

SUFFOCATION INSIDE A COLD STORAGE TRUCK AND OTHER PROBLEMS WITH TRAFFICKING AS “EXPLOITATION” AND SMUGGLING AS “CHOICE” ALONG THE THAI-BURMESE BORDER

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I. INTRODUCTION

When fifty-four Burmese migrants recently suffocated while traveling to job sites in Thailand in the back of a refrigerated truck designed to carry food, authorities arrested and deported the remaining survivors for immigration violations.¹ Distinguishing between human trafficking and human smuggling based on standards of consent and exploitation is particularly problematic along the porous Thai-Burmese border, across which millions of migrants have fled the Burmese military regime.² While the Burmese migrants’ labor is critical to the Thai economy, pressures to flee Burma coupled with minimally enforced protection under Thai law have placed the migrant workers at a severe disadvantage in the labor market, and at tremendous risk for bodily harm.³ Migrant workers fleeing government imposed forced labor in Burma frequently find themselves in slightly improved situations in Thailand.⁴ However, Thai authorities overwhelmingly classify these workers as smuggled rather than trafficked due to their willingness to escape to Thailand.⁵ Under the label of smuggling, these authorities fail to grant basic legal protections to migrants facing exploitative situations, including employer domination, sexual abuse, and even death.⁶

* J.D. Candidate, University of Arizona, James E. Rogers College of Law, 2010. This note is dedicated to the people of Burma, whether home or abroad—may future generations have the luxury of complaining about boredom. This note is also dedicated to U Aung Htoo, who started this project, and who served as an advisor, mentor, and role model for continuously risking his life to speak for those who would otherwise not be heard. This note is also dedicated to the Burmese migrant workers of Bangsaen Beach, who were friends. I would like to thank the Burma Lawyers’ Council, including the rest of the Executive Board Members, U Thein Oo, Hkun Okker, U Myint Thein, and Mr. B.K. Sen, the Legal Aid Team, the Legal Analysis Team, U Aung Myint, and, of course, Mr. Stewart Manley and Ma Naw Ku. Thanks also to those who got their hands dirty editing, including both my parents, Donald Gjerdingen and Kendra Gowdy Gjerdingen, and Iskra Uzunova. Finally, and most of all, special thanks to my wife, Alissa Paynter, who gave countless hours of invaluable field work, research, and brainstorming in contributing to the final product.

1. *See infra* Part II.A.
2. *See infra* Part IV.
3. *See infra* Part IV.B.
4. *See infra* Parts IV.B.2–3.
5. *See infra* Part II.
6. *See infra* Part II.B.

As the economic incentives of globalization increasingly drive migrants to seek potentially exploitative work in foreign countries, the international community has shown growing concern over preventing human trafficking, which is seen as reminiscent of historical slave trades.⁷ However, states have simultaneously expressed concerns that expansive anti-trafficking measures would hamper sovereignty and security, particularly by reducing the efficacy of domestic immigration laws.⁸ This tension has created two standards: human trafficking and human smuggling.⁹ With a variety of express protections for victims, laws against human trafficking target those who transport individuals against their consent or through coercive means.¹⁰ Alternatively, laws against human smuggling target consent to transportation that is seen as beneficial for the individuals transported, and do not recognize these individuals as victims.¹¹ Although the division between the two standards is frequently explained in terms of consent, authorities generally define an incident as human trafficking if the transported individuals are “exploited,” regardless of whether they consented to their transportation.¹²

While few would argue that Thailand should not retain authority to control unchecked immigration across its sovereign borders, the integral role played by Burmese migrants in the Thai economy, coupled with the severe conditions faced by these workers, suggests that Thai domestic law should provide more expansive human rights protections to foreign workers within its borders.¹³ Most specifically, the economic hardships fueling most Burmese migration to Thailand arguably qualifies as exploitative under international human trafficking standards, and could be distinguished from human smuggling regardless of individuals’ consent to be transported.¹⁴ As a result, Thai domestic law would best implement international standards by explicitly expanding definitions of human trafficking to address the exploitative situation faced by Burmese migrants.¹⁵ Still, the incident raises broader questions as to the efficacy of the division between human trafficking and human smuggling under international law, particularly as to whether these standards might exacerbate human rights violations against certain classes they appear to protect.¹⁶

Ahead, Part II of this note takes a longer look at the suffocation of the 54 Burmese migrants, examines the ensuing debate between police and civil rights advocates as to whether the survivors should be viewed as criminals or victims,

7. *See infra* Part III.

8. *See infra* Part III.B.1.

9. *See infra* Part III.A.1.

10. *See infra* Part III.A.2.

11. *See infra* Part III.C.

12. *See infra* Part III.C.1.

13. *See infra* Part V.B.

14. *See infra* Part IV.B.

15. *See id.*

16. *See infra* Part V.

and surveys the historical development of measures to combat trafficking and smuggling under Thai law.

Part III examines international legal standards defining human smuggling vis-à-vis human trafficking, including the historical context in which the standards arose, and discusses problems associated with recognizing these standards as two sides of the same coin, rather than as disjointed UN Protocols operating without an overarching and cohesive framework. Part IV takes a broader view of Burmese migrants in Thailand, addressing how political and economic crises of recent decades have resulted in increasing emigration from Burma, and how these migrants face exploitative working conditions without legal protection when they arrive in Thailand. Part V discusses Burmese migrants' conditions in Thailand in the context of trafficking and smuggling standards, arguing that many migrants fall under the category of "exploited," and could be considered trafficked. However, Part V concludes that even if migrants were recognized as exploited, both international standards and domestic law for combating human trafficking in Thailand would still inadequately address the complexities of the human rights crisis faced by the Burmese. Instead, Thai domestic law needs broad reform of smuggling and trafficking laws, reform tailored to realities of migrant laborers along the Thai-Burmese border. Such reform should recognize the unique issues created by political and economic crises in Burma encouraging migration to Thailand, the crucial role played by Burmese labor in the Thai economy to the benefit of Thai society as a whole, and the nearly complete and total lack of legal protections for these migrant laborers crucial to the Thai economy.

II. THE DEBATE IN CONTEXT

A. The Smuggled Migrants: Suffocation and Incarceration

On April 9, 2008, 121 Burmese migrant workers boarded the rear refrigeration compartment of a cold storage truck in Thailand's Ranong province.¹⁷ The truck was bound for Thailand's Phuket province, where the migrants planned to work.¹⁸ Though the driver's associates called him repeatedly during the early portion of the journey to remind him to check that the storage compartment's air conditioning was functioning properly, he stopped answering his phone when he encountered an extended period of treacherous winding roads.¹⁹ During this time, the migrants in the rear of the truck also tried to contact

17. Supara Janchitfah, *Open Borders to Human Rights*, BANGKOK POST, Jun. 1, 2008, available at http://www.caramasia.org/index.php?option=com_content&task=view&id=754&Itemid=51.

18. *Id.*

19. *Id.*; *Driver in Burmese Tragedy Surrenders*, BANGKOK POST, Apr.16, 2008, available at <http://www.mekongmigration.org/?p=60> [hereinafter *Driver*].

the driver by phone.²⁰ Though it is unclear whether the driver failed to turn the refrigeration unit on, or whether the unit subsequently failed, the migrants were rapidly running out of breathable air.²¹ Eventually, the driver pulled his truck to the side of the road in response to noises coming from the storage compartment, discovered that many of his passengers appeared near death, and fled.²²

When police arrived, they found that 54 of the 121 passengers had suffocated.²³ Among the survivors, the police discovered 14 children, 7 adult workers with proper documentation, and 46 workers without proper documentation.²⁴ The police charged these 46 workers with illegally entering Thailand—a charge typically resulting in a 2,000 baht fine.²⁵ Although such immigration fines are generally a light slap on the wrist for foreigners who overstay tourist visas,²⁶ the Burmese migrants were unable to pay.²⁷ As a result, authorities separated the children, and jailed the adults.²⁸ While imprisoned before being deported, the migrants were afforded virtually no legal representation by the state despite suffering actionable physical injuries and the potential for persecution upon return to Burma.²⁹

20. *Driver*, *supra* note 19.

21. *Id.*; Sutin Wannabovorn, *54 Illegal Migrants Suffocate in Truck in Thailand*, WASHINGTON POST, Apr. 11, 2008, at A15, available at <http://www.chinapost.com.tw/detail.asp?ID=151335&GRP=p2/54-Myanmar.htm>.

22. *Driver*, *supra* note 19; Wannabovorn, *supra* note 21.

23. *Driver*, *supra* note 19; Wannabovorn, *supra* note 21; Janchitfah, *supra* note 17.

24. Janchitfah, *supra* note 17.

25. *Id.* Based on historical currency exchange rates for April 9, 2008, from <http://www.xe.com>, this fine equaled approximately \$63 (US).

26. *See, e.g.*, Overstay, Thai Visa, Dec. 14, 2006, <http://www.thaivisa.com/303.0.html>.

27. Janchitfah, *supra* note 17.

28. *Myanmar Lorry Survivors Jailed*, ALJAZEERA.NET, Apr. 12, 2008, <http://english.aljazeera.net/news/asia-pacific/2008/04/2008525131427141242.html>.

29. Janchitfah, *supra* note 17; *see also* Vihit Muntarbhorn, Human Rights versus Human Trafficking in the Face of Globalization (Nov. 2002) (academic paper), available at http://www.hawaii.edu/global/projects_activities/Trafficking/Vitit.pdf. The public interest Law Society of Thailand, aided by the Federation of Trade Unions Burma, undertook civil representation of the migrants in an attempt to secure a financial settlement from the driver's insurance company. On February 17, 2009, the insurance company agreed to pay 35,000 baht (approximately \$992 (US)) to the family members of deceased victims, with the potential for another 65,000 baht payment if the deceased are "found to have not committed any crime." Unfortunately, this settlement does little to improve the long-term prospects of Burmese migrants in Thailand. First, while the settlement may provide temporary relief to victims' families, it hardly replaces the lost earnings over even a few years for deeply impoverished families. As well, the sum is not likely to be an effectively punitive measure to prevent future smuggling given that Burmese migrants typically save their employers far more than this amount in less than a year by working at a fraction of legal minimum wage. As a result, the fines provide little economic incentive to ensure transported workers' safety. Second, and connected with discussions throughout this paper,

B. The Ensuing Debate

Commenting on this incident, Thai human rights expert Vitit Muntarbhorn³⁰ criticized the police response for processing the migrants as criminals when they had been victims of serious crimes.³¹ Muntarbhorn argued that the migrants should have been given access to a broad range of legal protections and remedies provided for victims of similar harm under Thai law, including access to government aid programs.³² Reinforcing their status as victims, he stressed that the migrants “had been exploited every step of the way.”³³

In response, numerous police officials emphasized the legal distinction between responding to the incident as human trafficking, which Muntarbhorn supported, and human smuggling, a crime with significantly lesser penalties for the smugglers and no protections for the smuggled.³⁴ The police argued that the migrants came to Thailand by choice, did not have specific employers arranged at their destination, and once at their destination would not have undertaken requisite slave-like jobs required to meet the standard of trafficking.³⁵ A member of Thailand’s National Security Council directly questioned classifying the migrants as victims for its effect on national security laws.³⁶ Noting the millions of migrant laborers that cross into Thailand annually, Chartchai Bangchod stressed that a finding of victimization by human trafficking in the present case would undermine the enforcement of Thailand’s immigration laws.³⁷

Provoking strong emotional responses from both sides, the debate over the Burmese migrants’ fate parallels a global debate over distinctions between human smuggling and human trafficking. That debate is rooted in balancing key issues such as the heightened concerns over countries’ rights to take measures to secure their borders in order to protect national security concerns, the increasingly

the no crime clause on the potential second payment reinforces the Thai government’s hesitation to consider harmed Burmese migrants as “victims,” and its systematic extension of blame to these victims for crimes committed against them. Third, harms suffered by the surviving migrants are ignored, reinforcing the overall lack of access to judicial recourse by the vast majority of Burmese migrants suffering harm or injury in Thailand. *See* Mon Son & Blai Mon, *Families of 54 Migrants that Suffocated in April to Receive Compensation Tomorrow*, INDEPENDENT MON NEWS AGENCY, Feb. 17, 2009, <http://www.monnews-imna.com/newsupdate.php?ID=1324>.

