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**Victims, Representation, Remedies, Legal Status, and Accountability:
Key Legal Questions and Concerns Raised by the Suffocation
of 54 Burmese Migrant Workers
in Ranong Province, Thailand¹**

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The suffocation of 54 Burmese migrant workers in the back of a truck while being transported to work in Phuket is both horrific and yet sadly indicative of systemic problems plaguing migrant laborers in Thailand. Without major reform of the ways in which Thai society interacts with Burmese migrant workers, incidents such as this will certainly continue to occur. Among the many systemic problems underlying the tragedy, 5 key concerns are (1) the tendency to treat the migrant victims as criminal violators of immigration law rather than as victims of tragic crime, (2) the inadequate representation of victims throughout the process, (3) the inadequacy of the remedies available to the injured victims, (4) the impact of Thai migrant labor laws on the tragedy, and (5) the problem of adequate criminal prosecution in the transnational context.



**The Aftermath of April 9:
When Victims Became Criminals and Criminals Went Free**

On May 19, 56 of the 66 survivors returned to Burma under the uncertainty of the “Memorandum of Repatriation” signed between the two countries. Though local Kawthaung officials claimed the returning victims would not be prosecuted, the national Burmese government had removed the stipulation that they would not prosecute the returning victims “under any circumstances” or violate any of their basic human rights and instead replaced it with an agreement to follow the protocols of repatriation under the UN Convention against Transnational



Organized Crime.²

In fact, the majority of these victims have already been jailed by Thai authorities for being unable to pay fines for immigration violations, and remained in an immigration detention facility prior to their release.³ A representative of the Thai Lawyers Council criticized the callous treatment and rapid deportation of the victims, particularly police failure to question most women and children in the back of the truck. Instead, just 10 survivors had been held as witnesses.⁴ Shortly thereafter, these 10 survivors were also returned Burma.⁵

Ultimately, the Law Society of Thailand (“LST”) arranged small settlements with the truck’s driver’s insurance company on behalf of the survivors and families of the deceased. Still, it is unclear whether all the victims and their families will receive these payments. Likewise, other victims claim they do not want the money—seemingly fearful that accepting any remedy for the crime committed against them will lead to their own punishment.

In Thailand, victims of human trafficking have the right to sue those responsible for damages, but police ruled the case was not trafficking but smuggling. As an AHRC editorial in the Prachathai English News on April 24 noted, the police ruling is suspect. Not only would such questions of legal interpretations be better left to courts, but police have the ability to declare cases as trafficking rather than smuggling where the smuggled are exploited. Furthermore, the editorial noted that opening such an investigation would almost certainly show the complicity and even the involvement of police authorities at various stages in the crime.⁶ Ultimately, Thai authorities charged just six people in connection with the crime.⁷

In Burma, authorities recently responded by arresting nine people accused of involvement in trafficking, though none of these people have been accused of involvement in smuggling any of the Ranong victims. Furthermore, authorities arrested an additional 200 people searching for employment in Thailand.⁸ This response fails to hold any of the crime’s actual perpetrators accountable, and perpetuates the *status quo* of blaming victims as scapegoats for those who committed crimes against them.

Legal Analysis

I. The Criminalization of Victims: Narrow Views towards the Realities of Exploitation

The suffering of the migrant workers has been compounded by their treatment as criminals rather than victims. This criminalization has already resulted in jail time for most, fear of future punishment in Burma, and limited options for recourse against those responsible for the suffering. While new



anti-trafficking legislation has been enacted, the new legislation does not necessarily solve the key problem of recognizing Burmese migrant workers as exploited based on the political and economic crisis they fled.

A. The Law on April 9: Smuggling vs. Trafficking, Consent vs. Exploitation

In spite of the suffering and exploitation they endured, and the widespread outrage voiced in numerous media outlets, the migrant workers were not generally recognized as victims by government officials. In fact, these victims were criminalized. Unconscious survivors awakened among the bodies of the deceased only to be jailed for immigration violations.⁹

Police steadfastly claimed that tragedy had been the result of the victims' choices, and that they did not deserve the full protection available under the law. These officials claimed that there was no evidence workers were headed to any specific workplace, or to any specific workplace where they would be exploited. Additionally, the police argued that if immigration violators were treated as victims, the immigration laws would become unenforceable.¹⁰



