

IDE Discussion Papers are preliminary materials circulated to stimulate discussions and critical comments

IDE DISCUSSION PAPER No. 289

Is the Anti-Trafficking Framework Really for the ‘Victims’? –Reflections on Burmese victims of human trafficking and non-trafficked migrants in Thailand

Miwa YAMADA*

Abstract

Since the year 2000 when the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, human trafficking has been regarded as one of the egregious violations of human rights, and global efforts have been made to eradicate it. The anti-trafficking framework has multiple dimensions, and the way the anti-trafficking framework is constructed influences its impact on the victims and non-trafficked migrants. This paper will analyze the impact of the anti-trafficking framework on the experiences of Burmese victims and non-trafficked migrants in Thailand. I will question the conventional framework of anti-trafficking, and seek to construct a framework more appropriate for addressing victims’ actual needs. In conclusion, the anti-trafficking framework should serve the best interest of the victim; still, it should not be one which might adversely affect the interest of the would-be victim who is not identified as a victim according to the law.

Keywords: Human trafficking, Anti-trafficking, Framework, Law, Thailand

* Researcher, Law and Institution Research Group, Development Studies Center, IDE (miwamy@ide.go.jp)

The Institute of Developing Economies (IDE) is a semigovernmental, nonpartisan, nonprofit research institute, founded in 1958. The Institute merged with the Japan External Trade Organization (JETRO) on July 1, 1998. The Institute conducts basic and comprehensive studies on economic and related affairs in all developing countries and regions, including Asia, the Middle East, Africa, Latin America, Oceania, and Eastern Europe.

The views expressed in this publication are those of the author(s). Publication does not imply endorsement by the Institute of Developing Economies of any of the views expressed within.

INSTITUTE OF DEVELOPING ECONOMIES (IDE), JETRO
3-2-2, WAKABA, MIHAMA-KU, CHIBA-SHI
CHIBA 261-8545, JAPAN

©2011 by Institute of Developing Economies, JETRO

No part of this publication may be reproduced without the prior permission of the IDE-JETRO.

Is the Anti-Trafficking Framework Really for the Victims?

-Reflections on Burmese victims of human trafficking and non-trafficked migrants
in Thailand-

1. Introduction

Since the year 2000 when the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Protocol) was adopted as one of the two supplements to the United Nations Conventions against Transnational Organized Crime by the General Assembly, human trafficking has been regarded as one of the egregious violations of human rights the UN confronts, and global efforts have been made to eradicate it. Recognizing that poverty, unemployment, lack of socio-economic opportunities, gender-based violence, discrimination and marginalization are contributing factors that make persons vulnerable to human trafficking,¹ the anti-trafficking framework includes not only the rescue of the victim and the punishment of the offender, but also a wide range of dimensions such as awareness-raising, education and reintegration. The multi-dimensions of the anti-trafficking effort are generally classified as prevention, protection and prosecution as exemplified in the Global Plan of Action. Regional and bilateral instruments are composed of the same components such as seen in the Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region (COMMT) as well as in the Memorandum of Understanding between Thailand and Myanmar on Cooperation to Combat Trafficking in Persons, Especially Women and Children.

The anti-trafficking framework has multiple dimensions, and its structure and components can vary. The way the anti-trafficking framework is constructed influences its impact on the victims and non-trafficked migrants. My paper will, first, rethink the definition of the victims; second, analyze the impact of the anti-trafficking framework on the experiences of victims and non-trafficked migrants as it affects Burmese victims in Thailand where The Anti-Trafficking in Persons Act 2008 of Thailand (the Act)

*Researcher, Law and Institution Research Group, Development Studies Center, Institute of Developing Economies (IDE-JETRO)

¹ Preamble, UN Global Plan of Action against Trafficking in Persons, adopted by the General Assembly on 30 July 2010 (the Global Plan of Action).

applies.² Finally, I bring into question the conventional framework of anti-trafficking, and seek to construct a framework more appropriate for addressing victims' actual needs.