30. Professor Muntarbhorn is a faculty member of Chulalongkorn University and UN Special Rapporteur on the situation of Human Rights in the People’s Democratic Republic of Korea. *See* Muntarbhorn, *supra* note 29, at 10.

31. Janchitfah, *supra* note 17.

32. *Id.*; *see also* Muntarbhorn, *supra* note 29.

33. Janchitfah, *supra* note 17.

34. *Id.*; *see* The Measures in Prevention and Suppression of Trafficking in Women and Children Act, B.E. 2540 (1997) (Thail.) [hereinafter 1997 Trafficking Statute].

35. Janchitfah, *supra* note 17.

36. *Id.*

37. *Id.*

vital economic role played by foreign migrant labor in the face of rapid globalization, and the underlying impoverishment and poor quality of life that typically serve as root causes of such migration.³⁸ Balancing these factors, the international community has worked toward a theoretical middle ground for immigration law standards, where states maintain sovereignty over their borders while at the same time protecting exploited migrants. However, as exemplified by the case of the Burmese migrants, such standards have failed to affect a lasting solution to key immigration issues facing migrant workers along the Thai-Burmese border. In particular, the standards for granting legal protections and remedies to exploited workers are applied so narrowly as to leave many classified as criminals who at the same time are victims of significant crimes.

C. Thai Anti-Smuggling and Anti-Trafficking Law

1. Measures in Prevention and Suppression of Trafficking in Women and Children Act (1997)

At the time of the migrant suffocation in Ranong, the Measures in Prevention and Suppression of Trafficking in Women and Children Act was Thailand's key anti-trafficking statute.³⁹ This statute failed to comply with minimum international trafficking prevention standards, including the UN's Trafficking Protocol, which Thailand intends to ratify in the near future.⁴⁰ Section 5 defined trafficking as follows:

buying, selling, vending, bringing from or sending to, receiving, detaining or confining any woman or child, or arranging for any woman or child to act or receive any act, for sexual gratification of another person, for an indecent sexual purpose, or for gaining any illegal benefit for his/herself or another person, with or without the consent of the woman or child, which is an offence under the Penal Code, the law on prostitution prevention and

38. See Tom Obokata, *Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law*, 17 INT'L J. REFUGEE L. 394, 396 (2005); see also Nancie Caraway, *Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse*, 14 TUL. J. INT'L & COMP. L. 295 (2006); Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 317 (2007).

39. 1997 Trafficking Statute.

40. See U.S. Dep't of State, *Trafficking in Persons Report* 243, 243-45 (2008), available at <http://www.state.gov/documents/organization/105659.pdf> [hereinafter State Dept. Trafficking Report].

suppression, the law on safety and welfare of children and youths, or this Act⁴¹

Although it uses expansive language potentially to define as trafficking acts involved in “gaining *any* illegal benefit for his/herself or another person,” the Act is equally marked by narrow, restrictive language.⁴² Specifically, the statute limits the protection stemming from designation as a trafficking victim strictly to women and children, and almost entirely to those trafficked for sexual purposes.⁴³

a. The Application to the Case of the April 9th Migrants

Under this statutory standard emphasizing sexual exploitation, police argued that the survivors of the migrant suffocation—including women and children—did not meet the standard for protection as victims of trafficking.⁴⁴ First and foremost, the police emphasized that the migrants were not victims of forced sexual exploitation, which they identified as the crucial element of human trafficking.⁴⁵ Additionally, the police noted that the smugglers had not forced the migrants to come to Thailand, and that the smugglers’ involvement with the individuals was due to end once the migrants reached the province of Phuket.⁴⁶

In response, supporters of the migrant workers argued that the Thai police interpretation of the Act directly contradicted the UN Trafficking and Smuggling Protocols.⁴⁷ Emphasizing the language of the Trafficking Protocol,

41. 1997 Trafficking Statute.

42. *See id.* (emphasis added).

43. *See id.*

44. State Dept. Trafficking Report, *supra* note 40; Janchitfah, *supra* note 17; Daw Aung Suu Kyi’s Pages, *Thai FM: Burmese Survivors Should Not Be Prosecuted*, Apr. 18, 2008, <http://www.dassk.com/contents.php?id=1863> (last visited Nov. 8, 2008).

45. Janchitfah, *supra* note 17. *Cf. infra* Part III.A.1. (particularly the Human Rights Caucus’ lobbying efforts to deemphasize sexual element of trafficking and to place increased emphasis on other forms of forced labor).

46. Janchitfah, *supra* note 17.

47. Janchitfah, *supra* note 17; *see also* Muntarbhorn, *supra* note 29. Predating this incident of the suffocated migrants, Muntarbhorn argued that while the heavily anti-crime nature of the Trafficking Protocol was “welcome,” the human rights element of the Protocol was “diluted.” *Id.* at 4. Consequently, he noted that the Trafficking Protocol

should thus be read holistically together with basic human rights principles such as non-discrimination, effective access to assistance and protection, adequate preventative measures, gender-and-child sensitivity, monitoring by the United Nations, and action against impunity of the perpetrators. These are underlined by key human rights instruments, *e.g.*, the Convention on the elimination of All Form of Discrimination against Women, the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Right of All Migrant Workers and

Vitit Muntarbhorn argued that police failed to consider whether threats of force or other forms of coercion transformed the migrants into victims of trafficking.⁴⁸ Muntarbhorn notes,

They were transferred by a third party, and were exploited, regardless of whether they were willing or not. They became slaves [W]ith or without consent of such [a] woman or child, such [transportation] act is an offense under the Penal Code [They] were detained, abducted and handed over to death or injury. If we consider the facts around the incident, in which they were exploited by others, it can be assumed that they are victims Forget if they are willing or not. What we must consider is if they have been exploited.⁴⁹

The debate between police officials and Muntarbhorn emphasizes a key problem in the development of domestic trafficking and smuggling laws—the question of applying the decisive “exploitation” standard narrowly, and almost exclusively to sexual crimes, or broadly, expanding it to include non-sexual situations where the possibility to coerce individuals negates their apparent consent.⁵⁰

2. The Anti-Trafficking in Persons Act B.E. 2551

On June 4, 2008, the Anti-Trafficking in Persons Act came into force in Thailand.⁵¹ While its effective date was after the migrant suffocation, Thai Parliament had passed the Act on January 30, 2008, thus showing its apparent intent to expand the range of crimes considered to be trafficking several months before the suffocation incident.⁵² At the same time, lingering ambiguities leave

Their Families, the International Labour Organization (ILO)’s Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, and the Rome Statute of the International Criminal Court. These have been advanced by the guidelines on human rights and the question of human trafficking prepared recently by the Office of the United Nations High Commissioner for Human Rights, and a number of guidelines adopted by non-governmental organizations on the subject.

Id. at 4–5.

48. Janchitfah, *supra* note 17.

49. *Id.*

50. *See also* Muntarbhorn, *supra* note 29.

51. Anti-Trafficking in Persons Act, B.E. 2552, (2008) (Thail.) [hereinafter 2008 Trafficking Statute].

52. *Id.*; State Dept. Trafficking Report, *supra* note 40.

considerable room for debate when defining incidents as trafficking or smuggling, problematizing this apparent expansion of crimes falling under the trafficking umbrella.

In addition to the removal of gender as a factor in determining trafficking, a key development in the new act is the explicit inclusion of exploitation as a standard with which to measure human trafficking.⁵³ The Act states, “‘Exploitation’ means seeking benefits from the prostitution, production or distribution of pornographic materials, . . . other forms of [labor] or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.”⁵⁴ The Act also defines forced labor as

compelling the other person to work or provide service by putting such person in fear of injury to life, body, liberty, reputation or property, of such person or another person by means of intimidation, use of force, or any other means causing such person to be in a state of being unable to resist.⁵⁵

Both of these additions are important developments. First, the inclusion of the term of exploitation is an overt attempt to align the Act with the standards of the Trafficking Protocol.⁵⁶ While the change from the former statute’s language of “gaining illegal benefit” from the victim to “exploitation” is not necessarily significant out of context, the adaptation of the explicit language of the Trafficking Protocol is a clear sign that the Thai Government designed the law to conform with the Protocol.⁵⁷ As well, the definition of exploitation is significant for more clearly suggesting that exploitation does not have to be sexual in nature to qualify as exploitation for the sake of trafficking, specifically referencing slavery, forced begging, and forced labor.⁵⁸ Second, the definition of forced labor is notable for including an expansive definition of coercive mechanisms such that any coercion where an individual is unable to resist pressure to work qualifies as trafficking.⁵⁹ On its face, the Act appears to expand significantly the boundaries of crimes that are considered trafficking rather than smuggling, and seems to

53. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 9 (2008); see also Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT’L L.J. 473, 477 (2003).

54. 2008 Trafficking Statute, § 4; see *infra* Part III.A.1.

55. 2008 Trafficking Statute, § 4.

56. See *infra* Part III.A.2.

57. Cf. Trafficking Protocol, art. 3; see State Dept. Trafficking Report, *supra* note 40.

58. This parallels the Human Rights Caucus-influenced portions of Article 3 of the Trafficking Protocol. See *infra* Part III.A.2.

59. See *infra* Part III.A.2.

parallel elements of Trafficking Protocol pressed for by the Human Rights Caucus.⁶⁰

Alternatively, the Act retains significant limitations for not clearly defining how it applies differently than the previous law. Most importantly, the apparently expansive definition of forced labor is without any specific examples as to when that category might apply where other explicit examples of trafficking would not.⁶¹ In this regard, the Thai government's adaptation of the Trafficking Protocol's exploitation standard is not necessarily a significant shift from the status quo. Rather, the problem of interpreting and applying incidents of exploitation leaves open the possibility that few, if any, incidents will be shifted into the category of trafficking from smuggling even if the language of the new statute appears more adaptable and expansive than the previous statute.⁶²

III. INTERNATIONAL LEGAL STANDARDS FOR HUMAN TRAFFICKING AND SMUGGLING

The systemic problems plaguing Thai trafficking and smuggling laws mirror problems plaguing anti-trafficking and anti-smuggling initiatives globally. As a historical survey of the development of these international initiatives reveals, attempts by the international community to create universalized frameworks for dealing with trafficking and smuggling grew from specific, regional problems. As a result, these broad frameworks were not necessarily designed in consideration of the varying contexts in which they might need to be adapted and applied.