Quoted in a June 1 editorial in the *Bangkok Post*, Chulalongkorn's esteemed Prof. Vithit Muntabhorn criticized the position of police authorities, accusing them of an overly-narrow interpretation of human trafficking. Based on Thai laws effective on April 9, Prof. Vihit argued that exploited women and children are victims of trafficking whether or not they may have given consent at any time. He explained that the entire experience they had endured was filled with exploitation as they were transferred from truck to truck by members of organized criminal networks. They were never asked whether they consented to being locked in the back of a refrigerated truck. They were given no options. Prof. Vihit explained, "They became slaves."¹¹



B. Recent Legal Reform: The Continued Problem of “Exploitation”

On June 5, Thailand’s new Anti-Trafficking in Persons Act became law, though its effect remains unclear. While the law expanded to include men in addition to women and children, more clearly defined certain crimes as indicative of human trafficking, and increased potential fines and imprisonment for committing a violation, the law retains “exploitation” as the key determinate of an act of trafficking. This standard remains open to interpretation. While this law could adapt to include a greater number of incidents as trafficking, it could also continue to shield those complicit in smuggling and trafficking networks from investigation. Though the law allows victims to attach a claim for damages to a criminal prosecution against perpetrators, this is irrelevant until the victims of exploitation are truly recognized as victims.

1. The Crisis in Burma and the Realities of Limited Migrant Bargaining Power

Rather than applying narrow interpretations of exploitation for the purpose of protecting government officials and organized crime bosses, the political and economic crisis in Burma necessitates a broad and expansive understanding of exploitation. Burmese laborers daily flee forced labor, slavery, and other repression to take dangerous jobs in Thailand at half the minimum wage. The crisis in Burma has caused a total failure in the market for labor along the Thai-Burmese border—a market failure that emphasizes the migrant workers’ complete lack of bargaining power. This lack of bargaining power fuels the brutal international network of human cargo, and fosters exploitation every step of the way. Considering this fact, it is clear that authorities should treat this case and future cases like it as exploitative human trafficking rather than human smuggling.

2. Smuggling Containers as Evidence of Exploitation: The Legislative Guide to the UN Smuggling Protocol

Compliance with the UN Convention against Transnational Organized crime would have required Thailand to consider the case of the migrants more seriously. The Legislative Guide accompanying the supplemental Protocol against Smuggling Migrants emphasizes that domestic law makers should include stipulations that cases of smuggling in which particular aggravating circumstances have occurred are taken more seriously. The Guide explicitly mentions that cases in which victims have been transported in shipping containers must be treated as a crime of greater severity even if the case only otherwise meets the standards for smuggling and not trafficking.¹² Consequently, even if current Thai law does not recognize this case as trafficking, or if local officials failed to use their discretion to recognize this case as trafficking, international protocols



to which Thailand aspires would require Thai law and Thai officials to recognize the case of these workers transported in a sealed food container as a greater crime than human smuggling.

II. Inadequate Representation under Burmese Law: The Failure to Provide Legal Counsel and Other Forms of Assistance

Under the Burmese Anti-Trafficking in Persons Law, the government is required to provide aid to victims of human trafficking, including the arrangement of rehabilitation into society. Additionally, the law directs Burmese government officials to work with foreign governments to provide necessary aid to victims of trafficking, as well as to aid victims in filing suit against their traffickers.

Here, it is clear the Burmese government has completely and totally failed in their obligation to provide necessary relief for the victims. The government failed to provide legal representation for victims while in Thailand. Instead, LST provided limited representation for the victims in an attempt to secure a settlement with the truck driver's insurance company. Given the severity of the situation, the victims deserved the full representation of legal counsel paid for by the Burmese government to defend the victims against any charges against them, to help the victims file civil suits against all those responsible for their injuries, and to aid Thai prosecutors to file criminal charges against the traffickers on behalf of the victims.

Not only has the Burmese government failed to provide the victims with the required rehabilitation, including educational trainings noted in the applicable law, but the government itself was a significant hurdle to the resettlement of the victims. Evidenced by the fact that the Burmese government rejected terms of initial repatriation agreements that prevented prosecution of the victims, the Burmese government has added to the victims' suffering through fear, and is in direct violation of its own domestic laws designed to protect its citizens.

III. Inadequate Remedies under Thai Law: Current Policies, Current Problems, and Potential Reform

In the immediate aftermath of the tragedy, the LST arranged a settlement between the truck driver's insurance company and the survivors and their families.¹³ While some victims have begun receiving payments,¹⁴ others have not yet received these payments and might never. Regardless, the remedies offered and the even the total remedies available fall woefully short of compensating victims for their suffering, and highlight the need for new and better approaches.



A. The Problem of Calculating Remedies Based on Injuries

The Thai Commercial and Civil Code provides for compensation to victims for their injuries.¹⁵ For deceased victims, the Code provides for compensation including (1) funeral expenses, (2) medical expenses prior to death, and (3) compensation to those who may have lost “legal support” due to the death, likely including spouses and children who depend on the deceased person.¹⁶ For injured individuals, this compensation includes monetary and non-monetary damages, but not punitive damages.¹⁷

While Thai civil injury law provides for a remedy based on actual injury, the practical result of this standard is a drastically insufficient remedy. Here, LST has arranged for the driver’s insurance company to pay 35,000 baht in damages to the families of the deceased and 65,000 baht to survivors.¹⁸ The fact that the negotiated settlement awarded survivors more money than the deceased immediately raises questions as to how death is considered a lesser injury. Furthermore, even if the physical and economic damage caused by injuries were calculated with perfect accuracy, the result would still be insufficient. Conditions under the oppressive military regime in Burma have contributed to a complete failure in the market for migrant labor, and have fostered artificially low wages. When based on these wages, injury as loss of earning potential does not even remotely compensate individuals or their families already living on the edge of subsistence.



1. The Exception of Criminal Liability from Comparative Fault

Additionally, it is important to note that any possible criminal charges filed against the migrant workers should not impact any civil settlement. While Thai law reduces damages proportionally based on the victims’ contribution to their own injury, the determination of liability is not affected by criminal law liabilities or verdicts in a criminal law court.¹⁹ Furthermore, the victims tried to alert the driver about their condition, and there does not seem to be any other reason why driver or police could accuse the victims of being “contributorily negligent.”²⁰



Unfortunately, the criminal charges against the migrant workers may have impacted the settlement in various forms, including the possibility that workers may have been intimidated, that the workers feared further prosecution if they asked for more damages, and the fact that they were rapidly expedited from the country without making full statements.

B. The Policy of Enforcing Remedies as a Cost of Doing Business: Holding Liable for Injuries All Those Who Profit

Under Thai law, employers are responsible for injuries caused by their employees in the course of doing business. Worldwide, many legal systems have similar laws, and scholars frequently explain that the public policy theory underlying an employer's liability for their employees is that injuries caused by employees during the course of business should be recognized as a cost of doing business.²¹ In this case, it does not appear the remedies met their law and economics goals. As the settlement was arranged between the victims and the driver alone, it failed to assign costs of the migrants' injuries to the greater criminal network. Not only might this have limited the money available to use for victims' compensation, but it allows the majority of those involved in the criminal enterprise to avoid liabilities that would have been assigned to those involved in legitimate business.

1. Further Considerations on the Cost of Doing Business: Considering the Benefit to and Duty of Society as a Whole

Given the beneficial impact cheap migrant labor has on the Thai economy, there is a strong argument that Thai welfare services have both the duty and the best ability to compensate injured migrant workers within Thai borders. Various estimates suggest up to 2 million Burmese migrants work in Thailand, accepting jobs many Thais will not do and working at a fraction of the minimum wage. This labor fuels many sectors of the Thai economy, and provides a higher quality of life for Thais at a reduced cost. Given this tremendous benefit Thai society receives from the systematic capitalization on Burmese migrant labor, the costs of exploiting this labor should justly be passed on to Thai society as a whole.

Here, some early news reports mentioned the possibility of government compensation, but apparently this has not materialized. While the Thai trafficking law that came into effect in June creates a system for funding social programs to rehabilitate victims of trafficking, language of the law suggests the ultimate use of these funds is highly discretionary. There are no guarantees when or if funds will be used. Consequently, this is hardly a comprehensive system, and is unlikely to provide aid to the many victims of the systematic abuse of migrant labor.