2. The Definition of Victim in Human Trafficking

The anti-human trafficking law as criminal law defines a victim as a person who is a victim of human trafficking committed by an offender who is to be prosecuted. For there to be a victim of human trafficking, there has to be a human trafficking offense; thus the existence of a victim is necessary and essential for there to be a prosecution and conviction of an offender. Unless an offense is committed, criminal law does not apply, and there is no victim in terms of criminal law. However, when the anti-trafficking framework is applied in broader scope, the border between victims and non-trafficked migrants can change depending on the breadth applied to the framework. What makes it more complicated and challenging for the anti-trafficking framework is that the framework includes not only prosecution but also prevention and protection as stated in the Protocol and as exemplified in the Global Plan of Action. I will describe how despite the definition of victim given in the law, the line drawn between victims and non-trafficked migrants changes depending on the dimensions applied to the anti-trafficking framework.

2.1 Prevention Stage

Within the dimension of prevention is the educating of people against falling victim to human trafficking; therefore the meaning of victim needs to be broader than the legal definition of victim in the dimensions of prosecution and protection if the prevention measure is aimed at preventing not only human trafficking, which is the worst form of migration, but also other bad forms of migration.

As one of the preventive measures, the Global Plan of Action aims to “develop or strengthen the process for the identification of victims..., including, appropriate and non-discriminatory measures that help to identify victims of trafficking in persons among vulnerable populations.”³ The most crucial line to draw is to identify whether a person is a victim of human trafficking or not. Certainly it is most important to identify among the vulnerable populations the people who have already become victims; however, next in importance is to how to treat the rest of the people among such

² In Thailand according to the Bureau of Anti-Trafficking in Women and Children, the number of victims of sexual exploitation exceeds that of labour exploitation. Among Burmese victims, more than 70 % are suffering labour exploitation.

³ Clause 17 in i) I. Preventing trafficking in persons, the Global Plan of Action

vulnerable populations before they become victims. They are not victims at the time of screening, but they could become victims thereafter. In this sense, a precise distinction of victim and non-victim would rather hamper more effective prevention.⁴

2.2 Prosecution Stage

Within the dimension of prosecution, a clear and precise definition is essential. The legal definition of victim determines the experience of justice for the victim. While the anti-trafficking framework entitles the victim to seek redress, the very same framework excludes or ignores the non-trafficked migrants seeking justice. Within the prevention dimension, a rigid distinction between the human-trafficked victim and non-trafficked migrants is not necessarily effective for the purpose of prevention. Conversely, a crystal-clear clarification between the victim of human trafficking and non-trafficked migrants is required within the prosecution dimension.

It should be further noted that the definition of victim itself connotes a conflict between the rationale of identifying a victim and that of being identified as a victim. On the one hand, the prosecutor needs a witness who is able to testify effectively enough to prosecute and strongly enough to counter cross-examination. When the police identify victims at the very early stage, it is quite difficult to identify victims just by using an objective check-list.⁵ The interviewer also needs to change the victim's subjective attitude in order to obtain her/his statement for the prosecution. It is essential to get the victim to trust the police and the prosecutor in order to obtain a testimony sufficient enough to prove the offense of human trafficking. Even though the police might succeed in rescuing the victim, if they cannot obtain clues and are unable to apprehend the offender, there is a high risk of repeating the offense and of retaliation by the offender against the police and victim. Therefore, on the investigation side, they consider the feasibility of rescuing the victim as well as arresting the suspect. The prosecutor needs a victim of human trafficking which falls precisely into the definition in the criminal code.

⁴ At the Japanese Embassy in Thailand, the applicant for an entry visa to Japan is requested to answer several questions in writing, *inter alia*, "Are you anxious about being trafficked during this voyage to Japan?" According to the consulate at the Embassy, there was one case where an applicant ticked 'yes' on the questionnaire sheet. The consulate turned down the application and did not issue visa, having understood that by answering 'yes' to that question, the applicant was requesting not to have a visa issued. The consulate neither interviewed the applicant nor traced her data back.

⁵ For example, the Ministry of Social Development and Human Security of the Thai government has a checklist for identifying a victim according to the legal definition. In the checklist, an official in charge is to tick each applicable item such as 'procuring', 'deception', and 'forced labour'.

On the other hand, the victim wishes to know who is coming to her/his rescue and what the consequences will be of being rescued and giving statements. A victim can regret being identified as victim and cooperating in the criminal proceedings. One such victim felt that way after spending almost two years in a shelter under a protection programme. She said that if she had known her fate in advance, she would have given a different statement in order not to be identified as a victim to be sheltered. This also poses the very ethical question of whether a researcher should report to the police when encountering would-be victims while doing research.

2.3 Protection Stage

The anti-trafficking law provides protection and assistance to the persons who are identified as victims according to the definition thereunder. There are trafficked migrant workers who rather opt to continue working under severe conditions than to be rescued, protected and repatriated to their places of origin. Although they should be identified as victims according to the law, some are not identified as such due to the lack of communication skills to explain his/her situation, and others report falsely because they do not wish to be identified as victims. All the migrant workers rescued from the same factory under the same conditions are not necessarily identified as victims. However, there are some migrant workers who are not recognized as victims but who need protection equivalent to that given to identified victims. The victim cannot identify her/himself as a victim. she/he has to be identified as a victim by a relevant authority according to the law.

Furthermore, where there is no connection among movement, recruitment and employment, there are non-trafficked victims of exploitation who are categorized differently from the victims of human trafficking but who are to be protected.

Definitions of Victims and Non-Trafficked Migrants can be drawn as in Figure 1 below.

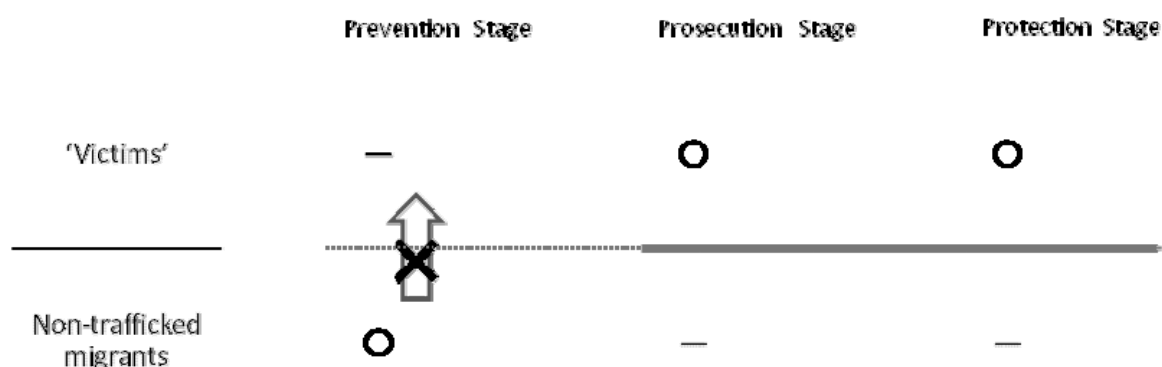


Figure 1: Definitions of Victims and Non-Trafficked Migrants

3. Experience of Mobility, Justice and Support

Having said that the distinction of the victim and non-trafficked migrants can change depending on the dimensions applied in the anti-trafficking framework, in this part I will analyze the mobility, justice and protection experienced by victims and non-trafficked migrants in Thailand. The way the anti-trafficking framework is applied affects each experience in the different dimensions.

3.1 Mobility

Awareness-raising campaigns aimed at persons at risk of being trafficked and at the general public are one of the measures to prevent human-trafficking.⁶ There are two ways that the knowledge about the risk of being trafficked protects prospective migrants from becoming victims. One is that a prospective migrant would rethink about migration and finally decides not to migrate. Another is that a prospective migrant would become more selective in finding a safer and legal way to migrate. As a result, prevention measures can decrease the mobility of prospective migrants, both latent victims and non-trafficked migrants. In other words, the anti-trafficking framework does reduce the mobility of latent victims, and shapes the mobility of non-trafficked migrants in safer ways.

A non-trafficked migrant who is not identified as a victim at a screening but is found illegal in terms of his/her stay, may be arrested, detained and deported after judicial proceedings according to Thailand's immigration law. While the victim is

⁶ Clause 18 in i) I. Preventing trafficking in persons, the Global Plan of Action

exempted from being prosecuted for his/her illegal entry, leave or residing under Section 40 of the Act, non-victims are not within the scope of such exemption. While screening is to identify the victims of human trafficking, the same screening also identifies non-trafficked migrants simultaneously. In this sense, the anti-trafficking framework functions to reduce the mobility of non-trafficked migrants who illegally enter, stay and/or work in the destination country.

Once a victim is rescued and given asylum in a shelter, that person is supposed to stay in the shelter to receive protection. Under Section 33 of the Anti-Trafficking in Persons Act 2008 of Thailand, the victim shall be provided with assistance such as food, shelter, medical treatment, physical and mental rehabilitation, education, training, legal aid; and all this assistance is to be provided at the shelter where the victim stays. The victim is required to stay in a shelter under protection which significantly limits the mobility of the victim. Furthermore, according to the Act, the victim is repatriated via a governmental channel. While it is necessary to secure the victim's safety in her/his place of origin, a governmental agency's following up of the returned victim can limit his/her the mobility. Under Section 44 of the Act, financial support is provided from a Thai governmental fund to the victim. This fund is supposed to be spent by the victim for setting up his/her own business such as a vending shop in the place repatriated to, and is not to be used for migrating to Thailand again.⁷ It is desirable within the anti-trafficking framework that the victim remain in the repatriated place and not move to another place. In this sense, the anti-trafficking framework limits the mobility of protected and repatriated victims.

At the prosecution stage, the victim is requested to remain in Thailand to testify where the criminal proceedings are commenced. Though it is not obligatory for the victim to be a witness in the criminal proceedings, the prosecutor needs the victim as a witness for effective prosecution and for the final conviction against the offender. Section 36 of the Act states, "In a case where the trafficked person will make a statement or testify as a witness in the offense of trafficking in persons under this Act, the trafficked person, as a witness, shall be under the protection according to the law on the protection of witness in a criminal case in all respects." In order to prevent a victim's prolonged stay in a shelter, Section 31 enables pre-trial deposition by petition to the court. While being protected in a shelter under the Act, the victim is required to stay in the designated shelter and is not able to go out or work. Although Section 37 provides that a foreign victim may be given permission to work, the Thai government has not yet

⁷ Similar financial support is provided by the Japanese government to the victim who is trafficked to Japan and repatriated to Thailand.

implemented this provision in practice.⁸ Opting to be a witness inevitably means a longer stay in a shelter and reduces the mobility and opportunity costs of the victim.

3.2 Justice

A victim is entitled to seek redress for damages caused by the offence of human trafficking. Section 34 of the Act states, “For the benefit of the assistance to a trafficked person, the inquiry official or public prosecutor shall, in the first chance, inform the trafficked person his rights to compensation for damages resulting from the commission of trafficking in person and the right to the provision of legal aid.” Furthermore, Section 35 provides that in cases where the victim has the right to compensation for such damages and expresses his/her intention to claim compensation thereof, the public prosecutor shall, on behalf of the victim, claim for compensation thereof. The claim for compensation may be brought with criminal prosecution, and the judgment in the part of the claim for compensation shall be given as one part of the judgment in the criminal case. Furthermore, the hearing proceedings of claim for compensation and the execution of judgment are exempt from any costs. These provisions certainly benefit the victim who would have difficulty in seeking redress by his/her own means. The victim can avail him/herself of the legal mechanism provided in the Act. Whereas the victim is provided with such legal assistance to seek for redress of damages within Thailand’s anti-trafficking framework, non-trafficked migrants are provided with nothing. A person who is not identified as a victim might have suffered a loss caused by a broker, a smuggler or an employer, who would have been an offender in a human trafficking case. The anti-trafficking framework prepares for the victim an opportunity to claim damages caused by the offense of human trafficking⁹; however, the same framework excludes the non-trafficked migrants who because of their situation are not identified as victims.

For a trafficked victim who suffered labour exploitation in Thailand, seeking payment of unpaid wages is another legal means for getting justice. Section 33 of the Act enumerates the types of assistance to be provided to the victim, *inter alia*, legal aid, which includes seeking payment of unpaid wages in a labour court. Regardless of being identified as a victim or not, or being documented or non-documented, laborers are entitled in Thailand to seek payment of unpaid wages. But whereas the Act provides a victim with legal assistance to claim unpaid wages in a labour court, it is very difficult

⁸ According to the official of Ministry of Social and Development and Human Security, this provision will be implemented in the near future. (Interview on February 22, 2011).

⁹ A public prosecutor claimed for compensation on behalf of the victim in criminal proceeding in July 2010 for the first time since Thailand’s implementation of the Act in June 2008.

for non-trafficked migrants to find a legal adviser to make such a claim, especially for undocumented migrant workers. It is apparent that the anti-trafficking framework differentiates between the experience of human-trafficked victims and non-trafficked migrants when seeking justice.

Prosecution is the very main stage of the anti-trafficking framework, where criminal justice is realized. Prosecution, conviction and punishment of the offender are the core of the anti-trafficking framework, which ultimately combats human trafficking offenses and aims at preventing a repeat offense. Therefore, the victim's testimony and participation as a witness are essential. The prosecutor needs to make the victim understand that his/her testimony is necessary and essential for prosecuting the offender. At the same time, the victim should be informed how long the legal proceedings will take, and should be protected against retaliation or threat by the offender. Victims will weigh their early returns against the realization of justice. But a prosecutor emphasized in interviews with the author the necessity and importance of gaining the trust of the victim in order to obtain his/her testimony for the legal proceedings.¹⁰ This same prosecutor described how reticent victims, even those with hostility, will change and become cooperative with a trusted prosecutor. By participating in the legal proceeding, the victim experiences the realization of justice when the offender is convicted and punished.¹¹ Non-trafficked migrants have no such experience.

Clause 42 of the Global Plan of Action states that it is necessary to provide the victim with the opportunity to consult with an appropriate advisor to assist in decision-making regarding cooperation with law enforcement and their participation in judicial proceedings. Considering the best interest of the victim, his/her decision should be respected above all. However, recognizing the purpose of the Protocol, it is desirable that the victim take part in the legal proceedings to prosecute, convict and punish the offender. In order to facilitate the victim's participation, the victim should be given more incentives to do so to experience the realization of justice. It should also be noted that the justice which the law provides for the victim might differ from that which the victim is really seeking.

3.3 Support

¹⁰ Interview at the Attorney General's Office in Bangkok in February and August 2010.

¹¹ In a labour exploitation case where the victims were rescued in September 2006, the victims who testified as witness in the legal proceedings were required to stay in a shelter for almost 2 years. The public hearing of the case commenced in May 2010 and the judgment was rendered in the first instance in December 2010. The case is still on appeal. It is not sure whether and when the victims will be informed of the judgment to be rendered and whether they will experience the realization of justice.

The victim of human trafficking is supported and assisted under Thailand's Act. Only the victim is able to avail her/himself of these assistances. As mentioned above, the range of support for the victim, from shelter, food, and medical treatment to education, training and legal aid, provided under Sec 33 of the Act, determines the victim's experience of mobility and justice as well. Furthermore, the Act states that the victim shall be informed of his/her right to receive protection, whether prior to, during or after the assistance provided, including the timeframe of delivering assistance at each stage; and the opinion of the victim is to be sought. Although it is the victim's right to receive support in a designated shelter, in practice the victim cannot make independent decisions but must comply with the programme provided in the shelter. Under the name of support, some programmes force the victim to receive training. It has also been pointed out that the range of vocational training is limited to handcraft making such as patch working, knitting and sewing. This supposes that the victims are all female and these programmes are suitable for women. Recently, shelters for male victims who have suffered labour exploitation have been set up, but they have not received the same range of assistance as female victims have. Section 37 provides that a competent official may assist a victim in getting permission to stay and work temporarily for the purpose of participating in proceedings against an offender. According to the relevant authority, this provision has not been fully implemented yet, but the need for urgent implementation has been accelerated by the emerging male victims who are supposed to be breadwinners.¹² In this sense, the victim's experience of support might vary dependent on his/her sex. Support also includes repatriation to the domicile of origin and reintegration in the community of origin. As mentioned above, this support links with the mobility of the victim. This also raises the question of whether repatriation is the best, or at least minimum, solution for the victim.

To provide protection and assistance to the victim is a salient feature of the Thai anti-trafficking law, and this characterizes the law not only as a penal code but as a social and humane provision. By contrast, non-trafficked migrants cannot avail themselves such support and assistance.

Experience of Victims and Non-Trafficked Migrants can be summarized as in Figure 2.

¹² An interview at the Bureau of Anti-Trafficking of Women and Children in Bangkok in August, 2010

	Mobility	Justice	Support
Victims	<ul style="list-style-type: none"> - To remain in a shelter for legal proceedings - To be repatriated to the place of origin - To be expected to remain in the repatriated place 	<ul style="list-style-type: none"> - Claims for unpaid wages -Claims for damages caused by the offense - Punishment of the offender 	<ul style="list-style-type: none"> - Prescribed support programme
Non-Trafficked Migrants	<ul style="list-style-type: none"> -Safer migration -To be deported if found to have entered illegally 	<ul style="list-style-type: none"> - Claims for unpaid wages 	

Figure 2: Experience of Victims and Non-Trafficked Migrants

4. Scope of Anti-trafficking Framework

The persistent question is how we postulate the anti-trafficking framework. In general, the framework has been understood to consist of three dimensions, i.e. the prevention of the offense, prosecution of the offender and protection of the victim as seen in the Protocol as well as the Global Plan. These dimensions cover not only criminal matters but a range of economic, social and political issues which are related to development issues in the world. If the anti-trafficking framework is set in narrower scope, we may exclude some factors which really need to be addressed. On the other hand, if the framework is set in wider scope to address all the relevant issues, the crucial point of issues may be blurred and the effect of corrective measures may be lessened.

4.1 NGO Activity

There are many NGOs working in anti-trafficking in Thailand, especially, in terms of protection of the victim. As reflected in the historical development of the country's anti-trafficking law, some NGOs have had a decade of achievements in helping sexually exploited women and children. A NGO in Chiangmai, one of the hot spots of human trafficking in Thailand, works closely with the local police to rescue and identify the victims of human trafficking. A staff worker told of one case where a 16-year old

Burmese girl was rescued from a brothel and given protection in a shelter.¹³ The girl left her hometown in Myanmar because her parents did not forgive her for having a boyfriend. She felt devastated and ended up in a brothel in Chiangrai. When she was rescued, she did not understand her situation and had little hope for her future. After hearing the NGO worker's explanation, she agreed to participate in the criminal proceedings with advice and assistance from the NGO. Once during the public hearings she made a statement which benefited the offender. The NGO worker was surprised, and after the hearing asked her why she made such testimony. It was found that the girl had been contacted by the offender's side and promised to be taken to meet her boyfriend if she made a statement beneficial to the offender. She had not been able to resist the temptation. The NGO worker explained the importance of telling the truth and the need for criminal justice, and what the victim should do for her future. The victim burst into tears and thereafter trusted the NGO worker. Finally the offender was convicted and sentenced to 10 years imprisonment. The victim was repatriated back to her hometown, and currently she is preparing to set up a small sewing business with the fund provided under the Act. The NGO concluded that it had been very difficult and challenging to change the victim's mind-set, but it was very rewarding to assist a young desperate foreign girl to find hope in her own future. It was apparent that the NGO worker felt her work worth doing because she was able to correct a poor girl's life.

By contrast, I found a desperation amongst the staff of a NGO working with Burmese migrant workers in the same district. After the deadline for renewing work permits, the crackdown on illegal migrant workers became harsh. There were many migrant workers who were unable to renew their work permits due to the high cost, time constraints or the complexity of the procedures. Without being screened for identification as victims of human trafficking, a significant number of migrant workers are arrested and suffer the imposition of so-called 'release money', or deported. Staff workers described several cases where the labour conditions and surroundings of migrant workers were equivalent to human trafficking cases. Nonetheless, the NGO did not intend to seek categorization of these migrants as victims of human trafficking. Rather it was seeking for them labourers' rights in principle. The NGO assists the migrant workers in seeking unpaid wages and compensation for labour related injuries. The NGO provided knowledge of labourers' rights and tried to empower the migrant workers. These workers neither wished to be protected in shelters nor be repatriated back to their places of origin, but wished to have decent work in the destination country.

¹³ An interview with a member of the legal staff of the NGO in Chiangmai in August 2010.

The NGO staff was disappointed about the prejudice, discrimination and exploitation that migrant workers have been facing continuously for almost two decades in Thailand. This was a different story from the one where the NGO had successfully changed the course for a poor little foreign girl.

4.2 Migration Policy

The Global Plan of Action states as one of its preventive measures the adoption and implementation of comprehensive policies and programmes at the national level and as appropriate at the sub-regional and regional levels to prevent all forms of trafficking in persons that are in line with relevant policies and programmes on national issues, *inter alia*, migration and employment.¹⁴ It is recognized that the promotion of safe migration is the most effective measure to prevent human trafficking. As stated in COMMIT, one preventive measure is to encourage destination countries, including those outside the Greater Mekong Sub-region, to effectively enforce relevant national laws in order to reduce access to the exploitation of persons that fuels the continuing demand for the labour of trafficked persons.¹⁵ It is also stated that both parties shall apply national labour laws to protect the rights of all workers based on the principles of non-discrimination and equality.¹⁶ The Memorandum of Understanding between Thailand and Myanmar on Cooperation to Combat Trafficking in Persons, Especially Women and Children, also refers to migration, stating, “The Parties shall make best efforts, to the extent possible, to take measures to minimize vulnerabilities and to promote safe migration.¹⁷”

The idea that safe migration prevents human trafficking is shared by many countries and clearly expressed in many legal instruments. Nonetheless, governments show little enthusiasm for implementing the idea into practice. Among 16 Asian countries, eight countries signed or ratified the Protocol whereas only four countries signed or ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which came into force in the same year as the Protocol (IOM [2008:128]). The four countries are all origins of migrant workers; no major destination country is a party to the Convention. Whereas human trafficking is recognized as an international issue to be tackled under the umbrella of the Convention against Transnational Organized Crime, the migration policy of a state still remains in the domain of its sovereignty.

¹⁴ Clause 14, i) I. Preventing trafficking in persons, The Global Plan of Action

¹⁵ Clause 26, IV. In the area of Preventive Measures, COMMIT

¹⁶ Clause 25

¹⁷ Article 4, III. