



CHAPTER II

UN PROTOCOL, ITS CRITICS, AND THEORETICAL FRAMEWORK

Trafficking is recognized as a national and transnational crime that has had a negative impact on humans and society. According to reports on trafficking, causes include gender inequality, lack of monitoring and legal mechanisms to protect workers' rights, poverty, corruption, and organized crime. In terms of gender, causes focus on inaccessibility to education for women, lack of economic and political opportunities, and social and cultural marginalization, all of which push women into a vulnerable state and making them easily targeted and deceived by traffickers.

Before 2000, NGOs in many countries had been established to fight against the trafficking of women. However, since these NGOs work individually – not cooperating among each other – the statistics and data address only the cases they themselves had received, and the information is therefore difficult to analyze, especially regarding whether governments should be encouraged to support the NGOs program or hesitate because of criticism. While some NGOs reported that the number of trafficked women was increasing, other NGOs reported it was decreasing. So, it is not even clear how one could determine which program should be used as an effective model. Coordination among NGOs did not begin until the early 2000s. During this time, there was also the creation of UN anti-trafficking protocol, which provided an international definition of trafficking. With this definition, NGOs have formed many groups in order to share information, resources, and programs, as well as to raise awareness, protection, prevention, rescue, rehabilitation and reintegration programs. To accomplish this, they believed that they should have clear and reliable data on trafficking as well as firm ground to convince the government not only to lead the fight against trafficking but also to take stronger measures to enforce the law, punishing criminals and their counterparts.

However, until now – even with the root causes of trafficking have been identified and the coordination among many NGOs achieved – the numbers of trafficked women is

reported to be increasing. Many reports still mention the same causes of trafficking. Some criticism even appears to question the NGOs' methods. One question that is repeatedly raised is why these reports always claim increasing occurrences of trafficking but still cite the same root causes. Reports and research related to trafficking have been analyzed. Among many factors, the definition of trafficking is incomplete and ineffective, and it also has many different interpretations according to the various agencies and their own contexts. Moreover, statistics on human trafficking are not effectively collected. There are many assumptions and disputed points when the information is integrated with the others. Another interesting point is the lack of funding for implementing any long-term programs for ensuring a high level of awareness, protection, rescue, rehabilitation and reintegration. Because there is a shortage of funding, the competition for money is very high among the NGOs. And since the donors set the policies for providing the funds, in order to qualify for receiving the funds, some NGOs set their policies accordingly. Below, we will show the reasons why they act this way.

2.1 DEFINITION

Women or human Trafficking is not the new phenomenon in our society. It has existed for a long time. However, it was paid attention and tackled in the west first; many measurement and laws were used to deal with that crime such as the international Agreement for the suppression of the white slave trade in 1904; the International convention for the suppression of the white slave traffic in 1910; the convention for the suppression of the traffic in women and children in 1921; the international convention for the suppression of the traffic in women of Full age in 1933; the UN convention for the suppression of the traffic in persons and exploitation of the Prostitution of others in 1949. However, some of these conventions have the limited scope focusing only on the white, and other could not be ratified by the other states because of the problem of colonialism, World Wars, and Cold War that divided the world into many partitions. Therefore, there was still no consensus on its definition or any coordinated effort to take measures against it. Many victims were treated as criminals via illegal entry or as unwelcome sex workers. They faced arrest, fines, imprisonment, and deportation, and they rarely received any

support. As a result, victims of this type of crime increased⁵ and became a substantial global concern; accordingly, in 2000 the UN made an effort to define the problem and asked its state members to ratify that definition, noted here:

"Trafficking in Persons" shall mean the recruitment, transportation, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a persons having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) have been used; (c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article.