A. Defining Trafficking

1. Background Debate

Measures to combat human trafficking are generally rooted in a broad, ongoing concern with eliminating evolving forms of human slavery,⁶³ but more recently became the focused subject of international concern after the fall of the Soviet Union created waves of former citizens of the Soviet Bloc seeking work in

60. See *infra* Part III.A.2.

61. See 2008 Trafficking Statute, § 4.

62. See *infra* Part. III.A.1. This section of the law parallels the CATW inspired portion of the Trafficking Protocol, likely remaining due to the CATW assertion that prostitution in any and all forms should qualify as trafficking, and CATW's reluctance to compromise with sex workers' rights organizations. In short, while the Trafficking Protocol's language appears to expand broadly to include all forms of forced labor, the explanatory examples within the statute still center around sexually-related forced labor, potentially undermining any expanded application of the statute.

63. See, e.g., Caraway, *supra* note 38, at 296–97, 302–04; Obokata, *supra* note 38.

the West, frequently enabled by criminal networks.⁶⁴ Criminal employers paid migrants low wages, forced them to work in poor conditions, and curtailed their freedom of movement.⁶⁵ As employers frequently forced migrants against their will either into the sex industry or into positions supporting the work of organized criminal networks, the international community began to address the problem not only as an issue of criminal law, but as one of basic human rights.⁶⁶ Thus, while the international community had historically used the terms “human smuggling” and “human trafficking” interchangeably,⁶⁷ it subsequently began concerted efforts to make the distinction between these terms clear to enable governments and NGOs to battle organized crime networks more effectively as increasing numbers of refugees enlisted these organized crime networks to aid in their transportation, and found themselves exploited.⁶⁸

In 2000, the Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children⁶⁹ (“Trafficking Protocol”) and the Protocol Against the Smuggling of Migrants by Land, Sea, and Air⁷⁰ (“Smuggling Protocol”) were attached to the United Nations Convention Against Transnational Organised Crime.⁷¹ Following the Conventions, the key differences between the definitions of trafficking and smuggling were summarized such that the crime of trafficking was defined as forcing clear victims into activities against their will to which they did not consent or understand, while smuggling was defined as an explicit and “mutually beneficial arrangement between two parties” involving illegal entry into a given country.⁷² These protocols served as the first definitions of human trafficking and human smuggling under international law.⁷³

These definitions grew from contentious debates between diplomats and NGOs on how to address prostitution.⁷⁴ Based in part on varied mores and

64. Ryszard Piotrowicz, *The UNHCR's Guidelines on Human Trafficking*, 20 INT'L J. REFUGEE L. 242, 242 (2008).

65. *Id.*

66. *Id.*

67. Obokata, *supra* note 38.

68. *Id.* at 394–95.

69. G.A. Res. 55/25, Annex II, UN Doc. A/RES/55/25/Annex II (Nov. 15, 2000) [hereinafter Trafficking Protocol].

70. G.A. Res 55/25, Annex III, UN Doc. A/RES/55/25/Annex III (Nov. 15, 2000) [hereinafter Smuggling Protocol].

71. G.A. Res 55/25, UN Doc. A/RES/55/25 (Nov. 15, 2000).

72. See Sarah King, *Human Trafficking: Addressing the International Criminal Industry in the Backyard*, 15 U. MIAMI INT'L & COMP. L. REV. 369, 371 (2008).

73. Obokata, *supra* note 38, at 395.

74. Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 NEMESIS 79, 79 (2003), available at <http://www.nswp.org/pdf/NEMESIS.PDF>; Jo Doezma, *Who Gets to Choose? Coercion, Consent and the UN Trafficking Protocol*, 10 GENDER & DEV. 20, 20 (2002); Obokata, *supra* note 38, at 394–96; see also Office for Democratic Institutions and Human Rights, Organization for Security and Co-operation in Europe, *Trafficking in Human Beings:*

stigmas related to prostitutes and prostitution, nations have traditionally differed in their approaches to its criminalization, with some criminalizing all elements of prostitution and others only criminalizing particular acts by particular participants.⁷⁵ Eventually, a coalition of human rights, anti-trafficking, and sex workers' rights NGOs, operating in a bloc known as the Human Rights Caucus, jointly lobbied UN officials to normalize international approaches to sex workers under anti-trafficking laws.⁷⁶ This coalition's cooperation was particularly unusual given that anti-trafficking advocates had traditionally argued that international standards should consider all forms of prostitution *de facto* trafficking.⁷⁷ Alternatively, sex workers' rights organizations had argued that governments frequently used anti-trafficking laws to restrict women's freedom of movement by withholding or confiscating passports in order to prevent women's travel into countries where they might subsequently become the victims of trafficking.⁷⁸ The Human Rights Caucus lobbied for a "broad and inclusive definition" of trafficking that would include "forced [labor], slavery and servitude, irrespective of the nature of the work or services provided or the sex of the trafficked person, and clearly excluding the voluntary, non-coercive prostitution or other sex work."⁷⁹ They pressed for a definition flagging the "presence of coercion, deception, debt bondage, abuse of authority or any other form of abuse in relation to the conditions of recruitment and/or the conditions of work," and sought human rights protections for all victims of such conditions.⁸⁰

Though the Human Rights Caucus contained factions that had traditionally supported defining all forms of prostitution as indications of trafficking, the Coalition Against Trafficking in Persons ("CATW") was unhappy

Implications for the OSCE, ODIHR Background Paper 199/3, Trafficking in Human Beings: Implications for the OSCE (1999); Human Rights Caucus, Recommendations and Commentary on the Draft Protocol to Prevent, Suppress, and Punish Trafficking in Persons at 4, U.N. Doc. A/AC.254/4/Add.3/Rev.2 (May 18, 1999) [hereinafter Human Rights Caucus]; Communication from the Commission to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation at 4, COM (1996) 567 final (Nov. 26, 1996).

75. See Sarah Richelson, Note, *Trafficking and Trade: How Regional Trade Agreements Can Combat the Trafficking of Persons in Brazil*, 25 ARIZ. J. INT'L & COMP. L. 857, 859–61 (2008); Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1, 18–19 (2004).

76. Ditmore & Wijers, *supra* note 74, at 79–81; Doezma, *supra* note 74, at 20–21.

77. Ditmore & Wijers, *supra* note 74, at 79–81; see also Human Rights Caucus, *supra* note 74.

78. Ditmore & Wijers, *supra* note 74, at 81 n.7 (discussing then-existing trafficking legislation in Hungary and the United Kingdom and noting that "already in 1912 Greece fought 'white slavery' by passing legislation forbidding women under 21 to travel abroad without a special permit"); see also Doezma, *supra* note 74.

79. Ditmore & Wijers, *supra* note 74, at 80.

80. *Id.*

with the potential compromise.⁸¹ Instead, the CATW pressed UN diplomats to consider all forms of prostitution as “forced labor.”⁸² The tension between these two blocs on the question of women’s agency resulted in a debate centered around the question of whether the type of work involved or the use of force and coercion should distinguish between trafficking and smuggling.⁸³

2. The Trafficking Protocol

The resulting definition embedded in the Trafficking Protocol reflects language used by both sides of this debate, but does not reach a clear resolution between them. Article 3 of the Trafficking Protocol states that

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at the 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 removal of organs.⁸⁴

Notably, the definition reflects the Human Rights Caucus’ concern with defining trafficking based on “force” and “coercion,” as well as the CATW’s concern with trafficking as fundamentally a prostitution-related crime, emphasized by the fact that the definition of exploitation focuses on references to “prostitution” and “sexual exploitation.”⁸⁵ However, this hybrid utilizes the ambiguous and confusing phrase “exploitation of the prostitution of others,” and leaves other exploitative labor practices largely undefined, making it more likely that states will narrowly apply trafficking statutes only to cases of prostitution.⁸⁶

81. *Id.*

82. *Id.*

83. *Id.* at 82–84.

84. Trafficking Protocol, *supra* note 69.

85. *See supra* Part II.A.

86. Trafficking Protocol, *supra* note 69.

B. Defining Smuggling

1. Human Smuggling, Refugees, and Migration

Issues related to the distinction between refugee and non-refugee migrants have heavily influenced national definitions of and attitudes toward human smuggling.⁸⁷ Customary international law prevents countries from punishing refugees for merely entering and prevents countries from returning refugees to their country of origin if doing so would place the refugees' lives or freedom in jeopardy.⁸⁸ While the determination of migrant status is relatively clear in certain circumstances, the distinction between refugees and migrants fleeing countries for an "absolute lack of opportunity" is difficult to categorize.⁸⁹ Furthermore, the causes underlying economic migration are factors that affect those migrants classified as refugees due to accompanying political concerns.⁹⁰ As many countries serve as a source of both political refugees and economic migrants at the same time, separating the two is problematic.⁹¹ Migrants nearly always claim they are refugees when they have fled from states with conditions potentially allowing these migrants to receive classification as a refugee, even when these political motivations were either secondary to economic motivations, or not present at all.⁹² Based on factors related to national sovereignty, including issues of defense, social unrest, economic concerns, and the reality of domestic disharmony frequently fostered by migration, states generally seek to restrict the

87. Claire Brolan, *An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective*, 14 INT'L J. REFUGEE L. 561, 563 (2002).

88. *Id.* (discussing the "non-refouler rule" and the Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150).

89. *Id.* at 566–67 (calling the situation of "distinguishing between people impelled to flee from persecution (refugees), and people impelled to flee from abject poverty and absolute lack of opportunity (so-called 'economic migrants')" a "moral dilemma" for Western states).

90. *Id.*; Adrienne Millbank, *The Problem with the 1951 Refugee Convention* (2000–2001) (parliament research paper) (Austl.), available at <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP05.htm>. Brolan illustrates this argument by detailing the causes most frequently cited by refugees for fleeing to the U.K. Many refugees cite economic factors inherently linked to conditions of war or political oppression (including Algeria, Angola, China, Somalia, and Zimbabwe) or economic factors alone (including the Czech Republic, India, Pakistan, Russia, and Turkey). Brolan, *supra* note 87, at 568–69 (citing *G2—Roads to Britain*, THE GUARDIAN (UK), May 21, 2001, at 11).

91. See, e.g., Global Consultations on International Protection, *Refugee Protection and Migration Control: Perspectives of UNHCR and IOM*, ¶ 2, U.N. Doc. EC/GC/01/11 (May 31, 2001); Executive Committee of the High Commissioner's Program, *Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, ¶ 26, U.N. Doc. EC/5-/SC/CRP.17 (Jun. 17, 2000).

92. Brolan, *supra* note 87, at 569.

number of those migrants who qualify as refugees.⁹³ Still, the more a state works to close its borders to migrants, the greater the economic incentives become to those who can facilitate these border crossings illegally.⁹⁴

In the late 1990s, Italy saw an increasing number of migrants landing on its shores, and this trend prompted Italy to call upon the international community to adopt a common legal approach for dealing with human smuggling.⁹⁵ Italy and other states began to realize that international organized criminal networks facilitated this wave of unwanted migrants, and that this problem required an organized, international response.⁹⁶ This action coincided with discussions already underway for a Convention aimed at tackling international organized crime in general, and the Commission on Crime Prevention and Criminal Justice under the UN Economic and Social Council flagged issues related to human smuggling to be dealt with by an accompanying Protocol.⁹⁷

2. The Smuggling Protocol

Supplementing the Transnational Organized Crime Convention, the Smuggling Protocol defines smuggling as “[t]he procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a State Party of which the person is not a national or permanent resident.”⁹⁸ The Protocol does not make migration a crime, and it encourages governments to adopt measures to protect smuggled migrants in dangerous and inhuman situations.⁹⁹ Furthermore, the Protocol makes explicit mention that nations must not use the Protocol to infringe on pre-existing rights frameworks, including the Convention on Refugees.¹⁰⁰ This document binds all state

93. *Id.* at 575–76; Stephen Krasner, *Think Again: Sovereignty*, FOREIGN POLICY 121, 122 (Jan. 2001); see also Guy Goodwin Gill, *After the Cold War: Asylum and the Refugee Concept Move on*, 10 FORCED MIGRATION REV. 14 (2001); Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18 INT’L J. REFUGEE L. 509 (2006).

