

A Shadow Report on Human Trafficking in Lao PDR: The US Approach vs. International Law

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Introduction

In December 2000, after a record drafting time of only two years, the international community adopted the first global agreement on trafficking for more than half a century. The *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* was a genuine breakthrough, not least through its inclusion of the first-ever international legal definition of trafficking. The adoption of the Protocol confirmed that trafficking was no longer a marginal social welfare issue but a crime infecting most, if not all, countries of the world. States agreed to take this matter seriously by criminalizing previously hidden offences; by developing stronger border control measures; by protecting and supporting victims; and by cooperating with each other to prevent the development of safe havens for transnational gangs.

That same year the United States government finalized, and formalized through legislation, its own national response to trafficking. One unusual feature of this national response was the requirement that the US State Department develop and issue annual reports on the situation of human trafficking in every other country deemed to have a significant problem in this area. The legislation established detailed criteria against which the performance of countries was to be measured and assessed. These trafficking in persons (TIP) reports, issued each year since 2001, have been hugely influential in terms of constructing and directing the global trafficking discourse as well as prompting individual governments to do something about trafficking and related exploitation.

The focus of this article is on the question of standards – specifically, the standards against which a State’s counter-trafficking performance are being – and should be – measured. This article argues that there is no need for the United States government to develop and apply a separate standard when it comes to measuring and assessing the performance of other countries in relation to their fight against human trafficking. International law already provides detailed and substantive guidance on the obligations of States in this area. Unlike the US criteria, these obligations are contained in international agreements developed and accepted by the majority of States and the international

¹ This article has been written in the author’s private capacity and the views expressed herein are strictly her own. The analysis builds on a model of responsibilities and obligations created by the author in the context of her PhD dissertation at the University of Utrecht. A similar study of the response of Australia and Thailand has been published in 2005 and 2006, respectively. Thanks to Gerard Smith and Lithnarong Pholsena for their helpful comments on earlier drafts. Thanks also to Nina Vallins for her invaluable editorial assistance.

organizations they have established to represent their collective interests. In the author's view, application of agreed international standards to individual country performance yields a far better result: one that is legally sound as well as more accurate, more nuanced and more likely to induce real and lasting change. The article seeks to test this proposition by isolating the key international obligations related to trafficking, identifying their origin and scope, and applying them to a concrete situation in a single country. The overall objective of this exercise is to confirm the importance of evaluation and assessment when it comes to a country's performance in dealing with trafficking – while at the same time emphasizing the dangers and limitations inherent in a unilateralist approach that is fundamentally limited in its ability to accurately capture the situation and is not necessarily grounded in established and accepted international rules.

Why select Lao PDR? This article is part of a broader study of the international legal framework around trafficking and differential application of that framework on the basis of particular national situations. Related works have examined Australia, a wealthy country of origin (Gallagher, 2005), and Thailand, an emerging regional power that serves as a point of origin, transit and destination for trafficked persons (Gallagher, 2006). An examination of the challenges facing Lao PDR, and of the way in which its response has been analyzed and represented by the US TIP report, provides insights that can be generally applied to many other extremely poor countries of origin.

International Law vs. US Standards

This part commences with a brief survey of the international legal framework as it relates to trafficking, with a special focus on recent legislative developments. It then examines the US' reporting / ranking process - describing its origins and the process by which the performance of countries is evaluated and identifying the tensions between international and US standards. An overview of the reporting and ranking process as it has been applied to Lao PDR during the period 2001-2006 concludes this part.

Human Trafficking in International Law

Human trafficking has been recognized as an international legal issue for well over a hundred years. A number of international legal treaties, focusing particularly on the movement of women and girls for sexual exploitation were developed in the first half of the twentieth century. Today, at least two of the major contemporary international human rights instruments ratified by the vast majority of the world's States (the Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination against Women) prohibit trafficking and related exploitation.² Other international human rights instruments, prohibiting a range of trafficking-related practices such as slavery, servitude, forced labor, child labor and forced marriage are also relevant.³

² For an overview of international legal developments relating to trafficking see Gallagher, 2002.

³ For example the International Covenant on Civil and Political Rights, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, the Convention concerning Forced or Compulsory Labor (ILO No. 29), the Abolition of Forced Labor

While trafficking clearly falls within the purview of international human rights law, the relevant norms are often difficult to extract and apply with the necessary level of precision and persuasive force. The situation has been further complicated by the absence of any international legal definition of trafficking and the consequent proliferation of a range of definitions. The international legal landscape as it applies to trafficking changed forever in December 2000 when representatives from more than eighty countries adopted the Convention against Transnational Organized Crime and its associated *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*. Thanks to this treaty, we now know that trafficking is the buying, selling and movement of persons within or between countries through (in the case of adults) a range of means such as coercion and deception, for the express purpose of exploiting them (Trafficking Protocol, Article 3).

The Trafficking Protocol did not just create a definition. It also sets out, in considerable detail, the steps to be taken by States Parties in preventing and dealing with this crime. Some of these are couched in the language of legal obligation. Others, including most of those related to protecting the rights of victims, are more equivocal. Since its adoption however, the Protocol has been supplemented by a number and range of international and regional agreements and instruments which, with only a few exceptions, add considerably to our understanding of what constitutes the “wrongs” of trafficking. These include a set of Principles and Guidelines on Human Rights and Human Trafficking presented to the UN Economic and Social Council in 2002 (“the UN Principles and Guidelines”), and the European Convention on Action against Trafficking adopted by the States of the Council of Europe in May 2005. Legal and sub-legal agreements have also been concluded at the bilateral and regional levels including a Memorandum of Understanding (MOU) signed by six countries of the Greater Mekong Region (Coordinated Ministerial Mekong Initiative against Trafficking or COMMIT MOU) and a treaty adopted by the members of the South Asian Association for Regional Cooperation (SAARC Convention). Many individual countries have developed their own special laws on trafficking, most of these closely modeled on the Protocol.