However, even though it has been ratified by many state members, the UN anti-trafficking protocol is still debatable and is the subject of much criticism. The trafficking protocol is commended for providing support to trafficking victims. However, it reportedly gives favor to developed countries. They use it as a tool to suppress foreign migrants from entering their countries. These countries believe this can be an incentive for illegal immigration and trafficking (Jennifer Margaret Cameron (2004) cited UNODC n.d). For instance, the trafficking definition mentions the consent used to determine whether a case involves trafficking or not. Undocumented migrant workers who are maltreated by their employers are still considered as undocumented migrant workers and are often deemed deserving of prosecution just for consenting to a job. This definition

⁵ According Matt Friedman who cited UNODC report in 2008, the number of victims is around 1 million per year and makes annual profit around 31000000000 USD.

seems to stress the country of origin and the crime against the sovereignty more than the human rights abuse in the destination countries. Recently, a U.S. TIP report (2008) suggested that UN protocol does not require movement as the primary criteria to be identified as a trafficking victim and advises that "the focus should be on the exploitation and the control of a person through force, fraud, and coercion." It is believed that this is simply a new interpretation and not yet adopted by the members. As with Thailand, in its Scope and Elements of Identification of Trafficked Persons Checklist, the UN protocol still uses the same criteria as the old interpretation (movements or acts, means, and purposes of exploitation) to identify anybody as the victims.

Checklist of the Identification of Trafficked Victims

2. Subjected to one of the following:

- procuring/buying selling/vending bringing from
 sending to detaining/confining harbouring
 receiving

3. The acts in (2) were committed by any of the following methods:

- threat use of force abduction
 fraud deception abuse of power
 giving 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

4. The acts in (2) and methods in (3) were done for any of the following purposes:

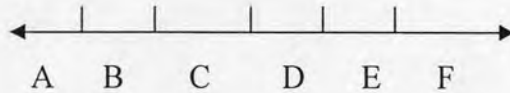
- Seeking benefits from the prostitution
 Production or distribution of pornographic materials
 Other forms of sexual exploitation
 Slavery
 Causing another person to be a beggar
 Forced labour or service
 Coerced removal of organs for the purpose of trade
 Any other similar practices resulting in forced extortion, regardless of such person's consent

5. Conclusion

- Not an act of trafficking in persons
 Potentially an act of trafficking in persons. The interviewee should be given temporary care and await further consultation
 An act of trafficking in persons, as defined by the following circumstances:

Source: National Operation Center on Prevention and Suppression of Human Trafficking (NOCHT), Thailand.

While UN protocol declared that only three elements (transportation, means, and exploitative purposes) constitute whether a case is defined as trafficking, some research is seen as irrelevant. For instance, Kritiya Archnukul suggests that trafficking should be treated as a continuum ranging from "visible and complete" trafficking to "invisible and incomplete" trafficking because victims can be deceived or volunteer to migrate and are often placed into legitimate jobs before they are forced into a complete human trafficking situation (Chantavanich, 2004). Kritiya Archnukul created a theoretical framework that is believed to be the most relevant for illustrating the trafficking situation in Southeast Asia. It is shown here:



A= Victims are forced and/or kidnapped

B= Victims are given false information, and are trafficked into types of business other than promised

C= Victims are aware of the kind of work, but not the work conditions

D= Victims are aware of the kind of work and work conditions, but are not aware of and/or unable to foresee the difficult situations they may encounter

E= workers (who may have been trafficking victims before) are aware of the kind of work and work conditions, but are not given an alternative worksite (can not choose where they want to work)

F= workers (who may have been trafficking victims before) are aware of the kind of work and the work conditions and are able to select their worksite.

Further support for this theoretical framework in Southeast Asia is given by Jerrold W. Huguet and Varamon Ramang Kura (2007), who have shown that if all the three elements are put into the criteria for identifying the trafficking victims, it will be

more difficult to find the trafficking victims since most of them migrate voluntarily rather than under someone's deception, force or threat. Ju Kojima (July, 2007) also provides more evidence that some migrant workers (documented or undocumented) are put into various job placements – including waitresses, housemaids or sold to employers – before ending up in prostitution or forced labor. To do this, there is no any evidence to show that they are deceived, forced, or exploited but voluntarily migrated to the country of destination. That led her to observe that *"there is as yet a strong tendency to treat trafficking and migration involving undocumented workers as two fixed, distinct categories. However, this overlooked the fact that the two categories are intertwined and reactive to structural changes in social practices. A clear legal demarcation between the categories underplays the fact that smuggled migrants and trafficked persons undergo equally exploitative conditions during migration."*(p.9). With some similarity, ILO (2008) also suggested a revision, saying that *"the truth is that 'trafficking' – despite there being now a well-established and broadly accepted definition of it in the Palermo Protocol – remains a generally cloudy concept. Trafficking activities are as diverse as they are secretive, and while the subject is conveniently standardized in conventions and treaties, such precision does not exist in reality or in the mind of the public, or even much of the anti-trafficking community."*