94. Brolan, *supra* note 87, at 576.

95. See Andree Kirchner & Lorenzo Schiano di Pepe, *International Attempts to Conclude a Convention to Combat Illegal Migration*, 10 INT’L J. REFUGEE L. 662 (1998); Hathaway, *supra* note 53, at 9; Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975 (2001).

96. Brolan, *supra* note 87, at 582.

97. *Id.*

98. Smuggling Protocol, *supra* note 70, art 3.

99. *Id.* art. 6(3)(a)–(b) and 16.

100. *Id.* art. 19.

signatories of the Smuggling Protocol to follow the 1951 Convention, even if they had not previously adopted it.¹⁰¹

C. Trafficking and Smuggling Protocols: Complement, Overlap, and Disconnect

Although the Trafficking and Smuggling Protocols emerged to complement the Transnational Organized Crime Convention,¹⁰² and the operable standards of “consent” and “exploitation” attempt to simplify the two crimes as elements of a common spectrum, the reality is far less precise. As suggested by the unique factors driving the processes by which diplomats wrote each,¹⁰³ the Protocols are hardly seamless, complementary legal documents.

Generally, four key points distinguish the Protocols.¹⁰⁴ First, smuggling involves the voluntary consent of the smuggled, while trafficking involves “coercion and/or deception.”¹⁰⁵ Second, trafficking involves exploitation of the trafficked individuals after transportation while smuggling ends with the end of transportation.¹⁰⁶ Third, smuggling is exclusively transnational, while trafficking may occur across borders or within a single country.¹⁰⁷ Fourth, while victims of trafficking may enter a state legally or illegally, smuggling requires illegal entry¹⁰⁸ and, as a consequence, “those smuggled will inevitably be regarded as illegal migrants.”¹⁰⁹

These distinctions encourage states to create fundamentally separate response mechanisms to trafficking and smuggling.¹¹⁰ Including exploitation as an element of trafficking results in the treatment of those defined as victims of trafficking to also be categorized as victims of human rights abuses, and encourages states to create systems to protect the trafficked, regardless of whether

101. Brolan, *supra* note 87, at 591–92.

102. *See supra* II.A.–B.

103. *See supra* II.A.–B.

104. For summary and overview of the construction, *see generally* Obokata, *supra* note 38; Hathaway, *supra* note 95.

105. Obokata, *supra* note 38, at 396; *see also* Patrick Twomey, *Europe's Other Market: Trafficking in People*, 2 EUR. J. OF MIGRATION & L. 1, 7 (2000).

106. Smuggling Protocol, *supra* note 70; Obokata, *supra* note 38, at 396–97.

107. Smuggling Protocol, *supra* note 70; Obokata, *supra* note 38, at 397.

108. *Id.*

109. Obokata, *supra* note 38, at 397.

110. *Id.*; *see also* Kelly E. Highland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 34 (2001); Liz Kelly & Linda Regan, *Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in Women for Sexual Exploitation in the UK* (2000), <http://www.homeoffice.gov.uk/rds/prgpdfs/fprs125.pdf>.

they crossed a national border illegally.¹¹¹ Alternatively, defining smuggling as involving a voluntary violation of immigration laws encourages “enforcement measures such as arrest, detention and deportation.”¹¹² Furthermore, while the Trafficking Protocol provides for significant protection of trafficking victims, including access to rehabilitative social programs as well as immunity from prosecution for immigration violations, the Smuggling Protocol limits prosecution against smuggled individuals for being complicit in their own smuggling specifically, but does not limit prosecution for their violation of immigration laws that occur during the smuggling.¹¹³ Ultimately, the Protocols have turned the two formerly interchangeable terms of trafficking and smuggling into highly-charged standards to which state responses vary radically.¹¹⁴

1. Pragmatic Issues in the Application of the Protocols: The Legislative Guide to the Convention

Accompanying the Transnational Organized Crime Convention, the UN released a Legislative Guide to implementing the Organized Crime Convention, which includes guides to implementing the Trafficking and Smuggling Protocols.¹¹⁵ The Guide notes that while human trafficking and human smuggling are part of an overlapping continuum, issues particular to each crime require independent protocols to foment independent legal enforcement mechanisms.¹¹⁶ While concern with human trafficking enforcement has existed for a longer period

111. Obokata, *supra* note 38, at 397.

112. *Id.*; see also Gallagher, *supra* note 95, at 999.

113. Obokata, *supra* note 38, at 398; Gallagher, *supra* note 95, at 999; see also Bo Cooper, *A New Approach to Protection and Law Enforcement under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1047 (2002) (noting that the definition of smuggling leaves open the door to interpretation that the smuggled are willing violators of national immigration laws).

114. See Obokata, *supra* note 38.

115. Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organized Crime (2004), available at http://www.undoc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf; Legislative Guide for the Implementation of the Protocol to Prevent and Suppress Trafficking in Persons, Especially Women and Children (2004), available at http://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf [hereinafter Trafficking Guide]; 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), available at http://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf [hereinafter Smuggling Guide].

116. Smuggling Guide, *supra* note 115, at 339–40; see also Hathaway, *supra* note 95, at 26–27.

of time, concern over the issues of human smuggling are more recent.¹¹⁷ In particular, while many states have long fought human smuggling by enforcing domestic immigration laws against the smuggled, concern over criminalizing the actions of the smugglers is more recent, and is the primary concern of the Protocol.¹¹⁸ The Guide stresses that the Protocol does not apply to victims of smuggling, but rather to the smugglers alone.¹¹⁹

At the same time, even while stressing that the Smuggling Protocol is not intended to criminalize or increase the criminalization of smuggled individuals, the Smuggling Guide repeatedly uses language to stress that those smuggled are not victims either. It states that the separate protocol was enacted “primarily because of differences between trafficked persons, who are victims of the crime of trafficking and, in many cases, of other crimes as well, and smuggled migrants.”¹²⁰ Defining the types of victimization that distinguish between those who are trafficked and those who are smuggled, the Smuggling Guide states,

The major differences lie in the fact that, in the case of trafficking, offenders recruit or gain control of victims by coercive, deceptive or abusive means and obtain profits as a result of some form of exploitation of the victims after they have been moved, commonly in the form of prostitution or coerced labour of some kind. In the case of smuggling, on the other hand, migrants are recruited voluntarily and may be to some degree complicit in their own smuggling.¹²¹

Even while admitting an overlap between trafficking and smuggling issues, the Guide’s language reinforces a sense that these definitions are on polar opposite ends of a spectrum with the trafficked individuals as clearly exploited victims at one end and the smuggled individuals as willing and complicit participants at the other end.

2. Questioning the Trafficking-Smuggling Continuum: The Problem of Victims and Smuggling

The crucial problem may be that trafficking and smuggling as defined in the protocols are not part of the same continuum at all.¹²² Because the Smuggling Protocol is rooted in expanding criminal sanctions for smugglers, not in protecting

117. Smuggling Guide, *supra* note 115, at 340.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 340–41.

122. *See, e.g.*, Obokata, *supra* note 38; Caraway, *supra* note 38; Chang, *supra* note 38.

the human rights of the individuals smuggled as with the Trafficking Protocol, it encourages a fundamental disconnect between the analyses of these crimes. Operating as a Catch-22, the Smuggling Protocol's explanation that smuggled individuals are not victims is problematic and misleading, suggesting that those individuals labeled as smuggled are labeled that way because they were not victimized, and reinforcing such sentiments as those of the Thai police that those classified as smuggled are not victims.¹²³ Instead, the classification of smuggling should be neutral towards the issue of whether the smuggled are victims of other crimes. The UN developed the Smuggling Protocol to combat and criminalize transnational organized networks that subvert national immigration laws and policies, but expressly directs the Smuggling Protocol at smugglers, and not technically toward the smuggled individuals themselves.¹²⁴ Rather than considering smuggling and trafficking as two ends of a sliding spectrum, it is more accurate to recognize the Trafficking Protocol and the Smuggling Protocol as fundamentally disconnected. Therefore, it is important to recognize that the analyses and procedures for classifying an incident as smuggling or trafficking are also fundamentally disconnected, and the findings of one analysis should not ostensibly impact the findings of the other.

It is crucial to recognize that trafficking and smuggling emerged in response to particularized issues and not as comprehensive, universalized, and mutually exclusive analytical frameworks. While this emerging concern with human trafficking was certainly a positive development in theory, the impact of context on the development of human trafficking protocols needs to be considered as well. Namely, the underlying concerns of the Trafficking Protocol are primarily rooted in post-Soviet Bloc sexual exploitation. As such, the Trafficking Protocol has natural limitations when applied in other contexts, including migration of Burmese workers to Thailand. This is not to say that the Trafficking Protocol is fatally flawed, but rather that any given country must adapt domestic laws to meet the Protocol while considering the particularities of their domestic concerns to operate most effectively.

Given the specific historical context giving rise to the Protocols, the notion that trafficking and smuggling are seamless parts of a single, all-encompassing continuum is further problematized.¹²⁵ In fact, the historical context of the Trafficking Protocol's origins helps to reinforce the combined limitations of the Protocols given that they were created to address somewhat narrow problems in limited geographical regions. It suggests that it is ineffective simply to assume the Smuggling Protocol is the de facto applicable standard when the Trafficking Protocol does not fit snugly around a given incident. This is particularly important given the fact that the Trafficking Protocol, grounded in post-Soviet Bloc migrant issues, is concerned with issues of criminal law and human rights,

123. See Janchitfah, *supra* note 17.

124. Smuggling Guide, *supra* note 115, at 340.

125. See *supra* Part III.C.

while the Smuggling Protocol, grounded in concerns over subsequent organized criminal networks' impact on migration, is concerned primarily with issues of criminal law alone. Incidents falling into the category of smuggling may not be less severe or exploitative than those falling under the category of trafficking. Rather, the human rights discourse of victims' protection surrounding incidents of smuggling is simply less developed.

IV. BURMESE MIGRANT LABOR IN THAILAND

The underdeveloped discourse on victims' rights during and after smuggling is especially troubling in the case of Burmese migrant workers along the Thai-Burmese border. There, the paradigm of trafficking as victimization and smuggling as consented-to transportation is generally inapplicable. The severe political and economic crises are driving migrants from Burma, where the migrants face death and other human rights abuses. Likewise, the migrants face a pattern of unconsented-to abuses at the hands of employers in Thailand. Thus, while the Burmese consent to be transported, exploitation both precedes and follows this choice. Furthermore, the Thai economy's reliance on Burmese migrant labor is an additional hurdle to applying the generic Trafficking and Smuggling Protocols "as is" along the Thai-Burmese border. Thailand relies on a steady stream of often undocumented migrant workers, and the migrants' employers and handlers seemingly use the trafficking as unconsented-to/smuggling as consented-to dichotomy to exploit and abuse migrants with impunity, and to keep the price of migrant labor artificially low. In short, the reality of Burmese migrant labor in Thailand reveals some of the dramatic shortcomings of the global Trafficking and Smuggling Protocols, particularly the failure to recognize smuggled migrants as victims even where they face exploitation and abuse simply because they consent to being transported. Alternatively, the unique details of Burma's modern history underscore the limitations of a strict exploitation or consent dichotomy when defining trafficking or smuggling.