In summary, while there is still considerable room for debate and discussion regarding the exact nature and content of the main rules, there can be no doubt as to their existence. International law clearly recognizes a core set of obligations on States in relation to human trafficking. These obligations include the following:

- An obligation to criminalize and appropriately penalize trafficking;
- An obligation to actively identify victims;
- An obligation to diligently investigate and prosecute trafficking;
- An obligation to protect, support and provide remedies to victims;
- An obligation to provide special measures for child victims;
- An obligation to actively prevent trafficking; and
- An obligation to cooperate (bilaterally, regionally and internationally).

Convention (ILO No. 105), and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182).

As the international legal framework is applied more widely, many of these general obligations have been fleshed out through international, regional and national policy and practice. For example, it is now widely accepted that the obligation to criminalize extends not just to the crime of trafficking but also to its various constituent elements such as debt bondage and forced prostitution. It is also accepted that effective criminalization requires States to eliminate safe havens for traffickers by either extraditing or prosecuting offenders. In this area at least, international law is a dynamic creature, rapidly evolving to keep pace with our growing understanding of the trafficking phenomenon and of the measures required for a full and effective response.

The US Trafficking in Persons Report

The 2000 Victims of Trafficking and Violence Prevention Act⁴ requires the US State Department to issue annual TIP reports describing “the nature and extent of severe forms of trafficking in persons...in each foreign country” (Sec. 110) and assessing governmental efforts to combat such trafficking. The Act also sets out minimum standards for the elimination of trafficking applicable to “the government of a country of origin, transit or destination” (Sec. 108). In brief, these standards require governments to: (i) prohibit and appropriately punish severe forms of trafficking, and (ii) make serious and sustained efforts to eliminate such trafficking. In evaluating governmental efforts in this latter regard, consideration is to be given to the following criteria: whether the government vigorously investigates and punishes acts of severe forms of trafficking; whether it protects victims and encourages their participation in the investigation and prosecution process; whether it has adopted prevention measures such as public education; whether it cooperates with other governments in investigations and prosecutions; whether it extradites (or is attempting to permit extradition of) traffickers; whether it monitors migration patterns for evidence of trafficking and responds to such evidence; and, finally, whether it investigates, prosecutes and takes appropriate measures against the involvement of public officials in trafficking.

Under the Act, the US will not, as a matter of policy, provide non-humanitarian, non-trade-related assistance to any government that does not comply with the minimum standards and that is not making significant efforts to bring itself into compliance (Sec. 10a). In addition, such countries will also face US opposition to their seeking and obtaining funds from multilateral financial institutions including the World Bank and the IMF (Sec. 110(d)(1)(B)). The annual reports are used as a basis for determining whether, and to what extent, sanctions are to be imposed.⁵

The first TIP report instituted a system of gradings based on three tiers. Tier One was for countries in full compliance with the required standards, Tier Two for countries making

⁴ For a comprehensive summary of the Act and for full citations of the major provisions set out below, see Feve and Finzel (2001: 283-284).

⁵ For an extensive analysis of the broader legal and policy implications of this sanctions regime, see Chuang (2006).

an effort but not yet fully compliant, and Tier Three for those countries that were not even trying or coming close. The Trafficking Victims Protection Reauthorization Act (December 2003) strengthened the minimum standards to be applied in determining an individual country's rating. These now include consideration of convictions and sentences (for traffickers and complicit officials) as well as investigations and prosecutions. Willingness to provide data on law enforcement action is now also a relevant consideration. The 2003 Act created a new category – a Special Watch List of countries to receive additional scrutiny. The list includes countries that have moved up one tier from the previous report as well as “weak Tier 2 countries” (Miller, 2004): those that have a significant number of trafficking victims, have not made increasing efforts over the past year, or have been provisionally exempted from Tier 3 status on the basis of commitments to progress.

Tensions between International and US Standards

To what extent do US standards mirror those that have emerged at the international level? In several important respects there is not much substantial difference. The US definition of what constitutes trafficking does not vary significantly from the definition contained in the Protocol. Both sets of standards highlight the need for criminalization, victim protection, prevention and cooperation with other countries. While the US framework of prosecution, protection and prevention is overly simplistic, it does potentially have the capacity to capture most of the major international legal obligations set out above.

However, some aspects of the criteria, particularly those included in the 2003 revisions to the Trafficking Act, are more troubling. In practice, a country can receive an adverse judgment if its prosecution rate is deemed to be unacceptably low or, more alarmingly, if that country fails to provide US officials with data on investigations and prosecutions. Leaving aside the methodological implications of judging a country on the basis of absent data, this standard fails to recognize a fundamental difference between countries of origin and countries of destination. Investigation and prosecution of traffickers, as opposed to small time recruiters, will inevitably be easier (for evidentiary reasons) and more productive in the country of exploitation. In addition, the US standard equates a high prosecution rate with a more effective response. As specialists in the field have acknowledged (ASEAN, 2006: 75; Holmes et al., 2003; INTERPOL, undated: 1; Lorenz, 2004: 110, UNODC, 2006: 10, 52, 70; *see also* Experts Group, 2004: 118-127), trafficking is an extremely difficult crime to investigate and prosecute. A success-by-numbers approach serves to discourage the development of longer-term capacities, systems and processes that are actually required for an effective criminal justice response. Conversely, it promotes a focus on the easy wins: the small players who can be identified and apprehended much more easily than those who are reaping the real financial rewards. The US standards are also silent on the issue of quality. All prosecutions seem to count, irrespective of their adherence to international criminal justice standards. The absence of an explicit qualitative element in the crucial area of prosecutions risks undermining basic rights including the right to fair trial as dysfunctional, often corrupt, national criminal agencies are called in to help secure a positive report card.

The lack of detail in the US standards and criteria is also a significant weakness that is overcome, at the international level, by the existence of a complex web of interrelated and mutually reinforcing obligations. For example, while the US standards refer to the rights of victims, they do not articulate or prioritize these rights in the manner and to the extent that international law has begun to do so. There is also no specific reference to the basic, internationally accepted right of all victims to immediate support and protection or their right of access to effective remedies. Failure to specify and apply detailed standards on victim treatment leads to significant inconsistency in application of the broader standard.