In addition, the UN Protocol is criticized for not providing sufficient protection to the victims, especially those who are undocumented. When they are rescued, only those who are eligible under the specific trafficking criteria – and agree to serve as a witness – will receive protection. And since the signatory states believe only the formula of the three elements (transportation, means, and purpose of exploitation) some victims who suffer the same thing have been misidentified due to those states' interpretation and level of understanding of the protocol, and the consent of victims to the jobs. Therefore, some trafficking victims are treated as undocumented migrant workers (Neil Howard and Mumtaz Lalani, 2008). As witnessed in the U.S TIP (2008) report, *"in March 2008, a team of labor ministry, immigration, police, and NGO representatives raided a shrimp processing factory in Samut Sakhon and found 300 Burmese migrant workers confined to the premises and working in exploitative conditions. For the first time, the government*

included 20 males among the classified 74 trafficking victims and referred them to a government-run shelter. However, the government handcuffed and detained other illegal male Burmese migrant laborers at the factory and sent them to a holding cell to await deportation. Reportedly, these workers who experienced the same exploitation as those deemed 'victims' by the Thai government, were treated as criminals detained, not allowed to retrieve personal belongings or identity papers left at the factories, and sent to a detention facility."

Moreover, since UN protocol does not provide a clear definition of "sexual exploitation" or "prostitution of others," its interpretation has caused much confusion, especially in the case of women who volunteer to work as sex workers. This is one reason why Neil Howard and Mumtaz Lalani (2008) have criticized the UN protocol, because they believe that it considers too many trafficking cases to be strictly instances of prostitution. As they expressed:

"What should be apparent from this brief history is the fact that 'historically' trafficking in person has been equated with prostitution. Such an understanding, as Kempadoo argues, is the result of the intersection of radical feminist advocacy and 'conservative Christian political agendas and ideologies.' Unfortunately, it is argued, even with the most recently elaborated international framework, such a situation seems still to have polarized debate between feminist abolitionist movement and those feminists arguing from a 'sex workers' rights' perspective. While the former recognize no distinction between 'forced' and 'free choice' prostitution, arguing that all prostitution is a form of sexual slavery and that trafficking is intrinsically connected to prostitution, the latter sex worker's rights view sees state action which criminalize prostitution as a denial of human rights to self-determination."

In addition, the ambiguity of the protocol make the states dispute on its governments' reputations, the interest and the movement of their own people, especially

when the destination states complain that the weak function of the states of origin is the factor to cause the migration and problem in their states. As a result, any measurement that emphasizes the strict control of movement is seen as the best tool for preventing trafficking. However, as witnessed in the EU, strict immigration control and a lack of political will have helped the victims contribute to an increasing number of trafficking cases (Jennifer Margaret Camenron (2004) cited House of Common International Development Committee). Moreover, that limitation generally affects the women who often are not receiving basic human rights. Ann Jordan (ibid), Director of the Initiative Against Trafficking in Persons of the International Human Rights Law Group observed:

"For women in particular, these restrictions diminish their autonomy. Governments must not adopt any laws or measures that would prevent anyone, particularly women, from leaving the country for the purpose of 'protecting them from being trafficked. Unfortunately, some governments have adopted policies or measures that, in effect, 'protect' young women out of their rights to travel."

To conclude, the UN trafficking definition is still problematic. It does not fully reduce trafficking but instead seems to cause more confusion among the involved agencies. In other words, this definition does not fit the reality at the grass roots level but cause the cooperation of states problematic.

2.2 STATISTICS

Recent statistical reviews of NGOs and government agencies have shown that some parts of their reports are unreliable, incomplete, out of date, and not able to integrate the statistics from other NGOs. As Ernesto U. Savona and Sonia Stefanizzi, (2007) described:

"Consequently, there emerges a lack, both nationally and internationally, of reliable collection systems and of consistent reporting of basic data on

the various facets of the phenomenon of trafficking in foreign women and children for sexual exploitation. This occurs despite the recent efforts by various national and international governmental agencies and scientific institutions, with a view to provide an overall perspective, based on established methodologies, of the problems of trafficking at the various territorial levels. The information, as the essays in this volume clearly show, is fragmentary, heterogeneous, difficult to acquire, uncorrelated and often outdated."

Such disputed data is evident even among the larger IOs. For instance, while some international organizations, including the ILO, reported that there are around 12.3 million persons being trafficked into sexual servitude, forced or bonded labor, other estimates believe that the number of trafficked persons ranges from 4 to 27 million people. There are also different estimates regarding how much profits are made from that crime. U.S. TIP (2008) recently estimated the profits of the global trade to be around 32 billion USD, with sex trafficking alone producing around 7 billion annually. However, other organizations, such as Interpol, believe it is as high as 19 billion per year for sex trafficking. Interestingly, the ILO reported in 2005 numbers far different than both assessments. According to the ILO, profits were estimated to be around 217.8 billion per year (ibid).

Moreover, according to UNODC, while the statistics show that sexual exploitation was present in 79 percent of trafficking, forced labor was present in only 18 percent. UNODC claimed there was statistical bias: because sexual exploitation very often happens in big cities and is reported, other forms of trafficking are often underreported. Therefore, until now it is not possible to know the magnitude of trafficking. However, interestingly, even some agencies are aware of that, they still use complicated and unreliable figure for advocacy or fund-raising. Doing so, Kritistiina Kangasputa (2007) argues, those statistics not only waste money and time, but they also do not help to reduce the number of trafficking victims.

Supporting the above studies, Derks et al (2006) presents similar results. Her study found that many reports of trafficking are full of assumptions that are unreliable, unholistic, or otherwise not national findings. Specific criticism includes that methods are not thorough enough to generate reliable data or findings. Often, the story of a single individual case is used to generalize the nationwide trafficking situation even though many research projects are conducted only in specific areas where there is frequent overlapping. Methods for estimating trafficking increases or decreases are also in doubt since the way they count is not systematic and nationwide; in fact, they do not even have a clear idea of who can be defined as the trafficking victims. For instance, in terms of trafficking for prostitution, agencies face difficulty distinguishing clearly between voluntary and involuntary sex workers. Therefore, when they count someone as a trafficking victim, there often remains the question of whether the victims also see themselves as trafficking persons (Derks et al, 2006).

Furthermore, some research depends on existing reviews, interviews with experts, or interviews with those who consider themselves trafficking victims but not of the traffickers. To generate sympathy, the victims do not claim guilt, even though sometimes the victims' narratives do not reflect what they did. For example, while some people reported that they were exploited in the destination place, Derks et al (2006), citing Vijghen, writes that: "*many stories (of exploited workers) go around but no one knows [what] is fact and what is myth.*" Therefore, according to Derks et al (2006), the finding provides an incomplete picture of the trafficking situation: it does not allow or explain how the trafficking works. Furthermore, while other believe that trafficking is related to transnational crime which could not be clearly proved, others blame on culture; for example, the traditional code of conduct of Cambodian women is always referred to as one of the factors of trafficking, even though those trafficked women do not know how to read.

Some questions go even further to criticize statistics that support causes of trafficking to be related to education or poverty. To do this, it can downplay the fact that some victims are not illiterate and even they are illiterate, in some instances, providing

education does not work because of birth order or unwillingness by parents to invest in their daughter's education; these both can push the girls into hazardous work such as sex work (Derks et al (2006) cited Taylor). This needs more thorough investigation, as well as long-term policies that convince the girl/woman *and* her parents to send the daughters to school. Criticism also suggests that measurements of poverty come from the victims' descriptions of their economic situations, rather than having a systematic approach to gauge their poverty level. And sometimes statistics only record the number of asset but not the value and the quality. To do this, it is difficult to know the real economic situation of the victims but only assumed blindly that they are all poor. Indeed, some research reports collected and reviewed show that the victims are not absolutely poor. Unclear records affect policy-making, which may be able to help people who wish to migrate, as well as those who have a problem and need help with rehabilitation and reintegration. For example, the absolutely poor may appreciate some skills training; however, for the relatively poor, more research needs to be conducted to determine their demands since they expect more than just a low income skill.

More interestingly, levels of debt are not shown in the statistics. To simply say this or that person has debt does not help explain the cause. As Derks et al (2006) has written: *"An issue that has become increasingly explored in relation to economic situation is debt. Research findings point to high levels of indebtedness among trafficked persons and migrants. Although, this tells us about the occurrence—less so about the levels—of indebtedness among the researched groups, how this relates to trafficking still needs to be explored in more detail. We should, for example, avoid reaching quick conclusions about the relationship between having a 'bad debt' and the 'phenomenon of debt bondage' as long as we do not know who is indebted to whom, the conditions of the contracts and the consequences of non-repayment."* According to the same authors, some sex workers who have already cleared their debts still do not leave their employers.

Even though there is some agreement that womanized labor, family crisis, sexual abuse, and the expectation of supporting roles in the family can create vulnerabilities for the girl and push her into unsafe migration and trafficking situations, they also credit

migration as a way to free those women from servile and abusive situations at home. Policies that support strict control at the borders do not help as much as they produce more illegal migrants and trafficked victims. Criticism extends to the recommendation for doing things that have not been tested or already proved to be effective. Some recommendations need a long time to be achieved, including the recommendations on reforming laws. Therefore, without reliable data, it is difficult to make effective policies to combat trafficking.

2.3 FUNDING POLICY

In some countries, especially developing countries, NGOs must depend on funds from foreign donors to run their programs. However, according to Matt Friedman (2009) who cited UNODC, while the annual profits of trafficking is around 31,000 million USD, the combined money for response to trafficking is only 0.05 percent of that annual profit. The fund can be allocated only if those NGOs fit their programs with the policies of donors. As Nell Howard and Mumtaz Lalani (2008) have observed, while the US government funds only those NGOs that do not support the sex workers' rights, other NGOs who receive other fund will protect the right of sex work. Accordingly, local NGOs have different policies and operations that sometimes can not be coordinated with others.

Moreover, since funds are limited but the competition is high, some NGOs that receive money must select only some target places and decide to pay only those staff members who accept a low salary; to do this also affects the quality of research and the same results are repeated. Another interesting thing is that since the nature of trafficking is very difficult to access but some NGOs need to impress the donor, they exaggerate their findings; however, to do this, it not only affects the real situation of trafficking, but also affects the existing policies and programs that actually work. As Guri Tyldum and Anette Brunovski (2005) cited and Mike Dottridge has observed:

Some human rights activists argue that exaggeration is not a major problem, as long as attention ends up being given to whatever abuses are

occurring. This seems to be a rather idealistic, not to say naïve approach, which ignores the damage that can be done by misrepresenting the scale of a problem. [...] an inaccurate estimate of the problem is likely to result in remedy being proposed that is equally inappropriate." (p.17)

"Overestimating the extent of the phenomenon can have equally negative consequences as underestimating it. Uncritically using or publishing findings not based on sound methodologies may result in misinformation and hinder the creation of relevant policies and appropriate programs." (p.18)

All of these points have also been noted by UNIAP (2008), which plays an important role in facilitating and coordinating the Mekong Sub-region agencies that fight against trafficking. Comments and questions are provided to the donors before they provide any funds to the agencies. This ensures that the work of those agencies really helps reduce the trafficking of persons. Comments and questions include the following:

Over the past decade or so, donors have provided tens of million of dollars to the human trafficking sector to address the problem. While many individuals and communities have no doubt benefited from these resources, there are a number of fundamental questions often asked related to the impact of this support, including: Are we as far along as we should be? Have we reduced trafficking? If so, where, how, and by how much? These are questions that the counter-trafficking community should ask itself. As professionals, we much be open to shining a spotlight on everything we do. We should have our peers look at our work and scrutinize it. If it is good, then let them say so. If it is not, then let them say this too. There is no room for political correctness and politeness when it comes to ensuring that what we do is on the mark and helping as many people as possible. If a program is not showing results, we should stop it. If it is not achieving what it is supposed to, then it should be modified or

shut down. If it is expensive and not applicable, then it should not be continued unless it demonstrates amazing positive impact that makes it worth the cost.

In addition to the comments and questions, UNIAP also creates a checklist for the donors as a guideline (shown below). Otherwise, the money might be wasted and not make much change in the trafficking situation. Moreover, the checklist requires that the proposal should be empirical and evaluated. Those projects that fail to comply are unlikely to contribute to the reduction of trafficking.

Table 2: Simple Donor Checklist for Counter-trafficking Proposals

	Yes/No
Does the proposal have a solid empirical foundation? Is it evidence-based?	
Have the interventions been evaluated? Has their effectiveness at reducing exploitation or supporting behavior change been proven?	
Does the activity focus on the most egregious exploitation, the most threatening emergent criminal activities, or the most vulnerable populations, using the most effective interventions?	
Is enough time and funding available to allow the intervention to make a demonstrable difference?	
Does the proposal contain a monitoring and evaluation framework to track progress so that the implementing agency can continuously learn as the intervention develops?	
Is the intervention linked with other activities or does it stand alone?	
Is the intervention culturally and linguistically appropriate? How is this assessed?	
Does the project instill a sense of urgency?	
Does the project have the technical support needed to meet international standards?	
Will the project demonstrate a measurable, sustainable impact in addressing human trafficking? Are the outputs outlined?	

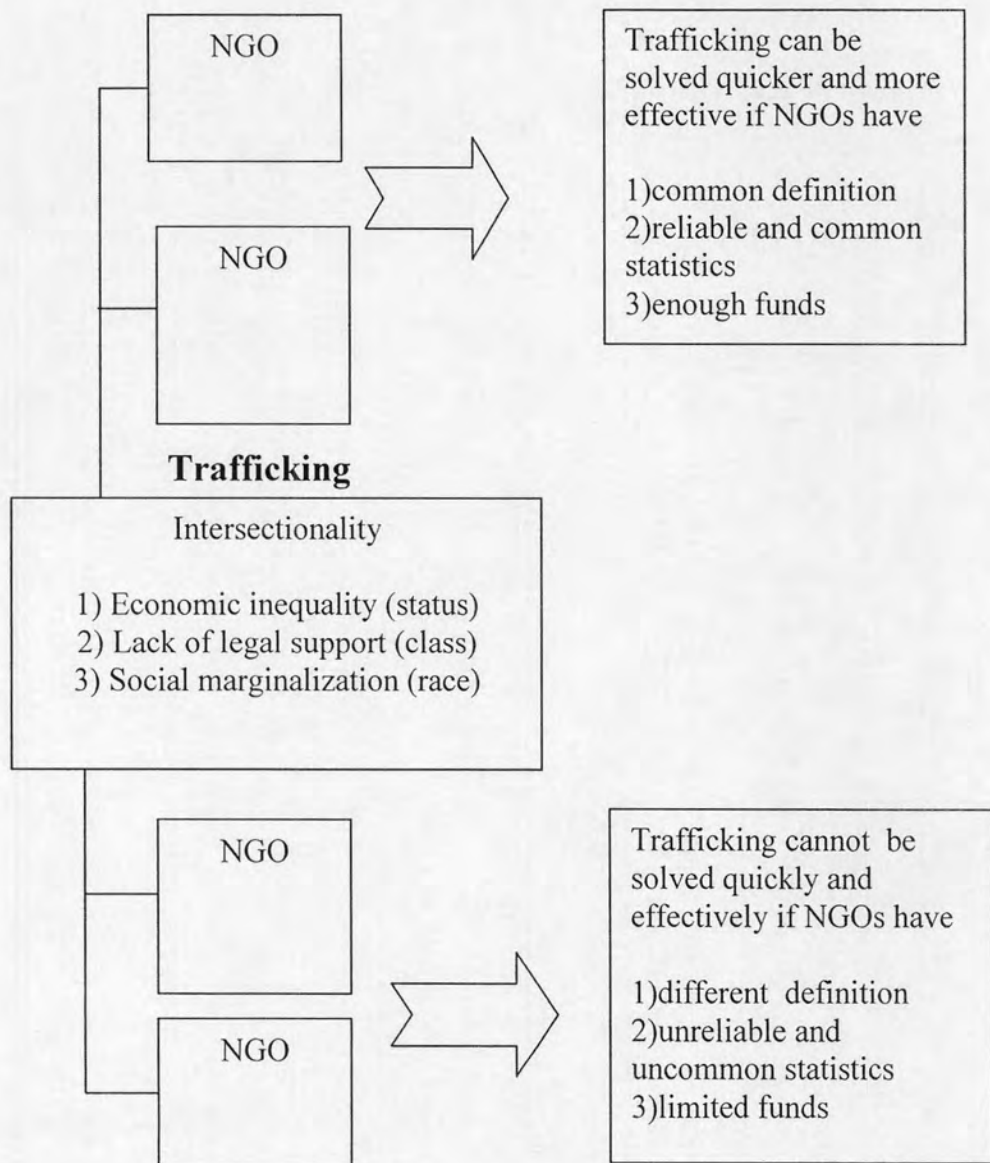
2.4 Theoretical Framework

Since trafficking of women is related to gender, the concept of intersectionality will be used as the method to explore the reality of women trafficking. With this concept, it is believed that women are discriminated not only in term of their bodies, but also their knowledge, rights, class, and ethnicity. One of the causes of trafficking in Southeast Asia is related to migration. Some people wrongly believe that once women gain access to new jobs they will no longer be economically dependent; however, in reality, because of hegemonic masculinity and capitalism, these women often simply become a commodity or labor, sold because they are put into the situation they can work for survival but not for improving their condition or status in society, and their rights have been abused, not to mention what happens within their own personal lives. However, this study does not suggest that the restriction of movement among women is the best solution to the problem. This study aims only to raise the negative points that occur during the process of their migration. Hereby, the involved agencies can help facilitate and protect these women as they migrate. Furthermore, it should be noted that racism still plays an important role in the trafficking of women. Citizens of the receiving country often consider those women to be migrant workers who simply steal their own jobs or cause social disturbances in their society. Intersectionality takes into account individual experiences in terms of religion, ethnics, etc., rather than generalizing everything or assuming they all experience the same problems. Therefore, intersectionality will be the best and most accurate tool to describe how women are trafficked.

Moreover, this study is also theorized that the unsuccessful role of NGOs – caused by different uses or interpretations of the trafficking definition - leads to different statistics in which the data are contradicted and unreliable. The common definition can help with coordination and lead to a similar understanding to deal with the trafficking problem. Moreover, it can help get rid of overlapping data by being more specific to the real situations of trafficking, the victims, and the traffickers. As mentioned above, the different usage of the trafficking definition has caused many real victims to be misidentified and has even pushed them to be re-trafficked. Furthermore, it is believed

that the limited funds also constrain the level of success of the role of NGOs since they heavily depend on the donation from the foreign countries to run their programs.

Figure 2: Theoretical Frame Work



2.5 Conclusion

In summary, the root causes of trafficking have long been detected and addressed, especially in the mandate of the UN protocol. However, because its stress that only those that fit the three elements (Transportation, means, and purpose of exploitation) are the only criteria to indentify the trafficking victims, many people who at first volunteer to

migrate but end up in being exploited in the destination countries are unqualified to be the victims. They are persecuted and deported rather than receiving any help. Moreover, with the ambiguous concepts (such as sexual exploitation or prostitution of others) some NGOs and government agencies try to use their own interpretation on the UN protocol. With the different level of understanding they end up in different operational definition. Furthermore, such different definition leads to the disputed and unreliable statistics among those agencies. As the result, the magnitude of trafficking and the effective means to tackle trafficking is still far to reach. Additionally, since fund is the important factors for the concerned agencies to run their programs, but they have to have their program policy the same as the donors' and have to compete for those limited fund among themselves, the gap and conflict among those agencies is bigger.