IV. The Problem of Migrants' Legal Status and its Contribution to the Harms of Smuggling and Trafficking

As mentioned in the previous section, Burmese migrant workers are an integral part of the Thai economy, and yet they are marginalized by Thai society. Even though the Thai economy expects the labor of Burmese workers, Thailand and Burma have signed a memorandum of understanding regarding the exchange of workers,²² and Thai employers can legally employ Burmese workers, the actual legal status of Burmese workers is tenuous at best. Though Burmese workers can apply for work permits, these permits may be too expensive for the employees to afford, or employers may hold the work permits at the employee's place of work. In either case, the migrant workers face the constant threat of arrest and deportation. This system effectively condones the employers and criminalizes the employees, giving the employers even greater power over migrant workers. And, as the case of the migrant workers shows, this system is disastrous, and perpetuates a dangerous criminal environment.

Without this culture of criminalization surrounding migrant workers in Thailand, the 54 migrant workers would not have suffocated. There would have been no reason for them to sneak across the country, and there would have been no reason for them to travel in a sealed cargo truck. As well, there would have been no reason to imprison the workers for immigration violations, and criminalize them for harms committed upon them. Were the Thai government to publicly acknowledge these workers that they silently condone, were the Thai government to publicly acknowledge the crucial role these workers play in the Thai economy, and were the Thai government to fully legalize the status of the workers, countless future tragedies would certainly be avoided.

V. Accountability: The Problem of Holding Traffickers Liable Under Criminal Laws

While remedies for civil damages may provide some disincentive to place the safety of others at risk, the disincentives are clearly minimal in this case given that damage calculations were small, the focus of civil liability has apparently been placed on just one individual, and no punitive damages are available. In this regard, the possibility of criminal liability is far more important as the primary deterrent against crime.

Unfortunately, the case of the migrants reveals significant limitations in the willingness or ability of authorities to prosecute those responsible. As mentioned above, Thai authorities have only prosecuted six individuals in connection with the crime, while many more were certainly involved in the operation. As noted in the AHRC editorial, a key problem with prosecuting all those involved is the complicity of police and other government officials.



Similarly, the Burmese crackdown on people who were involved in human smuggling but who may not have been involved in this particular case shows either a reluctance or inability to hold accountable those truly responsible. Perhaps the single greatest obstacle to reducing human trafficking is this reluctance or inability of local officials to prosecute genuine offenders.

A. The Problems of Domestic Jurisdictions Combating an International Criminal Network: Necessary Willingness to Cooperate

A fundamental difficulty in the prosecution of those responsible for human trafficking is the frequency with which the crime extends across international borders. Combating trafficking requires the coordinated efforts of police agencies and judicial systems from different jurisdictions to target the totality of a criminal network. Currently, there is insufficient cooperation between Thailand and Burma, and, furthermore, there appear to be significant hurdles to reaching an effective state of cooperation.

Thailand and Burma are signatories on a bilateral memorandum of understanding on the cooperative employment of workers,²³ and on a memorandum of understanding against trafficking in persons covering the Mekong region.²⁴ Unfortunately, these memoranda are neither legally binding nor effectively followed. Instead, both governments continue to prosecute low ranking members of criminal operations rather than truly cooperating to target entire transnational criminal networks.

The Convention against Transnational Organized Crime to which Burma has acceded and to which Thailand is a signatory and claims an intention to use in forming domestic law outlines protocols for cooperation between nations, although the ultimate effectiveness of the Convention is unclear.²⁵ Burma has already passed a law setting the framework for cooperation in the prosecution of crimes, but large scale criminal prosecutions ultimately require the discretion and desire of government officials.²⁶

Furthermore, the Convention allows nations to criminalize the act of trafficking against their citizens even when the acts are committed outside of their jurisdiction, and the Burmese law explicitly grants Burma authority to prosecute individuals committing offenses against Burmese citizens outside of Burma. However, the Burmese government likely is hesitant to pursue such prosecutions because this could set a precedent that would allow other nations to attempt to prosecute Burmese nationals within Burma. The ultimate success of the Convention will require not just the passing of laws but the actual desire and ability to cooperate in prosecutions. Instead, given the involvement of both government authorities and powerful private officials in human trafficking, both Thailand and Burma may prefer to continue to exercise complete control over



the prosecution of individuals within their jurisdictions.

VI. Recommendations

1) The Burmese migrant workers involved in this case and similar cases should be regarded as victims of trafficking. Due to the prevailing economic conditions in Burma and Thailand, as well as the lack of control over their own destinies once their journey began, they are objects of exploitation who deserve full protection under the law.

2) Migrant worker deaths similar to this case will sadly continue as a result of the economic situation in which there are almost no employment opportunities in Burma while Thailand needs more cheap labor. To improve the situation, Thai authorities, human rights groups and legal organizations should work together to establish a mechanism addressing victims' needs. Currently, victims of labor trafficking have no mechanism for systematic recourse. This mechanism should be a permanent and robust institution.

3) The governments of Burma and Thailand should work together to legalize Burmese migrant workers in Thailand. The lack of legal status remains a primary cause for workers attempting to enter and travel through Thailand under dangerous conditions. The general understanding of migrant workers and legal groups is that even workers holding the certificate issued by the Thai Ministry of Labor have not yet established formal legal status.

4) The governments of ASEAN countries should take concrete steps to liberalize the free flow of labor between countries. While they have supported the flow of capital investment, these countries have to a large extent ignored the burdensome restrictions on the international movement of workforces. Too many restrictions still exist and governments have not made it a priority to reduce them. Although complete freedom such as that in the European Union may not be realistic for ASEAN countries at this time, progressive steps to facilitate worker migration must be made.

5) The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers should create a strong mechanism to protect migrant worker rights and provide for remedies in the case of abuses. Currently, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers provides that countries receiving migrant workers must "intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers" and "provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal



and judicial system of the receiving states.” The Declaration also requires the countries from which the workers migrate to “enhance measures related to the promotion and protection of the rights of migrant workers.” The Committee must use its authority to facilitate the implementation of these obligations.

(Endnotes)

¹ This report was completed using information through July 24, 2008.

² Supara Janchitfah, Open Borders to Human Rights, Bangkok Post, Jun. 1, 2008 (http://www.bangkokpost.com/010608_Perspective/01Jun2008_pers001.php); Wimol Nookaew, Burmese Survivors Sent Home, Bangkok Post, May 20, 2008 (<http://www.mekongmigration.org/?p=109>).

³ Janchitfah, *supra*.

⁴ Penchan Charoensuthipan, 56 Survivors to be Deported, Bangkok Post, May 15, 2008 (<http://www.mekongmigration.org/?p=107>)

⁵ Wimol Nookaew, Death Truck Survivors Happy to Go Home, Bangkok Post, Jun. 9, 2008 (<http://www.mekongmigration.org/?p=150>)

⁶ Asian Human Rights Commission, When Will Police and Immigration Officials Also Be Detained over Deaths of 54 Migrants?, Prachathai English News, Apr. 24, 2008 (<http://www.mekongmigration.org/?p=94>).

⁷ Nookaew, *supra*.

⁸ Saw Yan Naing, Human Smuggling Crackdown Hits Kawthang, The Irrawaddy, June 24, 2008 (http://www.irrawaddy.org/article1.php?art_id=12943).

⁹ Janchitfah, *supra*.

¹⁰ *Id.*

¹¹ *Id.*

¹² Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention Against Transnational Organized Crime (2004) (http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf).

¹³ Janchitfah, *supra*.

¹⁴ Referenced on Burmese language Voice of America news program July 23, 2008.

¹⁵ § 420.

¹⁶ § 443.

¹⁷ § 446.

¹⁸ Janchitfah, *supra*.

¹⁹ Thai Civil and Commercial Code, §§ 223, 424, and 442.

²⁰ Driver in Burmese Tragedy Surrenders, Bangkok Post, April 16, 2008 (<http://www.mekongmigration.org/?p=60>).

²¹ See, e.g., Dan B. Dobbs, *The Law of Torts* (West 2000).

²² Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation in the Employment of Workers (2003) (http://www.artipproject.org/artip/05_laws/mou/bi/MOU%20Thai-Myanmar%20Work%202003_English.pdf).

²³ Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation in the Employment of Workers (2003) (http://www.artipproject.org/artip/05_laws/mou/bi/MOU%20Thai-Myanmar%20Work%202003_English.pdf).

²⁴ Memorandum of Understanding on Cooperation against the Trafficking of Persons in the Greater Mekong Sub-Region (Oct. 29, 2004) (http://www.artipproject.org/artip/05_laws/mou/multi/MOU%20COMMIT%202004_English.pdf).

²⁵ United Nations Convention Against Transnational Organized Crime, December 15, 2000, UN Doc. A/55/383 (Annex I, p. 25).

²⁶ See *The Mutual Assistance in Criminal Matters Law* (Burma, 2004) (http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/mutual%20assistance%20in%20criminal%20matters%20law_eng.pdf).

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