Perhaps the greatest conflict between the US standards and those derived from international law lie in the realms of policy and perception. Trafficking is one area where the international community, ironically under strong US leadership, decided to act collectively, cooperatively and decisively. Most countries of the world are now bound, freely and irrevocably, to a detailed set of standards. At a minimum, these are the standards set out in the UN Trafficking Protocol, supplemented by the provisions of international human rights treaties to which the vast majority of States are parties. To pass up an opportunity of holding States accountable to these standards is to lessen their political impact and legal force. The issues of credibility and political bias are also important. Sloppy assessments that are not backed up by a reliable and replicable methodology play directly into the hands of those who argue that the US uses the TIP process to demonize its opponents and to reward supporters (Chuang, 2006: 481-488; Gallagher, 2001). The international discourse around trafficking becomes distorted: dominated by political rhetoric and the language of blame and defense rather than that of shared commitment, obligation and accountability.

In 2006, the United States Government Accountability Office released a report on the US approach to combating trafficking abroad, including through the Department of State annual reports (USGAO, 2006). The report was damning in its identification of critical weaknesses in data collection and analysis. While it unfortunately failed to consider the quality of the substantive content of the standards or potential conflicts and overlaps with international norms, it did note the subjective nature of some of the criteria used to rank countries and the lack of adequate explanation regarding how these criteria were applied in specific cases. The report concluded that the ranking system is fundamentally flawed in its application, that it has little external credibility and that it does not consistently influence the direction of anti-trafficking efforts, including those of the US itself.

Lao PDR and the US TIP Report

The TIP report is highly controversial in Southeast Asia but is also extremely influential. Many governments, including that of neighboring Thailand where most Lao victims of trafficking end up, are very sensitive to the grading they are awarded and strive to provide positive information to those responsible for its compilation. There is also some indication, based on the author's own observations of national responses over the past four years, that the threat of the TIP report acts as an incentive for governments to take trafficking seriously. The Lao government is possibly an exception to this trend in that it

does not appear particularly intimidated or influenced by the TIP Report process in comparison with other countries. As noted below, this relatively unusual attitude has not been without consequence.

Lao PDR has moved up and down several tiers over the past six years in a pattern that mimics Thailand's own placement. It was originally in Tier 2; moved to the watch list in 2004 and moved back to Tier 2 in 2005. The 2004 downgrading was justified with reference to a lack of evidence of increased commitment on the part of the government to prosecuting traffickers and protecting victims. The 2005 report was more expansive and much more positive, concluding that the government was making "a significant effort to comply" with the minimum US standards. In terms of prosecution, the report identified progress in the law enforcement response including a very small number of "reported" prosecutions. It also noted, with apparent approval, the fact that the new law on trafficking provides for the death penalty in egregious cases. Outstanding problems cited by the report include weak judicial and law enforcement institutions, widespread corruption, and the absence of any mechanism or procedure to identify victims of trafficking from among returned migrants. In terms of protection, the report recognized the government's willingness to engage with NGOs while itself providing only minimal assistance to victims.

The 2006 report bluntly stated that the Government of Lao PDR "does not fully comply with the minimum standards and is not making significant efforts to do so." Lao PDR was accordingly awarded Tier 3 status and is therefore potentially subject to the full range of sanctions set out above. In justifying the placement, the report referred specifically to the failure of the government to protect returning victims and to prosecute traffickers. It also highlighted the fact that US demands for law enforcement data had not been met.

It is inevitable that annual reports of little more than a page will raise more questions than they provide answers. In relation to the 2005 report, for example, to what extent can the prosecution figures provided by the (incorrectly identified) Lao Anti People Trafficking unit be independently verified? What is the quality of these investigations and prosecutions? In relation to the 2006 report, how can a claim of no data be reconciled with a concurrent claim of "no discernible increase in ... prosecutions of trafficking related cases"? More generally, to what extent do the various criminal justice and victim protection procedures in place in Lao PDR meet international criminal justice standards? To what extent do they meet its international legal obligations? Given its situation as a point of origin, how is Lao PDR engaging with other countries to fight the trafficking and exploitation of its citizens? How do official and community attitudes towards women and migrant workers in Lao PDR aggravate or otherwise impact on the process of trafficking and the way in which it is being dealt with?

Evaluating the Lao PDR Response to Trafficking

This part seeks to provide a supplementary – or even an alternative – reading of Lao PDR response to human trafficking, utilizing the international standards set out above. It

commences with a short overview of the trafficking situation in Lao PDR and of the government's response. The following sub-sections then analyze that response in more detail against the specific international legal criteria with a view to making a preliminary determination of the extent to which Lao PDR is moving towards meeting its international obligations. An effort is also made to identify areas where legislative, policy or other changes could bring Lao PDR more closely in line with international standards, its own national legal framework and emerging good practices.

Overview of the Lao Situation and Recent Response

Lao PDR is primarily a country of origin for trafficked persons although there are some indications that it is becoming a transit point for trafficking from China. Lao women, men and children are trafficked throughout Southeast Asia but overwhelmingly into Thailand. Sexual exploitation is the most visible end-result of such trafficking but there is no evidence to confirm that it is any more common than forced and exploitative labor in factories, farms and fisheries. A strong tradition of migration for work, especially between Lao PDR and Thailand, has blurred the line between unfortunate migrant outcomes on the one hand and trafficking on the other in the minds of victims, criminal justice officials and policy makers on both sides of the border. Large-scale, seasonal migration from Lao PDR meets a growing demand for cheap, unregulated labor in Thailand. Such migration is the major or sole source of livelihood for many Lao individuals, their families and their communities. As in many other countries, corruption is generally a problem in Lao PDR. While there is no strong evidence of systematic official involvement or complicity in trafficking, it is likely that low-level officials smooth the path for traffickers, particularly in border areas.

It is impossible to accurately measure the extent of the trafficking problem in Lao PDR – particularly in terms of numbers of victims. As recently recognised by the United States Government Accountability Office (USGAO, 2006: 10-21), data on human trafficking is notoriously unreliable. Lao PDR is no exception. While several UN agencies and NGOs have made claims as to the number of individuals trafficked out of Lao PDR or currently in Thailand (for example, MOLSW and UNICEF, undated; ILO, 2003), their methodology is either unexplained or sub-standard and the resulting “findings” cannot therefore be verified. In addition, the overwhelming emphasis on trafficking in women and children has meant that no official or unofficial figures exist on the now widely acknowledged problem of trafficking in men. At this point, it is only possible to state that a significant percentage of the hundreds of thousands of Lao individuals who leave home each year in search of work end up in situations of extreme exploitation. Of this group, the majority are likely to have been trafficked.

