Home Office, 2008), p. 27

recovery programmes, for example, Voluntary Assisted Return and Reintegration Assistance.⁶²²

As a state party to the COE, the UK is required to comply with the Convention's provisions and to ensure that its domestic legislation responds appropriately to trafficked persons. The author notes that trafficked persons will benefit from better protection and support under the protection provisions. The ratification also emphasises the long-term commitment of the British Government to tackling human trafficking. The British Government is expected to introduce several new protection measures into the UK anti-trafficking policy and its legislation. In this connection, the Government has arranged a multi-agency National Referral Mechanism to provide a comprehensive framework for effective victim identification amongst front line staff and designated competent authorities.⁶²³

During April 2009 to March 2010, 706 victims are referral. Of these numbers, 74 % represents female victims (520). With regard to the type of exploitation, the majority of referral cases are those victims of trafficking for sexual exploitation (45.2%), of which 37.5 % represents adult victims of trafficking for sexual exploitation.⁶²⁴ The Government is also to invest extra funding to expand its capacity of multi-agencies in offering assistance and

⁶²² The Programmes are launched under the auspices of the International Organization for Migration, UK, for more information <http://www.iomlondon.org/aboutus.htm>

⁶²³ Art.10 of the COE, C.E.T.S. No.197

⁶²⁴ UKHTC, National Referral Mechanism Statistical Data April 2009 to March 2010, visit <http://www.soca.gov.uk/about-soca/about-the-ukhtc/statistical-data>

giving support to trafficked persons. Finally, the Government has introduced the granting of a 45 day minimum reflection and recovery period to trafficked persons with the possibility of a one-year renewable residence permit, which goes beyond its international obligation under the COE.⁶²⁵

5.7 Conclusion

It can be said that the UK has recognised trafficking as one of the most serious crimes threatening UK society.⁶²⁶ The scale of human trafficking in the UK is uncertain. Yet, the number of trafficked people appears to be increasing each year. The main factor for trafficking in the UK is the demand for trafficked people in all forms of exploitation, for instance, sexual and non-sexual exploitation. Whilst the UK has increasingly been used as a transit country, it is a typical destination country for sex trafficking. There is no clear evidence of the extent of the UK sex industry but it has continually expanded.

The British Government is aware of the fast growth in human trafficking and is determined to fight against this crime. The British Government ratified the Transnational Organized Crime, the Trafficking Protocol and has recently adopted COE, after long deliberation. The Government also announced the UK Action Plan on Tackling Human Trafficking, which was updated in 2008.

⁶²⁵ Art.13 of the COE and see also Explanatory Memorandum on the Council of Europe Convention on Action against Trafficking in Human Beings, Paras. 31-33, visit <http://www.crimereduction.homeoffice.gov.uk/humantrafficking004.htm>

⁶²⁶ The Statement from the Home Secretary on the date of the COE, coming into effect, 1 April 2009

The UK Plan has led to a number of significant changes in the UK anti-trafficking strategy and legislation. In the light of all forms of human trafficking, the new anti-trafficking laws criminalise trafficking offences. However, such laws are focused only on prosecution of traffickers.

Overall, the lack of a protection scheme has led to ineffective anti-trafficking laws. Many trafficked persons still suffer from their traffickers whilst traffickers gain significant financial benefit from such ambiguous laws. Several recommendations are thus now made to ensure that the human rights of trafficked persons are central to government strategy. All trafficked persons should be properly identified and given all basic needs. In this regard, the victim-centred approach is necessary. Trafficked persons must be informed about their rights by the relevant agency. The protection should not hinge on the state's discretion. All trafficked persons should be treated equally within a multi-dimensional protection scheme regarding age, sex and culture, for example. Protection should not be given only for those who have decided to assist authorities but to all trafficked persons.

To bring about the best practice in tackling the human trafficking problem, the British government must adopt and promote the comprehensive framework of human rights protection in its laws and policies towards legal and policy implementation to end human trafficking. Moreover, the anti-trafficking legislation should be reviewed and updated to achieve the prosecution of more traffickers i.e. through the comparative legal study, and to make the UK become a hostile environment for human trafficking. The

Government should consider all circumstances surrounding human trafficking. For instance, the Government should focus more on the protection of migrant workers' rights, including irregular migrants, to ensure that all types of migrant workers can have access to temporary support.

The next chapter will consider the international legal framework of human rights protection for trafficked persons as a minimum standard for the development of the framework of protection at national levels. The chapter will discuss the protection provisions under relevant international human rights law and the COE and compare those provisions with the anti-trafficking framework, the Trafficking Protocol. The comparative legal method is employed to identify differences and similarities of the law being studied, to analyse the functional equivalence of the law and to develop a more comprehensive framework of victim protection concerning existing problems of implementation at international level as well as those at national levels.

Chapter 6

The International Legal Framework of Human Rights Protection for Trafficked Persons

6.1 Introduction

Chapter 4 and chapter 5 considered the national legal responses to human trafficking in a country of origin and a destination country, respectively. According to the previous chapters, human trafficking problems at the national level are complex and difficult to deal with. Root causes of problems are different between the selected country of origin, Thailand and the selected destination country, the UK. In Thailand, persistent poverty, long-standing gender inequalities cutting across different social classes, the fast growth of sex tourism and the sex industry have been considered as determining factors of the contemporary human trafficking problem. In contrast, in the UK, the human trafficking problem has been influenced by the fast growth of the UK sex industry and, ironically, stricter immigration measures which push potential trafficked persons into the hands of unlawful intermediaries.

Chapter 4 and chapter 5 considered national legislation pertinent to human trafficking problems. Following the adoption of the Transnational Organized Crime Convention and the Trafficking Protocol, legal responses to human trafficking in Thailand and the UK have been developed, whether in a piece-meal way as in the UK or in a comprehensive Act, as in Thailand. The

author argues that, despite recent development, such legal responses continue to lack a comprehensive and effective approach to the fight against human trafficking. The anti-trafficking framework has taken a criminalistic framework. In addition, protection provisions, stipulated in both Thai law and English law, are rather weak and inadequate to meet the needs of all kinds of trafficked persons. The study contends that the current anti-trafficking framework fails to incorporate appropriate elements of a human rights approach, which reflects the totality of the problem.

To develop better protection measures, chapter 6 therefore considers relevant international human rights law to establish a link between basic elements of human rights and the issue of human trafficking. The chapter further examines and compares protection provisions, stipulated in the Transnational Organized Crime Convention, the Trafficking Protocol, and the COE. It is contended that the comparison will address what elements of human rights should be incorporated into national legal responses to human trafficking for best practice at all levels.

6.2 Organisation of Chapter 6

The study attempts to develop a comprehensive framework of human rights protection. The author argues that the protection provisions under the Trafficking Protocol are relatively weak and seemingly inadequate. In addition, such provisions fail to recognise trafficked persons as migrants, who are in need of particular support, assistance and services. Chapter 6 therefore

attempts to examine existing international human rights law and to address key elements of human rights protection, which are appropriate to the phenomenon of human trafficking. Chapter 6 is thus divided into four sections.

Section 1 (6.3) examines the basic documents of modern international human rights, the so-called International Bill of Rights, to provide the broadest picture of a wide range of rights of which non-citizens shall be guaranteed. Section 2 (6.4) will analyse particular international legal instruments dealing with the rights of all types of migrants, especially irregular migrants to establish possible links to the protection of trafficked persons, whose immigration status is somewhat irregular.

Section 3 (6.5) then examines the protection provisions under the Trafficking Protocol. In addition, this section will discuss the protection provisions under the COE, considering it as a more comprehensive legal document. The author contends that the advancement of the COE fills in the gaps of the protective provisions of the Transnational Organized Crime Convention and the Trafficking Protocol and could bring about best practice and accountability of states in combating human trafficking and protection of the human rights of trafficked persons. The author also suggests that the elements of human rights under the COE should be welcomed as complimentary to the existing anti- trafficking framework at the international and national levels. Finally, Section 4 (6.6) will be the conclusion of Chapter 6.

6.3 The International Bill of Rights: Human Rights of All People

This section elaborates attempts towards the development of the human rights regime since the establishment of the United Nations. In modern international law, there are at least three major legal documents, known as the International Bill of Rights, dealing with the fundamental human rights of people without discrimination between citizens and non-citizens. These are the UDHR,⁶²⁷ the International Covenant on Civil and Political Rights,⁶²⁸ and the International Covenant on Economic, Social and Cultural Rights.⁶²⁹

In addition to the core human rights documents, the section critically examines a number of specific legal documents dealing with the protection of migrants. These are, for instance, the ILO Conventions dealing with the rights of migrants, in terms of international labour standards, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁶³⁰ In addition, other international instruments that address specific provisions in the protection of human rights of non-citizens and of migrants' rights are dealt with as complimentary to the major international documents.

6.3.1. *The Analysis of the International Bill of Rights*

The International Bill of Rights is examined as the core human rights documents of modern international law. The regime concerns the protection of

⁶²⁷ See note 195 in Chapter 3, pp.79

⁶²⁸ See note 196 in Chapter 3, pp.80

⁶²⁹ Hereafter the ICESCR, 993 U.N.T.S. 3, 16 December 1966, entered into force 3 January 1976. As of 30 June 2010, 160 states have ratified to the ICESCR

⁶³⁰ Hereafter the ICRMW, 220 U.N.T.S. 93, 18 December 1990, entered into force 1 July 2003. As of 30 June 2010, 31 states have ratified the ICRMW

individuals as human rights. In this regard, the UDHR, adopted by the General Assembly and came into existence on 10 December 1948, is a milestone document in the history of human rights. The UDHR affirms inalienable, inviolable and indecisive nature of human rights,⁶³¹ which guarantees that 'everyone is entitled to all the rights and freedoms, set forth in this declaration *without distinction of any kind, such as national.*' In other words, all persons, by virtue of their humanity, have fundamental rights.⁶³²

However, it is noted that the UDHR is a non-legally binding document. In spite of this, the UDHR set core human rights principles which are recognised by international community. These are, for example, right to life, liberty and security of persons,⁶³³ prohibition of slavery or servitude,⁶³⁴ prohibition of torture or inhuman or degrading treatment or punishment,⁶³⁵ and right to leave any country and to return to one's own country.⁶³⁶ In an attempt to translate such core human rights principles listed in the UDHR into legal binding instruments, the ICCPR and the ICESCR were adopted in 1966, as a result. The UDHR, the ICCPR and the ICESCR, together form the International Bill of Rights.

The ICCPR, the first generation of rights, covers civil and political rights for which a number of rights are non-derogable -no limitations of rights under the state power or for national security.⁶³⁷ These are, for example, the right to

⁶³¹ It is noted that, however, in Art. 29 (2) of the UDHR does contain derogation clause which stipulates that in the exercise of one's rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due to recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society

⁶³² Art. 2 (1) of the UDHR, UNGA Res. 217A (III), 10 December 1948

⁶³³ Art. 3 of the UDHR, UNGA Res. 217A (III), 10 December 1948

⁶³⁴ Art. 4 of the UDHR, UNGA Res. 217A (III), 10 December 1948

⁶³⁵ Art. 5 of the UDHR, UNGA Res. 217A (III), 10 December 1948

⁶³⁶ Art. 13 of the UDHR, UNGA Res. 217A (III), 10 December 1948

⁶³⁷ Art. 4(2) of the ICCPR, 993 U.N.T.S. 3

life,⁶³⁸ the right to not to be subjected to torture, cruel, inhuman, degrading treatment or punishment,⁶³⁹ the right to be free all forms of slavery or to not to be held in servitude⁶⁴⁰ and the right not to be imprisoned for failure to fulfill contractual obligation.⁶⁴¹ Moreover, the ICCPR does guarantee that non-derogable rights are offered to citizens and aliens without discrimination.⁶⁴² Concerning civil and political rights, non-nationals are however exempted from some fundamental rights, which are explicitly guaranteed only to citizens, such as the right to vote and freedom of movement.⁶⁴³

For instance, in the case of irregular or illegal or undocumented migrants, they are normally viewed as illegal, as they breach the state's territorial sovereignty. A state should exercise the power to exclusively control irregular migrants in its territorial domain or to expel or remove such migrants, yet be subject to limitations imposed by international law.⁶⁴⁴ States parties to the ICCPR are bound to make protection available to all individuals, regardless of nationality. Therefore, the author argues that the breach of national immigration law should not deprive their fundamental human rights as guaranteed in international human rights law.

⁶³⁸ Art.6 of the ICCPR, 993 U.N.T.S. 3

⁶³⁹ Art.7 of the ICCPR, 993 U.N.T.S. 3

⁶⁴⁰ Art.8 (1) and (2) of the ICCPR, 993 U.N.T.S. 3

⁶⁴¹ Art.11 of the ICCPR, 993 U.N.T.S. 3

⁶⁴² Progress Report of the Special Rapporteur on the Rights of Non-Citizens, Mr. David Weissbrodt, submitted in Accordance with Commission on Human Rights at fifty-fourth session, *E/CN.4/Sub.2/2002/25*, 05 June 2002, Paras. 12-14

⁶⁴³ Weissbrodt D., 'The Protection of Non-Citizens in International Human Rights Law', in Cholewinski R., Perruchoud R. and MacDonald E., *International Migration Law: Developing Paradigms and Key Challenges*, (The Hague: T.M.C. Asser Press, 2007), p.222

⁶⁴⁴ Bosniak L.S., 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers' Convention', in Bogusz B. and Cholewinski R. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), p.317

The ICESCR, the second generation of rights, comprises economic, social and cultural rights such as those to health, education, a standard of living and other economic, social and cultural rights. Similar to the ICCPR, the ICESCR gives 'everyone' the right to the progressive realisation of social, economic and cultural rights without discrimination between citizens and non-citizens. For instance, states parties are required to respect and protect the right to health. In particular, emergency health care is to be equally provided to everyone, including illegal migrants. Failure to do so is subject to *de jure* or *de facto* discrimination by such states.⁶⁴⁵ However, an exception may be made with respect to economic rights but not social and cultural rights.⁶⁴⁶

Although more states are bound by obligations under ICCPR and ICESCR, the author contends that a number of obstacles indicate the low level of best practice of states for the protection of fundamental human rights of non-citizens, including migrants. Amongst other issues, political issues are one of the main obstacles, especially when dealing with the issues of the interest of nations, state sovereignty and security concerns. Concerning migrants' human rights, for example, the right to freedom of movement, the right to leave any country and to return to one's own country, stated in Art. 13 (1) and (2) of the UDHR and reiterated in the Art. 12 of the ICCPR, is considered as a practical obstacle to state action. Without the corollary right to

⁶⁴⁵ Grant S., 'The Legal Protection of Stranded Migrants', in Cholewinski R., Perruchoud R. and MacDonald E., *International Migration Law: Developing Paradigms and Key Challenges*, (The Hague: T.M.C. Asser Press, 2007), p. 38

⁶⁴⁶ Charlesworth H. and Chinkin C., *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000), pp.203-204 and see also Weissbrodt D., 'The Protection of Non-Citizens in International Human Rights Law', in Cholewinski R., Perruchoud R. and MacDonald E., *International Migration Law: Developing Paradigms and Key Challenges*, (The Hague: T.M.C. Asser Press, 2007), p.224

enter another country freely, the decision on conditions of entry is at the sole discretion of a state.⁶⁴⁷ Hence, most non-citizens, living outside their host countries and migrants, regardless of their immigration statuses still find it difficult in practice to exercise their rights guaranteed under the international human rights law.

In addition, there is also a series of general human rights instruments, which could apply to those non-nationals. For instance, the International Convention on the Elimination of All Forms of Racial Discrimination was adopted to deal with discrimination based upon race, colour, and ethnic origins, guaranteed by domestic laws of states parties.⁶⁴⁸ In addition, relevant provisions in the Protocol Relating to the Status of Refugees,⁶⁴⁹ the Convention Relating to the Status of Stateless Persons,⁶⁵⁰ the Convention on the Reduction of the Stateless,⁶⁵¹ the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live⁶⁵² and the Vienna Convention on Consular Relations⁶⁵³ reiterate the principle of non-discrimination and deal with specific issues concerned with the human rights of different types of non-citizens.

⁶⁴⁷ Grant S., 'The Legal Protection of Stranded Migrants' in Cholewinski R., Perruchoud R. and MacDonald E., *International Migration Law: Developing Paradigms and Key Challenges*, (The Hague: T.M.C. Asser Press, 2007), pp. 38 – 46 and see also Mattila H.S. "Protection of migrants' human rights: principles and practice" (2000) 38 *International Migration* 57

⁶⁴⁸ Hereafter ICERD, 660 U.N.T.S. 195, 7 March 1966, entered into force 4 January 1969. As of 30 June 2010, 85 states have ratified the ICERD

⁶⁴⁹ Hereafter the 1967 Refugee Protocol, 606 U.N.T.S. 267, 31 January 1967, entered into force 4 October 1967. As of 30 June 2010, 145 states have ratified the 1967 Refugee Protocol.

⁶⁵⁰ 360 U.N.T.S. 117, 28 September 1954, entered into force 6 June 1960

⁶⁵¹ 989 U.N.T.S. 175, 30 August 1961, entered into force 13 December 1975

⁶⁵² UNGA Res. 40/44, 13 December 1985

⁶⁵³ 596 U.N.T.S. 261, 24 April 1963, entered into force 19 March 1967

6.3.2 *The Establishment of Protection Measures for Migrant Workers: The ILO Conventions*

In addition to core human rights instruments, human rights of migrants are also recognised by international organisations. The ILO, as the United Nations specialised agency, was the first intergovernmental organisation to formulate international labour standards for migrant workers.⁶⁵⁴ In this connection, the two ILO Conventions were adopted as the principal legal instruments dealing with the protection of migrant workers: the Migration for Employment Convention (ILO No.97)⁶⁵⁵ and the Convention Concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No.143).⁶⁵⁶

The ILO No. 97 deals with the recruitment of migrants for employment and their working conditions in host country. The ILO No. 97 also articulates the fundamental principles underlying the ILO's work in the equal treatment of labour standards between national workers and migrant workers. However, the ILO No. 97 does not explicitly address the protective provisions for irregular migrant workers. On the contrary, the ILO No. 143 devotes its provisions to the protection of irregular migrant workers, for example the focus of damages and abuses associated with irregular migration.⁶⁵⁷ The ILO Convention No. 143 also imposes a legal obligation upon states parties to

⁶⁵⁴ Charlesworth H. and Chinkin C., *The Boundaries of International Law: A Feminist Analysis*, (Manchester: Manchester University Press, 2000), pp.172-173

⁶⁵⁵ 20 U.N.T.S. 70, 1 July 1949, entered into force 22 January 1952

⁶⁵⁶ 1120 U.N.T.S. 13, 24 June 1945, entered into force 9 December 1978

⁶⁵⁷ Bosniak L.S., 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers' Convention', in Bogusz B. and Cholewinski R. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), pp.312-313

respect basic human rights of 'all migrant workers'.⁶⁵⁸ The author also notes that this Convention extends the principle of equal treatment to irregular migrant workers and their families, in respect of rights to remuneration, social security and other benefits. Such rights are only applicable in the case of 'past employment'.⁶⁵⁹

The human rights protection of irregular migrants was also discussed under the UNGA 's 1985 Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live. The Declaration reiterates legal norms under existing international instruments which are available for the protection of migrants. For instance, Art. 5 of the Declaration guarantees many essential civil and political rights to 'all aliens', including irregular migrants i.e. the right to life and security of person. As a non-legally binding document, no legal force imposes upon states for the protection of human rights of all migrants. Such limitation of the legal application under the ILO Convention No. 143 and the Declaration, including the considerable change in the labour migration situation led to the development of the treaty-making of the ICRMW.⁶⁶⁰

The author notes that the reason for the campaign of drafting the ICRMW was based on a number of legal obstacles. For example, a number of provisions for the protection of the rights of irregular migrants under the ILO Convention No. 143 did not satisfy a number of developing countries. Many states remain unwilling to ratify the ILO Convention No.143. In fact, the

⁶⁵⁸ Art.1 of the ILO Convention No.143, 1120 U.N.T.S. 13

⁶⁵⁹ Art. 9 of the ILO Convention No.143, 1120 U.N.T.S. 13

⁶⁶⁰ the ICRMW was signed on 18 December 1990, in which 18 December becomes the International Migrants Day

Convention achieved only a low rate of ratification. After its entry into force in 1978, the ILO Convention No.143 was ratified by 18 countries, including a very low number of developed countries, for example, Norway and Sweden.⁶⁶¹

6.4 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: A Critical Review

As stated above, the protection of irregular migrant workers was firstly discussed in the international arena in 1975. The ILO Convention No.143 explicitly included irregular migrant workers within the scope of certain protective provisions.⁶⁶² The protection of irregular migrant workers has since been discussed in a number of international reports, for example, the report on *the Exploitation of Labour through Illicit and Clandestine Trafficking*.⁶⁶³ The UNGA called for the drafting of the ICRMW in 1979. The drafting process lasted 10 years from 1980 to 1990.⁶⁶⁴ The objective behind the drafting of the ICRMW was to protect the fundamental human rights of all migrant workers, including those who were in an irregular situation. This section of the thesis will analyse the ICRMW for further development of the framework of human rights protection in relation to trafficked persons.

⁶⁶¹ International Labour Organisation, C143 Migrant Workers (Supplementary Provisions) Convention, 1975, Available from <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143>

⁶⁶² Bosniak L.S., 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers' Convention', in Bogusz B. and Cholewinski R. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), p. 312

⁶⁶³ Cholewinski R., *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, (Oxford: Oxford University Press, 1997), p.139

⁶⁶⁴ Ibid, p.142

6.4.1 *The ICRMW: The First International Standards towards the Protection of Irregular Migrants*

The ICRMW was adopted by the UNGA on 18 December 1990,⁶⁶⁵ with the intention to reaffirm the basic human rights in existing legal instruments and to develop a specific legal instrument dealing with the protection of migrants. The ICRMW is considered as the lengthiest core international human rights instrument, containing 93 Articles.⁶⁶⁶ The Convention sets guidelines for the promotion of legal protection of migrants and recognises that problems involved in migration are even more serious, particularly, in the case of irregular migration. Despite the increasing recognition of human rights of 'all migrants', the ICRMW took 13 years, after the year of adoption, to receive the 20 ratifications, as required for entry into force 1 July 2003. As of 18 March 2009, there are 41 ratifications of which all are from developing countries.⁶⁶⁷ It also appears that neither Thailand nor the UK is a state party under this Convention.