A. Historical Background of Burmese Migration into Thailand

1. The Patchwork Modern Nation-State Arising from the Colonial Era

The territory and ethnic groups comprising present-day Burma solidified under British colonial rule.¹²⁶ At that time, colonial rulers included outlying

126. Louise Southalan, *Issue of Self-Determination in Burma*, 5 LEGAL ISSUES ON BURMA J. 7, 7-8 (2004); Bryant Yuan Fu Yang, *Life and Death Away from the Golden*

regions that previously operated autonomously under the direction of a centralized government.¹²⁷ When Burma gained independence in 1948, these colonial borders remained without much consideration granted to realignment in order to return political autonomy to traditionally autonomous regions.¹²⁸ Numerous ethnic groups within Burma continued to pressure the central government for autonomy or independence, particularly in response to perceived fears that the government planned to subsume ethnic groups into a common national fold.¹²⁹ Instability and unrest continued for the next decade, until 1962, when the military seized power for the stated purpose of maintaining unity within the state.¹³⁰ However, this takeover has failed to calm tensions between ethnic groups, and individuals fleeing the fighting—both as members of a target ethnic group or simply as citizens caught in the middle of conflict—have steadily fled to relative safety in Thailand.¹³¹

2. The 8888 Uprising

Beyond the military's ongoing conflict with ethnic groups throughout the country, political persecution has remained rampant. The government has maintained control by responding brutally even to the most peaceful demonstrations.¹³² On August 8, 1988, tensions over the military rule appeared to reach a head as protestors flooded streets demanding return to a representative government.¹³³ The military responded violently, gunning down protestors even

Land: The Plight of Burmese Migrant Workers in Thailand, 8 ASIAN-PAC. L. & POL'Y J. 485, 488–89 (2007).

127. Southalan, *supra* note 126, at 7–8; Yang, *supra* note 126, at 488–89; MARTIN SMITH, *BURMA: INSURGENCY AND POLITICS OF ETHNICITY* 42–43 (1999); *see also* GEORGE ORWELL, *BURMESE DAYS* (1934) (a fictional but nuanced discussion of the end period of British colonial rule in Burma exploring the relationship of Burmese political leaders seeking to maintain power within the bureaucratic system established by the British).

128. Yang, *supra* note 126, at 488–89.

129. *Id.*; Josef Silverstein, *Burma's Uneven Struggle*, 7.4 J. DEMOCRACY 488, 488 (1996).

130. *Id.*

131. Yang, *supra* note 126, at 490–92.

132. *See, e.g.*, Dominic Faulder, *Memories of 8.8.88*, THE IRRAWADDY (Aug. 2008), available at http://www.irrawaddy.org/article.php?art_id=13758&page=1; AMNESTY INTERNATIONAL, MYANMAR: EIGHTEEN YEARS OF PROSECUTION (Oct. 24, 2007), available at <http://www.amnesty.org/en/news-and-updates/feature-stories/myanmar-eighteen-years-persecution-20071024>; Stephen Schwartz, *The Saffron Revolution: Bloody But Hopeful Days in Burma*, THE WEEKLY STANDARD, Oct. 8, 2007, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/174jedwp.asp>.

133. Silverstein, *supra* note 129, at 88; Yang, *supra* note 126, at 492.

as they fled.¹³⁴ In the years immediately following the “8888 Uprising,” the military severely curtailed freedoms of speech and assembly, and imprisoned or killed political activists.¹³⁵ The military also began imposing forced labor on its citizens, including using some as expendable human minesweepers.¹³⁶ As detailed by International Labor Organization (“ILO”) reports, government officials routinely rounded up and forced villagers to porter materials for the government without food, water, or compensation.¹³⁷ If villagers refused, they faced retribution in the form of physical abuse, torture, rape, and death.¹³⁸ In 1990, military officials invalidated the results of a national election when the opposition party, NLD, led by future Nobel laureate Daw Aung San Suu Kyi, gained a sweeping majority of votes.¹³⁹ However, the ruling SLORC party, dominated by military officials, invalidated election results, and placed elected party members in jail, including Dr. Suu Kyi, who remains under house arrest to this day.¹⁴⁰ Though it briefly looked as though it could be the end of the military dictatorship in Burma, the 8888 Uprising has instead served to mark the dawning of an era of heightened military power.

3. The Saffron Revolution

In recent years, political tensions and economic hardships within Burma have only gotten worse. Late in 2006, with per capita annual income hovering near \$300 (US), the cost of basic commodities such as rice, eggs, and cooking oil all rose between 30 and 40%, which represented an extreme burden for people who on average spent 70% of their income on food.¹⁴¹ The hardship was

134. Laurent Rotroff, *Should the ICTB be the Next International Criminal Tribunal?: Examining the Burmese Junta as a Candidate for an International Criminal Tribunal for Burma*, 9 NEW ENG. INT’L & COMP. L. ANN. 491, 498 (2003).

135. Silverstein, *supra* note 129, at 89.

136. Yang, *supra* note 126, at 494. Not only were women used as disposable minesweepers, but they became the targets of a widespread and deliberate campaign of rape by members of the military for the purposes of repressing potential dissenting groups. *Id.* (citing *John Doe I v. UNOCAL Corp.*, 395 F.3d 932, 939 (9th Cir. 2002)).

137. International Labor Organization, Forced Labor in Myanmar (Burma): Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labor Organization to Examine the Observance by Myanmar of the Forced Labor Convention, 1930 (No. 29) (1998), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm> [hereinafter Forced Labor Report] (discussing the construction practices of an oil pipeline that became the subject of a major Alien Tort Claims Act suit in *UNOCAL*, 395 F.3d at 932-63).

138. Forced Labor Report, *supra* note 137, at ¶ 482.

139. Yang, *supra* note 126, at 494.

140. *Id.*

141. Jonathan Head, *The Hardship That Sparked Burma’s Unrest*, BBC NEWS, Oct. 2, 2007, <http://news.bbc.co.uk/1/hi/world/asia-pacific/7023548.stm>; see also Aung San Suu

exacerbated in August of 2007 when government leaders announced cuts in fuel subsidies leading to gas price increases that crippled the country's transportation infrastructure.¹⁴² Immediately, many were unable to travel even to work,¹⁴³ and food prices rose higher.¹⁴⁴ Police quickly arrested initial activists, after which Buddhist monks took to the streets in protest over the economic hardships.¹⁴⁵ Police injured a number of monks while attempting to disperse the protest in early September, sparking the dramatic participation of hundreds of thousands more monks in demonstrations.¹⁴⁶ Though it was the largest political demonstration in Burma since the 1988 uprising, the government ultimately quelled protesters through brute force, leaving the underlying economic causes unchanged.¹⁴⁷

4. Cyclone Nargis

On May 2, 2008, Cyclone Nargis made landfall, striking at Burma's fragile, underdeveloped infrastructure with tremendous force, leaving an estimated 138,000 dead and another 2.4 million homeless.¹⁴⁸ Burma's military government initially refused to allow foreign aid workers entry to the most devastated regions, and foreign aid experts immediately warned that Burma lacked the necessary tools to distribute aid effectively to those struck by the cyclone.¹⁴⁹ Though it eventually granted access to a limited number of aid workers, the government continued to handle ongoing relief efforts with entrenched malevolence.¹⁵⁰ Almost immediately, reports surfaced that the Burmese government had quickly pushed cyclone survivors out of refugee camps, forcing them to return to flood-stricken areas without food, water, shelter, or medical care.¹⁵¹

Kyi & Fergal Keane, *Breakfast Blues*, in *LETTERS FROM BURMA 27-30* (1998) (illustrating the long term impact of inflation by discussing the progressive simplification of meals on typical Burmese breakfast tables, particularly the growing absence of meat).

142. *Burma Leaders Double Fuel Prices*, BBC NEWS (Aug. 15, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/6947251.stm>.

143. *Id.*

144. Head, *supra* note 141.

145. *Id.* (noting that the rapid reduction in morning alms given to monks in the form of food served as a clear indicator of the dramatically worsening economic situation for most Burmese citizens).

146. *Q&A: Protests in Burma*, BBC NEWS (Oct. 2, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/7010202.stm>.

147. Head, *supra* note 141.

148. *Myanmar Cyclone Toll Rises to 138,000 Dead, Missing*, REUTERS UK (Jun. 24, 2008), <http://uk.reuters.com/article/featuredCrisis/idUKBKK15852620080624>.

149. *Burma Shuns Foreign Aid Workers*, BBC NEWS, May 9, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7391535.stm>.

150. *See Burmese Junta Forcing Cyclone Victims out of Emergency Camps: Amnesty*, CBC NEWS, Jun. 5, 2008, <http://www.cbc.ca/world/story/2008/06/05/burma-amnesty.html>.

151. *Id.*

In many cases, the government appears to have utilized displacements for political gain.¹⁵² Many displaced by the cyclone were unable to vote in the constitutional referendum scheduled for May 10, and the government declared May 24 a second day of balloting in certain affected townships in order to prevent accusations that they had prevented these individuals from voting—even if the outcome of the referendum officially entrenching military control over the country was never in doubt.¹⁵³ Reports note government officials appear to have used foreign aid donations in exchange for votes and labor, and to have frequently distributed aid in repackaged containers to make it appear to Burmese citizens that their government had provided the aid, rather than foreign governments and NGOs.¹⁵⁴ Furthermore, given the Burmese military government's history of utilizing forced labor, Amnesty International expressed concern that the widespread displacement and lack of basic commodities in the aftermath of Cyclone Nargis allowed the government to further develop its forced labor programs.¹⁵⁵

B. The Current Landscape of Burmese Migrant Labor in Thailand

1. Background Data

In the wake of worsening economic and political conditions over the course of decades, nearly one million registered Burmese migrant workers live in Thailand, and while government estimates suggest between two and six million are unregistered, Burmese migrants likely amount to between five and ten percent of Thailand's population.¹⁵⁶ These migrants typically fill jobs in sectors such as construction, agriculture, fishing, manufacturing, and domestic services.¹⁵⁷ Not only does Thailand benefit economically from the migrants' reduced labor costs, typically amounting to just 60–70% of what Thai citizens would make for similar menial labor, but businesses are generally unable to find Thai citizens to take such

152. Amnesty International, Myanmar Briefing: Human Rights Concerns a Month after Cyclone Nargis, at 10 (Jun. 5, 2008), *available at* <http://www.amnesty.org/en/library/asset/ASA16/013/2008/en/85931049-32e5-11dd863fe9cd398f74da/asa160132008eng.pdf> [hereinafter Myanmar Briefing].

153. *Id.*; see also Yeni & Min Lwin, *Massive Cheating Reported from Referendum Polling Stations*, THE IRRAWADDY, May 10, 2008, http://www.irrawaddy.org/article.php?art_id=11923.

154. See Myanmar Briefing, *supra* note 152.

155. *Id.* at 10.

156. Yang, *supra* note 126, at 488–89; CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2008), *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/th.html>; STATISTICAL FORECASTING BUREAU, THAIL. MINISTRY OF INFO & COMM. TECH., STATISTICAL YEARBOOK THAILAND 2004 (2005).