In terms of responses, trafficking has proved to be a huge and presently insurmountable challenge to the Government of Lao PDR. The pressures on individuals to migrate are very strong and the borders are long and porous. The Lao Government has neither the resources nor the inclination to actively prevent the seasonal migration that is so much a way of life in the border regions of this country and so essential to both subsistence and economic growth. The fact that locally imposed and collected fines for unauthorized

migration to Thailand are widely considered to be an informal community “tax” of overseas earnings underscores the extent to which such migration is part of the fabric of Lao life.

Ending impunity for traffickers and securing justice for victims is a huge task for even the most sophisticated and well-resourced national criminal justice system. The Lao criminal justice system is extremely weak at all levels. Despite the commitment of some individuals, law enforcement agencies, prosecutors and the judiciary generally lack the independence, skills, resources and technical abilities/capacity to present a credible challenge to traffickers.

While identified victims are generally treated sympathetically on their return, there are no facilities to provide immediate assistance, to support their reintegration and to prevent re-trafficking. The absence of a strong civil society has placed the burden for such support on the shoulders of an inexperienced and unwieldy social welfare bureaucracy. This has meant, in effect, that most victim support is either never delivered or is eventually provided, after considerable delay, through international organizations. Recently, national authorities have sought to develop effective working relations with their counterparts in Thailand. Overall however, information exchange and cooperation on the issue between the two countries is minimal and generally unproductive.

The Government of Lao PDR first took up the issue of trafficking in 2003, largely as a response to a growing understanding of the extent to which Lao citizens in Thailand were being exploited and abused. Pressure also came from other countries in the region as well as from international organizations and donors who feared that lack of action in Lao PDR could contribute to a rapidly worsening of the situation in other countries, especially Thailand. Lao PDR was one of the first countries of the region to ratify the UN Trafficking Protocol. In early 2003, a specialist trafficking unit, modeled on the interdisciplinary approach then being piloted in northern Thailand, was established with considerable external technical and financial support. Legislative reform and greater engagement at the bilateral and regional levels has followed. Despite such developments, there have been, as noted by the TIP report, almost no prosecutions of traffickers and only a handful of Lao PDR-initiated identification and rescues of trafficking victims.

Lao PDR and the Obligation to Criminalize Trafficking

The obligation to criminalize trafficking is contained in Article 5 of the Trafficking Protocol. All other international and regional agreements echo this requirement (European Convention, Art. 18; UN Principles and Guidelines, Principles 12 – 17 and Guideline 4). However, the offence of trafficking will often be very difficult to prove and it is necessary to ensure that traffickers and their accomplices are held responsible for more easily prosecuted constituent offences. It is therefore of great practical importance that states also criminalize certain offences which are related to trafficking such as debt bondage, forced labor and child labor. Effective criminalization can involve the passing of a special law but this does not need to be the case.

In Lao PDR, prior to October 2004, the crime of trafficking was only covered, indirectly, through references in the national penal code to conduct such as the trade and abduction of persons (Art. 92) and encouraging or misleading people into migrating unlawfully (Art. 69). Trafficking was mentioned in the Penal Code but not defined. In October 2004, the National Assembly passed the *Law on Development and Protection of Women*. The law is comprehensive, covering most aspects relevant to the rights and status of women. Chapter 4 deals specifically with protection of women and children against trafficking and domestic violence. The law defines trafficking more or less in accordance with the definition set out in the Trafficking Protocol except that it does not cover men (Art. 24). Trafficking and complicity in trafficking are both criminalized (Art: 24). The law provides for penalties ranging from five years (Art: 49). Aggravated offences are recognized and can attract capital punishment in cases where the victim is seriously injured or dies (Art: 49). A limited range of trafficking-related offences have also been criminalized – principally through the Lao Labor Law and, as noted above, the Penal Code. A recent amendment to the Penal Code, criminalizing trafficking in all persons, is another positive step forward, particularly in its expansion of the definition of trafficking to include men as well as women and children.

In summary, Lao PDR can be said to have met its international obligations with respect to the criminalization of trafficking at least in regard to women and children. It is not yet clear whether the amendments to the Penal Code (currently only available in English in the form of an unofficial translation) conform to the international standard which Lao PDR itself has explicitly accepted with regard to inclusion of trafficking in men. International law does not categorically reject the death penalty. However, it is unlikely that the provision for capital punishment reflects the spirit of the relevant international criminal justice standards given the complexity of the trafficking crime, inevitable investigatory difficulties, and highly variable levels of complicity.

2.3. Lao PDR and the Obligation to Actively Identify Victims of Trafficking

The obligation to actively identify victims of trafficking is the foundation upon which all other obligations with respect to victims rests. It is also essential when it comes to investigation and prosecution of traffickers because of the necessarily heavy reliance on victim cooperation and testimony (Holmes et.al., 2003; Lorenz, 2004: 109; Experts Group, 2004: 119). The obligation is not contained within the Trafficking Protocol but is reflected in both the European Convention (Article 10); the UN Principles and Guidelines (Guidelines 2 and 11.5); and the COMMIT MOU (Para. 8). The Principles and Guidelines explain, very clearly why identification of victims is so important and why it is an obligation: *“A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place”* (Guideline 2).

For Lao PDR, the identification of victims of trafficking is complicated by this country’s position as a point of origin. Lao victims of trafficking are very often only identified abroad by others and only after they have been exploited. When victims are positively identified in Thailand and returned through the official repatriation process, the

Government accepts the determination of Thailand. However, many victims are incorrectly identified by Thai officials as illegal immigrants and deported, either officially or informally. All deportees from Thailand are detained by Lao authorities upon their return. It is at this point that failures in Thailand's victim identification process could be rectified. However, border officials responsible for processing the large number of Lao deportees are not trained to recognize the differences between smuggled migrants, illegal migrants and trafficked persons. There are no guidelines, checklists or other resources available to border officials to help in the identification process. While Lao authorities have recently made a couple of identifications of victims of trafficking on their own accord, there is an overwhelming reliance on Thailand to do this for them. As a result, victims are not being identified or are being incorrectly identified and Lao PDR is thereby failing to meet the relevant international legal obligation.