The Convention aims to encourage appropriate actions to prevent and eliminate the clandestine movements and trafficking in migrant workers, whilst, at the same time, to ensure that the fundamental human rights of migrants are respected. According to its preamble, the ICRMW goes beyond

⁶⁶⁵ 220 U.N.T.S. 3

⁶⁶⁶ Cholewinski R., 'The Rights of Migrant Workers', in Cholewinski R., Perruchoud R. and MacDonald E., *International Migration Law: Developing Paradigms and Key Challenges* (The Hague: T.M.C. Asser Press, 2007), p.259

⁶⁶⁷ Bosniak L.S., 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers' Convention', in Bogusz B. and Cholewinski R. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), p.312

other international documents by clarifying that basic economic, social and cultural rights apply to both regular and irregular migrant workers. The Convention also provides a set of international standards to address the treatment, welfare and rights of migrant workers and members of their families and the obligations and responsibilities of states involved.

With a broad range of explicit human rights protection for irregular migrant workers and the members of their families, the author argues that the ICRMW is recognised as the most comprehensive international treaty on migrant rights protection. However, the ICRMW fails to recognise the growth in numbers of temporary migrant workers on a short-term basis, particularly in lower skilled sectors such as the service industry.⁶⁶⁸ The ICRMW is not applicable to the protection of certain specific categories of temporary migrants, for example students and trainees. The author argues that such limitation adversely affects the effectiveness of the ICRMW in providing protection to such emerging types of migrants, who are finding more difficulties in accessing human rights protection under this Convention and have become one of the vulnerable groups of migrants in many receiving countries.

6.4.2. The Definition of a Migrant Worker: The Major Accomplishment of the ICRMW

It is the author's view that the ICRMW contains the most comprehensive definition of 'migrant worker' compared with other international

⁶⁶⁸ Cholewinski R., 'The Rights of Migrant Workers', in Cholewinski R., Perruchoud R. and MacDonald E., *International Migration law: Developing Paradigms and Key Challenges*, (The Hague: T.M.C. Asser Press, 2007), pp. 260-263

instruments concerned with migrants. The ICRMW is applicable to *all* migrant workers, including those who are in an irregular situation as well as members of their families.⁶⁶⁹ According to the ICRMW, the term “migrant worker” is defined as a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national.⁶⁷⁰

The ICRMW also extends the scope of protection to the would-be migrant worker, who holds a work contract, to current migrant workers and past migrant workers. However, the Convention does not cover someone who is seeking employment for the first time.⁶⁷¹ The Convention also recognises the importance of women as migrant workers. References are made throughout the Convention to ensure full applicability to females as well male migrant workers and their families.

6.4.3 *The Human Rights of Migrant Workers under the ICRMW*

According to the structure and scope of legal application, the ICRMW is divided into nine parts, providing a list of rights for all migrants and their families. The two main parts regarding the human rights of migrant workers are Part III and Part IV. Part III (articles 8-35) deals with the protection of ‘all migrant workers and members of their families’, including those who are irregular migrant workers and their families. Part IV only applies to those migrant workers who are in a regular situation. For instance, migrants with proper documents enjoy a wide range of rights, which are more extensive and

⁶⁶⁹ Art.1 of the ICRMW, 220 U.N.T.S. 3

⁶⁷⁰ Art.2 (1) of the ICRMW, 220 U.N.T.S. 3, 18 December 1990

⁶⁷¹ Cholewinski R., *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, (Oxford: Oxford University Press, 1997), p.151

specific than those who are undocumented. For the benefit of the analysis, attention will be paid to Part III, in particular, the human rights of irregular migrant workers and members of their families.

Part III contains a list of rights that is applicable to all migrants – regular and irregular and members of their families. The list of rights, which pertains to all migrants and member of their families, is as follows:

Articles 8 to 35 list the rights to various fundamental human rights, which have existed in a number of international instruments, for example the UDHR as a non- discrimination principle,⁶⁷² the right to freedom to leave any country and to enter their country of origin,⁶⁷³ and the right to life.⁶⁷⁴ In addition, Article 25 of the ICRMW reiterates the provisions under the ICESCR to protect the employment rights and guarantees equal treatment between all migrants both regular and irregular and nationals in respect of remuneration, other conditions of work⁶⁷⁵ and other terms of employment. Finally, Article 27 protects the social security rights.

However, the right to social security protection has become the most debated Article in the drafting process as a number of countries, such as Germany, opposed the inclusion of this article.⁶⁷⁶ During the drafting process, it was not entirely clear as to whether the level of the social security protection applied equally to irregular migrant workers. There are two main approaches

⁶⁷² Art. 7 of the ICRMW, 220 U.N.T.S. 3

⁶⁷³ Art. 8 of the ICRMW, 220 U.N.T.S. 3

⁶⁷⁴ Art. 9 of the ICRMW, 220 U.N.T.S. 3

⁶⁷⁵ This includes overtime, hours of work, weekly rest, holidays with pay, safety, health and termination of the employment relationship, which are equal for national or migrant workers whether they are classified as irregular migrant workers or not.

⁶⁷⁶ Cholewinski R., *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997), pp.165-167

regarding social security rights of irregular migrant workers. First, social security benefits should be given to irregular migrant workers at least to the extent that they might have indirectly contributed. Second, only those regular migrants and their families would be given the social security rights as a minimum standard.

Finally, there is a list of rights, which are addressed under Part III, for example the rights to health care,⁶⁷⁷ basic education,⁶⁷⁸ and culture.⁶⁷⁹ Concerning the right to health care, the provision seems to guarantee merely that 'all migrants and their families' are entitled to the rights to receive emergency medical care necessary for the preservation of their life or the avoidance of irreparable harm to their health. The author argues that the right to basic education should apply to each child of the migrant worker, irrespective of whether they or their parents are in an irregular situation. This provision should be brought forward to the attention of each state party in seeking supplementary strategies to deliver its best practice in the area of education, in relation to the rights of the child.

As mentioned above, the ICRMW goes beyond other international instruments to afford protection to irregular migrant workers. However, legal obstacles, for example, the lack of the protection of the rights stated under Part IV of the ICRMW which are considered important, means there is a protection gap in relation to the principle of equal treatment. These rights are,

⁶⁷⁷ Art.28 of the ICRMW, 220 U.N.T.S. 3

⁶⁷⁸ Art.30 of the ICRMW, 220 U.N.T.S. 3

⁶⁷⁹ Art.31 of the ICRMW, 220 U.N.T.S. 3

for example, liberty of movement in the territory of the state of employment,⁶⁸⁰ the right to form trade union and participation in public affairs in the state of employment,⁶⁸¹ the right to family unity,⁶⁸² equality of treatment as nationals with regards to certain benefit programs including housing, educational and health-related services,⁶⁸³ and further employment protections.

In addition, some protective provisions under Part III of the ICRMW are inapplicable due to the limitation of state administration: the right to social security and the right to health. More significantly, the author contends that despite the existing legal norms for the protection of migrant's rights, practical obstacles, encompassing all difficulties such as contradiction between the aim of the Convention and the state's practice in immigration control policies, undermine best practice towards the human rights protection of irregular migrants.

6.5 The International Standard of Victim Protection under the Trafficking Protocol

As discussed in chapter 2,⁶⁸⁴ under the category of irregular migrants, trafficked persons have become one of the most vulnerable types of migrants whose human rights have been violated by traffickers. The plight of trafficked persons has come to the attention of the international community which has made attempts to fight against human trafficking. In 2000, the Transnational Organized Crime Convention was adopted, together with the two supplementary Protocols: the Smuggling of Migrants and the Trafficking

⁶⁸⁰ Art. 39 of the ICRMW, 220 U.N.T.S. 3

⁶⁸¹ Art. 41 of the ICRMW, 220 U.N.T.S. 3

⁶⁸² Art. 44 of the ICRMW, 220 U.N.T.S. 3

⁶⁸³ Art. 43 and Art. 45 of the ICRMW, 220 U.N.T.S. 3

⁶⁸⁴ See Chapter 2: Section 2.6, pp. 38-49

Protocols. Unlike the Smuggling of Migrants Protocol, the main purpose of the Trafficking Protocol is to establish a comprehensive legal approach to end human trafficking through three prominent measures: prevention and prosecution of human trafficking, and protection of the trafficked persons, including the protection of their internationally recognised human rights.

Chapter 3 noted that the Trafficking Protocol focuses on crime control and deterrence of unlawful migration. However, there appears to be some assertions of human rights concerns.⁶⁸⁵ This section elaborates particularly on victim protection provisions under the Trafficking Protocol. The main analysis will be placed on Part II of the Trafficking Protocol, dealing with the protection of trafficked persons. Part II contains three provisions, Article 6 to 8. The section further examines the protection provisions under the Transnational Organized Crime Convention- Article 24 (protection of witnesses) and Article 25 (assistance to and protection of victims) as incorporating protective measures to trafficked persons.

Whilst the obligations to prohibit trafficking are mandatory, the author argues that provisions under the obligations to protect victims of trafficking are relatively weak. This is because the language used in each provision tends to be optional rather than the imposition of 'hard' obligations to state parties.⁶⁸⁶ The use of optional language was inevitably criticised by the United Nations Agencies such as the Office of the United Nations High Commissioner for

⁶⁸⁵ See in Chapter 3: Section 3.7.4, pp.114-116

⁶⁸⁶ Gallagher A. "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis" (2001) 23 *Human Rights Quarterly* 990

Human Rights (OHCHR), IOM, the United Nations Children's Fund (UNICEF), and the United Nations High Commissioner for Refugees (UNHCR).

The main overall criticism was centred on the lack of a state's obligations to provide protection for trafficked persons.⁶⁸⁷ This was not included in the final draft of the Trafficking Protocol. The main reasons for failure can be accounted for by the following reasons. Firstly, states, especially those perceived as destination countries, did not attempt to commit themselves to protect the rights of those who in the view of the states are a threat to internal security, because of their link with criminal activities which breach the state's immigration law. Therefore, the protection provisions of the Trafficking Protocol raise special problems of legal enforcement in national domestic law. Secondly, destination states are usually unwilling to provide trafficked persons with legal protection, which may incur expenses for the states and be time consuming. States tend to deport, remove or return trafficked persons without careful investigation of the causes and consequences of human trafficking.⁶⁸⁸

6.5.1 Protective Measures and the Trafficking Protocol

The author contends that the framework of victim protection under the Trafficking Protocol does not address a new framework of human rights

⁶⁸⁷ The United Nations High Commissioner of Human Rights, the United Nations Children's Fund, the United Nations High Commissioner for Refugees and the International Organization for Migration on the Draft Protocol concerning migrants smuggling and trafficking in persons, *A/AC.254/27*, 8 February 2000 and *A/AC.254/27/Corr.1*, 22 February 2000, hereafter Inter-Agency Submission, Paras.7

⁶⁸⁸ Anti-Slavery International, *Human Traffic, Human Rights: Redefining Victim Protection*, (London: Anti-Slavery International, 2002), pp.109-110

protection but reiterates existing fundamental rights, embodied in the core human rights treaties, applicable to non-nationals. States parties are obliged to protect trafficked persons who are entitled to gain access to state assistance and services as a result of being trafficked. Despite addressing the framework of victim protection, the definition of victim is absent under the Trafficking Protocol. The author contends that the omission of the definition of a victim of trafficking highlights legal and practical obstacles in the identification of victims.

To ensure that trafficked persons who are victims are entitled to protection and accorded assistance, the author argues that the definition of victim should be given by an amendment of the law or by reference to existing human rights instruments applicable to human trafficking. The latter idea is taken into account in this study as an interim process to the amendment of the Protocol. For the best practice, the author suggests consideration of the definition of victim given under the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁶⁸⁹ This is considered a broader definition and should therefore be made applicable to the case of human trafficking.

According to the Principles, a victim is defined as a person who individually or collectively suffered harm, including physical or mental injury, economic loss or substantial impairment of his/her fundamental rights,

⁶⁸⁹ United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human and Serious Violations of International Humanitarian Law, Resolution adopted by the General Assembly, *A/Res/60/147*, 21 March 2006

through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. The term “victim” also extends to the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.⁶⁹⁰ The author contends that such definition adopts a victim-centered approach which results in a multi-dimensional meaning for ‘victims.’ This is to ensure a victim is accorded protection and not held liable for the acts committed as a result of being trafficked, which reaffirms the principle of non-criminalisation.⁶⁹¹ According to the Trafficking Protocol, a victim of trafficking should be entitled to a number of rights and assistance. This will now be considered.

Article 6: Assistance to and Protection of Victims of Trafficking

*The Right to Privacy*⁶⁹²

Article 6 of the Trafficking Protocol contains a series of general protection and support measures for trafficked persons. For example, regarding the right to privacy, state parties are required to take basic measures, which include the protection of the privacy of trafficked persons, to ensure the right to access information about criminal investigations or proceedings and any facilities during the process of criminal procedures and to provide for physical, psychological and social recovery of victims of

⁶⁹⁰ Section V: Victims of Gross Violations of International Human and Serious Violations of International Humanitarian Law, Principle 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human and Serious Violations of International Humanitarian Law, *A/Res/60/147*, 21 March 2006

⁶⁹¹ Mattar M.Y. “Incorporating the five basic elements of a modal anti-trafficking in persons legislation in domestic laws: from the United Nations Protocol to the European Convention” (2006) 14 *Tulane Journal of International and Comparative Law* 382 and see also discussion in Chapter 8: Section 8.5.2., pp.315-318

⁶⁹² Art.6.1 of the Trafficking Protocol, 2237 U.N.T.S. 319

trafficking. However, the granting of protection under this provision depends upon a state's discretion.

The author argues that a state party should take positive steps to fulfill its obligation to protect trafficked persons through the recognition of the privacy and safety of trafficked persons. Since every trafficked person is at risk of retaliation by traffickers and is open to being re-traumatised through social stigmatisation, the victim's identity must be kept confidential. As stated above, the granting of the right to privacy should be extended to members of the trafficked persons' family who suffered harm or are deemed to be threatened by traffickers. However, it is admitted that the granting of rights to privacy under national laws still remains inconsistent due to different levels of concern over victim protection in each state.

In addition, the author argues a state's reluctance to ensure the rights to privacy of trafficked persons underscores the low rate of prosecution and conviction of traffickers. This is because it is unlikely for trafficked persons to co-operate with the authorities to testify against traffickers without the affirmative action of states to guarantee the privacy and safety of trafficked persons as well as members of their families. The author suggests that states parties should call for the amendment or development of national laws and policies to consolidate the international human rights standard towards the right to privacy of victims of trafficking to be explicitly recognised in any anti-trafficking legislation.

*The Right to Access Information and Remedies*⁶⁹³

The author contends that the right to access information and remedies are ineffective as a consequence of inappropriate language used in the Protocol. It is noted that in practice, as a non-national, a trafficked person could by no means access legal assistance unless the right to access is clearly stated under domestic laws. A trafficked person should be informed of their entitlement to protection and assistance as a basic human rights protection. Legal assistants such as translators or solicitors should be appointed to facilitate information reaching a trafficked victim appropriately. It is the author's argument that as far as state accountability is concerned, states parties cannot escape their obligations to protect the right to information, without any reservations. In addition, the right to information and remedies should be given equally to all trafficked persons, whether or not they agree to co-operate with the authorities.

In connection with the right to remedies, a number of human rights treaties do provide a remedy both substantive and procedural. For example, individuals suffering injury from unlawful conduct by state authorities will be remedied under the provision of ICCPR.⁶⁹⁴ The widespread violence or conflict that inflicted losses of personal or real property on large groups of victims has resulted in the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International

⁶⁹³ Art.6.2 (a) of the Trafficking Protocol, 2237 U.N.T.S. 319

⁶⁹⁴ Art.2 (3), Art. 9(5), and Art. 14(6) of the Trafficking Protocol deal with the right to compensation, 2237 U.N.T.S. 319

Human Rights and Serious Violation of International Humanitarian Law in 2005, after a lengthy process, which was initiated in 1989.⁶⁹⁵

According to the Principles, compensation is a monetary payment for financially assessable damages, arising from the violations, covering material and moral injury.⁶⁹⁶ However, claims for restitution and compensation can involve a number of different remedies, depending on the specific circumstances giving rise to claims, socio-political and economic contexts and, more importantly, the accountability and willingness of the state towards individual rights to remedies. Despite recent progress and acceptance of an individual's responsibilities to make claim for remedies, the author argues that none of the human rights instruments has yet specifically addressed provisions enabling an individual to gain direct redress.

This is because only states are traditionally recognised under international law as subject to the full rights and obligations, whereas individuals are beneficiaries who must claim their rights via states or nationalities.⁶⁹⁷ To facilitate claims for compensation for various groups of victims, including victims of trafficking, the author argues that the development of international bodies are necessary legal mechanisms to effectively facilitate remedies for those who suffered harms, damages or losses as a result of being trafficked.

⁶⁹⁵ Wühler N., 'Claims for Restitution and Compensation', in Cholewinski R., Perruchoud R. and MacDonald E., *International Migration Law: Developing Paradigms and Key Challenges*, (The Hague: T.M.C. Asser Press, 2007), pp.204-207

⁶⁹⁶ Principle 20 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human and Serious Violations of International Humanitarian Law, *A/Res/60/147*, 21 March 2006 and see also Gillard E.C. "Reparation for violations of international humanitarian law" (2003) 85 *International Review of the Red Cross* 531

⁶⁹⁷ Gillard E.C. "Reparation for violations of international humanitarian law" (2003) 85 *International Review of the Red Cross* 537

*The Right to Social Benefits*⁶⁹⁸

The rights to physical, psychological and social recovery can be viewed as the right to appropriate housing, to counselling and information, to medical and psychological help and material assistance and a right to employment, education and training opportunities. It can be said that these rights reiterate the provisions in ICESCR. As most trafficked persons have been threatened not only physically, but also mentally, the rights to social protection are of the utmost necessity. The author contends that each state party has legal obligations to provide social protection for those who are insecure by adopting progressive measures up to the maximum of available resources and by all appropriate means.⁶⁹⁹ However, in practice, most trafficked persons are likely to be re-victimised by state actions.

For example, as there is no agreed principle on the provision for the right to housing benefit, most victims of trafficking have been immediately deported, imprisoned or put in detention centres, depending on the convenience of each state.⁷⁰⁰ Such state practice may lead to the lack of best practice. First, the immediate deportation policy has proved in many countries that traffickers remain unpunished because of a lack of evidence.⁷⁰¹ Second, as there is no agreed principle on benefit, it is dependant solely upon an individual state's discretion. The right to housing may be ignored as a state party usually argues that there is no appropriate place and other resources to

⁶⁹⁸ Art.6.3 of the Trafficking Protocol, 2237 U.N.T.S. 319

⁶⁹⁹ See also Art.2 of the ICESCR, 993 U.N.T.S. 3

⁷⁰⁰ Anti-Slavery International, *Human Traffic, Human Rights: Redefining Victim Protection*, (London: Anti-Slavery International, 2002), pp.109-110

⁷⁰¹ Pollock J., 'Collateral Damage: Thailand', in the Global Alliance against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights and the World* (Bangkok: GAATW, 2007)

house trafficked persons. Therefore, the author suggests that at the minimum, a state party must ensure state obligations and accountability to provide at least accommodation and basic needs for a flexible short-term period, with the possibility to extend when required.

The Trafficking Protocol deals with counseling in a legal context. However, it is suggested that a state party should act with due regard to the broader context of counselling, based on the needs of trafficked persons. This is because each victim has been facing threats in a different way and level. Thus, the protection and assistance given to trafficked persons should be flexible. In terms of legal advice, a state party must ensure that trafficked persons are provided with lawyers and interpreters or translators when required in all stages of legal proceedings.⁷⁰²

Finally, a state party must recognise the fundamental human rights of trafficked persons such as the right to health, education, training and employment,⁷⁰³ even though the latter seems unrealistic in current circumstances. In addition, if victims of trafficking are children, their special needs must be taken into account by a state party. This must be considered in conjunction with the CRC to benefit child victims of trafficking, as they are more vulnerable than adults. Without discrimination against child victims, each

⁷⁰² *Airey V Ireland* (App.6289/73), Judgement of 9/9/79, Para.25 "state must take positive steps to secure an effective right of access to the courts" under Art.36 of the 1969 Vienna Convention on Consular Relations, hereafter VCCR, 596 U.N.T.S. 261, 24 April 1963, entered into force 19 March 1967

⁷⁰³ *Velikova V Bulgaria* (App.41488/98), Judgement of 18/05/00, Paras. 74-76 "a failure of authorities to provide adequate medical treatment for seriously injured detainees could result in breach of Art. 2 of the ECHR, C.E.T.S. No. 005. This is equivalent to Art. 39 of the CRC, 1577 U.N.T.S. 3. See further discussion in Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), pp.158-159

state party must ensure that whilst in its jurisdiction, child victims are accorded 'equal treatment' with all children, for example, the right to have access to education, health care and social services.

Article 7: Status of Victims in Receiving Countries

This provision aimed to ensure the immigration status of trafficked persons by adopting domestic legislation to permit such trafficked persons to remain in the country. However, the Trafficking Protocol does not mandate the state's obligation to adopt any measures to determine the residency status of trafficked persons or the period of residency. It is the author's view that the lack of the right to residency has adversely affected the comprehensive approach of the Trafficking Protocol. This is because the immediate return, deportation, or removal of trafficked persons is unsatisfactory both in terms of the state's obligation to protect victims and the prosecution of traffickers.

The author contends that all trafficked persons whether or not they are witnesses in the criminal procedure against traffickers should be guaranteed appropriate assistance and protection. The customary international law on the approach of non-refoulement is essential and should not be narrowly construed.⁷⁰⁴ A trafficked person shall enjoy the right to be protected from

⁷⁰⁴ The inability of the government of the Ukraine to protect trafficked Ukrainian women made it more likely for them to be prosecuted by her traffickers constitutes the well-founded fear and the principle of non-refoulement or non-return shall apply, *Secretary of State for the Home Department V Lyudmyla Dzhygun*, (Immigration Appeals Tribunal), Appeal No. CC-50627-99 (00TH00728), 13 April 2000 and see also Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), p.155 and Demir J.S., *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?*, a working paper No.80, UNHCR, 2003

deportation. States must ensure that trafficked persons shall be returned to their host countries without being at risk.

To support this view, the Convention relating to the status of refugees, as amended by the Protocol Relating to the Status of Refugees should be made applicable to assist trafficked persons to the extent that these persons are considered as members of a particular social group.⁷⁰⁵ Piotrowicz advocated that in order to be given the protection on the grounds of the 1951 Convention; trafficked people will have to satisfy the following criteria:

1. They must have a well-founded fear of persecution.
2. Such fear has brought them outside the country of origin.
3. They are unable or unwilling to return to their country because of their fear.⁷⁰⁶

In this connection, a state should consider the period of residency in the background of trafficked persons themselves, and the current situation in their countries of origin. If it proves too dangerous for trafficked persons to return home, a state should then give extendable temporary residency to those victims. The author contends that despite being considered as a significant measure for protecting trafficked victims, such a proposal is not yet likely to be adopted. A number of states, mostly developed countries are reluctant to take such measures to protect the fundamental human rights of

⁷⁰⁵ Art. 1A (2) of the 1951 Refugee Convention considers a refugee status as someone owing to well founded fear "of being prosecuted for reasons of....members of a particular social group.. owing to such fear, is unwilling to return to it"

⁷⁰⁶ Piotrowicz R. "Victims of people trafficking and entitlement to international protection" (2005) 24 *Australian Law Year Book* 264

trafficked persons, but rather adopt stricter border control and strict national immigration laws for entry into their national territories, overriding the obligation for victim protection. The principle of non-refoulement will be further discussed in chapter 8.⁷⁰⁷

Article 8: Repatriation of Victims of Trafficking in Persons

The return of trafficked persons to their countries of origin is dealt with in Article 8. A major concern with this provision is that it may leave such trafficked persons vulnerable to being re-trafficked and re-victimised. They are also vulnerable to retaliation from traffickers for having cooperated in legal procedures against traffickers.⁷⁰⁸ Under this provision, both sending and receiving states are obliged to facilitate the return of trafficked persons, 'with due regard to the safety of that person and without unreasonable delay'.

Before returning trafficked persons to the host country, a receiving state is required to investigate and ensure that there is no danger to the victim's life, for example, reprisal of traffickers, civil war and any reasons for being re-trafficked or re-victimised. In addition, it should ensure that the repatriation is not forced by receiving states. Receiving states must ensure that voluntary repatriation is facilitated in cooperation with sending states.⁷⁰⁹

Likewise, sending states shall arrange all facilities and related documents,

⁷⁰⁷ See in Chapter 8: Section 8.5.4, pp.322-328

⁷⁰⁸ Vlassis D., *Overview of the Provisions of the United Nations Convention against Transnational Organized Crime and its Protocols*, a paper presented at the 119th International Training Course Visiting Expert's Papers, Resource Material Series No.59, p.462

⁷⁰⁹ Jordan A.D., *The Annotated Guide to the Complete UN Trafficking Protocol*, (Washington: International Human Rights Law Group, 2002), p.27

necessary for the return of trafficked persons i.e. a travel document. Moreover, if required, states should arrange transportation tickets and accommodation, with due regard and without unreasonable delay for the return of trafficked persons.⁷¹⁰

Article 24: Protection of Witnesses

Article 24 of the Transnational Organized Crime Convention contains provision for protection of all witnesses, including trafficked persons and their relatives or other persons close to them. There is a list of rights, concerning the rights of witnesses, for example, the right to physical protection, read in conjunction with Article 6 of the Trafficking Protocol, and the right to relocation if needs be. However, the author notes that Article 24 is applicable only to witness protection before and during legal proceedings. It is the author's view that the witness protection scheme should be flexible and extended after the conviction of traffickers to ensure the safety of witnesses and their relatives, free from retaliation by other members of an organised crime group who are not convicted in the case of trafficking.

However, the lack of best practice is considered as a major obstacle to successful prosecution of traffickers. In some countries, due to the lack of a specific legislation dealing with witness protection, a number of trafficked persons are unable to testify against traffickers, as they are subjected to deportation before the trial. Other than the legal obstacles, most trafficked

⁷¹⁰ Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), pp.157-158

persons refuse to cooperate with the concerned authority due to the fear of reprisal and lack of trust in the criminal justice system. The author argues that a number of incentives for trafficked persons to testify against traffickers should be introduced, including alternative methods of testifying to guarantee the safety of trafficked persons and their families and to empower trafficked persons through appropriate mechanisms and measures, as long-term protection.

Article 25: Assistance to and Protection of Victims

Article 25 covers the assistance and protection of victims. As compared with Article 6 of the Trafficking Protocol, this provision is based on the stronger state obligation for the protection and assistance of victims. As the principle of *mutatis mutandis* applies to trafficking, a state party is obliged to give broader protection and assistance to trafficked persons under Article 25 read in conjunction with Article 6 of the Trafficking Protocol.

To sum up, the problem of the Transnational Organized Crime Convention and the Trafficking Protocol is that both legal instruments acknowledge the criminalisation of human trafficking through state cooperation but leave protection provisions to the discretion of a state. As a result, the author argues that the protection provisions under such treaties are relatively weak and inadequate to cover all aspects of human rights protection. It can be said that prosecution and suppression incentives would not be effective and sufficient to end human trafficking as a form of human

rights violation. This section now examines protection provisions under the COE in comparison to the Trafficking Protocol for development of a comprehensive framework of protection.

6.5.2 *The COE: the Lessons Learned from the Mistakes*

The adoption of the COE is instrumental to the development of a more comprehensive framework of victim protection. This is because the COE emphasises a human rights instrument adding values to victim protection and goes beyond the international minimum standard.⁷¹¹ Apart from basic human rights and assistance to which a trafficked person is entitled, for example, the right to privacy,⁷¹² and assistance to victims in their physical, psychological and social recovery,⁷¹³ the COE develops a number of provisions to grant protection and assistance to a trafficked person.

In comparison to the protection provisions under the Trafficking Protocol, which undermines the provision on the identification of victims, the COE fills in a gap to acknowledge that victim identification is essential to the comprehensive protection framework.⁷¹⁴ In this connection, the definition of victim is explicitly given as 'any natural person who is subjected to trafficking in human beings'.⁷¹⁵ The author notes that to ensure the effective process of

⁷¹¹ Gallagher A. "Recent legal developments in the field of human trafficking: a critical review of the 2005 European Convention and related instruments" (2006) 8 *European Journal of Migration and Law* 167-169

⁷¹² Art.11 of the COE, C.E.T.S. No.197

⁷¹³ Art. 12.1 (a) –(f), of the COE, C.E.T.S. No.197

⁷¹⁴ Art.10 of the COE, C.E.T.S. No.197 and see discussion in Chapter 8: Section 8.5.1., pp.311-314

⁷¹⁵ Art.4 of the COE, C.E.T.S. No.197

identification of a victim, a state party is required to take necessary actions to identify and protect victims. A number of conditions should be created to achieve the state's obligation.

First, a state should train competent authorities capable of identifying victims and channelling them for their protection and assistance under the COE. Second, a state should adopt an effective legal framework and measures necessary to the identification process.⁷¹⁶ Moreover, a state party is required to recognise victims of trafficking as those who suffered harm, violence and exploitation. Such persons are to be considered as victims rather than having penalties imposed for their involvement in unlawful activities.⁷¹⁷ This provision should reaffirm the principle of non-criminalisation.⁷¹⁸

The COE also extends the scope of protective measures to provide for a 'reflection period'⁷¹⁹ allowing victims to recover and decide whether or not to cooperate with law enforcement. A reflection period should be considered as an initial phase towards the granting of a residence permit⁷²⁰ to trafficked persons when necessary owing to their personal situations such as well-founded fears of prosecution or any potential retaliation or intimidation by traffickers. In this regard, the COE sets out a recovery and reflection period of 'at least 30 days' - a minimum standard, which is extendable to meet individual needs. During the reflection period, a victim cannot be repatriated against his/her will,

⁷¹⁶ Mattar M.Y. "Incorporating the five basic elements of a modal anti-trafficking in persons legislation in domestic laws: from the United Nations Protocol to The European Convention" (2006) 14 *Tulane Journal of International and Comparative Law* 389

⁷¹⁷ Art.26 of the COE, C.E.T.S. No.197

⁷¹⁸ See discussion in Chapter 8: Section 8.5.2., pp.315-318

⁷¹⁹ Art. 13 of the COE, C.E.T.S. No.197

⁷²⁰ Art.14 of the COE, C.E.T.S. No.197

yet it is open to the voluntary return of a victim. The return of a victim shall be done through state cooperation between country of origin and destination country without any delay.⁷²¹

In connection with the trafficking in children, the COE recognises the special needs of a child victim of human trafficking. As a result, the COE provisions go considerably beyond those of the Trafficking Protocol. Key provisions relating to protection and assistance to a child victim are, for example, the establishment of actions towards the right to acquire nationality,⁷²² the right to family reunification,⁷²³ and the right to access education.⁷²⁴ Moreover, the COE reiterates the principle of non-discrimination on the basis of gender and aimed to promote gender equality towards protective measures.⁷²⁵ Finally, having taken a victim-centred approach,⁷²⁶ the COE also establishes a range of provisions to facilitate victims, in accordance with better protection and appropriate remedies. Victims are entitled to legal assistance towards the making of claims for monetary compensation.⁷²⁷

To conclude, the COE has taken a positive step for the protection and assistance of victims. It is considered as a more comprehensive and more sensitive human rights instrument. The COE also fills in several gaps left by the Trafficking Protocol. However, the effectiveness of the COE is yet another

⁷²¹ Art.16 of the COE, C.E.T.S. No.197

⁷²² Art. 10.4 (b) of the COE, C.E.T.S. No.197

⁷²³ Art.10.4 (c) of the COE, C.E.T.S. No.197

⁷²⁴ Art.12.1 (f) of the COE, C.E.T.S. No.197

⁷²⁵ Art.17 of the COE, C.E.T.S. No.197 and see discussion in Chapter 8: Section 8.5.3., pp.318-322

⁷²⁶ Gallagher A. "Recent legal developments in the field of human trafficking: a critical review of the 2005 European Convention and related Instruments" (2006) 8 *European Journal of Migration and Law* 181

⁷²⁷ Art. 15.2 and 15.3 of the COE, C.E.T.S. No.197

concern, depending on a number of factors such as the number of ratifications of the COE⁷²⁸ and the willingness and enthusiasm of states for tackling human trafficking with more comprehensive and effective measures. Not only is the promotion of human rights protection necessary, but the cooperation and mutual understanding amongst all concerned agencies ought to be paramount.⁷²⁹

6.6 Conclusion

From the analysis in this chapter, the key obligations of the Trafficking Protocol lie in three areas. The first two are the prosecution and prevention of traffickers. The third is the protection of trafficked people. However, the criminalisation of traffickers is seen as the most important aspect of the Trafficking Protocol, whereas the protection provisions have proved relatively weak and failed to promote and implement human rights protection. The author concludes that the Trafficking Protocol is neither a comprehensive nor effective legal instrument and does not address all aspects of trafficking in persons. The author suggests that it is the state's obligation to adopt a broader scope of international human rights standards from core international human rights treaties, norms and principles to human trafficking for the promotion of best practice.

The chapter also discusses the major causes that led to the ineffective implementation of protection provisions. The current definition of trafficking

⁷²⁸ As of 31 July 2010, there are 20 states parties to the COE, visit http://www.coe.int/t/dg2/trafficking/campaign/Flags-sos_en.asp and see also Note 532, in Chapter 5

⁷²⁹ See discussion in Chapter 8: Section 8.5.5., pp.328-334

uses the existence of force, slavery or a servitude element. However, trafficking is not considered as a practice that constitutes slavery. The author contends that the lack of expansive legal interpretation results in the ineffective implementation of the anti-trafficking law and relevant human rights laws. In addition, the contemporary human trafficking is far more complex. As stated in chapter 3, not all trafficked people are subjected to physical force or violence but they are inherently owned and subsequently exploited by the trafficker.

In addition, the author argues that the anti-trafficking measures have become anti-prostitution or anti-immigration measures and violate the right of movement, right of employment and right to development of migrants. The author therefore calls for a more comprehensive and sensitive legal instrument. The approach should thus include all missing issues and fill in the protection gap. The shift in paradigm from criminalistic to human rights approach is required to include: the definition of trafficked persons, the principle of non-criminalisation of trafficked victims, non-discrimination, non-refoulement and the involvement of a monitoring mechanism i.e. the participation of members of civil society.

Table 2: Thailand and the United Kingdom’s Ratifications of International Human Rights Documents, Applicable to the Protection of Victims of Human Trafficking
(In Chronological Order)

International Human Rights Documents	Thailand	UK	Citation
1.International Labour Organization Convention No.29 Concerning Forced or Compulsory Labour	28 Feb 1969 (R)	03 June 1931	39 U.N.T.S. 55, 28 Jun 1930 entered into force1 May 1932
2.The Universal Declaration of Human Rights			UNGA. Res 217 A. (III) Adopted by General Assembly, 10 Dec 1948
3.The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	-	-	96 U.N.T.S. 273, 2 Dec 1949 entered into force 21 Mar 1950
4.The Convention Relating to the Status of Refugees	-	11 Mar 1954 (R)	189 U.N.T.S. 150, 14 Dec 1950 entered into force 22 April 1954
6.The International Convention on the Elimination of of All Forms of Racial Discrimination	28 Jan 2003 (A)	7 Mar 1969	660 U.N.T.S. 195, 7 Mar 1966 entered into force 4 Jan 1969
5.The Protocol Relating to the Status of Refugees		4 Sept 1968 (A)	606 U.N.T.S. 267, 16 Dec 1966 entered into force 4 Oct 1967
7.International Covenant on Economic, Social and Cultural Rights	5 Sept 1999 (A)	20 May 1976	993 U.N.T.S. 3, 16 Dec 1966 entered into force 3 Jan 1976
8.International Covenant on Civil and Political Rights	29 Oct 1996 (A)	20 May 1976	993 U.N.T.S. 1971, 16 Dec 1966 entered into force 23 Mar 1976
9.International Labour Organization Convention No.143 Concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers	-	-	1120 U.N.T.S. 324, 24 Jun 1975 entered into force 9 Dec 1978

International Human Rights Documents	Thailand	UK	Citation
10.Convention on the Elimination of All Forms of Discrimination Against Women	9 Aug 1985 (A)	7 Apr 1986	1249 U.N.T.S. 13, 18 Dec 1979 entered into force 3 Sept 1981
11.The Declaration on Human Rights of Individuals who are not Nationals of the Country in which They Live			A/RES/40/144, 13 Dec 1985
12.Convention on the Rights of Child	27 Mar 1992 (A)	16 Dec 1991	1577 U.N.T.S. 3, 20 Nov 1989 entered into force 2 Sept 1950
13.Recommended Principles and Guidelines on Human Rights and Human Trafficking			E/2002/68/Add.1, 20 May 2002
14.International Labour Organization Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour	16 Feb 2001	22 Mar 2000	2133 U.N.T.S. 161, 17 Jun 1999 entered into force 9 Nov 2002
15.International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	-	-	2220 U.N.T.S. 3, 18 Dec 1990 entered into force 1 July 2003
16.Convention against Transnational Organized Crime and its Protocols	-	9 Feb 2006	2225 U.N.T.S. 209, 15 Nov 2000 entered into force 29 Sept 2003
17.Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	-	9 Feb 2006	2237 U.N.T.S. 319m 15 Nov 2000 entered into force 25 Dec 2003
18.Council of Europe Convention on Action against Trafficking in Human Beings	-	17 Dec 2008 (R)	CETS.No 197, 16 V 2005 entered into force 1 Feb 2008

Note: R= Ratification, A = Accession

Chapter 7

Conclusion and Recommendations

This chapter presents a summary of the research, with conclusions and recommendations. The aim of this research was to develop a more comprehensive and effective framework for protection of trafficked persons. To comprehend the current phenomenon of human trafficking, this thesis elaborates upon and critically analyses the following concerns: approaches to human trafficking, legal responses to the trafficking problem both at national and international levels and the development of a framework for victim protection.

The chapter is divided into three sections. The first draws together a brief summary of the research based on the previous chapters. The focus is to address problems arising from both theory and practice. Section 2 sets out the conclusion of this study. This section sums up the research findings and concludes possible remedies necessary for the legal development. The author hopes that such remedies could bring some better practice into the chronic problem of human trafficking. The last section follows with recommendations for the comprehensive human rights protection of victims of trafficking, which will be discussed in chapter 8.⁷³⁰

⁷³⁰ See discussion in Chapter 8, pp.289-337

7.1 Summary

This section is a brief summary of each chapter. It underscores how human trafficking is discussed, elaborated and critically analysed. In chapter two, human trafficking is discussed as a multi-faceted problem of modern day migration. This problem is a product of 'knowledge deficiency' in approaches to human trafficking- arising from inadequacy of traditional migration approaches. The author argues that knowledge deficiency arguably creates tension amongst relevant law, migration policies at theoretical and practical levels, and ideologies and realities. Although human trafficking is not a new concept, the author concludes that it has, over the last twenty years, become a persistent global problem.⁷³¹

The international community in the mid nineteenth century responded to human trafficking, known as the white slave trade, which conflated human trafficking with prostitution. But, modern day international migration has acknowledged human trafficking as the nexus between irregular migration, forced labour and prostitution.⁷³² Chapter two concludes that the fast growing problem of human trafficking and smuggling of migrants is due to unequal economic development and disparities amongst nations. Victims of all forms of human trafficking and the smuggling of migrants are migrant labourers, who are looking to improve their economic situation.⁷³³

⁷³¹ Chapter 2: Section 2.9, pp.60-62

⁷³² Sanghera J., 'Unpacking the Trafficking Discourse', in Kempadoo K., Sanghera J. and Pattanaik B., *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights*, (London: Paradigm Publishers, 2005), pp.3-12

⁷³³ Prasad N. and Rohner B., 'Undocumented Migration, Labour Exploitation and Trafficking', in Sector Project against Trafficking in Women (eds.), *Challenging Trafficking in Persons: Theoretical Debate and Practical Approach*, (Baden Baden: Namos, 2005) p.39

Moreover, the study notes that the reality has shown imbalances between the increasing demand for and the autonomous mobilisation of low-skilled labour. In many destination countries, the migration for low skilled labour is strictly regulated. As a result, many potential low skilled workers seek help from various types of facilitators-smugglers or traffickers to move across such tightened borders. Such labour mobility poses a dilemma, especially when their movement is tied in with 'conditions of irregularity.'⁷³⁴ From the research findings, irregularity constructs complicated interaction between gender, class and ethnic groups, which in turn exacerbates vulnerability, abuse and the exploitation of migration. Dichotomies between voluntary and involuntary, victim and agent, and coercion and consent are other difficult areas, which reinforce the increased complexity of human trafficking in the 21st century.

Chapter three deals with the complexity of human trafficking in the realm of international documents. Human trafficking has been recognised by various international instruments, both hard (treaties) and soft law (Declarations, Resolutions and other Non-Treaty obligations, for instance). Chapter three discusses the legal history of human trafficking from the white slave trade and the notion of slavery to the Transnational Organized Crime Convention and the Trafficking Protocol. Chapter three summarises that at international level, human trafficking consists of two main legal dimensions: criminal and human rights dimensions. However, since the adoption of the

⁷³⁴ Kostakopoulou D., 'Irregular Migration and Migration Theory: Making State Authorization Less Relevant', in Bogusz B. and Cholewinski R. et al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Leiden: Martinus Nijhoff Publishers, 2004), pp.41-44

Transnational Organized Crime Convention and the Trafficking Protocol in 2000, human trafficking measures have moved more to the criminal dimension.⁷³⁵

Due to the criminalisation of human trafficking, the Trafficking Protocol seeks to strengthen effective prosecution and suppression measures, whilst protection provisions are merely regarded as optional to state parties. In practice, most state parties opt to implement a stricter immigration policy. Chapter three concludes that tougher prosecution and suppression measures have not and will not effectively stop human trafficking. Such legal intervention instead serves to encourage trafficked persons to become invisible and go underground.

The author contends that at international level, the current legal response to human trafficking does impose a burden upon trafficked persons, who are mostly low skilled labour and the victims of unequal development. Unless they become informants to the authorities in destination states as witnesses of human trafficking, many irregular migrants (including smuggled migrants or trafficked persons) are treated as criminals who have breached national laws. As a result, the worst forms of exploitation, abuses and human rights violations of irregular migrants continue, whilst facilitators or intermediaries still reap large benefits.

At national levels, the thesis investigates two national case studies in Chapter four and five. Thailand is chosen as the country of origin⁷³⁶ and the

⁷³⁵ See discussion in Chapter 3: Section 3.6, pp.97-105 and Section 3.7, pp.105 -117

United Kingdom as the destination country.⁷³⁷ The study compares Thai and English law pertinent to human trafficking, from their history to current initiatives. The study concludes that both Thailand and the United Kingdom have long responded to the issue of human trafficking, since the mid nineteenth century. Whilst Thailand has not yet ratified the Transnational Organized Crime Convention and the Trafficking Protocol, the UK is now a state party to such treaties.

In connection with the anti-trafficking framework under domestic laws, the study concludes that no single model is applied in the two countries where legal systems differ. Yet, the anti-trafficking framework can be taken as a comprehensive act- the 2008 Anti-Trafficking Act under the Thai law or as various branches of law – criminal law and immigration law under the English law, for example, the SOA 2003 and the AIT 2004. The comparative study shows that, Thai and English laws have a similar shared focus dealing with the human trafficking problem as a violation of national sovereignty rather than a violation of human rights.

The study concludes that, to tackle all forms of human trafficking, a criminalistic approach is taken as the dominant discourse under both Thai and UK law. Both countries have placed more emphasis on the prosecution and suppression of human trafficking, and treat it as equal to illegal migration. However, the author argues that both countries have failed to address and promote a comprehensive and effective human rights framework into the domestic legislation. Although traffickers and intermediary agents are targeted

⁷³⁶ See Chapter 4, pp.119-173

⁷³⁷ See Chapter 5, pp.174-218

under the current legal responses, they are likely to go unpunished. On the contrary, trafficked persons have become 'criminals' under other branches of law- such as immigration, as they are directly and easily caught by authorities at borders, or at workplaces.

However, both Thailand and the UK have recently attempted to develop a more comprehensive framework of human trafficking through protective measures. According to the comparative study, Thailand has developed its protection framework to a greater extent than the UK. The adoption of the 2008 Anti-Trafficking Act recognises the importance of victim protection and puts forward the need to identify the victims as those entitled to protection and assistance. Moreover, the new law enables an identified victim to make a claim for compensation as a remedy to abuse, exploitation, damages or losses thorough the criminal proceeding. Although none of the above measures exists under the UK anti-trafficking framework, the UK has ratified the COE, as the international minimum standard for the UK's framework of victim protection. A number of protective measures are underway to ensure more effective protection provisions.