157. Yang, *supra* note 126, at 500–01.

jobs at all, because many Thai citizens refuse the type of work done by Burmese migrants, viewing it as demeaning.¹⁵⁸ As a result, Burmese migrants play a truly integral role in the Thai economy.

2. The Working Conditions of Burmese Migrants in Thailand: Underlying Factors

Constituting what can be described as abuse and exploitation, and problematizing the notion of migrants as criminal illegal immigrants rather than exploited workers, Burmese migrant workers in Thailand face tremendous hardships in the workplace as a result of several factors, including tenuous and vague legal statuses, pro-business incentives in areas of high Burmese migrant concentration, and police corruption.¹⁵⁹

a. The Problem of Legal Status

In recent years, the Thai government has worked to regularize migration in order to gain greater control over the rapid influx of Burmese migrants in order to effectively fill the labor needs of Thai employers.¹⁶⁰ However, the registration process accompanying this program is often prohibitively complex, creating new problems.¹⁶¹ First, the government allows registration at non-fixed periodic intervals, meaning that workers in the country cannot register at their convenience.¹⁶² Thus, workers who would be eligible for registration are frequently unable to do so, leaving them with an illegal status.

Second, political refugees granted access to refugee camps often find that the camps do not have adequate amounts of food and other crucial resources, and leave camps in order to find employment because they are not allowed to work while in the camps.¹⁶³ Because it will not allow individuals to work under refugee status, the government undermines its objective of managing immigration by forcing these documented individuals living in safe and identified housing areas

158. Sumalee Pitayanon, *Migration of Labour into Thailand*, 13 CHULALONGKORN J. OF ECON. 2, 13 (2002).

159. See Yang, *supra* note 126, at 485–535 (2007); Dennis Arnold & Kevin Hewison, *Exploitation in Global Supply Chains: Burmese Migrant Workers in Mae Sot, Thailand*, 35(3) J. CONTEMP. ASIA 319, 319–340 (2005), available at http://burmalibrary.org/docs3/EXPLOITATION_IN_GLOBAL_SUPPLY_CHAINS.pdf.

160. Yang, *supra* note 126, at 505–510.

161. *Id.*

162. See *id.*

163. See Press Release, Burma Lawyers' Council, Child Abduction is Every Parent's Worst Nightmare (June 27, 2008) (on file with author); Sumalee Pitayanon, *supra* note 158, at 12.

into an at least temporarily undocumented, illegal status during which time the refugees are at greater risk for exploitation, and during which the government has no effective procedure to trace or regulate these refugees.

Third, the Thai government charges a 3,800 baht registration fee,¹⁶⁴ including costs for bureaucratic processing, a medical check-up, and enrollment in the Thai national health care program.¹⁶⁵ This registration fee is an impossible sum for many, if not most, Burmese migrant workers whose pay may reach as little as 50 baht per day.¹⁶⁶ Likewise, employers who advance the fees to workers may garnish wages in amounts far greater than the actual fees, resulting in a best case scenario of protracted employment while bound to a particular employer at significantly lowered wages.¹⁶⁷

If an employee wants to change their employer, they must re-register and incur fees again.¹⁶⁸ While employers claim this protects their investment in employee registration fees, employers frequently leverage this re-registration requirement to control workers.¹⁶⁹ While in violation of Thai law, employers frequently hold original documents, and give employees only non-legally valid photocopies, which subjects workers to the constant threat of deportation by local police and immigration officials when the workers are away from the confines of their employer.¹⁷⁰ Exploiting this threat of deportation, employers frequently withhold workers' pay and force workers to work long hours.¹⁷¹

164. Over the past decade, 3800 baht has generally corresponded at or near to \$100 (US).

165. Press Release, Burma Lawyers' Council, Child Abduction is Every Parent's Worst Nightmare (Jun. 27, 2008) (on file with author); Pitayanon, *Migration of Labour into Thailand*, *supra* note 158, at 12; Yang, *supra* note 126, at 506.

166. Press Release, Burma Lawyers' Council, Child Abduction is Every Parent's Worst Nightmare (Jun. 27, 2008) (on file with author); Pitayanon, *Migration of Labour into Thailand*, *supra* note 158, at 12; Yang, *supra* note 126, at 507; *see also* Naw Seng, *Labor-Burma: Thai Crackdown Means Life in Hiding, Uncertainty*, INTER PRESS SERV., Mar. 22, 2004.

167. *See* Yang, *supra* note 126, at 508–09.

168. *Id.*; JERROLD W. HUGUET & SUREEPORN PUNPUING, INTERNATIONAL MIGRATION IN THAILAND 39 (2005), *available at* http://www.humantrafficking.org/uploads/publications/iom_thailand.pdf.

169. *See* Yang, *supra* note 126, at 508–09; Huguet & Punpuing, *supra* note 168, at 39.

170. Yang, *supra* note 126, at 509.

171. *See, e.g.*, Marwaan Macan-Makar, *Thailand: Burmese Migrants Find Low Pay and Harsh Work*, INTER PRESS SERV., Oct. 1, 2003. As well, even when employees register properly, the Thai government prohibits movement outside of the province in which they are registered. As a result, family members registered in different provinces may not visit one another without the risk of deportation. *See* Yang, *supra* note 126, at 509; Hanna Ingber, *Even Legal Migrants Face Problems*, THE IRRAWADDY, June 1, 2005, http://www.irrawaddy.org/article.php?art_id=4682.

b. The Concerns of Industry

While the flawed registration system inherently grants employers potentially exploitative power over workers,¹⁷² Thai statutory and administrative law creates broad economic incentives to utilize this Burmese migrant labor.¹⁷³ In 1993, Thailand's Board of Investment created a number of investment promotion zones aimed at increasing development outside of traditionally centralized industrial areas.¹⁷⁴ This program grants industries investing in areas nearest the Burmese border the greatest economic incentives, including exemption from import duties on heavy machinery, full corporate tax exemptions for a project's first eight years, complete tariff exemption on imported raw materials used in products for export for five years, and a 75% tariff exemption on raw materials used in products sold domestically.¹⁷⁵ These incentives, coupled with the availability of sub-minimum wage Burmese migrant labor, serve to attract factories to border areas in particular.¹⁷⁶ Mae Sot, a rural border town in Thailand's Tak Province, has an estimated 100,000 Burmese workers spread across 200 factories, giving manufacturing firms tremendous incentives to take advantage of the cheap, plentiful, and functionally unregulated labor market.¹⁷⁷

c. Police Corruption

Further contributing to the pressure on Burmese workers, immigration enforcement procedures, particularly in border towns and provinces, provide a lucrative source of income for police and customs officials.¹⁷⁸ Such income may take the form of required bribes to process bureaucratic documents, extortion of migrants outside of the workplace, cooperative arrangements with employers to selectively enforce immigration laws for the benefit of factories, active involvement in legal business ventures, including ownership of local factories using Burmese labor, and illegal business ventures, including smuggling drugs and sex workers.¹⁷⁹

172. *See infra* Part V.B.2.a.

173. Arnold & Hewison, *supra* note 159, at 320–21.

174. *Id.*

175. Thailand Board of Investment, Incentives: BOI Privileges by Location, http://www.boi.go.th/english/about/boi_privileges_by_location.asp (last visited Sept. 18, 2009).

176. *See* Arnold & Hewison, *supra* note 159, at 320–21.

177. *Id.*

178. *Id.* at 331–32.

179. *See id.*

3. Conditions of Burmese Migrants in Thailand at Work and Beyond: The Example of Mae Sot

In spite of claimed governmental goals of better regulating migration and employer assertions that current governmental regulation helps to safeguard investments in migrant workers,¹⁸⁰ the combined effect of migrant worker registration programs, governmental regulations promoting development along the Burmese border, and corrupt customs and police officials has frequent disastrous consequences, often rising to levels of human rights violations.¹⁸¹ Although the undocumented, underground nature of the Burmese migrants' exploitation makes exact statistical quantification difficult, patterns of abuse are nonetheless readily apparent, and paint a striking portrait of Burmese migrants' lives as laborers in Thailand.¹⁸²

a. Basic Working Conditions in Mae Sot

Although the Thai government has set Mae Sot's minimum wage at 135 baht per day, Burmese migrant workers in Mae Sot typically earn between fifty and seventy baht,¹⁸³ live in crowded housing accommodations, and are fed only low quality rice, while both food and board are frequently deducted from workers' pay at higher than their cost to employers.¹⁸⁴ In many cases, migrants work more than twelve hours per day, and receive no more than one vacation day per month.¹⁸⁵ Additionally, factories frequently deduct money from workers' pay for lost materials when the factories judge products produced by workers as substandard, a maneuver workers often see as arbitrary.¹⁸⁶

Studies have suggested that Burmese migrant laborers are un- or under-educated working poor, in part because these Burmese are the first and most greatly affected by economic downturns.¹⁸⁷ When significant numbers of educated professionals left Burma following the 8888 Uprising, many started or became involved with NGOs providing aid to Burmese migrants near the Thai-

180. See Yang, *supra* note 126, at 505–10.

181. See Arnold & Hewison, *supra* note 159, at 331–32; see generally PIM KOETSAWANG, IN SEARCH OF SUNLIGHT: BURMESE MIGRANT WORKERS IN THAILAND (2001).

182. See *infra* Part V.B.3.

183. For the past decade, 40 baht has roughly equaled \$1 (US).

184. Arnold & Hewison, *supra* note 159, at 3.

185. Interview with "Joe," Burmese migrant factory laborer, in Mae Sot, Thailand. (June 3, 2008).

186. *Id.*

187. Yang, *supra* note 126, at 500.

Burmese border.¹⁸⁸ Since that time, educated Burmese migrants have typically sought out such positions, whether they are unable to return to Burma for political reasons or whether they have come to Thailand specifically for such positions.¹⁸⁹ Now, there are increasing signs that worsening conditions within Burma exacerbated by political and economic crises have forced greater numbers of educated Burmese into Thai factories, extending the crisis beyond just the under-educated lower classes.¹⁹⁰ Although it is difficult to estimate exact numbers, following the destruction caused by Cyclone Nargis, college graduates fled Burma to find employment as unskilled workers in Thai textile factories because they could find no better employment in Burma, and because they believed the Burmese government would not rebuild the destroyed infrastructures of their hometowns.¹⁹¹

b. Workplace Harassment, Violence, and the Absence of the Rule of Law

Beyond the long hours, low pay, and poor working conditions, Burmese migrant workers have little to no recourse against employers for violation of employment agreements.¹⁹² Under Thai law, employers cannot force workers to work more than forty-eight hours or six days in one week without the employees' consent.¹⁹³ In addition, groups comprising at least fifteen percent of a firm's workforce may legally petition an employer to improve working conditions, and these workers may petition the Ministry of Labor to become involved in the dispute if an agreement cannot be reached within five days.¹⁹⁴ However, both employers and the Ministry of Labor have repeatedly ignored these protocols

188. Interview with U Aung Myint, Office Manager, Burma Lawyers' Council, in Mae Sot, Thailand. (June 23, 2008).

189. Interview with Thar Naing Htwe, Staff Attorney, Burma Lawyer's Council, in Mae Sot, Thailand. (June 23, 2008); Interview by Alissa Paynter with Oo Nie Kie, Staff Member, Burmese Women's Union, in Mae Sot, Thailand. (July 14, 2008).

190. Interview with "Joe," Burmese migrant factory laborer, in Mae Sot, Thailand. (June 3, 2008). The interviewee's name is changed in order to protect his identity. At the time of the interview, Joe, and a number of his fellow workers, met the author on their daily hour break near their factory, and risked severe retribution for doing so. Joe subsequently supplied the author with information regarding what textile products he was producing for various international corporations, and the countries where these products were being shipped. While that is not a direct topic of discussion in this paper, it may be discussed in another work, and, given that the author is indebted to this individual for his knowledge, insight, and college-educated analysis from inside a sweatshop, "Joe" is best cited by a pseudonym.

191. *Id.*

192. Arnold & Hewison, *supra* note 159, at 7.

193. *Id.*

194. *Id.*

when dealing with Burmese workers.¹⁹⁵ Mae Sot-based migrant workers' rights organization Yaung Chi Oo has regularly documented such instances, including examples of employees fired for refusing to work an additional thirteen-hour shift immediately following a twenty-four-hour shift, workers fired and deported for filing claims about poor working conditions, and one factory that, following a judgment by the Ministry of Labor in the workers' favor, shut down entirely and kept Burmese employees' work permits to prevent them from finding other work in the country.¹⁹⁶ In another incident, one factory requested police to raid its facilities to arrest and deport its workers in order to avoid paying the two months of back pay it owed.¹⁹⁷

In addition to dismissal and deportation, employees who protest either to their employers or other agencies face harsh, violent retribution.¹⁹⁸ In June 2008, a twenty-seven-year-old Burmese migrant worker was severely beaten in front of a textile factory in Mae Sot, losing the use of his right eye.¹⁹⁹ Immediately prior to the attack, the worker had complained to his employer that he had not received his full wages, at which time the employer apparently signaled a group of men to attack the worker.²⁰⁰ The beaten worker approached local NGOs for aid in reporting the incident to police, but police claimed there was insufficient evidence to file charges because none of the co-workers who witnessed the attack would agree to discuss the incident.²⁰¹

Such incidents of abuse and exploitation of migrant workers without ramification also occur to workers and their families outside of work settings.²⁰² In addition to the risk of bribe extraction and deportation, migrants along the Thai-Burmese border have long faced the risk of rampant violent crime, including rape, murder, and abduction.²⁰³ In many cases, police have killed Burmese migrants with little to no further investigation by government officials under governmental policies of impunity favoring extrajudicial killing of suspected drug dealers.²⁰⁴

Burmese legal advocates note the first prosecution of Thai authorities for a serious violent crime against Burmese migrants probably did not even occur

195. *Id.*

196. *Id.* at 8–11.

197. Macan-Makar, *supra* note 171.

198. Dennis Arnold & Kevin Hewison, *supra* note 159, at 11–12.

199. Press Release, Burma Lawyers' Council, Aid Requested for Victim of Severe Assault (July 4, 2008) (on file with author).

200. *Id.*

201. *Id.*

202. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Special Groups and Individuals: Migrant Workers*, U.N. Doc. E/CN.4/2004/NGO/22 (Feb. 12, 2004) (submitted to ECOSOC by the Asian Legal Resource Center).

203. *Id.*

204. *Id.*

until 2005.²⁰⁵ Then, the bodies of six charred migrants were found near the Thai-Burmese border when the Mae Sot-based Burma Lawyers' Council issued press releases to a range of news agencies fearing those responsible for the murders would go unpunished, and witnesses would go missing without immediate action.²⁰⁶ The French Press Agency ran a wire story about the incident, which was then picked up by other news agencies, and the resulting international attention forced Thai officials to take murder witnesses into protective custody. These witnesses ultimately identified local Thai authorities involved in the killings.²⁰⁷ However, the rarity of such prosecutions and the length of time required to bring them about underlie the dearth of legal protection for Burmese migrants in Thailand in the face of violence by government officials, and underscore Burmese migrants' general lack of protection by the Thai judicial system.

Likewise, government agents have traditionally turned blind eyes to organized violence against Burmese migrants.²⁰⁸ Following a 2003 government initiative aimed at heightening enforcement of laws against illegal migrants in Thailand, violence against Burmese migrants spiked, including one man's murder by a Thai gang targeting migrants for acts of violence, and the appearance of a significant number of migrants' charred bodies throughout the area.²⁰⁹

Among the Burmese migrant community in Thailand, child abduction and trafficking is another prevalent, recurring criminal threat for which Thai authorities offer little support. In June 2008, a Burmese migrant worker was unable to find his young son when the boy's friend admitted a man had beaten the boy, strapped him to a bicycle, and taken him away.²¹⁰ Although local NGOs suspected his abductor had taken the boy to exploit his labor under slave-like conditions, local government authorities offered little or no aid, and his father, who could afford neither a phone nor public transportation on his wages as an agricultural laborer, spent the following months walking across the province searching for his son.²¹¹ In this case, the boy and his father had left the apparent security of a refugee camp because there was not enough food.²¹² In other cases,

205. U Aung Htoo, *Six Migrant Workers Murder Case and Legal Status Issues of Burmese Migrant Workers in Thailand*, 22 *LEGAL ISSUES ON BURMA J.* 13, 13–14 (2005).

206. *Id.*

207. *Id.*

208. See Taw Tra, *The War on Illegal Migrants*, *BURMA ISSUES NEWSLETTER*, May 2003, <http://www.burmaissues.org/En/Newsletter/BINews2003-05.php>.

209. *Id.*

210. Press Release, Burma Lawyers' Council, *Child Abduction is Every Parent's Worst Nightmare* (June 27, 2008) (on file with author).

211. *See id.*

212. *See id.*

the same desperation led parents in the camps to arrange the sale of their children to human trafficking gangs for little more than \$100 per child.²¹³

V. ADDRESSING THE “EXPLOITATION” STANDARD IN CONTEXT

The political and economic chaos necessitating refugees’ flight from Burma, the systemic abuse of the refugees’ labor once they arrive in Thailand, and the unavailability of judicial recourse to combat employment law abuse and other crimes endemic within their community raises strong human rights concerns, making the suffocation victims’ prosecution extremely troubling.²¹⁴ The abhorrent conditions of Burmese workers combined with their seeming lack of alternatives gives strong support to those who argue that these workers are exploited, and that they should receive protection under Thai anti-trafficking measures.²¹⁵ However, the situation raises broader questions as to the efficacy, applicability, and intent of international standards for regulating trafficking and smuggling.²¹⁶

A. Characterizing Burmese Migrants as Exploited Under Thai Law and the Trafficking Protocol

Arguing that the fifty-four suffocated migrants would not have met the exploitation standard even under the newer anti-trafficking statute that went into effect after that incident, Thai police outlined a three-part test for determining exploitation under the trafficking standard as opposed to smuggling: (1) whether the individual consented to transportation; (2) whether the individual was being transported to a pre-determined workplace, and (3) whether the workplace environment would amount to slave-like conditions.²¹⁷

A number of key issues emerge related to the problem of consent. First, Burma’s political, economic, and environmental crises’ extremity, highlighted by endemic human rights violations, suggests migrant workers may have been functionally unable to stay within Burma. This exodus should not be deemed as consensual any more than that of official refugees that have met the often arbitrary criteria for granting refugee status.²¹⁸ Second, by narrowly considering consent in

213. See Aung Su Shin, *Child Trafficking Gang Arrested in Mae Sot*, THE IRRAWADDY, Sep. 2, 2004, http://www.irrawaddy.org/article.php?art_id=3875.

214. See *supra* Part II, *infra* Part VI.

215. See Janchitfah, *supra* note 17; see also Muntarbhorn, *supra* note 29.

216. See generally, Hathaway, *supra* note 95.

217. See Janchitfah, *supra* note 17.

218. See Jenni Millbank, “The Ring of Truth”: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations, 23 INT’L J. REFUGEE L. 1, 33 (2009). Millbank analyzes seemingly subjective and arbitrary standards for determination of

terms of consent to cross Thailand's border, police fail to attack the greater part of the criminal network that ultimately poses the greatest threat to the migrants.²¹⁹ Muntarbhorn stressed that the suffocated migrants had not consented to their risky form of transportation.²²⁰ Further examples include the number of young female workers that factory owners later subject to rape.²²¹ While both the Thai Anti-Trafficking Act and the Trafficking Protocol would regard this as exploitation in its end form, this example falls through the cracks of the Smuggling Protocol. The example illustrates that while victims may be smuggled at their journey's inception and trafficked at some later point, and that being smuggled places individuals at great risk for exploitation, the Smuggling Protocol's analysis of consent operates without regard for these nuances.

Likewise, strict consideration of whether an individual is being transported to a particular, pre-determined employer ignores the realities of the marketplace. The entire Thai economy relies on a constant stream of Burmese migrant workers, and many employers regularly receive workers from those in the business of transporting these migrants.²²² The suggestion of Thai police that they must consider whether migrant workers are headed to a particular employer when determining whether the act is smuggling or trafficking ignores the potential for the vast number of black market recruiters to exploit migrant laborers.²²³

refugee status in a number of Western countries. Discussing in particular the way in which administrative boards evaluated the credibility of homosexual applicants' general stories based on their demeanor in response to questions about particular past sexual experiences as a sort of litmus test, she argues that governments ought to pursue review systems with more critical and objective oversight in earlier stages of decision making. Millbank's assertion that refugee determinations turn almost entirely on the story told by the applicant raises strong questions in the Burmese context where this arbitrary process distinguishes from a pool of those with often extremely similar experiences who left by choice and those who left because they had no choice. For further discussions of problems determining refugee status, see also Zachary Steel, Naomi Frommer, & Derrick Silove, *Failing to Understand: Refugee Determination and the Traumatized Applicant*, 27 INT'L J.L. & PSYCHIATRY 511 (2004); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367 (2003); Jaya Ramji-Nogalas, Andrew Schoenholtz, & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

219. See Janchitfah, *supra* note 17; Hathaway, *supra* note 95, at 26–27 (criticizing the Smuggling Protocol for its narrow focus on criminalizing border crossings without consideration for the broader context into which the crossings fit).

220. Janchitfah, *supra* note 17.

221. See Yang, *supra* note 126, at 520.

222. See Saw Yan Naing, *Human Smuggling Crackdown Hits Kawthaung*, THE IRRAWADDY, June 24, 2009, http://www.irrawaddy.org/article.php?art_id=12943; Saw Yan Naing, *Authorities Crack Down on Human Trafficking in Kawthaung*, THE IRRAWADDY, Aug. 14, 2008, http://www.irrawaddy.org/article.php?art_id=13861.

223. *Id.*

Regarding the third element of the Thai police exploitation test, the employment conditions of many Burmese migrants are arguably slave-like, or close to it.²²⁴ Many Thai employers in Mae Sot take full advantage of the non-enforcement of labor laws coupled with the threat of immigration law enforcement, including retention of registered workers' permits to prevent them from leaving the immediate area of the factory. Employers may also contain workers and make absolute demands over the use of Burmese labor even to the point of severe injury or death.²²⁵ As well, by fronting money for various fees, often of a largely arbitrary and ill-defined nature, and then requiring workers to repay this along with room and board from meager daily wages,²²⁶ employers frequently lock the migrant workers into a virtual debt bondage, which is prohibited under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.²²⁷ Furthermore, the Trafficking Protocol nullifies the issue of intent for any kind of forced labor, slavery, or slave-like conditions.²²⁸ As a result, a significant number of Burmese migrant laborers may fit the definition of a trafficked person based on the exploitative conditions under which they live and work.

B. Systemic Failure of the Smuggling and Trafficking Protocols in Context

While many Burmese migrants in Thailand now fit the standard for having been trafficked even if they may originally have appeared only smuggled, and while many of the migrants left without oxygen in the back of a cold storage truck might have eventually fit the definition of trafficked had they arrived at their destination, the Smuggling Protocol does not meaningfully address the rights of migrants at risk for exploitation. In other words, because it does not adequately establish migrants killed or nearly killed during transportation as victims, the Smuggling Protocol does not meaningfully address the rights of migrants at risk for exploitation.

224. See *supra* Part V. See also Hathaway, *supra* note 95, at 4–5 (citing Kevin Bales, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY, 8–9 (1999)); Liz Kelly, “You Can Find Anything You Want”: A Critical Reflection on Research on Trafficking in Persons within and into Europe, 43 INT’L MIGRATION 235, 239 (2005) (suggesting that calculations within the last decade place the number of individuals whose living conditions meet the standard for slavery at more than 27 million, of which only about 3% fall into the category of trafficked person).

225. See Part V.B.; see generally Yang, *supra* note 126; Arnold & Hewison, *supra* note 159.

226. See Yang, *supra* note 126, at 508–09.

227. Art. 1, Apr. 1, 1957, 18 U.S.T. 3201, 226 U.N.T.S. 3; see also Hathaway, *supra* note 95, at 8–9.

228. G.A. Res. 55/25, Annex II, UN Doc. A/RES/55/25/Annex II (Nov. 15, 2000).

Perhaps, as noted by James Hathaway, “the fight against human trafficking is more fundamentally in tension with core human rights goals than has generally been recognized.”²²⁹ Explaining his position, Hathaway argues: (1) while the Trafficking Protocol is rooted in an anti-slavery movement, the Protocol fundamentally protects certain forms of “culturally ingrained, endemic slavery” frequently counted upon for global expansion, (2) relatively consensual acts of human smuggling have become more dangerous due to their illegality, and (3) the “border control emphasis” of the Protocols directs states to “penalize refugees for illegal entry or presence.”²³⁰ This critique accurately depicts the situation at the Thai-Burmese border. First, cheap Burmese labor is so significantly vital to the Thai economy and to the preservation of Thailand’s relative wealth vis-à-vis the majority of its neighbors, that any significant change in the status quo of Burmese migrant labor—particularly an increase in cost—would likely have a negative economic impact on most Thais in the short run,²³¹ and would prevent industries from parlaying this labor into profits along the global supply chain.²³² Second, the example of the suffocated migrants seems to support Hathaway’s assertion that the Smuggling Protocol’s narrow view with regards to border crossing disrupts otherwise consensual movement and makes it significantly more costly.²³³ As though describing the experience of the suffocated migrants, he notes:

While it is true that smuggling efforts sometimes transform themselves into the abusive situations defined as trafficking, this is far from the usual case. To the contrary, most smuggling has historically been a consensual and relatively benign market-

229. Hathaway, *supra* note 95, at 4.

230. *Id.* at 6.

231. See Yang, *supra* note 126, at 485–510; Pitayanon, *supra* note 158, at 13.

232. For a diverse discussion of global industries utilizing forced labor, slavery, and quasi-slavery, including Thai sweatshops, see Mary Ross Hendriks, *Modern Slavery and the Production of Consumer Goods in a Global Economy: Consumer Choice—Not Law—Will Trigger the Next Diaspora*, 20 T.M. COOLEY L. REV. 431, 444 (2003). See also Hathaway, *supra* note 67, at 15-16; A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT’L L. 303, 322 (1999). Furthermore, Thailand has long utilized systems of forced labor to encourage its development, including a corvée system used into the beginning of the Twentieth Century, while subsequent labor movements have not gained significant footing due in large part to governmental resistance. PASUK PHONGPAICHIT & CHRIS BAKER, THAILAND: ECONOMY AND POLITICS 10–26, 187–222 (2002). However, this is not to say that modern Thai labor practices are any more rooted in its Nineteenth Century practices than modern American practices are connected to its Nineteenth Century slavery practices. Rather, as Phongpaichit and Baker discuss, the successful management of labor, particularly the utilization of cheap labor, has played a critical role in Thailand’s development and its current prominence over many of its neighbors. *Id.*

233. Hathaway, *supra* note 95, at 5–6.

based response to the existence of laws that seek artificially to constrain the marriage of surplus labor supply on one side of a border with unmet demand for certain forms of labor on the other side of that border. Indeed, the criminalization of smuggling may actually increase the risk of human trafficking by driving up the cost of facilitated transborder movement and leaving the poor with no choice but to mortgage their futures in order to pay for safe passage.²³⁴

Taking Hathaway's note one step further, the increased cost of border crossing necessitated the risky transportation measures that ultimately led to the death of the fifty-four migrants.²³⁵ This seems all the more illogical given the Thai economy's dependence on the entrenched supply of Burmese migrant labor.²³⁶ As well, Hathaway's discussion of the Protocols' incongruity with the reality of refugees is on point for many Burmese in Thailand.²³⁷ While the Refugee Convention technically requires the protection of refugees upon arrival even if they entered their destination country illegally,²³⁸ Hathaway notes this guarantee is of little use given the Trafficking and Smuggling Protocols' "indiscriminate" application in practice.²³⁹

In the context of the Thai-Burmese border, the application of the Trafficking and Smuggling protocols may, as Hathaway suggests, work contrary to human rights goals.²⁴⁰ As shown in the case of the fifty-four suffocated migrants, the indiscriminate criminalization of border traffic under the Smuggling Protocol resulted in greater risk to those making what should have been a mutually beneficial border crossing. Likewise, the narrowness of the Trafficking Protocol, with regard to certain forms of trafficking evident during border crossing, severely limits its application to those whose status as trafficked only becomes clear later, but who were clearly at risk of exploitation from the beginning of their journey. In short, the problem may not sit with Thailand's domestic application alone. Rather, the Protocols' constructions are such that states may use them as a kind of safe harbor under which they may appear to be combating trafficking and smuggling's evils, when in reality states are not pressed to attack root causes of the evils, or to make changes in domestic policy that might

234. *Id.*

235. See Janchitfah, *supra* note 17; Saw Yan Naing, *Human Smuggling Crackdown Hits Kawthaung*, *supra* note 222; Saw Yan Naing, *Authorities Crack Down on Human Trafficking in Kawthaung*, *supra* note 222.

236. See Yang, *supra* note 126, at 485–510.

237. See Hathaway, *supra* note 95, at 6.

238. Convention Relating to the Status of Refugees art. 31, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

239. Hathaway, *supra* note 95, at 6.

240. *Id.* at 4.

negatively impact their economies.²⁴¹ In the case of the Thai-Burmese border, the Trafficking and Smuggling Protocols fit imperfectly at best.

C. Additional Domestic Solutions in Context

Given that many Burmese migrant workers in Thailand appear to meet the exploitation standard of the Trafficking Protocol and the Anti-Trafficking Act, but also appear unable to seek protection or redress except in narrow, limited circumstances, a significant reform scheme is necessary in order to protect basic human rights. However, given the entrenchment of ambiguously legal workers in ambiguously illegal work environments, it seems clear that such reforms would be extremely complex, and best made incrementally. As Muntaborn argued, a possible first step could be to recognize as victims those migrants who have faced abuse and imposed hardships, rather than to hide behind the Smuggling Protocol and to suggest that those such as the suffocated migrants were at fault for their injuries.²⁴² Behind such an idea is a fundamental recognition for the unheralded role Burmese workers play in the Thai economy, and the benefit they give to Thai society as a whole.²⁴³ For many Burmese in Thailand, the ultimate tragedy of the migrant suffocation was the unapologetic failure of Thai police to admit the economic benefit Thailand gains from the risks taken by the Burmese.²⁴⁴ In recent years, some legal scholars have increasingly heralded the importance of apology as both a civil and criminal remedy, noting that apology provides psychological healing for victims, prevents victims from self-blame, and promotes social justice.²⁴⁵ Similarly, even without any other remedy, an unequivocal and apologetic admission by Thai government officials that the suffocated migrants were victims could provide healing for both the surviving victims and other Burmese migrants who have suffered similarly, alleviate the self-blame widely expressed by victims of the incident, and, most importantly, promote an open and honest recognition of the benefit Thai society gains from the presence of Burmese migrant laborers. Such an apology could help to reframe normative Thai social relationships with Burmese migrant workers, placing them more in accord with

241. *See id.* at 1–6.

242. Janchitfah, *supra* note 17; *see also supra* note 29.

243. *See* Yang, *supra* note 126, at 485–510; Pitayanon, *supra* note 222, at 13.

244. While speaking with Burmese in Mae Sot, Thailand, about the incident, some Burmese expressed to the author the angered sentiment that the police response in this case represented the broad response of Thai society towards Burmese migrants as accepting the benefits they bring without taking action to mitigate the risks migrants face in giving Thai society these benefits.

245. Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1268, 1273–85 (2006).

the actual benefit received, and ultimately reduce incidents of exploitative or near-exploitative behavior.²⁴⁶

VI. CONCLUSION

The debate as to whether the suffocated Burmese migrants qualify as protected victims under the Trafficking Protocol and the Thai Anti-Trafficking Act, or whether these migrants simply qualify as criminal violators of immigration laws, raises questions over more than just the applicability of the Trafficking Protocol's exploitation standard in this given case. The debate raises broader questions as to the efficacy of the Trafficking and Smuggling Protocols in protecting human rights globally, as well as what domestic remedies might best prevent the exploitation of migrant workers specific to conditions along the Thai-Burmese border. In particular, the Trafficking and Smuggling Protocols work together to broadly criminalize border traffic, while only narrowly protecting exploited workers. Consequently, officials should question whether the Trafficking Protocol adequately protects exploited victims of emerging criminal migration networks, and whether the Smuggling Protocol should be expanded with regard to human rights concerns in order to tackle incidents of exploitation inherent in the particular criminal migration networks, the concern over which led to the development of the Smuggling Protocol.

At present, the Protocols are an imperfect remedy for widespread human rights violations. Globally, migrant workers at high risk for exploitation fall through the cracks, including those who may ultimately fall victim to forced labor or forced prostitution. In turn, it is inappropriate to expect the Trafficking and Smuggling Protocols to provide comprehensive solutions to the root causes of the Burmese workers' mistreatment in Thailand. While many Burmese migrant workers in Thailand seem to fit the Anti-Trafficking Act's definition of exploited or forced laborers, they too fall through the cracks. Still, the Protocols' broad guidelines are not the only possible approach to addressing the exploitation of Burmese migrant workers. Instead, the Thai government can begin tackling these violations by developing dynamic remedies tailored to the complex role played by Burmese migrants in Thai society, and moving away from the one-size-fits-all remedies to migration issues composed by the international community at large—remedies rooted in historical and geographical contexts far from the modern Thai-Burmese border. However, progress toward adequate treatment of Burmese migrant workers and refugees can only begin when the migrants are recognized for the significant ways in which they benefit the Thai economy, and Thai society as a whole. Only then can Thai government begin to implement laws that

246. White notes that “due to their high expressive utility, apologies—both voluntary and forced—offer a powerful alternative to monetary compensation, and can be an effective means of sending messages about acceptable behavior and desired social norms.” *Id.*

effectively balance concerns over controlling unauthorized immigration with the reality of economic and political crises forcing individuals out of Burma, and the reality of major Thai industries' reliance on Burmese migrant labor.