2.4. Lao PDR and the Obligation to Diligently Investigate and Prosecute Trafficking Cases

The obligation of criminalization contained in the Trafficking Protocol carries with it a clear expectation that States Parties will investigate and prosecute trafficking cases seriously. The UN Principles and Guidelines declare unequivocally that: "States have a responsibility under international law to act with due diligence to ... investigate and prosecute traffickers" (Principle 2, Guideline 2; see also Guideline 11.5). This is a reiteration of a basic principle of international law relating to state responsibility for violations of international law including human rights law.⁶ How does one measure whether a State is taking seriously its obligation to investigate and prosecute? The worst case will naturally be the easiest to decide. A State that does not even bother to have a law against trafficking, that fails to investigate *any* cases of trafficking, that fails to protect *any* victims or to prosecute *any* perpetrators when there is reliable evidence available of the existence of a trafficking problem, will clearly not pass the due diligence test. In less egregious cases, it is necessary to evaluate whether the steps taken evidence a seriousness on the part of the State to investigate and prosecute trafficking. The test will always be more stringent for countries of destination because it is here that the actual exploitation takes place and it is here that investigations and prosecutions will almost always be easiest. However, this does not remove responsibility from countries of origin such as Lao PDR that have an important role to play in identifying and prosecuting community-based trafficking agents and others who form part of an internal or cross-border criminal network.

As noted above, the development of a modern criminal justice system in Lao PDR is still in the earliest stages. There are very few lawyers outside the capital. Prosecutorial and judicial processes are not independent or transparent.⁷ Police receive very little basic

⁶ The due diligence standard as it relates to investigation and prosecution is well established in cases of human rights violations. The duty to investigate and prosecute is applicable when there is an allegation of violation by state officials *and* when the alleged perpetrator is a non-State actor.

⁷ For example, the prosecution/conviction ration in Lao PDR is close to 1:1 because judges and prosecutors discuss and decide outcomes of cases beforehand. If a judge is not satisfied with the evidence made available by a prosecutor he will instruct the prosecutor to look for more evidence (personal information).

training and are not equipped to lead serious criminal investigations into a crime as complex as trafficking. As a country of origin for trafficked persons, Lao PDR has a particularly difficult task, because the exploitation side of trafficking, its most visible aspect, occurs outside Lao jurisdiction and control. The Lao authorities are thus left with the technically much more difficult task of identifying, *ex post facto*, recruiters and facilitators with criminal intent as well as victims who might be able to help them with an investigation. In a country that tolerates and desperately needs large-scale seasonal migration, including illegally facilitated (but not necessarily exploitative) migration, this is a huge task.

Until very recently, there had not been a single trafficking case investigated or successfully prosecuted in Lao PDR. There have been no documented cases of Lao officials being prosecuted for complicity in trafficking or trafficking-related corruption. In April 2003, the Ministry of Public Security (responsible for law enforcement and border control), established, with foreign assistance, a specialist unit to deal with trafficking. The unit initially comprised law enforcement officials, an investigator from the police investigation unit, a representative of the prosecutors' office, and two delegates of the main "mass organizations," representing women and youth respectively. The mass organization representatives have recently been replaced by immigration police in recognition of the specialist unit's overwhelming investigatory focus. The Lao Anti-People Trafficking Unit (LAPTU) has now become the focal point for the criminal justice system's response to trafficking in that country. While its size and the inherent limitations of the system within which it is operating have prevented LAPTU from having a significant impact on the problem of trafficking, a number of important steps have been taken. Following a public information campaign about its function, LAPTU now regularly receives complaints about trafficking, often from parents who have received information that their children are trapped in brothels and factories in Thailand. Its work is all reactive: LAPTU does not yet have the skills or resources to conduct proactive investigations. Complaints are investigated by LAPTU and by provincial law enforcement officials, some of whom have received some basic technical training. In most cases, "investigation" involves little more than verification of the original information and passing on of this information to the Royal Thai Police. While some rudimentary awareness-raising has been done within the office of the prosecutor and the judiciary, levels of understanding about trafficking and the applicable legal framework within these two groups are generally considered to be very low.

Given the scale of the problem and the relatively modest results secured so far, it is unlikely that Lao PDR has met its international obligation to investigate and prosecute trafficking cases with due diligence. While considerable improvements have been made over the past several years, the baseline is still set very low. Many of the changes that have taken place have only been possible through the infusion of foreign resources and skills. There is still a question about the sustainability of structures such as LAPTU and the extent to which the government is willing to make concrete commitments to improving investigations and prosecutions. Such commitments would include, for

Such practices severely undermine confidence in the rule of law and brings into question the ability of Lao PDR to prosecute traffickers effectively, let alone to provide justice for victims.

example, provision of regular budget resources for LAPTU, a more proactive approach to investigations, greater attention to victim identification, and the development of genuine incentives for victims to cooperate with criminal justice agencies.

Lao PDR and the Obligation to Protect and Ensure the Rights of Victims of Trafficking

The Trafficking Protocol acknowledges the importance of victim support and assistance, encouraging (but not requiring) States to help victims of trafficking. However, other international, regional and bilateral agreements on trafficking are much more specific when it comes to obligations towards victims. The UN Principles and Guidelines, for example, require States to: “[E]nsure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care [which] shall not be made conditional on the capacity or willingness of trafficked persons to cooperate in legal proceedings (*Principle 8*).

It is also relevant to note that international law more generally is increasingly recognizing and articulating the rights of victims, particularly those who have been subject to serious violation of their rights.⁸ On the basis of this, the following core obligations are proposed as applicable to the State in its dealings with victims of trafficking: (1) protection from further harm; (2) provision of emergency shelter, primary health care and counseling; (3) assistance with legal proceedings; (4) safe and, where possible, voluntary return; and (5) access to remedies.