In chapter six, the study analyses the framework of international human rights protection under the Trafficking Protocol. The study examines the international human rights law, including the Trafficking Protocol and the COE, in particular, its protection provisions. The study concludes that none of the protection provisions under the Trafficking Protocol are considered as universal and available for the violation of the rights of trafficked persons.

Chapter six calls for revision of the current framework under the Trafficking Protocol, in comparison to the COE for further amendment or development of effective protection measures.

Moreover, the study summarises that some problematic issues attached to the Trafficking Protocol need to be revised and improved. These issues include the definition of exploitation and of victims of trafficking in the Protocol. The author argues that the development of a protection framework at the international level should incorporate basic elements of human rights protection into the amended version to bring it up to a higher standard of protection. These are, for example, the recognition of trafficked persons as those whose human rights are being violated and, therefore, entitled to be accorded protection under international human rights. Finally, the study seeks to determine state practice and legal obligations regarding the human rights protection of trafficked persons to be universally accepted as international norms under customary international law.

7.2 Conclusion

This section deals with the research findings in the form of conclusions to this study. As the research aimed to develop a better framework of victim protection to tackle human trafficking for sexual exploitation, this section explains emerging problems of human trafficking, arising from theories and practice. The section finally seeks to postulate remedies, which transcend practical solutions and serious and effective actions against human trafficking.

From the analysis of this study, the following points are discussed as existing problems, which impede the effectiveness of the anti-trafficking intervention for the achievement of justice.

Human Trafficking as 'Knowledge Deficiency'

In chapter two, it is argued that human trafficking is currently viewed as irregular migration. Despite some distinctions between human trafficking, smuggling and other forms of irregular migration, this study has shown the real difficulty in ultimately distinguishing them. This is because, first and foremost, smuggling of migrants and human trafficking share some similarities. They are not clean-cut issues as some may make them seem. Secondly, the binary opposition between these two terms makes for some potential dangers in migration practice. There are some debates around these two issues. For instance, it is possible that states, especially destination countries, may misuse this binary opposition to violate human rights of all types of irregular migrants in order to strictly control irregular movement. It seems that the term 'irregular' is still ambiguous and sometimes interchangeably but unjustifiably used with the term 'undocumented' and 'illegal'.⁷³⁸

Arguably, the condition of irregularity is socially, culturally and politically constructed and defined by governments of destination states. It also reflects the illegal status of migrants, who are positioned outside the protection of

⁷³⁸ See discussion in Chapter 2: Section 2.6.1, pp.41-44

state law in destination countries. In other words, irregular or illegal migrants have become marginalised due to the exclusion of law. They may be faced with a variety of but inconsistent legal practices from toleration to deportation; they are at the mercy of the state. Consequently, under the condition of irregularity, a migrant can experience conflicts of personhood, visibility and existence in a destination country. Likewise, many governments of destination countries are confronting tension between the flow of migration and stricter immigration law, and experiences of migrants in their everyday lives.⁷³⁹

It can be summarised that the ambiguity of terms used to describe a migrant as irregular, illegal or undocumented has imposed hardships on such migrants. In particular, irregular migrants may be confronted with the accumulation of abuse, structural violence and living without human dignity. The author argues that their basic human rights, legally confirmed by a number of international human rights provisions and international norms of state practice and legal obligations regarding human rights protection under customary international law are ignored, and, sometimes denied. Their human rights are also violated by national laws and state power.⁷⁴⁰ In addition, most national policies on migration currently consider the matter as one of the control of immigration and are centred on prevention and suppression of irregular or illegal migration. It is the author's view that such a narrow view of migration neither reflects the whole picture of international migration nor helps to improve the current situation of migration.

⁷³⁹ Willen S.S. "Exploring illegal and irregular migrant's lived experiences of law and state power" (2007) 45 *Journal of International Migration* 2-3

⁷⁴⁰ See discussion in Chapter 4, pp. 119-173, Chapter 5, pp. 174-218 concerning state laws pertinent to human trafficking and Chapter 3, pp.63-118 and Chapter 6, pp.219-257 concerning international law on human trafficking and other relevant human rights standards

Human Trafficking: Insufficiency of Existing Migration Approaches

Other than the knowledge deficiency of human trafficking, existing migration approaches-be they the neo-classical economics approach, the historical-structural approach, the household and the world system approach-are too inadequate and insufficient to explain either the complexities of international migration, or simple causes and reasons for migration.⁷⁴¹ Most approaches have failed to address the root causes of irregular migration and left some unanswered issues. Chapter two suggests that one of the root causes for people moving irregularly is a result of unequal economic development.

Unequal economic development has caused, for instance, socio-economic disparity, persistent poverty, gender and race discrimination and political instability and war, especially in some developing countries. Such problems are arguably potential factors to exacerbate the vulnerability of particular groups of people. However, they have not critically been taken into account under existing approaches. Such approaches are no longer sufficient and are inadequate to explain the complexities of irregular migration, including human trafficking and smuggling of migrants.

Under migration analysis, human trafficking and smuggling of migrants are classified and equated as a sub-category of irregular migration. However,

⁷⁴¹ See discussion in Chapter 2: Section 2.5, pp.29-38 and Section 2.6, pp. 38-49 and see, for example, Castles S. and Miller M., *The Age of Migration: International Population Movements in the Modern World*, 3rd ed., (London: The Guildford Press, 2003) and Massey D. et al. "Theories of international migration: a review and appraisal" (1993) 19 *Population and Development Review* 431

the critical distinction between them has been absent. This study concludes that despite being similar forms, human trafficking and smuggling of migrants are different in context and not just about migration. Under normal circumstance, people move voluntarily to search for greater economic opportunities, family unification and livelihood. Despite having similar reasons for migration but different root causes, human trafficking and smuggling of migrants end up with different outcomes. These forms of population movement are involved with force, exploitation and the violation of human rights prior to, during or even throughout such movement.

Chapter two elaborates upon the growth of human trafficking as a negative impact of development and economic restructuring. It has been argued that lives of marginalised people, be they women, disabled people or minorities in many developing countries have been affected considerably more than those who have wealth and prosperity.⁷⁴² In Thailand, for example, the rise of economic globalisation has enforced the power of the market and expanded socio-economic disparity between the rich and the poor in the country rather than contributing to the well-being of all Thais. Compounded by gender inequality and beliefs of inferiority, Thai women from rural areas or working classes are at far greater disadvantage and are more vulnerable because of economic development.

⁷⁴² See general discussion in, for example, Sassen S., *Globalization and Its Discontents* (New York: New Press, 1998), at Ch.7-8, Ehrenreich B. and Hochschild A.R., *Global Woman: Nannies, Maids and Sex Workers in the New Economy*, (New York: Henry Holt and Co., 2004) and Kofman E. "gendered global migrations: diversity and stratification" (2004) 6 *International Feminist Journal of Politics* 643 and Oishi N., *Women in Motion: Globalization, State Policies and Labour migration in Asia*, (California: Stanford University Press, 2005)

The benefits of economic globalisation are distributed unevenly. Wealth is shared amongst those who have more economic power than those who have less or least power to access resources. As a result, groups of people with little power have been disadvantaged and become victimised by development. Amongst those, many women from poor countries have been confronted with inequality in the process of a globally liberalised market. To serve and sustain the growth of the global market, a large number of women from Third World countries have entered into the global labour market, particularly, the service sector. Such an increasing percentage of women in the global workforce is considered as the feminisation of labour migration.⁷⁴³

In chapter two, it is contended that the feminisation of labour migration; however, does not lead to women's development and empowerment. Nor does the process of the feminisation of labour represent the capabilities of female migrants in the global workforce. Furthermore, under existing migration approaches, the study argues that the feminisation of labour migration is linked with gender inequality through male domination. Despite the large number of women in the global service sector, such women still suffer in the masculine world of work.⁷⁴⁴ This means that they are paid less and exploited more.⁷⁴⁵ Rather, the feminisation of labour migration represents the mobilisation of cheap and flexible female migrant labourers.

⁷⁴³ See Chapter 2: Section 2.8.1, pp.53-55

⁷⁴⁴ See discussion in Chapter 2, pp.59-63 and see also Piper N. "Feminization of labour migration as violence against women: international, regional and local nongovernmental organization responses in Asia" (2003) 19 *Violence against Women* 723 and Sassen S. "Women's burden: counter geographies of globalization and the feminization of survival" (2002) 71 *Nordic Journal of International Law* 255

⁷⁴⁵ Rittich K., 'Feminization and Contingency: Regulating the State of Work for Women', in

In addition, globalisation promotes consumerism, which indicates the growth in demand for commodities. Since everything is or can be commoditised, female labour, bodies and sexualities have become the categorisation of most wanted commodities across the globe. Ironically, the rise of consumerism is therefore a symbol of the liberation of sexuality, yet it is driven and governed by male desire. It is admitted that women may be trapped into the discontent of consumerism, too. They may voluntarily enter into the sex industry, which is being endorsed, yet mistakenly, considering their liberalised female sexualities. From the author's point of view, they are regarded as victims of the rapid liberalisation of trade and consumerism. Furthermore, for those falling into the sex industry by coercion and force either physically or economically, they are regarded as victims of the deficiency of the neo-liberal order.⁷⁴⁶

Human trafficking: Definitional Problems

Chapter two reviews the literature on human trafficking, which can be used as knowledge transition throughout the study. Chapter two argues that human trafficking is a knowledge insufficiency, which may result in inappropriate and inadequate practice. Chapter 3 further analyses international legal responses to human trafficking. From its history to the 21st

Conaghan J. et al. (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, (Oxford: Oxford University Press, 2002), p.117-136

⁷⁴⁶ The author agrees to use the concept of neoliberalism, as it extends the powerful capitalist restructuring society. The neoliberal discourse is based largely on commodification, yet highly gendered, privatization, free but not fair trade and flexibility of labour but more abusive manners to keep capitalist society last

century, it can be concluded that human trafficking consists of two legal dimensions: criminal and human rights law. Taking a human rights perspective, human trafficking is recognised as modern day slavery as it is considered various practices of exploitation. Some of which could constitutes slavery.

This idea was followed by the Rome Statute. The Rome Statute, as a combined idea between international criminal law and international human rights law, explicitly included human trafficking as an act that constitutes a crime against humanity. According to the Rome Statute, human trafficking is recognised as having the key element of enslavement- the exercise of any or all of the powers attaching to the right of ownership over a person, in the course of human trafficking. Having been considered as an act that constitutes the most serious crime of concern to the international community- a crime against humanity, human trafficking falls within the jurisdiction of the Rome Statue. In 2000, human trafficking, under the Transnational Organized Crime Convention and the Trafficking Protocol, however, is considered as a transnational organised crime.

What is new in the current anti-trafficking framework is that the Trafficking Protocol extends well beyond trafficking for prostitution, as compared to the campaigns against the white slave trade- the origin of legal response to human trafficking. This legal document includes all forms of human trafficking such as forced labour and domestic work. In addition, the definition of human trafficking under the Trafficking Protocol is discussed as

the first-ever legal definition of human trafficking. As discussed in chapter 3, human trafficking is distinguished from smuggling of migrants in the following aspects:

First, human trafficking is the movement which is carried out with the use of coercion, force or involvement of deception. This represents human trafficking as the involuntary movement of people.

Second, human trafficking is involved with various practice of exploitation throughout the process of trafficking. Exploitation includes, for example, exploitation of prostitution of others, sexual exploitation, forced labour and slavery.

Last, trafficking can be considered as both internal and international movement, whilst smuggling is viewed as cross-border movement.⁷⁴⁷

Despite its wide acceptance, the definition of trafficking has yet shown some problems when it is used in practice. Such problems are argued to be the root causes of legal shortcomings and confusions. For instance, whilst focusing on combating human trafficking, the definition overlooks the fact that both human trafficking and the smuggling of migrants are equated to irregular migration. This has led them to be classified as overlapping in causes, process and outcomes. It is therefore almost impossible in practice to draw the demarcation between human trafficking and smuggling of migrants. In

⁷⁴⁷ Art. 3 (a) of The Trafficking Protocol, 2237 U.N.T.S. 319 and Gallagher A. "Human rights and the new UN Protocols on trafficking and migrant smuggling: a preliminary analysis" (2001) 23 *Human Rights Quarterly* 984-988

addition, smuggled migrants may end up being trafficked and may fall within the status of trafficked persons, if elements of force, coercion and exploitation are involved when in transit, prior to and after arrival in destination countries. In some cases, victims of trafficking may partly consent to their journey and the jobs they will do in destination countries. It is difficult to see a clear line between smuggling of migrants and 'human trafficking' within a continuum of migration.

Since an element of coercion or force can possibly be found in both human trafficking and smuggling of migrants, the author argues that the definition of trafficking does not involve a consideration of the differing extent of coercion or force. Moreover, the character of force and coercion can be visible- if it is physical- or can be invisible- if it is mental.⁷⁴⁸ The author suggests that the broader scope of coercion/force should always be considered in practice. Furthermore, the definition of human trafficking also reflects the conceptual limitation of consent. The language used in the Trafficking Protocol regarding consent represents a compromise, which has become problematic.

Ironically, when considering the case of trafficking for sexual exploitation, the issue of consent has negatively affected trafficked persons and other types of irregular migrant workers, due to rigid views on free and forced prostitution. For instance, the feminist abolitionist with the anti-prostitution viewpoint denies the fact that a woman can freely consent to sell

⁷⁴⁸ Obokata T., *Trafficking of Human Beings From a Human Rights Perspective: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publisher, 2006), p. 25

her body, sexuality and sexual services under male domination and oppression, but that it is forced prostitution. Therefore, to be protected and assisted under the Trafficking Protocol, which it is primarily influenced by such idea, the burden imposed upon a woman is to prove that she is innocent, was forced to work as a prostitute and is suffering from abuse, violence and exploitation. However, different levels of measures and protection also depend on state law on prostitution provisions as to whether prostitution is legalised, decriminalised or criminalised.

In the centrally important chapter 3, the author argues that the rigid protectionist-abolitionist approach has ignored the reality of a moral panic over current migration policy and law. Moreover, this approach has overlooked the issue of human agency, represented by a voluntary decision to enter prostitution. Lack of a human agency in migration discourse would have reinforced multi-dimensional prejudices over race and gender. This is not only a closed door to reality but also it makes sex work as a form of labour still invisible and impossible.⁷⁴⁹ However, the author strongly agrees and accepts that a large number of young women are still being forced into prostitution. Hence, the rhetoric of victimisation is still legitimate as long as the concept of justice is always incorporated and of concern.

From the discussion in chapter 3, the definition of human trafficking is crucial to legal responses to the contemporary human trafficking phenomenon, so too is a clearer definition of victims of trafficking. However,

⁷⁴⁹ See Chapter 3: Section 3.4, pp.72-76

the latter is totally omitted in the Trafficking Protocol. The study concludes that, on the one hand, such an ill-defined term has certainly left some technical terms undefined, for instance, the issue of consent and exploitation. On the other hand, the undefined term of victim of trafficking presents an ineffective framework of protection provisions. The identification of the victim is an important indicator of the best use of the protective measures of the Trafficking Protocol and existing international human rights instruments to ensure the basic needs of victims are met. This will be discussed later in chapter 8.⁷⁵⁰

In addition, the scope of the Protocol is applicable only when human trafficking is considered as a transnational matter.⁷⁵¹ This means that internal human trafficking is excluded. When read in conjunction with the Transnational Organized Crime Convention, trafficking is an offence committed by transnational organised criminals. Therefore, individual criminals- who may be relatives, friends and parents-, act as perpetrators, agents/recruiters and traffickers are beyond the scope of the Transnational Organized Crime Convention and the Trafficking Protocol.⁷⁵² The study suggests that states should therefore ensure that the nature of trafficking (transnational and internal) is acknowledged under domestic laws and through state's cooperation, which is considered as best practice to fight against human trafficking.

⁷⁵⁰ See Chapter 8: Section 8.5.1., pp.311-314

⁷⁵¹ Art.4 of the Trafficking Protocol, 2237 U.N.T.S. 319

⁷⁵² See discussion in Chapter 3: Section 3.6, pp.97-105 and Section 3.7, pp.105 -117

National Anti-trafficking Frameworks: High Standard of Prosecution and Suppression but Low in Protection Measures

Domestic anti-trafficking legislation is variously adopted in the forms of a comprehensive act or of parts of criminal law or immigration law. Comprehensive and effective legislation varies due to other internal factors, for example, state endeavours, understanding of the current situation of human trafficking and national policies on immigration and human trafficking. In the case of Thailand, it is concluded that Thailand has actively responded to human trafficking and developed its legal framework and national policies to tackle human trafficking.

As discussed in chapter 4, the current law- the 2008 Anti-Trafficking Act comes into effect and it has repealed the previous law- the 1997 Trafficking in Women and Children Act. The 2008 Anti-Trafficking Act is adopted in conjunction with the requirement of the Transnational Organized Crime Convention and the Trafficking Protocol, though Thailand is not a state party to these treaties. It is argued that the adoption of this Act is a step forward in tackling human trafficking in Thailand. Under this Act, the first legal definition of human trafficking is given under the Thai Law. Human trafficking for sexual exploitation is also criminalized and has become a key offence of this Act. The Act increases its criminal essence through the heavy penalties, which are higher than the previous law- the 1997 Trafficking in Women and Children Act.

The Act also sets up the Anti-Trafficking in Persons Committee (ATP) to support, monitor and evaluate the prevention and suppression of human trafficking.⁷⁵³ Concerning the protection of trafficked persons, the 2008 Anti-Trafficking Act has taken a more protectionist approach than its previous law. According to the protection measures, it is the author's point of view that the 2008 Anti-Trafficking Act goes far beyond the international standard of human rights protection. A trafficked person, as an injured party, is given the right to compensation for damages, and benefits from better access to justice. In the case of trafficked persons as witnesses, the law gives the protection necessary for witnesses and their family members, for example, a temporary or permanent residence, the right to seek employment and the right to security and welfare.

Finally, a number of issues are raised towards the development of comprehensive and effective legislation. For instance, cooperation amongst concerned agencies, awareness of the current situation of human trafficking, smuggling of migrants and other forms of irregular migration and corruption, are the causes for concern. Due to the dynamic of human trafficking, chapter 4 therefore calls for the need of frequent law revisions and improvement, the re-appraisals of policies on combating human trafficking towards the protection of trafficked persons and the suppression of traffickers.

Chapter 5 analyses the UK responses to human trafficking. As the destination country, the UK has considered the problem of human trafficking

⁷⁵³ See discussion in Chapter 4: Section 4.6.5, pp.161-169

for sexual exploitation as a fast growing trend. To tackle human trafficking, the UK has initiated, reviewed and amended a number of laws and policies, pertinent to the problem. Unlike the 2008 Anti-Trafficking Act of Thailand, the UK introduced a number of Acts to tackle all forms of human trafficking. Two laws, the SOA 2003⁷⁵⁴ and the AIC 2004,⁷⁵⁵ are used to cope with all forms of human trafficking. The SOA 2003 covers a wide range of sex trafficking offences, whereas, the AIC 2004 deals with trafficking for labour exploitation. Notably, both legal regimes have criminalised human trafficking through tougher sentences.⁷⁵⁶

In relation to human trafficking for sexual exploitation, the SOA 2003 shifts its legal regime from a regulationist to a subjectivist approach. That means the law targets exploitation of prostitution where as prostitution itself is not illegal. Chapter 5 concludes that in the history of the English law, prostitution is considered as a controversial issue and has been critically involved with three prevalent discourses: prostitution as a moral panic, as sexual domination and as work. Similar to the 2008 Anti-Trafficking Act, the SOA 2003 is gender-neutral legislation, which provides better protection provisions for all trafficked persons, especially those who are vulnerable and are victims of prostitution. Despite positive changes, the SOA 2003 presents legal limitations, ambiguities and confusions, when tackling sex trafficking.

This is because, first, the issues of trafficking, migration and prostitution are not clearly distinguished. Second, prostitution itself is a

⁷⁵⁴ See discussion in Chapter 5: Section 5.5.1, pp.188-198

⁷⁵⁵ See discussion in Chapter 5: Section 5.5.2, pp.198-207

⁷⁵⁶ Section 57-59 of the SOA 2003, C.42

controversial issue in both domestic and international legal contexts. The author argues that the controversy over prostitution is a root cause of the problem. When considering human trafficking for sexual exploitation, the dichotomy between free and forced prostitution has been heavily involved, together with irregular immigration of trafficked persons. Despite better victim protection provisions, migrants who consent to prostitution, partly or fully are not protected by this Act but considered as criminals under immigration law.

Other than sex trafficking, the AIC 2004 deals with human trafficking for labour exploitation. Interestingly, the term 'exploitation' is defined under this Act. The author concludes that the UK anti-trafficking framework has developed and moved beyond the minimum international standard, yet only in the area of prevention and suppression of human trafficking. However, the Act has taken a more punitive immigration stance, whilst relegating protection to a less important position.

Overall, the SOA 2003 and the AIC 2004 do not specifically focus on the protection provisions of trafficked persons. However, the UK has now adopted the COE, recognised as a more comprehensive human rights treaty.⁷⁵⁷ Remarkably, its protection provisions extend beyond the Trafficking Protocol, which include identification of victims⁷⁵⁸, protection of private life,⁷⁵⁹ assistance irrespective of residency,⁷⁶⁰ recovery and reflection period,⁷⁶¹

⁷⁵⁷ The UK signed the COE, C.E.T.S. No.197 on 23 March 2007, but ratified it on 17 December 2008. The COE came into effect in the UK on 01 April 2009

⁷⁵⁸ Art.10 of the COE Convention, C.E.T.S. No.197

⁷⁵⁹ Art.11 of the COE Convention, C.E.T.S. No.197

⁷⁶⁰ Art.12 of the COE Convention, C.E.T.S. No.197

⁷⁶¹ Art.13 of the COE Convention, C.E.T.S. No.197

residency permit,⁷⁶² compensation and legal redress,⁷⁶³ repatriation and return of trafficked persons,⁷⁶⁴ and, more importantly, gender equality.⁷⁶⁵ Such provisions are being incorporated into the English law and will be fully implemented.

In short, Thailand and the UK have made greater improvements in the development of their domestic legislation in relation to human trafficking. It is however seen that each country fails to adopt a more comprehensive anti-trafficking framework to combat human trafficking. In response to the Transnational Organized Crime Convention, both Thailand and the UK have strictly focused on prosecution and suppression of human trafficking. To combat human trafficking, both countries have implemented repressive immigration measures through tightened borders and tougher law enforcement to protect the interest of nations rather the human rights of migrants.

Despite legal improvement in criminal provisions, prosecution and suppression measures, the anti-trafficking legal frameworks of Thailand and the UK have failed to develop a more comprehensive framework of human rights protection. Both countries have lost sight of the extreme importance of protection provisions. In practice, trafficked persons have little benefited from protection provisions unless they agree to be witnesses against traffickers. The thesis finally calls for the serious revision of protection measures for the

⁷⁶² Art.14 of the COE Convention, C.E.T.S. No.197

⁷⁶³ Art.15 of the COE Convention, C.E.T.S. No.197

⁷⁶⁴ Art.16 of the COE Convention, C.E.T.S. No.197

⁷⁶⁵ Art.17 of the COE Convention, C.E.T.S. No.197

benefit of all: states and trafficked persons in cooperation to fight against human trafficking.

Human trafficking: Towards a Comprehensive and Effective Approach of International Human Rights Protection

Notwithstanding the existence of protection provisions under the Trafficking Protocol, chapter 6 concludes that the current framework of human rights protection is relatively weak and an inadequate tool to assist trafficked persons.⁷⁶⁶ To improve and develop a more comprehensive approach to protection, there is an urgent need to consider amending the Trafficking Protocol in line with the COE and other international human rights instruments. Furthermore, since trafficking status is always tied to irregular migration, the discussion of an international standard for protection of migrant workers, including irregular migrant workers is beneficial to further development of a protection framework. Yet, the author argues that the discriminatory treatment and lack of state practice remain major problems.

Chapter 6 concludes that the most vulnerable groups of non-citizens are irregular migrants, including smuggled migrants and trafficked persons, who severely suffer multi-levels of discrimination. Irregular migrants are classified as those who enter into a destination country via irregular channels or means. They are likely to be seen as those who violate the state sovereignty. Due to their irregular status, smuggled migrants and trafficked persons continue to suffer degrading treatment by the state. In particular, they

⁷⁶⁶ See discussion in Chapter 6: Section 6.5.1., pp.238-251

are intercepted by authorities, who have a lack of sufficient knowledge or are unwilling to hear their stories, or perhaps are corrupted. In the worst cases, they are placed in detention, treated as serious criminals and denied their fundamental human rights.

In connection with the protection of migrants, the ICRMW is recognised as the most relevant international document. It came into force on 1 July 2003, after 10 years of negotiation with only 34 state parties- none of them are major receiving countries.⁷⁶⁷ The limitation of a low rate of ratification by those sending states has led to ineffectiveness in state's cooperation between sending and receiving countries in the protection of migrant labour. It is therefore necessary to encourage major destination countries to sign or ratify this Convention to aid its effective implementation. However, if this is not possible in the short term, chapter 6 calls for supplementary actions, plans, and policy to enhance international standards for protection of irregular migrants.

Despite relevant provisions in extensive international human rights documents, the Trafficking Protocol is acknowledged as the main treaty dealing with the human trafficking problem. From the analysis in chapter 3, it can be seen that the Trafficking Protocol focuses more on state obligations to prosecution and suppression measures, whilst protection is their discretion. Chapter 6 argues that trafficking is a human rights issue in which human trafficking must be regarded as a serious threat to the promotion and

⁷⁶⁷ Cholewinski R., 'The Right of Migrant Workers', in Cholewinski R. , Perruchoud R. and Macdonald E., *International Migration Law: Developing Paradigms and Key Challenges*, (The Netherlands: T.M.C Asser Press, 2007), pp.257-259

protection of human rights.⁷⁶⁸ Protection measures are stipulated in Article 6-8 of the Trafficking Protocol and Article 24 and 25 of the Transnational Organized Crime Convention. As far as the protection provisions are concerned, states parties are obliged to protect and assist trafficked people for all basic needs.⁷⁶⁹

Chapter 6 argues that despite an optional state obligation to protect trafficked persons, states parties should move the scope of protection beyond the international minimum standard. Currently, most states fail to take positive steps to establish a more comprehensive approach to human rights protection i.e. the UK. It is noted that the criminalisation of human trafficking must not prevent states parties from fulfilling their obligation for the protection of trafficked migrants. More comprehensive protection provisions can be found from various international human rights documents and international norms under customary international law, applicable to trafficked persons. Despite the lack of a universal remedy, states should in good faith ensure that trafficked persons have their privacy and identity protected and given assistance with residency permit (short or long terms) and all other needs.

Although the participation of trafficked persons as witnesses to prosecute traffickers is desirable, it should not prejudice a person's protection if the person decides not to participate. States should always recognise that throughout their journey, trafficked persons have experienced the most

⁷⁶⁸ Obokata T. "A human rights framework to address trafficking of human beings" (2006) 24 *Netherlands Quarterly of Human Rights* 380

⁷⁶⁹ Obokata T., *Trafficking of Human Beings from Human Rights Perspectives: Towards a Holistic Approach*, (The Hague: Martinus Nijhoff Publishers, 2006), pp.147-172

harmful situation and have been threatened by traffickers. Their stories are too complex to uncover in a short time. Trafficked persons are normally faced with unknown danger and may be re-traumatised or re-victimised by states through criminal procedures.

The author offers a number of positive steps to facilitate best practice to assist and protect victims of trafficking. First, states should ensure that trafficked persons have their voices heard and have opportunities to access assistance both from governments in destination countries, and from their own governments through consular assistance. Second, the author calls for the examination of the principle of *non-refoulement* or non-return, and the principle of *non-discrimination*. Both of which should always be considered and guaranteed in the case of human trafficking, when trafficked persons are deemed to face torture, inhuman or degrading treatment by both non-state actors- traffickers and their host country.⁷⁷⁰ Last but not least, the case is made for extension of protection measures towards the right to access to justice and the rights of remedies, compensation and legal redress, together with the gender equality towards a more comprehensive approach to human trafficking.

7.3 Recommendations and Final Remarks

The section above summarises the research findings on human trafficking. It also suggests what could be done immediately to tackle human

⁷⁷⁰ Piotrowicz R. "Victims of people trafficking and entitlement to international protection" (2005) 24 *Australian Law Year Book* 159

trafficking. However, human trafficking should be also recognised as a fundamental structural problem, which cannot be solved without examining global economic development. It is crucial to state that current economic development does not equally benefit all stakeholders. At the international level, economic development has arguably brought wider disparities between the rich and the poor. Poverty, discrimination against race and gender and lack of negotiation power, for instance, have caused greater difficulties for people and made them more marginalised and vulnerable and possibly become unwanted migrants.

In contrast, the hope for better lives and equality is a good ground for labour migrants to make the decision for migration. Migration has thus become a gamble with destiny for labour migrants, especially those who migrate irregularly. Since they have nothing to lose, migrants may prefer to take the risk involved with migration. In this thesis, it is argued that global economic development is a serious obstacle in tackling human trafficking and other forms of irregular migration. Nevertheless, the elimination of disparities at a global level is almost impossible in the short term and certainly not a quick fix. To tackle human trafficking, this thesis draws attention to more practical recommendations towards best practice.

First, the study calls for the removal of the fallacy involved with irregular migration. It is important for policy makers, law drafters and states to have a clearer picture of the current situation of irregular migration, including human trafficking and smuggling of migrants. However, it is probable that human trafficking is not all about irregular migration, but the violation of human rights through various forms of exploitation. A common understanding

of human trafficking as a human rights issue is required amongst the relevant officers for appropriate assistance and protection to be given to trafficked persons.

Moreover, as shown in the conclusion, a lack of sufficient knowledge and understanding of human trafficking has caused the failure of policy and legal intervention into human trafficking. The absence of a definition of victim and sexual exploitation and the ambiguity of other terms used around the issue of human trafficking are key obstacles preventing effective protection of victims. Thus, there is an urgent need to define the missing terms and to redefine the ambiguous terms. The comparative legal study shows that it is necessary for any anti-trafficking measure in various legal systems to define the terms human trafficking and trafficked persons (victims) to be consistent with the minimum requirement of the term human trafficking offered by the Trafficking Protocol and the COE. Since the term sexual exploitation and victim of trafficking are not given under the Trafficking Protocol, it is states parties' obligation to address how such terms are defined in domestic laws and what basic elements are incorporated into the terms sexual exploitation and victims. The author argues that clear definition can facilitate protection measures to be more comprehensive and effective at domestic levels.

Second, along with the nexus of human trafficking and migration, the study also calls for revisiting the human trafficking-prostitution related problem. The lack of consensus amongst feminists on prostitution has distorted the reality of trafficking for sexual exploitation. Women may or may not be forced to work as prostitutes, but what facilitates the growth of

trafficking is an extensive demand for prostitution globally. Compounded by the powerful neo-liberal global order, underpinning the selling and buying of bodies and sex as commodities, prostitution has become a means of exploitation, coercion and abuse of women in prostitution.

To tackle human trafficking for sexual exploitation, a state should be responsible for the minimisation of demand by clients. However, the right to self-determination and agency of women should be asserted but must not be confused with coercion and exploitation of women in invisible prostitution. To alleviate this problem, the author calls for attention to be paid to the complex interrelation between the neo-liberal global order, demands for prostitution and migration.

Third, to prevent human trafficking, it is crucial to shift from a linear dimension such as criminalisation of human trafficking to multi-dimensions. These issues are, for example, the recognition of human capabilities, the awareness of migrant's rights in the dynamic international migration and gender equality and empowerment. To achieve such multi-dimensional prevention measures, the recognition of human capabilities or potential of all should always be incorporated. Equal opportunities between men and women, in terms of employment and education, must be promoted to enhance human capabilities towards the reduction of poverty.

Although the eradication of poverty is too ideological and less than practical, the study calls for a critical examination of state commitment to

prevent persistent poverty as one of the root causes of human trafficking. To alleviate persistent poverty, a number of poverty reduction programmes have been initiated by internationally agreed frameworks for example the Millennium Declaration Goals.⁷⁷¹ States are working through cooperation to create national poverty reduction strategies and policies to eliminate all forms of discrimination on the grounds of gender, class, age and ethnicity and to provide significant empowerment tools such as equal opportunities in education, living conditions and employment towards sustainable development and gender equality.

In some countries, women are seen as less capable persons and are excluded by states and human development policies. To eradicate all forms of violence against women, including all forms of trafficking in women, the author calls for gender justice at all levels. By doing so, each state is responsible for non-discrimination measures or indicators. In this regard, multi-dimensional gender justice is recommended; gender justice should not be a fixed idea that resonates globally, but in harmony with cultural differences. It is a state, which has a significant role to play in raising awareness of gender justice. Since gender is socially and culturally constructed, therefore empowerment and development tools that enable women to get better access to social and economic justices are not always transferable from one to another country, yet can only be one of the model examples.

⁷⁷¹ See more information at <http://www.un.org/millenniumgoals>

Finally, to develop a more comprehensive approach to human trafficking based on better protection measures at the international level, the study calls for the revision of the protection provisions under the Trafficking Protocol. The study also recommends the combined protection approach amongst extensive international human rights law, for example, the protection provisions of the ICRMW. It is also useful for further study to examine the protection measures under the framework of protection at the regional levels, for example, the COE.

At national levels, national law and policies pertinent to human trafficking must respond to all legal shortcomings and policy failures effectively. According to the two case studies, human trafficking is viewed as a crime against national sovereignty and is tackled by tougher criminal provisions and repressive immigration policies. The national anti-trafficking framework may generally be seen so far to be an anti-immigration policy. It is difficult to see how the current anti-trafficking framework is able to harmonise the interest of a nation and of individual migrants.

The author argues that the existing approach is insufficient to combat human trafficking and calls for the development of better protection provisions, responding to all voices with good faith and taking further actions against all legal shortcomings of law and policy. In this connection, the author suggests that any future anti-trafficking legislation should recognise trafficked persons more as those who are entitled to protection and assistance. The

protection and assistance should be given to all trafficked persons and not confined to those who cooperate with the authorities in criminal prosecution of traffickers. State parties should adopt anti-trafficking measures which treated victims of trafficking as those whose human rights are being violated.

Final remarks

Human trafficking illustrates persistent global problems. It will continue to flourish as long as the root causes of human trafficking still exist. To tackle the problem of human trafficking, there is a need for conceptual clarity and the redefinition of the dominant trafficking discourse. At a normative level, legal and policy responses to human trafficking should deconstruct all paradoxical discourses which are controversial, dichotomised and problematic as they often hamper the effectiveness of the anti-trafficking intervention. The promotion of human rights, human capabilities, gender equality, and socio-economic empowerment towards the mitigation of poverty are thus urgently required.

At a practical level, authorities, officials and states should admit that human trafficking is not solely a problem at border crossings or the violation of state territory. It is the problem of a gap in knowledge. Furthermore, lack of co-operation amongst relevant agencies between states and lack of coordinated actions at all levels, combined with a lack of state's willingness, resources, materials, and useful information present considerable practical problems in countering human trafficking. In the best interest of trafficked

persons, it is necessary to establish networks of multidisciplinary working groups- for prevention, suppression and protection of human trafficking. As the way forward, the next chapter develops a suggested framework of human rights protection for victims of human trafficking.

Chapter 8

Human Rights Protection: The Way Forward

8.1 Introduction

The lack of a comprehensive framework to tackle human trafficking, referred to in chapter 7, undermines the effectiveness of current anti-trafficking intervention at all levels.⁷⁷² For example, in chapter 4 and 5 it is contended that both Thailand and the UK have experienced practical difficulties in the implementation of effective national anti-trafficking intervention. The major problem lies in the current anti-trafficking framework, which focuses particularly on the criminalisation of human trafficking. Both Thailand and the UK have arguably failed to adopt a more comprehensive anti-trafficking framework that is designed to incorporate a human rights dimension to tackle human trafficking.⁷⁷³ This Chapter aims to explore the way forward to secure a more balanced, comprehensive and effective legal framework, with a particular focus on the protection of trafficked victims.

8.2 Theme and Organisation

Chapter 8 aims to develop a comprehensive and effective anti-trafficking framework, based upon the critical analysis of the 3P measures: prevention, prosecution and protection, as laid down in the Trafficking

⁷⁷² See Chapter 7, pp.278-281

⁷⁷³ See Chapter 4: Section 4.7, pp.169-170 and Chapter 5: Section 5.6, pp.214-216

Protocol.⁷⁷⁴ As discussed in this study, the current anti-trafficking framework, taking primarily a criminalising approach to human trafficking, is much less effective in terms of prevention and protection measures.⁷⁷⁵ This also raises important questions of how and to what extent the current anti-trafficking framework, the Trafficking Protocol, affects the lives of trafficked victims.

It is, however, recognised that the adoption of the Trafficking Protocol is remarkable in bringing human trafficking from the margin to the mainstream of international legal discourse. The Protocol was the first treaty to give the first internationally agreed definition of human trafficking for which states could develop uniformity and consistency to international standards. Rather than rejecting the existing protection provisions, this study calls for an amendment to the Trafficking Protocol that encompasses more recognition of human rights of the trafficked victims. More importantly, to amend the Trafficking Protocol, protection provisions under the Council of Europe Convention on Action against Trafficking, and provisions under existing human rights instruments will be taken into account for developing an amended version of protection provisions under the Trafficking Protocol.⁷⁷⁶

Chapter 8 is divided into four substantive sections (sections 8.3 – 8.6).

Each section will identify the basic elements or requirements necessary to

⁷⁷⁴ Art.2 of the Trafficking Protocol mandates the purposes of this Protocol are 1) to prevent and combat trafficking in persons, paying particular attention to women and children; 2) to protect and assist the victims of such trafficking, with full respect for their human rights; and 3) to promote cooperation amongst state parties in order to meet those objectives

⁷⁷⁵ See Chapter 3: Section 3.6, pp. 97-105 and Section 3.7, pp.105-117

⁷⁷⁶ Art.1.1 of the COE sets out the purposes of the COE are: to prevent and combat trafficking; to protect human rights of victims; to ensure effective investigation and prosecution; and to promote international cooperation

secure more comprehensive and effective anti-trafficking intervention. The first substantive section (8.3) begins with a succinct analysis of the prevention of trafficking, recognised as the first measure to combat human trafficking. According to the Trafficking Protocol, prevention measures refer to the adoption of policies and social activities and campaigns to stop future acts of human trafficking from occurring.⁷⁷⁷

In the second section (8.4), the author acknowledges that prosecution measures are paramount to the crime-based treaty, the Trafficking Protocol, but argues that these measures should be relegated second after prevention measures. It is mandatory for state parties to adopt legal measures to criminalise all forms of human trafficking and prosecute traffickers and those involved in the exploitation of trafficked victims. The third section (8.5) sets out the main focus of this Chapter - the development of a comprehensive framework of human rights protection for trafficked victims. This section calls for the promotion of the legal principles fundamental to a comprehensive framework of human rights protection under the Trafficking Protocol.

Beyond the analysis of the 3P measures, a comprehensive anti-trafficking framework requires the exertion of all states' efforts to ensure positive obligations that protect the human rights of trafficked victims. The developed framework thus aims 1) to promote the participation of all states and other stakeholders and 2) to establish effective report and monitoring mechanisms to ensure effective legal intervention. As yet, a significant

⁷⁷⁷ Art.9 of the Trafficking Protocol requires states parties to establish comprehensive policies, programs and other measures to prevent and combat human trafficking and to protect trafficked victims, from especially women and children, from re-victimization

number of states lack the interest and have little intention to combat human trafficking. The author argues that international cooperation is a valuable resource in strengthening state commitments to prevent and prosecute human trafficking and to protect trafficked victims through the legal means available. Finally, section 8.6 concludes with a recommendation summarising the best practice to achieve a more balanced, comprehensive and effective anti-trafficking framework.

8.3 Prevention of Trafficking

In chapter 7, prevention measures are considered to be a long-term and sustainable goal to tackle human trafficking.⁷⁷⁸ As outlined in Art.9-13, the Trafficking Protocol takes a multi-pronged approach to prevention: providing social measures on the side of victims and strengthening national security i.e. border control to prevent human trafficking. However, the author argues that the prevention of human trafficking has been government's least employed tactic. This is because under the Trafficking Protocol, the prevention provisions are not mandatory. For instance, Art.9 of the Trafficking Protocol requires that states *shall establish* comprehensive policies, programmes and other measures to prevent human trafficking.

Todres argues that the different levels of legal intervention of prevention measures express unequal outcomes amongst the wide variations

⁷⁷⁸ Chapter 7, pp.284-285

of prevention measures. With minimum effort, states tend to provide minimum resources to be allocated for implementing programmes and activities to prevent human trafficking on the side of victims. A state may opt to implement its obligations to by adopting a restricted view of prevention campaigns, but fail to address systematic issues that permit human trafficking to occur.⁷⁷⁹ According to the study, there are many identifiable components that perpetuate human trafficking for sexual exploitation. These are, for instance, gender discrimination and persistent poverty, which generate a large supply of vulnerable and desperate young women, and the demand that exists for them to be sexually exploited.⁷⁸⁰

Whilst obligations to prevent human trafficking under the Trafficking Protocol are narrow in scope, those under the COE appear to be positive measures seeking stronger state commitment.⁷⁸¹ Overall, the COE foresees the need to reduce factors that make people vulnerable, which should go hand-in-hand with the need to increase the risks of apprehension and prosecution that traffickers face. However, Gallagher notes that prevention strategies under the COE are fairly orthodox, and are so broad as to be almost meaningless, in terms of measuring compliance.⁷⁸²

⁷⁷⁹ Todres J., "The importance of realising 'other rights' to prevent sex trafficking", (2006) 12 *Cardozo Journal of Law and Gender* 887 and see also Todres J., "Law, otherness and human trafficking", (2009) 49 *Santa Clara Law Review* 642-645

⁷⁸⁰ Chapter 2: Section 2.8, pp.50-59

⁷⁸¹ Sembacher A., "The Council of Europe Convention on Action against Trafficking in Human Beings" (2005 – 2006) 14 *Tulane Journal of International and Comparative Law* 442-445

⁷⁸² Gallagher A., "Recent legal development in the field of human trafficking: a critical review of the 2005 European Convention and related instruments" (2006) 8 *European Journal of Migration and Law* 184

This is because to reduce factors making people vulnerable, i.e. persistent poverty, is characterised as long-term relief. Such measures, especially social and economic programs, require the full commitment of states, concerned institutions and resources i.e. to provide funding to ensure continuity of prevention measures.⁷⁸³ In addition, there is a need for a more balanced prevention framework for both the side of victims and national security. For instance, measures to tackle poverty may include the promotion of the protective environment, gender equality and more sensible migration policies in both sending and receiving countries. The author, however, argues that current prevention measures under the Trafficking Protocol are far short of being comprehensive and thus do not bode well for a long-term relief. What needs to be done to achieve effective intervention is to promote coherent action plans to tackle issues surrounding poverty.

In addition, the COE calls for the adoption of a human rights-based approach, including gender mainstreaming: seeing gender equality as vitally important to end all forms of discrimination as identified causes of human trafficking. In addition, a child sensitive approach is to be adopted.⁷⁸⁴ Chapter 2 argued that women are often discriminated against in education, vocational and job training, employment (including wage differentiation), and in some cases, migration.⁷⁸⁵ A state is to adopt laws to promote gender equality and other social and economic measures to end discrimination. In this regard, states parties should give greater attention and commitment to existing human rights instruments, such as the ICCPR, ICESR and CEDAW that

⁷⁸³ Chapter 7, pp.287-288

⁷⁸⁴ Art.5.3 and Art.17 of the COE, C.E.T.S. No.197

⁷⁸⁵ Chapter 2: Section 2.8.1., pp.53-60

particularly respect the principle of non-discrimination.⁷⁸⁶ In addition, neither state nor non-state actors alone can prevent human trafficking from occurring. Coordination between civil society and institutions, which are responsible for combating human trafficking, should also be encouraged for the effective implementation of prevention measures.⁷⁸⁷

Since Thailand is not a party to the Trafficking Protocol and the COE, the obligations under both treaties are not applicable. It is recommended that prevention measures should be determined in compliance with other human rights treaties, i.e. ICCPR⁷⁸⁸ and CEDAW⁷⁸⁹, which Thailand has ratified. As a contracting party to the ICCPR, the law not only entails negative obligations, such as requiring Thailand to refrain from any act of discrimination against women, it also imposes positive obligations, namely, seeking Thailand to respect the principle of non-discrimination (under Art.2 and Art.26) and to ensure equality between men and women (under Art.3). In this regard, Thailand has assumed substantive duties to take all appropriate measures i.e. legislation, administrative and other measures, in line with international requirements. For instance, section 30, paragraph 2 of the Constitution of the Kingdom of Thailand: the Supreme Law of State guarantees *de jure* equality between men and women.⁷⁹⁰ So far, however, no specific law on gender equality has been adopted in the Thai legal system.⁷⁹¹

⁷⁸⁶ Chapter 6: Section 6.3, pp.220-224

⁷⁸⁷ Sembacher A., "The Council of Europe Convention on Action against Trafficking in Human Beings" (2005 – 2006) 14 *Tulane Journal of International and Comparative Law* 442-435

⁷⁸⁸ Art.2 and 26 of the ICCPR respect the principle of non-discrimination and equality. Thailand ratified the ICCPR without making reservation and is legally bound by it since 29 January 1997

⁷⁸⁹ Art.1, 2 and 4 of the CEDAW are to ensure effective protection of women against any act of discrimination. Thailand acceded the CEDAW on 9 August 1985 and is legally bound it since 8 September 1985

⁷⁹⁰ Constitution of Thailand B.E.2550 (2007), published in the Government Gazette, Vol. 124, Part 27 (a), dated 24 August 2007. Section 6 mandates the Constitution is the supreme law of

In its concluding observation in 2005, the Human Rights Committee (HRC) announced its concerns and recommendations upon Thailand regarding its compliance with international obligations under the ICCPR. No specific obligations to combat human trafficking exist under the ICCPR. In accordance with Art.8, the HRC called upon Thailand's positive obligation to adopt the Human Trafficking Bill without delay. This is because human trafficking could constitute conditions of slavery, i.e. the violations of personal autonomy that involve all forms of exploitation, including servitude and forced labour. To ensure that anti-trafficking laws and other measures are fully enforced, it is necessary for Thailand to provide adequate enforcement mechanisms, i.e. a victim-friendly complaint mechanism and practice, in conjunction with an effective criminal justice to end human trafficking.⁷⁹²

The CEDAW Committee also raised its concerns about a breach of Thailand's obligation under Art.6 of CEDAW to combat the persistent problems of human trafficking and the exploitation of women in the country.⁷⁹³ Although no absolute liability is imposed when breach obligations under

state. The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable. There are other Sections that promote the principle of equality without discrimination, for example, Section 4 human dignity, right, liberty and equality of the people shall be protected, Section 5 The Thai people, irrespective of their origins, sexes or religions shall enjoy equal protection under this Constitution

⁷⁹¹ Committee on the Elimination of Discrimination against Women, Concluding Comments of the CEDAW: Thailand, *CEDAW/C/THA/CO/5*, 3 February 2006, Para.16. With regard to the Gender Equality Law, Thailand has drafted it Gender Equality Bill since 2006 sponsored by the Ministry of Social Development and Human Security. The draft Bill is now with the Council of State, the government's legal arm, before it is forwarded to the cabinet for approval, then to Parliament, in Ekachai S., 'Gender Equality cannot wait', *The Bangkok Post*, 1 July 2010

⁷⁹² Human Rights Committee, Concluding Observations of Human Rights Committee: Thailand, *CCPR/CO/84/THA*, 8 July 2005, Paras.20-21. The second report of Thailand was due to submit on 1 August 2009, however, Thailand was late for submission for this second report

⁷⁹³ Committee on the Elimination of Discrimination against Women, Concluding Comments of the CEDAW: Thailand, *CEDAW/C/THA/CO/5*, 3 February 2006, Para.28

CEDAW,⁷⁹⁴ Thailand is responsible for failure to exercise due diligence (either acts or omissions) to end human trafficking. In addition, the CEDAW committee also considered the continuing phenomenon of sex tourism in Thailand, which not only serves to fuel the demand of human trafficking, but also helps to create continuing discrimination against women.⁷⁹⁵

Critically, Thailand has substantially failed to ensure cooperation with tourist countries of origin to combat sex tourism. The lack of positive actions to uphold the principle of non-discrimination and equality has disadvantaged a number of poor and marginalised Thai women in gaining meaningful access to resources, education, and job opportunities, thereby leaving them in a more socially and economically vulnerable position.⁷⁹⁶ To this end, in allowing persistent discrimination against women and all forms of exploitation, including human trafficking, Thailand is found in breach of its international obligations under the ICCPR and the CEDAW.

Finally, to prevent human trafficking in terms of national security, both the COE and the Trafficking Protocol expect border controls to be strengthened to detect human trafficking.⁷⁹⁷ The author, however, contends that stricter border controls without measures to avoid abuses are likely to exacerbate risks in migration for potential victims. Certainly, the management

⁷⁹⁴ Cook R.J., 'State accountability under the Convention on the Elimination of All Forms of Discrimination against Women' in Cook R.J.(ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), pp.230-233

⁷⁹⁵ Chapter 5, pp and see also Raghu M., "Sex trafficking of Thai women and the United State asylum law response", (1997-1998) 12 *Georgetown Immigration Law Journal* 178 – 180 and Todres J., "The importance of realizing 'other rights' to prevent sex trafficking" (2006) 12 *Cardozo Journal of Law and Gender* 894-895

⁷⁹⁶ Chapter 4: Section 4.5.3, pp.143-148

⁷⁹⁷ Art.11 of the Trafficking Protocol, 2237 U.N.T.S. 319 and Art.7 of the COE, C.E.T.S. No.197

of migration is a sovereign right and responsibility of states. Nevertheless, a durable solution is to consider the inclusion of a human rights dimension, which takes into account the principles of non-discrimination and equality, the right to be properly identified, non-refoulement and co-operation with all stakeholders in dealing with human trafficking.⁷⁹⁸ All of these matters will be discussed later in this chapter.

8.4 Prosecution of Trafficking

Effective prosecution measures are a central element of anti-trafficking law. The author argues that in order to consider whether prosecution measures are effective, there are at least three factors to be taken into consideration. First, the criminalisation of human trafficking must extend to other related activity, namely money laundering,⁷⁹⁹ corruption,⁸⁰⁰ child labour, and forced labour. Second, all the persons involved in human trafficking, including traffickers, their accomplices, accessories and abettors must be targeted for prosecution. Likewise, as discussed in the previous section, employers or clients knowingly using the services of a trafficked victim should also be punished. Last, the sanction must be proportionate to the gravity of the crime.⁸⁰¹

⁷⁹⁸ Buckland B.S, "More than just victim: the truth about human trafficking" (2008) 15 *Public Policy Research* 46 (Emphasis added by the author)

⁷⁹⁹ Art.7 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

⁸⁰⁰ Art.8 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

⁸⁰¹ See relevant provisions, for example, Art.11.1 of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209 and Art.23.1 of the COE, C.E.T.S. No.197

8.4.1 *The Criminalisation of All Forms of Human Trafficking and Other Related Crimes*

To enhance more comprehensive and effective prosecution measures, the author argues that a strong anti-trafficking law must first define human trafficking in uniformity with the Trafficking Protocol as well as the COE. As discussed in chapter 3, human trafficking consists of three separate elements: acts (e.g. recruitment, transportation, transfer or receipt of persons), means (e.g. the use of force, coercion or any illicit means to achieve the consent of a person or having control over another) and purposes (e.g. sexual or labour exploitation).⁸⁰²

In contrast to the smuggling of migrants,⁸⁰³ human trafficking is acknowledged as a process by which an individual is moved within the victim's own and across borders for the maintenance of a situation of exploitation, which is not limited to sexual exploitation, but also labour exploitation.⁸⁰⁴ It is noted that the means and purpose elements have become primary legal and conceptual, thereby separating trafficking from the smuggling of migrants. In the case of trafficking children, the means element is not considered. Yet, it will become an element to nullify the consent in

⁸⁰² Art. 3 of the Trafficking Protocol, 2237 U.N.T.S. 319 and Chapter 3: Section 3.7.3, pp.108-114

⁸⁰³ Art. 3 of the Smuggling of Migrants Protocol defines 'smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident

⁸⁰⁴ Chapter 2: Section 2.6.2, pp.44-48 and Chapter 3: Section 3.7.3, pp.108-114 and see also United Nations Office on Drugs and Crime, *International Framework for Action: To Implement the Trafficking in Persons Protocol*, (Vienna: UNODC, 2009), p.10 and Gallagher A. and Holmes P., "Developing an effective criminal justice responses to human trafficking: lessons from the front line" (2008) 18 *International Criminal Justice Review* 322-323 (emphasis added by the author)

relation to trafficking for adults. This is to signify that consensual trafficking of either adults or children is a legal impossibility.

Since potential victims may no longer be kept under lock, or held at gunpoint, at the point of origin, rather, they may have given initial consent to unscrupulous brokers or others involved in initiating or sustaining exploitation. In this regard, they may be categorised as parties to smuggling.⁸⁰⁵ Notably, it has increasingly become more difficult, in practice, to draw the line between human trafficking and smuggling of migrants. Components of the means element, which operate to achieve the consent of an adult victim to movement, are not limited to force or coercion.⁸⁰⁶ Taking this into account, the author notes that the means element should extend to other more subtle means associated, for example, with poverty, abuse of vulnerability,⁸⁰⁷ lack of opportunities and family responsibilities. This is because, in many cases, an initial consent is more likely to be given due to such facts.

⁸⁰⁵ See for example *R V Tang* [2008] HCA 39, 28 August 2008, the five Thai women had come to Australia voluntarily and were aware that they would be working in a brothel in Australia. They entered in to agreement with a Thai recruiter and owed with the sum of AU\$ 45,000 to the Thai recruiter, before being sold to Tang. To repay the debt, the women had to work 6 days a weeks over a period of seven or eight month to reduce their debt by AU\$ 50 per customer, their passports and travel documents i.e. return tickets were withheld by the defendant. No evidence was made whether the victim were physically maltreated and were kept under key and lock, but there were effective restricted to the premises till the debt had been paid off. The Court ruled that the defendant was found guilty on five counts of possessing slaves, (five Thai women) and of using them as sex workers in a brothel in 2002-2003, pp. 50-51 (emphasis added by the author)

⁸⁰⁶ Munro V., "Of right and rhetoric: discourse of degradation and exploitation in the context of sex trafficking" (2008) 35 *Journal of Law and Society* 250

⁸⁰⁷ Although the concept of abuse of vulnerability has been recognised in the Trafficking Protocol, the interpretation is not abundantly clear leaving possibility for a state to impose a narrow interpretation, thereby representing conceptual ambiguity. See Report of the Ad Hoc Committee, *On the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions, Addendum Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, U.N. Doc. A/55/383/Add.1, 3 November 2000, Para.63

The definition of human trafficking also illustrates the importance of maintaining victims in the situation of exploitation. According to the Trafficking Protocol and the COE, exploitation is only given at a minimum to include, for example, forced labour, sexual exploitation, slavery and practices similar to slavery and servitude. Although it is not mandatory for state parties to address exploitative practices, which are the end purposes of exploitation of human trafficking, in their national anti-trafficking law, state parties have positive obligations to address exploitative practices in their domestic laws. This is one of the identified areas of change: an amended version of the Trafficking Protocol to incorporate this requirement into international law would better ensure consistency at national levels.

Regarding anti-trafficking intervention within a national context, the United Kingdom, a contracting party to the Trafficking Protocol and the COE, adopted the SOA 2003 for combating trafficking for sexual exploitation. According to section 57-60 C, the law targets the transportation of a person into, out of, and within the UK for the purpose of commercial or sexual exploitation constituting trafficking offences. Unlike the Trafficking Protocol, the law does not require the proof of the means element to be established in relation to the trafficking of adults. The existence of the 'for gains' ground is sufficient for a person to be charged under the SOA 2003.

Despite the advancement of the SOA 2003, the author, however, notes that the lack of analytical clarity of what entails exploitative conditions provokes an outcry from sex workers, which leads to a significant retreat from

the human rights dimension.⁸⁰⁸ Against this backdrop, the author argues that the issue of trafficking for sexual exploitation should not be conflated with prostitution. Both issues should be treated differently as to the prevention and protection measures. Finally, to ensure a more coherent legal response to human trafficking, conditions that constitute exploitation should be further interrogated. These can be elaborated from other relevant international and regional human rights instruments, i.e. the 1926 Slavery Convention and the ILO Forced Labour Convention, and other evidence bases, such as case law (national and international), and country reports on human trafficking situations.

The law must also ensure no safe haven for traffickers and others involved in sustaining exploitation. The amended version of the Trafficking Protocol should promote state cooperation covering all issues under an effective criminal justice system, i.e. effective investigation, prosecution, and judiciary including extradition.⁸⁰⁹ More importantly, other related crimes, namely those stipulated under the Transnational Organized Crime Convention, must be formally criminalised under the amended Trafficking Protocol.⁸¹⁰ As part of a strengthening an anti-trafficking intervention, the amended Trafficking Protocol should adopt the provision under the COE that obliges state parties not to impose on trafficked victims any criminal liability of

⁸⁰⁸ Section 57- 59 of The SOA 2003, C.42 and see also Munro V.E. 'Exploring exploitation: trafficking in sex, work and sex work' in Munro V.E. and Della Giusta M., *Demanding Sex: Critical Reflections on the Regulations of Prostitution* (Aldershot: Ashgate, 2008), p.88 (emphasis added by the author)

⁸⁰⁹ Gallagher A. and Holmes P., "Developing an effective criminal justice responses to human trafficking" (2008) 18 *International Criminal Justice Review* 321

⁸¹⁰ For example, laundering of proceeds of crime (Art.6), money laundering (Art.7), corruption (Art.8-9) and obstruction of justice (Art.23) of the Transnational Organized Crime Convention, 2225 U.N.T.S. 209

trafficking-related violations, such as illegal immigration, prostitution or labour.⁸¹¹ The non-punishment provision which rejects the arrest or prosecution of trafficked victims will arguably give a two-fold effect.

On the one hand, the non-punishment principle will reinforce the recognition of the rights of the victim. This, in turn, will certainly affect the ability of a state to investigate and prosecute traffickers due to increased cooperation of victims to testify against traffickers. On the other hand, the principle also allows the victim a better opportunity to assert the right to privacy, the right to be properly identified, the right to legal redress or legal remedy and other possible legal supports and assistance. It is worth noting that this provision will not be employed in any non trafficking-related crime, committed by a trafficked victim for which criminal intent remains a requisite element.

As a state party to the COE, the UK is legally bound not to impose penalties on a victim of trafficking for the involvement of any unlawful activities, to the extent that s/he is compelled to do so. Failure to implement such legal obligation could arguably incur UK responsibility for any acts or omissions to a breach of international legal obligation. Although Thailand is not a state party to the COE, and therefore is not bound by it, the 2008 Anti-Trafficking Act adopts a non-criminalisation provision giving effect that no victim will be prosecuted for trafficked related crimes, i.e. immigration and prostitution.⁸¹² The author acknowledges Thailand's good practice towards the development of a comprehensive anti-trafficking framework.

⁸¹¹ The non-criminalisation principle is adopted under Art.26 of the COE, C.E.T.S. No.197

⁸¹² Section 41 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

8.4.2 *The Prosecution of All involved in Human Trafficking (excluding trafficked victims)*

Moving beyond the scope of the Trafficking Protocol, the COE seeks states to adopt the criminalisation of the use of services of victims of trafficking. This is one of the most ground-breaking provisions that give both prosecution and preventive effects.⁸¹³ Based on the matter of supply and demand in trafficking, this provision targets not only a trafficker but also a client or employer who uses the services of a trafficked victim. The main purpose of this provision is to discourage demand for exploitable people that drives human trafficking.⁸¹⁴ However, the implementation of this provision will undoubtedly prove difficult in practice, especially when anti-trafficking intervention is used to deal with issues that are related, but ultimately separated, such as prostitution, which inevitably poses practical problems of intervention.⁸¹⁵

As a state party to the COE, the UK, with an aim to follow the Swedish model,⁸¹⁶ has recently passed the Policing and Crime Act 2009 that is now enforced to criminalise the purchase of sex from a prostitute that is pimped or

⁸¹³ Art.19 of the COE, C.E.T.S. No.197

⁸¹⁴ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S 197, May 16, 2005, Para. 230

⁸¹⁵ Scoular J. and O'Neill M., 'Legal incursions into supply/demand: criminalising and responsabilising the buyers and sellers of sex in the UK, in Munro V. and Della Giusta M. (eds), *Demanding Sex: Critical Reflections on the Regulations of Prostitution*, (Ashgate: Aldershot, 2008), pp, 20-25 and see also Bridget A. and Rutvica A., "Sex slaves and citizen: the politics of anti-trafficking, (2008) 40 *Soundings* 139-140

⁸¹⁶ Sweden adopted the Prohibition of the Purchase of Sexual Services Act 1998 which came into force on 1 January 1999. According to such Act, 'a person who obtains a casual sexual relation for payment will be sentenced- unless the act is punishable under the Penal Code- for the purchase of sexual services to a fine or a term of imprisonment not exceeding six months and See also, Ekberg G., "The Swedish law that prohibits the purchase of sexual services: best practices for prevention of prostitution and trafficking in human beings", (2004) 10 *Violence against Women* 1187

trafficked.⁸¹⁷ Despite such legislative effort, the strict liability offence has attracted criticism, largely from pro-sex work feminists as opposed to the abolitionist, who claim that the new offence is counter-productive in harming those whom it was intended to protect.⁸¹⁸ It was not intended to take a view on the ideological controversy between different feminist stances. Rather, the discussion in this study rests upon the practicability of such measures and what elements should be incorporated.

The UK adopts a strict liability offence whereby urging that, whether or not the clients know that the women they have sex with are those who are forced or subjected by force, is not a defence.⁸¹⁹ Although it is still under discussion whether a strict liability offence should be imposed without the necessity of proving *mens rea* (the mental element, in other words, intention), there are some concerns over the effectiveness and appropriateness of such offence, which will be thoroughly examined.

Considering the advantages of this approach, the author accepts that at the time of writing this thesis, not all countries see prostitution as a form of work. Thus, first, some of those, especially migrants working in the sex industry (whether trafficked or not) are disadvantaged by various ideas

⁸¹⁷ The Policing and Crime Bill received the Royal Assent on 12 November 2009 and now becomes the Act of Parliament- the Policing and Crime Act 2009 (C.26). It is also noted that section 14 (brought into effect in England and Wales) and 15 (brought into effect in Northern Ireland) of the Policing and Crime Act, which came into force on 1 April 2010, made amendments to the SOA 2003. See further information in <http://www.homeoffice.gov.uk/about-us/home-office-circulars/circulars-2010/006-2010/> (last visited 3 July 2010)

⁸¹⁸ House of Commons, *Policing and Crime Bill*, Library Research Paper 09/04, 15 January 2009, pp.40-52

⁸¹⁹ Home Office, *Tackling the Demand for Prostitution: A Review*, (London: Home Office, 2008), p.14

towards prostitution, as well as stricter migration policy. The prohibition of the purchase of sexual services of trafficked victims thus guarantees the real victim better access to criminal justice.

Second, in terms of litigation, a strict liability offence considerably saves costs involved in proving and disproving fault. All that the victim has to prove is the fact that she was forced into prostitution and had sex with the client. It is likely that imposing strict liability offence would bring higher deterrence, since more clients are likely to be prosecuted. Once they are found liable, this will give more legal channels for trafficked victims to get remedies for the violation of their human rights.⁸²⁰

Third, rather than being too harsh to clients who are paying for the sex services of persons not known to be trafficked victims, it is reasonable for the UK to impose a softer form of penalty such as a fine. This also supports the author's argument that any sanction should be proportionate to the gravity of the crime. In effect, it gives a better balance between the interests of victims and clients.

The most striking disadvantage lies in the objection in principle to strict liability. On this view, it is morally unjustified and potentially unfair to a client who genuinely does not know of the forced control by a trafficker over a prostitute. Whilst the mental element (*mens rea*) does not necessarily need to be proved in such cases, criminal liability, which pre-supposes fault, should in

⁸²⁰ Karen-Paz T. and Levenkron N. "Clients strict liability towards victims of sex-trafficking" (2009) 29 *Legal Studies* 452-453

principle be obtained only in the presence of clear intention, recklessness or negligence. As such, the strict liability approach may be challenged on broad grounds relating to the theory of culpability.⁸²¹

In addition, the UK approach will also prove unduly simplistic, due to the failure to address the effects on the whole sex industry, especially for those migrant sex workers, whose prostitution may become an instance of human rights abuse.⁸²² It also raises questions regarding discourse of rights, recognition and redistribution of sex workers as individuals.⁸²³ To ensure that an anti-trafficking intervention is not an anti-prostitution measure, the author argues that the UK should establish mechanisms for monitoring the legal intervention of the UK model to tackle demand for trafficking for sexual exploitation. In this connection, interests of individuals, either trafficked victims or migrant sex workers, must always be taken into account when evaluating the UK model.

8.4.3 *The Proportionate Sanction to the Gravity of Crime*

A strong prosecution measure must ensure that penalties are proportionate to the gravity of the crime. All punishable trafficking offences are required to be met by 'effective, proportionate and dissuasive sanctions,

⁸²¹ Archard D., 'Criminalising the Use of Trafficked Prostitutes: Some Philosophical Issues' in Munro V. and Della Giusta M. (eds), *Demanding Sex: Critical Reflections on the Regulations of Prostitution*, (Ashgate: Aldershot, 2008), pp.157-159

⁸²² Sanders T. and Campbell R., 'Why Hate Men who Pay for Sex?: Exploring the Shifts to Tackling Demand in the UK', in Munro V. and Della Giusta M. (eds), *Demanding Sex: Critical Reflections on the Regulations of Prostitution*, (Ashgate: Aldershot, 2008), pp.174-176

⁸²³ Scoular J. and O'Neil Maggie, 'Legal Incursions into Supply/Demand: Criminalising and Responsibilising the Buyers and Sellers of Sex in the UK' in Munro V. and Della Giusta M. (eds), *Demanding Sex: Critical Reflections on the Regulations of Prostitution*, (Ashgate: Aldershot, 2008), pp.23-24

including deprivation of liberty that gives rise to extradition'.⁸²⁴ In addition, any anti-trafficking law should consider increasing liability in aggravated circumstances taking into account where trafficking : (i) endangers the victim's life deliberately or by gross negligence, (ii) is committed against children, (iii) is committed by a public official in the performance of duty, or (vi) is involving a criminal organisation.⁸²⁵

In relation to the gravity of crime, both the Trafficking Protocol and the COE do not provide a clear standard by which to determine sanctions. Such ambiguity will inevitably undermine the effectiveness of the implementation of internationally agreed standards. Finally, the author argues that there is a need for shared information on state practice as to how trafficking offences have been determined at national levels, including lessons learned from state cooperation and mutual legal assistance. All of which are considered as positive steps towards the more effective implementation of the obligation to prohibit trafficking.

8.5 Protection of Trafficking: The Framework of Human Rights Protection

The protection measures in the Trafficking Protocol reflect fundamental rights, as provided in the existing international human rights instruments.⁸²⁶

⁸²⁴ Art.11.1 of the Transnational Organized Crime Convention takes account of a sanction must be proportionate whereas Art. 23.3 of the COE goes even further to call for states to adopt "effective, proportionate and dissuasive standards", when measuring sanctions

⁸²⁵ Art.24 (d) of the COE, C.E.T.S. No. 197

⁸²⁶ For example, UNDHR, ICCPR, ICESCR, so-called the International Bill of Rights and ICMRW. See Chapter 6: Section 6.3.1, pp.220-224

These are, for example, the right to privacy,⁸²⁷ the right to safety⁸²⁸ and the right to a safe return to the victim's own country.⁸²⁹ However, such provisions are couched in non-binding language rather than that of a matter of obligation. This leaves the obligation to protect victims of trafficking at the sole discretion of states.⁸³⁰ Considering that the Trafficking Protocol does not provide a strong report and monitoring mechanism, together with general protection of rights, the author argues that it fails to adopt the comprehensive framework of human rights protection.⁸³¹

The adoption of the COE may be seen as a remedy for this failure of the Trafficking Protocol. The COE instrumentally advances the principles essential to human rights protection, which are absent from or least discussed in the Trafficking Protocol.⁸³² These are, for example, the importance of the correct definition and identification of victims,⁸³³ the non-discrimination principle,⁸³⁴ the non-criminalisation of victims of trafficking,⁸³⁵ the non-

⁸²⁷ Art.6.1 of the Trafficking Protocol, 2237 U.N.T.S. 319 and see also Art.12 of the UDHR, UNGA Res. 217A (III) and Art.17 of the ICCPR, 999 U.N.T.S. 171

⁸²⁸ Art.6.5 of the Trafficking Protocol, 2237 U.N.T.S. 319 and see also Art.3 of the UDHR, UNGA Res. 217A (III) and Art.6 of the ICCPR, 999 U.N.T.S. 171

⁸²⁹ Art.8.1 of the Trafficking Protocol, 2237 U.N.T.S. 319 and see also Art. 13 of the UDHR, UNGA Res. 217A (III) and Art.12 of the ICCPR, 999 U.N.T.S. 171

⁸³⁰ United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, (New York: United Nations, 2004), Para.8. The non-binding languages are, for example, "in appropriate case and to the extent possible under domestic law and endeavour or ensure to provide..."

⁸³¹ Mattar M.Y. "Comparative models of reporting mechanisms on the status of trafficking in human beings" (2008) 41 *Vanderbilt Journal of Transnational Law* 1-60

⁸³² As opposed to the Trafficking Protocol, the COE aims to improve the protection measures afforded under the Trafficking Protocol and to develop standard which the Trafficking Protocol establishes, see in the Preamble of the COE, C.E.T.S. No.197

⁸³³ The correct identification of a victim of trafficking is of paramount to the provisions of protection and assistance in, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S 197, May 16, 2005, Para. 127 and see also Art.10 of the COE, C.E.T.S. No.197

⁸³⁴ Art.3 of the COE, C.E.T.S. No.197

refoulement principle, and a report and monitoring mechanism.⁸³⁶ To achieve a more comprehensive anti-trafficking framework, the author notes that an amendment to the Trafficking Protocol is an essential mechanism to ensure that all identified principles will be adopted in any national anti-trafficking legislation of state parties. As members of the international community fight against human trafficking, it is important for non-state parties to be exhorted to ratify or accede to the Trafficking Protocol and the COE to reach a consensus regarding anti-trafficking treaties.

8.5.1 The Definition of Victim of Trafficking and the Identification Process

The definition of trafficked victims is the first element, which ensures human rights protection and assistance to those being trafficked, to be correctly implemented. However, the Trafficking Protocol does not define 'victim of trafficking'. By contrast, the COE defines a trafficked victim as 'any natural person who is subjected to trafficking in human beings as defined in this article.' This is giving that anyone, who is subjected to the combination of elements of a human trafficking crime: acts, means and purposes, fall within the category of a victim of trafficking.⁸³⁷ To ensure more effective legal intervention, the author argues that the Trafficking Protocol must be amended to include the definition of victims under the COE, for which states parties have a positive obligation to adopt in their domestic role. This will ensure that

⁸³⁵ The non-criminalisation principle is one of the substantive criminal law provisions of the COE (Art.26), C.E.T.S. No.197

⁸³⁶ Chapter VII of the COE (Art.36 – Art.38), C.E.T.S. No.197

⁸³⁷ Art. 4 of the COE corresponds to the Art.3 of the Trafficking Protocol giving the same account that trafficking consists of three separate elements: acts, means and purposes

those failing victim to trafficking are accorded the protection and assistance provided under the Trafficking Protocol.⁸³⁸

In addition, the needs of protection are likely to increase, when victims decide to co-operate with authority in the prosecution of traffickers. Most obviously, witness protection is a pressing need in cases brought against criminal gangs. Protection and assistance for the period: before, during and after the criminal proceedings should be granted to victims, those related to victims and other witnesses. During such a period, there are possible risks of potential retaliation, intimidation, and possible threats from traffickers, but such protection and assistance provided must of course be with the consent of those concerned.⁸³⁹ To ensure effective and appropriate protection and assistance, the author argues that the Trafficking Protocol should amend the provision concerning the recognition of potential victims and witnesses. Finally, for the best use of the definition above, gender and child sensitive issues should always be taken into account when dealing with different needs of victims.

The recognition of victim: The right to be properly identified

Art. 10 of the COE is a significant provision devoted to the identification of victims of trafficking.⁸⁴⁰ It places positive obligation on states to adopt

⁸³⁸ See Chapter 8: Section 8.4.1, pp.299-304

⁸³⁹ The correct identification of a victim of trafficking is of paramount to the provisions of protection and assistance in Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S 197, May 16, 2005, Para. 289 and Art.28 of the COE, C.E.T.S. No.197

⁸⁴⁰ See also Guideline 2: The identification of trafficked persons and traffickers in the Report of the United Nations High Commission for Refugees, Recommended Principles and

legislative and policy measures to guarantee the identification process, dealt with by competent authorities; those who are trained and qualified in identifying and helping victims, taking into account women and children. The provision also requires that the victim will not be removed before the identification process is complete.⁸⁴¹ In addition, the identification of victims is instrumental in many respects.

For example, it advances the human rights protection of the victim. This is because the identification process will give a victim status to be recognised in a country where s/he is found, and this guarantees a victim a number of appropriately protected rights. Secondly, accurate identification ensures that real victims would not be wrongly prosecuted, which could cause the total breakdown of anti-trafficking intervention. Finally, an effective identification process will enhance state accountability towards its obligations to protect victims of trafficking.

Despite Article 10, Ezeilo argues that many victims remain unidentified or misidentified by the authorities carrying out the screening process.⁸⁴² The identification of victims of human trafficking is not straightforward and can be time consuming. Therefore, a number of issues should be taken into account to ensure detailed enquiries facilitating the proper, correct and timely process of identification.

Guidelines on Human Rights and Human Trafficking, *E/2002/68/Add.1*, 20 May 2002, pp.6 – 7 [hereafter the UNHCR Recommended Principles and Guidelines]

⁸⁴¹ Art.10.1-4 of the COE, C.E.T.S. No.197

⁸⁴² United Nations, Trafficking in Persons, especially women and Children, noted by the General Assembly at its sixty-fourth session, *A/64/290*, 12 August 2009, Para.36. Ms. Joy Ngozi Ezeilo of Nigeria serves as the second U.N. Special Rapporteur on Trafficking in Persons, Especially Women and Children. She took her office in August 2008

First, a victim-centred approach should be adopted at the centre of all efforts.⁸⁴³ Prior to the identification process, the concerned authority is to be aware of relevant matters surrounding a victim, namely gender, age, relationship with the trafficker, immigration status, fears of reprisals, socio-economic and cultural backgrounds, including other individual circumstances.⁸⁴⁴ Knowledge of such factors is essential for the authority to develop protection and assistance measures to meet the different needs of victims throughout the identification process.

Second, since the identification of victims is reliant on the discretion of the concerned authority, the official given task should be trained competent enough to make decisions.⁸⁴⁵ To assist the competent authority, guidelines and procedures regarding the identification of victims should be developed. In addition, the competent authority is required to act on 'reasonable grounds to believe' that a person has been a victim of trafficking.⁸⁴⁶ For example, the UK has set out the indicators available for the designated competent authorities, such as the UK Border Agency (UKBA) and the UK Human Trafficking Centre (UKHTC), to make a primary assessment of whether a person is or may be a potential victim case.⁸⁴⁷

⁸⁴³ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S 197, May 16, 2005, Para.127 and see also the UNHCR Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 1: the Primacy of human rights, E/2002/68/Add.1, 20 May 2002

⁸⁴⁴ United Nations Office on Drugs and Crime, *Toolkit to Combat Human Trafficking: Global Programme against Human Trafficking*, 2nd ed., (Vienna: UNODC, 2008), pp.255-256

⁸⁴⁵ The concerned authority dealing with human trafficking are those police, border authorities, health care and social workers

⁸⁴⁶ Art.10.2 of the COE, C.E.T.S. No.197

⁸⁴⁷ The indicators include, for instance, evidence of physical or psychological harm or debt bondage, signs of fear or anxiety, including threats against individuals or their family members, found in or connected to a type of location likely to be used for exploitation, and

Third, there is a need for co-operation amongst designated authorities that deal with human trafficking. It is considered as good practice for the UK to have established the National Referral Mechanism, a joint body of the UKHTC and UKBA responsible for identification of victims.⁸⁴⁸ This needs to be investigated further as to whether solid procedures are put in place to ensure effective and appropriate protection. In addition, to increase the level of individual complaint on behalf of victims, the identification process should be facilitated by ethical principles in caring for, and sensitively interviewing, victims of trafficking; taking into account the do no harm principle, the rights of safety, privacy and confidentiality of victims.⁸⁴⁹ Such principles would also increase trust and cooperation of victims which would favour positive consequence on human rights protection of victims. The provisions of witness protection discussed in chapter 3 are consistent with this approach.

8.5.2 Non-Criminalisation of Trafficked Persons

As stated earlier, the lack of a proper process of identification of victims may result in criminal sanctions against trafficked victims. During trafficking, victims are normally compelled to conduct or to be involved in unlawful activities under domestic laws, i.e. illegal migration, irregular labour status, prostitution and forgery of travel documents. As a result, they become the target of prosecution. In contrast, to the Trafficking Protocol, the COE

forfeiture of travel identity. However, the list is not exhaustive. See Home Office, *Enforcement Instructions and Guidance*, (London: Home Office, 2009)

⁸⁴⁸ The National Referral Mechanism came into effect from 1 April 2009, and see also Chapter 5: Section 5.6, pp.205-216

⁸⁴⁹ United Nations, Trafficking in Persons, especially women and Children, noted by the General Assembly at its sixty-fourth session, A/64/290, 12 August 2009, Para.36. Ms Joy Ngozi Ezelio is appointed as the Special Rapporteur on trafficking in persons between 2008-2011 in the same report, A/64/290, 12 August 2009, Para.41.

obligates states to adopt and implement the principle of non-criminalisation of trafficked victims, thereby 'possibly not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so'.⁸⁵⁰

However, the principle is not considered to be a strong feature of the Convention, due to the relatively weak language used and given the fact that state parties could always opt to prosecute trafficked victims for any traffic related offences.⁸⁵¹ As a result, it appears that a number of victims have still been detained, and then either prosecuted or deported, usually for trafficking-related offences, such as immigration status.⁸⁵² This amounts to a significant retreat of opportunities from victims to seek access to justice. Most importantly, it may cause a total failure of anti-trafficking legislation because the law re-victimises those who have already been the victims of human trafficking.⁸⁵³

To prevent such failure and to enhance the effectiveness of state obligations to human rights protection, the following criteria are suggested as essential guidelines.

⁸⁵⁰ Art.26 of the COE, C.E.T.S. No. 197

⁸⁵¹ Gallagher A. "Recent legal developments in the field of human trafficking: a critical review of the 2005 European Convention and related instruments" (2006) 8 *European Journal of Migration and Law* 178

⁸⁵² Gallagher A. "Developing an effective criminal justice response to human trafficking: lesson from the front line" (2008) 18 *International Criminal Justice Review* 331

⁸⁵³ See for example the case of *R v O*, where the victim was misidentified and she was pledged guilty to possession of a false identity upon which a custodial sentence had been imposed. However, following the signature and ratification of the COE, the Court of Appeal was able to put right some of the damage to the victim and to find protection standards for victims of human trafficking considering a step to the development of the positive obligations under international human rights law. See, *R v O* [2008] EWCA Crime 285 and see also Elliott J. "(Mis) identification of victims of human trafficking: the case of *R v O*" (2009) 21 *International Journal of Refugee Law* 727-741

First, although the principle of non-criminalisation of victims of trafficking was not addressed in the Trafficking Protocol, this chapter calls for the inclusion of this principle in an amended version of the Trafficking Protocol. This is because it stands to serve the objective of the Trafficking Protocol to prosecute traffickers, not victims of trafficking.⁸⁵⁴ Meanwhile, states should acknowledge the importance of this principle which ought to be incorporated in any domestic anti-trafficking legislation. In this regard, it should be noted that Thailand, despite being a non-party to the Trafficking Protocol and the COE, adopted a specific provision of non-criminalisation of trafficked persons in its anti-trafficking law. The author considers this legal movement as good practice towards the development of Thailand's positive obligation to human rights protection.⁸⁵⁵

Second, the principle of non-criminalisation of victims must be complemented with rights available to victims of trafficking, for example the rights protected under international human rights law.⁸⁵⁶ The victim should be provided useful information on the state's criminal justice system, information on victim immunity and relevant rights, assistance and support. The information given to the victim must be communicated both in the language and in the manner that the victim understands. In addition, the victim should be informed of their rights to justice, to legal assistance, to participate in criminal proceeding as witness against the trafficker, to privacy and security and to a remedy, typically compensation for loss or damage.⁸⁵⁷

⁸⁵⁴ Elliott J. "(Mis) identification of victims of human trafficking: the case of R v O" (2009) 21 *International Journal of Refugee Law* 739

⁸⁵⁵ Section 41 of the 2008 Anti-Trafficking Act, Government Gazette, Vol.125, Part 29 (a), dated 6 February B.E.2551 (2008)

⁸⁵⁶ See Chapter 6: Section 6.3, pp.220-227 and Section 6.4, pp.227-233

⁸⁵⁷ Chapter 6: Section 6.5.1, pp.235-248 and Art.6-8 of the Trafficking Protocol, 2237 U.N.T.S. 319

Third, the principle of non-criminalisation of victims of trafficking ought not to be used to induce the victim to co-operate in the prosecution of traffickers. In addition, protection, assistance and support should not depend upon whether the victim is willing or unwilling to co-operate with the authority.

Finally, the principle of non-criminalisation of victims must not only be addressed as a matter of best practice but also harmonised amongst national legislation. In order to achieve this goal, each state needs to ensure that human trafficking offences in domestic law are established in line with international legal frameworks. In this connection, the definition of a victim of trafficking adopted in Art. 4 of the COE should be employed as guidance for practice to ensure that a person who falls into situations where exploitation continues to exist, especially in a destination country, will not be prosecuted under other relevant laws to human trafficking.

8.5.3 The Principles of Non-Discrimination and Equality

The legal principle of non-discrimination is echoed by the UN Charter 'to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'.⁸⁵⁸ Since then, the non-discrimination principle has become a widely accepted norm of international human rights protection, embedded in most international and regional human rights documents, i.e. the UDHR,⁸⁵⁹ ICCPR,⁸⁶⁰ ICESCR,⁸⁶¹

⁸⁵⁸ Art.1(3) of the Charter of the United Nations, 1 U.N.T.S. 16, 24 June 1945, entered into force 24 October 1945

⁸⁵⁹ The core provision of non-discrimination lies in Art. 2 of the UDHR, UNGA Res. 217A (III). However, there are a number of provisions under the UDHR relevant to a non-discrimination principle, for example, Art.7 (equality before the law) and Art.23 (the right to equal pay). It is

CEDAW,⁸⁶² ECHR,⁸⁶³ including the Trafficking Protocol and the COE. Whilst the Trafficking Protocol simply guarantees no discrimination against victims,⁸⁶⁴ the COE adopts the non-discrimination principle in a more extensive sense. Particularly, the latter focuses on the positive obligation of states to protect and assist particular groups of victims with specific needs, namely women and children as victims of human trafficking.⁸⁶⁵

The obligation to the non-discrimination principle is a general obligation, guaranteed by the above human rights instruments. Hence, the author argues that states, irrespective of whether they are parties to the Trafficking Protocol or the COE, ought to ensure that all protection and support measures are to be provided on a non-discriminatory basis. That is, the national law ought to ensure that different treatment of victims, which may result in direct discrimination, is prohibited. By doing so, states should provide institutional tools and mechanisms to address what could be root causes of discrimination or obstacles, to promote equality and prevent discrimination. In connection to human trafficking, the author argues both source and destination countries ought, even if not signatories, to be responsible to adopt

noted that although the UDHR is not a legally binding document, it has been a most influential human rights document to date

⁸⁶⁰ There are two important provisions regarding the principle of non-discrimination. These are Articles 2 (1) and 26 of the ICCPR, 999 U.N.T.S. 171

⁸⁶¹ Art.2 (2) of the ICESCR, 993 U.N.T.S. 3

⁸⁶² For example, Art.1 and Art.2 of the CEDAW, 1249 U.N.T.S. 13

⁸⁶³ Art.14 of the ECHR, C.E.T.S. No.005

⁸⁶⁴ Art.14 of the Trafficking Protocol, 2237 U.N.T.S. 319 and see also United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, (New York: United Nations, 2004), Part II, pp.419-421

⁸⁶⁵ Art. 3 of the COE, C.E.T.S. No. 197 and see also, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S 197, May 16, 2005, Para.63

positive measures to prohibit discrimination against trafficked victims on the ground of race, sex and 'other identity'.⁸⁶⁶

As discussed in chapter 2, women, whilst at home, tend to suffer from unequal development, socio-economic, political and cultural inequality and gender-based discrimination.⁸⁶⁷ Such underlying problems not only render women vulnerable to human trafficking, but also constitute persistent violations of basic human rights of women. In this connection, a country of origin, such as Thailand, ought to be responsible to tackle the root cause of human trafficking from the supply side. Whilst Thailand is a contracting party to the major human rights treaties, the ICCPR and CEDAW, it is recommended that Thailand should ratify the Trafficking Protocol without delay so that Thailand would be obliged to prevent human trafficking.

One of the prevention measures, which states parties should highlight, is the promotion of gender equality by improving the socio-economic conditions of vulnerable groups of the population social and economic initiatives. In addition, the adoption of anti-discrimination laws (for instance, the area of labour and education) and relevant policies is also paramount in safeguarding social and economic rights of women and in prohibiting discriminatory practice on grounds of differences including gender, race and ethnic origins. To this end, the non-discrimination principle should also be implemented to ensure the long-term prevention of human trafficking in the country of origin.

⁸⁶⁶ Art.3 of the COE, C.E.T.S. No. 197

⁸⁶⁷ Chapter 2: Section 2.8.2 – 2.8.4, pp.55-60

A destination country where a victim is normally found should guarantee substantive equality under other human rights instruments i.e. ICCPR. The 3P measures (prevention, protection and prosecution) must not reinforce inequality, but enhance *de jure* and *de facto* equality amongst all victims. States should also take proactive measures and encourage treatment to meet special needs of such persons. Although victims of trafficking may experience different forms and degrees of exploitation during the trafficking process, the majority of young women suffer sexual exploitation and are more vulnerable to abuses and violence.

Apart from basic guaranteed rights, such as civil and political rights and social, economic and cultural rights, some specific assistance and protection is required. This includes assistance to victims to ensure subsistence (housing and other material assistance), a recovery and reflection period (including a residence permit), the right to legal remedies, repatriation and the return of victims. These features should be adopted in national legislation, especially in a destination country, of which Art.3 of the COE places positive obligation on states parties.⁸⁶⁸

⁸⁶⁸ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S 197, May 16, 2005, Para.68. There are several positive obligations related to human trafficking. Obligation to prevent and combat trafficking is not only required by the Trafficking Protocol (Art. 2) and other relevant legal instruments i.e. legally binding instruments such as Art.6 of CEDAW – states parties shall take all appropriate measure to suppress all forms of traffic in women and exploitation of prostitution of women and non-legally binding instruments such as Principle 12 of the UNHCR Recommended Principles and Guidelines- states shall adopt appropriate legislative and other measures necessary to establish as criminal offences, trafficking, its component acts, and related conducts, E/2002/68/Add.1, 20 May 2002

The UK, a party to the COE, is therefore bound by Art.3 of the COE to fulfil its positive obligation to take preventive and protection actions to secure human rights of victims of human trafficking and to implement such measures without discrimination. On the contrary, despite a non-state party to the Trafficking Protocol and the COE, Thailand has obligations under the ICCPR, ICESCR, and the CEDAW, for example, to take all appropriate measures, i.e. legislation, executive acts, policies, to secure human rights of trafficked victims.

8.5.4 The Non-Refoulement Principle

Despite the recognition of the non-refoulement principle in its saving clause, the Trafficking Protocol offers little protection to a victim seeking to gain residency and this seems to undermine effective victim protection.⁸⁶⁹ The COE, taking a more human rights based approach, goes further to require a state not to return a victim of trafficking immediately to his/her host country, but to consider a renewable residence permit to such victims, making significant contribution to the protection of victims of human trafficking. However, again, leaving the determination of the length of a residency permit is entirely up to a state. This, together with the lack of a mechanism for which

⁸⁶⁹ Art.14.1 of the Trafficking Protocol declares that nothing in the Protocol shall affect the rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law, and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein. Art.7 of the Trafficking Protocol simply states that each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory temporarily or permanently, in appropriate cases

a victim could challenge deportation, undermines the effectiveness of the COE.

Given the limitations of the above trafficking-specific legal instruments regarding the implementation of the non-refoulement principle, this study offers possible routes by which a trafficking victim could be more effectively protected. At its core, non-refoulement is the cornerstone of international protection enshrined in both customary law and codified treaties. Under customary law, '*non-refoulement* prohibits states from rejecting, returning, removing or expelling an individual to a country where there is a substantial risk of facing torture, cruel, inhuman or degrading treatment, or prosecution'.⁸⁷⁰ Moreover, some scholars claim that such principle has attained the normative value of *jus cogens*, from which no derogation is permitted.⁸⁷¹

Non-refoulement has also been codified in a number of treaties, for instance, Article 3 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment,⁸⁷² Art.3 of the ECHR⁸⁷³ and Art.7 of the ICCPR⁸⁷⁴ prohibit *refoulement* of any individual and

⁸⁷⁰ Ryan D., "International law- prohibition on refoulement: remedies- Maher Arar V. John Ashcroft et al, 532 F3d. 157 (2nd Cir 2008)" (2009) 32 *Suffolk Transnational Law Review* 40-41

⁸⁷¹ See for example, Allain J. "The Nature of *jus cogens*: nature of *non-refoulement*" (2002) 13 *International Journal of Refugee Law* 533-558. He notes that the principle of *non-refoulement* can be demonstrated as having attained the status of *jus cogens*, a peremptory norm of international law from which is accepted, recognised and bound by the international community of states as a whole.

⁸⁷² Hereafter, the CAT, 1465 UNTS 85, 10 December 1984, entered into force 26 June 1987. As of 30 June 2010, there are 147 states parties. Art. 3 of the CAT states that no state party shall expel, return (refouler), or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected torture

⁸⁷³ Art.3 of the ECHR states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The provision thus applies to everyone, not simply to 'refugees' and see also in *Ireland V United Kingdom* (App. 5310/71), Judgement of 18 /01/1978 where the court elaborated Art.3 of the ECHR makes no provision for exception

are not subject to exception. As a means of non-refoulement protection for those qualifying refugee status, the 1951 Refugee Convention⁸⁷⁵ along with the 1967 Refugee Protocol⁸⁷⁶ become potential paths for a state party, for example, the UK. Article 33 of the 1951 Refugee Convention establishes a duty of state not to *refoule* a refugee 'in any manner whatsoever'. In essence, a state should not eject a refugee from its territory and return that person to a place, i.e. a country of origin where s/he might be exposed to torture or experience persecution, unless there is exceptional evidence applied.⁸⁷⁷

To gain recognition as a refugee and to be protected under the 1951 Refugee Convention's non-refoulement principle, a person must meet the following criteria: (1) a person must have a well-founded fear of persecution; (2) the persecution must be for reasons of race, religion, nationality, membership of a particular social group or political opinion; (3) s/he must be outside her/his host country; and (4) s/he must be unwilling or unable, owing to the fear of

even in the event of a public emergency threatening the life of the nations, Para.65 and other cases, *Soering V United Kingdom*, (App.14038/88), Judgment of 7/7/89 and *Chahal V United Kingdom*, (App.22414/93), Judgement of 15/11/96 where the European Court of Human Rights ruled that member states, including the UK, cannot return that person if s/he faces the risk of torture in his/her state of origin

⁸⁷⁴ Art.7 of the ICCPR states no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation

⁸⁷⁵ 189 UNTS 150, as of 30 June 2010, there are 144 states parties to the 1951 Refugee Convention. It is note that; however, Thailand is not a state party to such Protocol, whereas the UK ratified it on 11 March 1954

⁸⁷⁶ As of 30 June 2009, there are 144 states parties to the 1967 Refugee Protocol

⁸⁷⁷ For example, according to Art. 1 (F) of the 1951 Convention, the application of non-refoulement will exclude a person (1) committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes, (2) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee and (3) has been guilty of acts contrary to the purposes and principles of the United Nations and where there are reasonable grounds for regarding a refugee as a danger to the security of the country in which he is, or who, have been convicted by a final judgement of a particularly serious crime, which constitutes a danger to the community of that country (Art.33 (2)) and see also Duffy A. "Expulsion to face torture? *Non-refoulement* in international law" (2008) *International Journal of Refugee Law* 373-374

persecution, to avail her/himself of the protection of his/her host country.⁸⁷⁸ It is noted, however, that such criteria have posed some difficulties in the cases of trafficking where 'being a victim of trafficking normally does not suffice to establish a valid claim for refugee status.'⁸⁷⁹

Over the years, there have been attempts by international organisations to develop guidelines to place a trafficked victim within the reach of international refugee law.⁸⁸⁰ With regard to the persecution requirement, through the development on the part of jurisprudence, it is now accepted that gender-based violence leading to vulnerable status of women, such as Female Genital Mutilation (FGM), could be used as grounds for proving membership of a particular social group, which those women belong to.⁸⁸¹ The author contends that, in many trafficking cases, family ostracism,

⁸⁷⁸ According to Art.1A(2) of the 1951 Refugee Convention, a refugee is a person who: 'owing to a well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his formal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'

⁸⁷⁹ The United Nations High Commission for Refugees, Guidelines on International Protection No.2: "Membership of a Particular Social Groups within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, *HCR/GIP/02/02*, 7 May 2002, Para. 11

⁸⁸⁰ There are a number of organisations concerning the issue of international protection to victims of human trafficking, for example, The United Nations High Commission for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, *HCR/GIP/02/01*, 7 May 2002 [hereafter, the 2002 UNHCR's Guidelines on Gender related Persecution] and UNHCR, Guidelines on International Protection No.2: "Membership of a Particular Social Groups within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, *HCR/GIP/02/02*, 7 May 2002 [hereafter, the 2002 UNHCR's Guidelines on Membership of a Particular Social Group], The United Nations High Commissioner of Human Rights, the United Nations Children's Fund, the United Nations High Commissioner for Refugees and the International Organization for Migration on the Draft Protocol concerning migrants smuggling and trafficking in persons, *A/AC.254/27*, 8 February 2000 and *A/AC.254/27/Corr.1*, 22 February 2000 (Inter-Agency Submission). In 2006, UNHCR, Guidelines on International Protection No.7: The Application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, *HCR/GIP/06/07*, 7 April 2006, [hereafter the 2006 UNHCR's Guidelines]

⁸⁸¹ *Secretary of State for the Home Department v K (FC), Fornah (FC) v Secretary of State for the Home Department* is a case in point where the House of Lords ruled that a Sierra

reprisals by traffickers, potential re-trafficking and forms of gender-based violence become major problems upon return to a country of origin and could constitute persecution for which a victim of trafficking may be in need of international refugee protection.⁸⁸²

Further, trafficking for sexual exploitation, where such violence could be inflicted purely for the reason of gender, could reasonably establish a causal link to a well-founded fear of persecution, on the grounds of membership of a particular social group.⁸⁸³ This is because a victim has suffered either past persecution or has a fear of future gender-based persecution, and the experience of gender-based violence in which a victim has shared with other women may become an established practice in particular settings. In addition, the return of the victim would place her at risks of serious human rights violations amount to persecution, either by state or non-state agents. Although the latter is not mentioned in the 1951 Refugee Convention, in a human trafficking context, acts of persecution most likely emanate from non-state agents i.e. individuals, traffickers, criminal

Leonean woman who had fled her country because she refused to undergo genital mutilation is qualified for refugee protection as a member of a particular social group within the meaning of the 1950 Refugee Convention. With regards to the FGM, the Court also grounded that FGM, constitutes treatment amount to gender-specific persecution to which all Sierra Leonean, 18 October 2006, [2006] UKHL 46 and see also Report of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, *HCR/1P/4/Eng/Rev.2* recognised that, for the purpose of the Refugee Convention, certain forms of gender-specific violence can qualify as persecution for which trafficking for sexual exploitation may be particularly qualifying types of gender-specific violence

⁸⁸² The 2006 UNHCR's Guidelines, *HCR/GIP/06/07*, Para.14-18 and see also Edwards A. "Traffic in human beings: at the intersection of criminal Justice, human rights, asylum/migration and labor", (2007) 36 *Denver Journal of International Law* 36-38, and Gallagher A.M. "Triply exploited: female victims of trafficking networks- strategies for pursuing protection and legal status in country of destination" (2004) 19 *Georgetown Immigration Law Journal* 107

⁸⁸³ According to the UNHCR, a particular social group is 'a group of person who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights' in UNHCR, Guidelines on Membership in Social Groups, *HCR/GIP/02/02*, 7 May 2002

enterprises, including family or community members. In addition, it is accepted that the failure by a state to take effective measures against the risk of human trafficking and protect trafficked victims may be sufficient to give rise to a well-founded fear of persecution.⁸⁸⁴

Although Thailand is not a party to either refugee instruments, it is bound by Art.7 of the ICCPR which could extend an additional layer of protection for a trafficked victim. As a non-derogable provision, its scope is thus wider than the non-refoulement requirement of the international refugee law. It rejects torture, cruel, inhuman or degrading treatment or punishment upon return of a person by way of extradition, expulsion and refoulement.⁸⁸⁵ Whilst the persecution element is a requirement to establish a claim for refugee status under the 1951 Refugee Convention, the ICCPR requires a different set of evidence for a victim to compile, thereby demonstrating the risks of return fall within the definition of torture, cruel, inhuman or degrading treatment or punishment as prohibited under Art.7.

Despite the availability of the non-refoulement principle in international instruments, as well as its customary nature, a number of trafficked victims have still experienced immediate and involuntary return, which is arguably a very unsatisfactory practice. The lack of effective repatriation assistance and other relevant resources to facilitate the return, such as medical assistance, documentation and arrival assistance also mitigates against the effectiveness

⁸⁸⁴ The 2006 UNHCR's Guidelines, Paras. 22-24 and see also Piotrowicz R., "The UNHCR's Guidelines on human trafficking" (2008) 20 *International Journal of Refugee Law* 246-248

⁸⁸⁵ Human Rights Committee, General Comment 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art.7), adopted by the Human Rights Treaty Bodies, *HRI/GEN/1/Rev.1*, 3 October 1992, Para.9

of state co-operation in the long-term prevention of trafficking. In this regard, to promote state practice to the non-refoulement protection, the author argues that there is a need of a strong report mechanism to monitor and evaluate the implementation of laws relating to human trafficking and consistency of state practice to the protection of victims of trafficking.

8.5.5 Participation, Monitoring and Evaluation

The lack of formal requirements for the report, monitoring and evaluation mechanisms to investigate the scope of trafficking problems and government actions and responses under the Trafficking Protocol, negatively affects overall anti-trafficking measures.⁸⁸⁶ To remedy such weakness, the author calls for an amendment to the Trafficking Protocol to adopt a provision on the report, monitoring and evaluation mechanisms to ensure and enhance the effectiveness of anti-trafficking intervention.

Participation Building

In addition, the effective fight against human trafficking will not succeed without (international) cooperation amongst different partnerships. The author argues that this requires not only cooperation from multi-state agencies, but participation is also needed from other members of civil society ranging from local NGOs, community, family and individuals. The participatory framework is

⁸⁸⁶ In this regard, the only potential body is a Conference of Parties under the Transnational Organized Crime Convention to promote and review implementation of the Convention (Art.32 of the Transnational Organized Crime Convention). In connection to the Trafficking Protocol, a supplementing Protocol, a Conference of Parties to the Convention is enforced only when trafficking matters could be brought under the provisions of the Convention itself

paramount to ensure that all states, whether or not they are parties to the Trafficking Protocol and the COE are able to join forces to combat human trafficking. The framework also ensures the participation of civil society through various forms of communication, formal and informal, which will be an asset to the report, monitoring and evaluation functions.

The author considers that the participation of all stake-holders would also assist states to monitor the discharge of their positive obligations in relation to human trafficking. It is noted that the primary wrong of human trafficking is normally private individuals for which, in principle, are not within the reach of international law. Yet, the author maintains that states remain obliged under a range of human rights treaties by which they are bound, including the Trafficking Protocol and the COE, to prevent violations of trafficked victim's human rights.⁸⁸⁷ It is a state responsibility to address state accountability for breach of human rights either by acts or omissions of a state and from violations of customary international law or binding treaties.

To prevent breaches of human rights in the case of human trafficking, the author argues, positive obligations to 3P measures: prevention, protection and prosecution should be fulfilled to secure best practice in anti-trafficking intervention. In this regard, the author argues a state should take many forms of actions such as preventive or remedial measures through the adoption of

⁸⁸⁷ Some scholars have argued that the initial conduct of trafficking may not fall on a state. However, a state is held responsible for its failure to combat human trafficking. See for example, Piotrowicz R. "Victims of people trafficking and entitlement to international protection" (2005) 24 *Australian Yearbook of International Law* 165-167 and Gallagher A.M. "Triply exploited: female victims of trafficking networks- strategies for pursuing protection and legal status in country of destination" (2004) 19 *Georgetown Immigration Law Journal* 115-117

legislation, or policy, making them as comprehensive as possible. However, it is observed that positive obligation towards human rights protection are often ignored and unsatisfactorily implemented. It would seem that most trafficked persons are still frustrated in getting access to protection and assistance.

As part of the development of positive obligations to human trafficking, states are required to coordinate their efforts with civil society to prevent and prosecute traffickers and protect victims of trafficking.⁸⁸⁸ Starting from local levels, local NGOs have played a major role in providing assistance and protection for victims in sending, transit and destination countries. The multi-level participation of local NGOs and other members of civil society in prevention and protection measures, for example, capacity building programmes in education, job training, repatriation and re-integration programmes including prevention of re-trafficking, should be encouraged. The participation of civil society can be arranged by both formal and informal communication, i.e. meetings with representatives from NGOs, and members of civil society and the formulation of memorandums of understanding between authorities and NGOs. In addition, the involvement of individuals is, in the author's view, becoming a significant part of the holistic participatory framework to effectively fight human trafficking.⁸⁸⁹

Strengthening the report, monitoring and evaluation mechanisms

The lack of reliable and comparable data and updated information regarding the status of human trafficking, both in a national and global

⁸⁸⁸ Art.9 of the Trafficking Protocol, 2237 U.N.T.S. 319 and Art.35 of the COE, C.E.T.S. No. 197

⁸⁸⁹ Mattar M.Y. "Incorporating the five basics elements of a model anti-trafficking in persons legislation in domestic law: from the United Nations Protocol to the European Convention" (2006) 14 *Tulane Journal of International and Comparative Law* 406-408

context, remains a key issue that undermines effective anti-trafficking intervention. To remedy this, the duty to report, monitor and evaluate states' legal accountability for combating human trafficking remains crucial to ensure that states correspond to their respective obligations to anti-human trafficking under relevant instruments, i.e. the Trafficking Protocol, the COE and other human rights instruments, including customary law.⁸⁹⁰

According to the COE, two monitoring bodies are modelled. One is a technical independent body chosen from individual experts known as the Group of Experts against Trafficking in Human Beings (GRETA).⁸⁹¹ GRETA is responsible for evaluating state performance and preparing reports containing information given by state parties and analysis on implementation of the COE, together with recommendations.⁸⁹² Another body is the Committee of Parties, a more political body, working to ensure that GRETA's recommendations are taken by concerned parties, to promote cooperation, and to ensure proper implementation of the COE.⁸⁹³ Other than the existing Special Rapporteur appointed under the United Nations on Human Rights Committee,⁸⁹⁴ the COE

⁸⁹⁰ Whereas the Trafficking Protocol is silent as to monitoring mechanism, Art.32 of the Transnational Organized Crime Convention establishes a Conference of Parties responsible for the periodic examination of the implementation of the Convention. Please see also the monitoring mechanism of government's anti-trafficking activities in compliance with Art.18 of the CEDAW and Art.44 of the CRC in Mattar M.Y. "Comparative models of reporting mechanisms on the status of trafficking in human beings" (2008) 41 *Vanderbilt Journal of Transnational Law* 38-41

⁸⁹¹ According to Art.36 of the COE, GRETA shall be composed of ten to fifteen members selected on the basis of expertise with attention given to gender balance, geographical balance and multi-disciplinary experience. Members serve four-year terms, renewable once and are elected by the Committee of the Parties among nationals of the states parties to the COE and see also Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, C.E.T.S 197, May 16, 2005, Para.369

⁸⁹² Art.38 of the COE, C.E.T.S. No. 197

⁸⁹³ According to Art.37 of the COE, the Committee of Parties is composed of one representative of each state party and is linked directly to the COE's committee of ministers

⁸⁹⁴ The Special Rapporteur on Trafficking in Persons, Especially Women and Children has the power to investigate the scope of the problem, monitor and report on government actions,

calls for parties to consider appointing a National Rapporteur for monitoring the implementation of anti-trafficking activities at national levels.⁸⁹⁵

The author argues that the reporting, monitoring and evaluation models developed in the COE are useful features for any national anti-trafficking laws to adopt. To secure an effective and more inclusive response to human trafficking, a report should be submitted annually. It should systematically assess problems and obstacles faced in the implementation of anti-trafficking activities, including proposals for possible changes. In addition, independent bodies and experts on human rights protection should be encouraged to participate in monitoring and evaluation mechanisms.⁸⁹⁶ Such independent views would provide useful recommendations influencing states to take positive and affirmative action to combat human trafficking.

Finally, the question of state responsibility will arise when a state, once monitored and evaluated, fails to comply with its obligations. The development of the International Law Commission Draft Article (ILC) on state responsibility imposes states responsibility for their wrongs, meaning the wrongs they actively perform and the wrongs legally attributable to them through culpable omissions.⁸⁹⁷ In relation to human trafficking, state parties to either the

receive and inquire into complaints and make recommendations for policy changes. See further information <http://www2.ohchr.org/english/issues/trafficking/index.htm>

⁸⁹⁵ Art. 29.4 of the COE, C.E.T.S. No.197

⁸⁹⁶ For example, the COE contains provisions (Art.35 and 36) which aim at ensuring the effective implementation of the Convention by the parties. Following which, GRETA (the Group of Expert against trafficking in human beings) is a technical body, composed of independent and qualified experts in the area of human rights, assistance and protection of victims and of action against trafficking in human beings or having professional experience in these areas is in charge of monitoring the implementation of the Convention by the parties.

⁸⁹⁷ The concept of state responsibility was developed under the work of International Law Commission during 1960s, which came to an end at the ILC's 53rd session in 2001. It is

Trafficking Protocol, or the COE, are held liable for the acts or omissions of different organs of such states for the failure to respect states' international obligations under both treaties.

In relation to non-state parties to either the Trafficking Protocol or the COE, such as Thailand, the author argues that Thailand should not shy from this fact. This is because the obligation to prosecute and prevent human trafficking, and protect victims of trafficking, could emanate from its current legal obligations under other human rights instruments such as the ICCPR and even from customary international law as discussed in this study. Still, it is significant to encourage non-state parties to ratify the Trafficking Protocol or the COE to ensure the collective vision and practice to fight against human trafficking. Finally, what could be real and meaningful improvement for states to combat human trafficking is the development of positive measures and effective mechanisms to assess state responsibility and accountability to human trafficking and related exploitation.

8.6 Conclusion

The most significant factor to bring the best practice to combat human trafficking is by the adoption of a comprehensive and effective anti-trafficking framework. The current framework, outlining the 3P measures, set forth in the Trafficking Protocol alone, is no longer effective and should include two

known as the ILC's Articles on Responsibility of State for Internationally Wrongful Acts. See also, Crawford J., Peel J., and Olleson S. "The ILC's Articles on responsibilities of state for internationally wrongful acts: completion of the second reading" (2001) 12 *European Journal of International Law* 963. For further information regarding the work of ILC visit www.un.org/law/ilc/

additional factors: first, the development of a human rights protection framework and, second, the integration of participation, monitoring and evaluation mechanisms. In addition, the thesis recommends the areas of improvement of the 3P measures discussed in this chapter to enhance effective intervention.

The prevention of human trafficking first requires the adoption of various measures including legislative, policy, and administrative measures to prevent and combat human trafficking, and to protect victims of human trafficking from re-victimisation. In addition, to enhance the effect of prevention measures, two concepts should be taken into account. These are gender mainstreaming and child sensitivity for the best interests of women and children, who are the majority of victims of trafficking.

Second, prosecution measures must criminalise all forms of human trafficking, including trafficking-related offences and extend criminal liability to all persons involved in human trafficking to ensure that no safe havens become available for traffickers and those involved in such crimes. There must also be effective and proportionate sanctions. The application of effective sanctions to traffickers and all involved is a vital part of effective enforcement. The suggested prosecution measures must, however, ensure that victims of human trafficking are not liable or are immune from criminal liability of human trafficking offences and other unlawful related activities committed whilst being trafficked.

Third, the lack of a comprehensive, effective, and binding legal framework of human rights protection among states undermines effective anti-

trafficking intervention as a whole. Whilst traffickers escape punishment and continue reaping high benefits from the trafficking business, it is the victim who is still being exploited and whose human rights are violated and left unprotected by the law. It is the author's view that a comprehensive and effective framework of human rights protection must be adopted to remedy this injustice.

The thesis contends that the suggested framework must as a minimum take into account four criteria to be incorporated in the amended version of the Trafficking Protocol to which any non-state party, including Thailand, is strongly encouraged to ratify. These are (i) the definition of victims and the correct identification of victims, (ii) non-criminalisation of victims, (iii) non-discrimination (vi) non-refoulement protections. To achieve the necessary strength of human rights protection, the author calls for an integrated framework at all levels of participation, monitoring and evaluation mechanisms, which increasingly necessitate improving state's capacity to investigate human rights violations of victims of trafficking.

More importantly, this approach encourages an effective report system, including a regular national report and independent experts, which constantly assess state practices in the fight against human trafficking. This helps to determine whether states are responsible for trafficking taking place in their territories or involving their citizens, either as perpetrators or victims. Failure to provide effective protection to trafficked victims amounts to breaches of state responsibilities to fight against trafficking. As discussed earlier, states, irrespective of whether they are state parties to Trafficking Protocol or the COE, are still held responsible for human trafficking under general obligations

of other human rights instruments such as the ICCPR, and those which emanate from customary international law.

Much still remains to be done to ensure the effective implementation of the 3P measures with a particular focus on human rights protection. These are, for example, a strong criminal justice system in all states, which guarantees due process and fair trial, the willingness of states to promote best practice for human rights protection, and to provide adequate funding for research and development in the area of human trafficking. However, it is finally contended that a comprehensive and effective framework of human rights protection for victims of trafficking is an approach that will ultimately deliver best practice and secure justice for the victims of human trafficking.

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