What are the obligations of States when it comes to detaining victims and prosecuting them for status-related offences? According to the UN Principles and Guidelines, both responses are inappropriate and (implicitly) illegal. States are required to: “Ensur[e] that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody” (Guideline 2(6)). The COMMIT MOU, while more equivocal, nevertheless expresses a similar sentiment with signatory States committing themselves to “ensuring that persons identified as victims of trafficking are not held in detention by law enforcement authorities” (Para. 16). The UN Principles and Guidelines also indicate that trafficked persons should not be detained, charged or prosecuted for their involvement in illegal activities (such as prostitution or unlawful migration) to the extent that this involvement is a direct consequence of their situation (Principle 7). While the COMMIT MOU and Trafficking Protocol do not pronounce on the specific issue of prosecution of status-related offences, the principle of non-prosecution as set out in the

⁸ The Statute of the International Criminal Court, for example, requires the court to “protect the safety, physical and psychological well-being, dignity and privacy of victims” as well as to permit the participation of victims at all stages of the proceedings as determined to be appropriate. The Statute also includes provisions on reparation, including restitution, compensation and rehabilitation (Rome Statute, 2002). In April 2005, the UN Commission on Human Rights adopted a set of Principles and Guidelines which set out the entitlements of victims of gross human rights violations and serious violations of international humanitarian law to remedies and reparation. Commission on Human Rights, *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*, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005).

UN Principles and Guidelines can be ably defended with reference to logic and basic principles of law and justice.

Under the new legal framework in Lao PDR, victims in that country are entitled to an impressive range of assistance and protection measures including the right to ask for help from people nearby; the right to protection and care for their personal safety; and the right to receive suitable assistance in terms of shelter, food, clothing, medical services, vocational training and repatriation (Lao Women's Law, Art. 25). In relation to the criminal justice process, victims of trafficking in Lao PDR are entitled to report to officials; to testify and present evidence; and to request compensation and rehabilitation. The right to privacy is protected in law. Prosecutions must be undertaken with due regard to confidentiality and safety of victims (Lao Women's Law, Art. 27). During a prosecution, officials are required to cooperate with doctors, social workers and others: "in order to give necessary assistance, provide medical treatment, counseling service to the victims and send them to safe shelter" (Lao Women's Law, Art. 33). It is the responsibility of the Lao embassy or consulate to provide protection and assistance to Lao victims of trafficking abroad (Lao Women's Law, Art. 28). There is no provision for special visas or other arrangements which would allow foreign victims of trafficking to remain in Lao PDR.

Unfortunately victims of trafficking in and from Lao PDR are yet to benefit from these generous protections. The most immediate problem, identified above, relate to identification. The vast majority of Lao victims of trafficking never become visible and therefore never have the chance to be informed of or access the rights to which they are entitled. The Lao Embassy in Thailand has occasionally provided help but there is no organized program or policy of consular assistance or support to Lao nationals who have been trafficked into and exploited in Thailand. Another problem relates to the inability of the Lao government to provide protection and support services to victims once they return. There are very few measures taken to ensure the safety and well-being of victims repatriated, either officially or unofficially, from Thailand. Apart from a small transit center operated by the Ministry for Labor and Social Welfare,⁹ there are no government-run shelters for victims of trafficking in the country – although this situation may change in the near future. There is also no governmental budget allocation for victim support. Victims generally receive no legal advice. They do not have an option to give or refuse consent to their repatriation.

⁹ Those victims who are identified in Thailand receive the support available in that country for the period between their identification and repatriation. Once victims of trafficking are officially repatriated from Thailand they are housed at a transit center in the Lao capital, Vientiane. The center usually keeps victims for no longer than a week during which time it provides family tracing and medical services before they are returned to their families. Longer-term monitoring of victims is the responsibility of the State-based mass organizations (Lao Women's Union and Lao Youth Union). It is not presently possible to determine the extent to which this monitoring is actually done. The transit center has facilities only for 12 women or girls. Its services are only available to victims who have been officially repatriated from Thailand. Victims who are returned following informal cooperation from the Thai police or in any other unofficial way are simply sent back to their families. There have been a number of cases where victims have been refused accommodation in the center because they did not come directly from Thailand. In at least one instance, this resulted in victims being detained with the immigration police (Personal information).

What about remedies for victims of trafficking? Courts in Lao PDR are generally empowered to order offenders to pay compensation to victims. It is not possible to verify the frequency and outcome of such actions.¹⁰ The new women's law in Lao PDR provides victims with the "right to request compensation and rehabilitation in order to reintegrate into society" (Art. 24). The law also specifically envisages the possibility of the court ordering compensation from the offender for physical and mental damage suffered by the victim including expenses for rehabilitation and medical services (Art. 52). In practice, the right of victims of trafficking to remedies seems to be completely illusory. Criminal justice authorities are unable to identify a single case of compensation being paid to a victim of trafficking in Lao PDR. It is too early to tell whether the new law will impact on this situation but the history of victim remedy in Lao PDR weighs against any real change to the current status quo.

The new women's law provides one of the most comprehensive statements available on the issue of detention and prosecution for status-related offences. Under that law, victims have a right: "not to be prosecuted and detained on the charge of trafficking in women and children such as: prostitution, illegal migration" (Art. 25.6). Once again, the reality is quite different. As noted above, victims of trafficking are rarely identified correctly by Lao authorities on their return and are usually treated as irregular migrants by the national authorities. While such a designation is not particularly harmful, it has, in the past, led to the imposition of a fine and can also involve detention.¹¹ The situation is worse for Lao victims identified abroad. In Thailand, Lao nationals, especially women and girls who are identified as having been trafficked are often detained for long periods in Thai "shelters." Lao authorities have recently started to protest such detention and to seek alternatives within the framework of a generally enhanced system of cooperation with Thailand on this issue. However, there is clearly much more the government could do to protect its citizens abroad. Victims officially repatriated from Thailand are also effectively detained in the transit shelter by Lao authorities. Even victims who have self-identified have been detained against their will. While some measures have recently been taken to implement the commitment contained in the Law it is not yet possible to say that Lao PDR is meeting its obligation of non-detention and non-prosecution for status-related offences.

Lao PDR and the Obligation to Provide Special Measures for Child Victims

Children are naturally included in all of the protection and assistance rules and standards set out above. However, it is widely accepted that the particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation requires that they be dealt with separately from adult trafficked persons in

¹⁰ Note that verification of cases is extremely difficult. Case records are kept at each court and not aggregated or stored centrally.

¹¹ Provincial authorities levy a fine on all irregular migrants returning to Lao from Thailand. The system does not have any deterrent purpose or function: irregular migration is widely accepted as a fact of life for a significant proportion of the Lao population who would not be able to support themselves or their families otherwise. The fine is, instead a kind of tax imposed by the government on those who have been working and making money abroad.

terms of laws, policies and programs. This approach is validated by international human rights law that explicitly recognizes the special position of children and thereby accords them special rights.

What are States required to do as a matter of law when it comes to child victims of trafficking? The core rule is derived from the obligations contained in the Convention on the Rights of the Child to which Lao PDR is party: in dealing with child victims of trafficking, the best interests of the child (including the specific right to physical and psychological recovery and social integration) are to be at all times paramount (Arts. 32-39). This position, affirmed by the UN Principles and Guidelines, means that States cannot privilege other considerations, such as those related to immigration control or public order, over the best interests of the child victim of trafficking.¹² In addition, because of the applicability of the Convention on the Rights of the Child to all children under the jurisdiction or control of a State, child victims of trafficking are entitled to the same protection as nationals of the receiving State in all matters including those related to protection of their privacy and physical and moral integrity. These principles have special resonance for Thailand in respect of its treatment of child victims of trafficking from Lao PDR.

In terms of its legislative framework, Lao PDR has gone some considerable way towards acknowledging the special position and vulnerabilities of child victims. The relevant section of the women's law adopts the definition of trafficking in children consistent with that set out in the Trafficking Protocol. The law also mandates special treatment for child victims of trafficking that focuses on their physical and mental recovery; that responds to their special needs; and that both provides and creates the conditions for children to return to their families and society (Art. 28). The Lao Ministry of Justice has recently drafted a new law on children and included an article on trafficking in children. The Lao Penal Code, which also criminalizes trafficking, provides for "increased penal responsibilities" in relation to crimes against minors (Art. 37).

In terms of practice, child victims of trafficking in Lao, especially those under 15, are generally unlikely to be criminalized by national authorities. Apart from this, the opportunities for Lao PDR to provide special care and protection for child victims of trafficking are extremely limited. Structural and resource constraints, coupled with a general lack of understanding within the government of the issue and of appropriate responses, has resulted in a general failure to meet the needs of all victims of trafficking, including children. While officials demonstrate a willingness to act more quickly and more creatively in finding solutions to support and protection problems when children are involved, much remains to be done.

Lao PDR and the Obligation to Prevent Trafficking

International law recognizes a general obligation of the State of "reasonable and appropriate" prevention in relation to trafficking. The existence of this obligation is a

¹² Principle 10 states, in relation to child victims, that: "[t]heir best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs."

consequence of the widespread recognition of trafficking as a violation of human rights law (Gallagher, 2002). The obligation of prevention when it comes to trafficking can also be found in all the principal international instruments on trafficking including the Trafficking Protocol (Arts 2.1., 9, 11, 12), the European Convention (Arts 29, 32) and the UN Principles and Guidelines (Principles 2, 4-6, Guideline 7). In determining whether or not a State has met the “reasonable and appropriate” standard of prevention it is important to consider that State’s capacity to undertake preventive action including its place in the trafficking chain. A poor country of origin such as Lao PDR will not need to meet the same standard as a developed country of destination. Nevertheless, in relation to any State, failure to take known preventive measures when this is both *possible* and *practical* should be considered sufficient grounds for establishing a violation of the obligation of prevention.

While acknowledging that countries of destination such as Thailand can do a great deal in terms of prevention by, for example, providing for safe and legal migration,¹³ it is still important to ascertain whether Lao PDR has met its own obligations in this regard. Certainly the Lao Government has recognized the importance of prevention. It is currently cooperating with a number of international organizations in programs aimed at reducing vulnerability of individuals and communities, income generation schemes, and encouraging safe migration. Their scope and reach is, however, extremely limited. No evaluation has yet been conducted of their effectiveness and it is even questionable whether the right groups have been targeted.¹⁴ The government has gone some way towards recognizing the importance of a coordinated response in preventing trafficking from Lao PDR and has established internal coordination structures although these are still too young to evaluate their effectiveness. The government has recognized that its relationship with Thailand is critical to the success of any prevention strategy and has entered into a range of agreements with that country. In 2002, Lao PDR and Thailand concluded an agreement on labor migration that sought to improve the joint management of labor migration. The implementation status of this agreement is unclear. In 2005, the Governments of Lao PDR and Thailand concluded a detailed memorandum of understanding on trafficking (discussed further below) that indicates a range of preventive measures to be taken by each separately and jointly.

Lao PDR and the Obligation of International Cooperation

In most cases, successful investigation and prosecution of international trafficking cases requires cooperation between national criminal justice authorities (Holmes et al., 2003; Konrad, 2002: 12-13; *see also* Trafficking Protocol, Art. 10). Cooperation is also essential when it comes to developing policies and procedures for legal and safe migration – one of the most important ways of reducing vulnerability to trafficking. The

¹³ For a thoughtful study of the relationship between trafficking from Lao PDR and the presence or absence of avenues for safe and legal migration, *see* Molland (2005).

¹⁴ In Lao PDR, the assumption that vulnerability to trafficking is higher in border regions has been integrated into prevention programs. This assumption has been called into question by research that indicates those closest to the border are usually more familiar with migration dangers and have often built up a number of informal safety strategies, including contacts on the Thai side. As a result, their vulnerability often turns out to be less acute than that of individuals who travel from provinces further away to cross into Thailand (MoLSW and UNIAP, 2004: 8fn2, 10 – 13; Molland, 2005).

lack of a tradition of cooperation between countries, even those sharing a common border, has been identified, in the UN Principles and Guidelines, as a key obstacle to the development of meaningful, effective responses to trafficking. Cultural, linguistic and political differences often work to prevent the development of a habit of cooperation. Even in situations where contacts at the highest levels of government are both frequent and substantive, operational links between governmental agencies (e.g., between national police forces or other parts of the national criminal justice process) tend to be much less developed. Traditional cooperation mechanisms such as mutual legal assistance arrangements, where they do exist, are generally unsuited to the type and quality of collaboration required for successful investigation of trafficking cases. All key legal agreements and policy documents on trafficking recognize the critical importance of international cooperation (Trafficking Protocol, Arts. 2, 9, 10, 13; Organized Crime Convention, Arts. 16 and 18; European Convention, Arts 18, 33, 34; UN Principles and Guidelines, Guideline 11).

As a poor country of origin of trafficked persons Lao PDR was quicker than most to realize that its efforts to fight trafficking would be unlikely to bear fruit without a meaningful engagement with the main countries of destination for its nationals, in particular Thailand. In terms of its willingness to commit itself to cooperation at the international, regional and bilateral levels, it is difficult to find fault with the approach taken thus far. The Government of Lao PDR was one of the first in the region to ratify both the Convention on Transnational Organized Crime and the Trafficking Protocol. Lao PDR has been an active member of the COMMIT process and, as such, is one of the signatories to the COMMIT MOU. In addition to its agreement on labor migration, the government has also concluded a detailed MOU with Thailand in 2005 on cooperation against trafficking. The MOU, modeled on an earlier one concluded between Cambodia and Thailand, reiterates important principles relating to the treatment of victims including their right of access to assistance and to safe repatriation. It commits both parties to joint action in a range of areas including investigation and prosecution. The MOU has been supplemented by a Plan of Action which should help promote its effective implementation. Lao PDR has also concluded extradition agreements with Thailand, Vietnam, China and Cambodia which could potentially cover suspected traffickers.

When it comes to actual implementation of the commitment of cooperation, Lao PDR also fares relatively well. Despite an extremely weak infrastructure, the government has made some efforts to secure the protection of victims and the investigation and prosecution of perpetrators through strengthening its cooperation with neighboring countries. These efforts have included engagement with the Heads of Specialist Trafficking Units process that involves LAPTU and its counterpart units in Thailand, Cambodia and Myanmar; demonstrable efforts to improve procedures for cross-border transmission of intelligence; and increasing communication with the Thai authorities, particularly in relation to the identification and repatriation of victims. While results have been modest thus far (relating principally to victim identification and repatriation with very little success in the area of prosecution) this appears to be reflective more of the technical and resource shortcomings in Lao PDR than of a lack of commitment to cooperation. However, a final judgment may have to wait a bit longer. To this point, it

has not cost Lao PDR much, economically, politically or in terms of effort, to meet the general obligation of cooperation. As donors begin to demand more of the government in exchange for their support, it will become easier to measure the true level of official commitment for the kind of changes that will really make a difference.

Conclusion

In terms of its response to trafficking, there are good reasons for not judging Lao PDR too harshly. Unlike many countries of destination, the government and people of Lao PDR have reaped little or no material or other reward from trafficking. In addition, as a poor country of origin, it is much harder for Lao PDR to do something about trafficking than it is for a rich country of destination like Australia or even Thailand where the actual exploitation takes place. However, while such factors need to be taken into account when assessing legal and moral responsibility, they are ultimately not determinative. The question must always be whether Lao PDR has done all it reasonably could be expected to do to prevent, address and redress the human rights abuses and other international legal violations associated with trafficking.

The various efforts undertaken by the government over the past several years initially point to a positive assessment. A rudimentary legal framework is in place; there is now some limited capacity to investigate and prosecute trafficking; victims, including children, have been given certain legal rights; efforts have been made to prevent trafficking; and there has been significant engagement on the international, regional and bilateral levels. In terms of what existed even a few years ago, this represents a significant achievement. It can be expected that these improvements will continue over the next few years and will begin to secure real results in terms of ending impunity for traffickers and securing justice for victims.

However, broader structural problems are likely to compromise and eventually block progress. The rule of law is very weak in Lao PDR and this plays directly into the hands of traffickers. By improving the independence of judges and prosecutors, by strengthening the capacities of police, and by directing scarce but available resources to the criminal justice system, the government could make a substantial difference to the ability of that system to conduct fair and effective prosecutions and deliver justice to victims. Steps could also be taken to ensure that the rights granted to victims through national law are known and respected in practice. Of particular importance is the provision of emergency shelter and other services to returning victims and an absolute prohibition on their detention. The treatment of Lao victims abroad, including their criminalization and incarceration, should be an issue of the highest priority and the government must recognize the duty of care it owes to these forgotten individuals. The government also needs to look more closely at the reasons why Lao women and girls are especially vulnerable to trafficking. What is the relationship between trafficking and socially entrenched (often legally sanctioned) gender discrimination? On a broader level, what steps could it be taking to reduce the pressure on families to send young people, commonly very young girls, abroad without supervision or support? Are there new or different ways in which Lao PDR can promote safe, legal migration that will meet its development needs while not sacrificing its most important resource?

This article has utilized the situation in Lao PDR to explore the issue of standards used in evaluating the response of States on the issue of human trafficking. The US Government, through its annual TIP report, has developed a unilateral assessment system based on standards derived from its own national legislation and reflecting its own understandings of the problem and its own views on the best solutions. Part One of this study has demonstrated that such an approach is conceptually faulty, politically divisive and ultimately unpersuasive. It hampers international norm development and thereby directly serves the interests of those States that wish to weaken and disengage from international rules, systems and processes.

From a legal perspective, States should be judged by the international rules that are recognized to be part of customary law and those additional obligations they have freely accepted. Such assessments can be unilateral or multilateral provided they acknowledge and utilize the same accepted standards. Unilateral assessments, especially coming from powerful countries can be extremely important in pushing otherwise reluctant governments to do something that they may not otherwise have bothered with. This is an important consideration and one that should not be discarded in trying to work out the formula for real and lasting change. In short, there is indeed a place for one State to demand another State comply with its legal obligations.

Ultimately however, the impetus for development of an effective national response to trafficking must come from within. Unilateral assessments that do not derive their legitimacy from internationally agreed standards will therefore never be as significant or as legitimate as a judgment made on the basis of commitments voluntarily accepted by Lao PDR and endorsed by the international community of States. This is the value and the strength of international law.

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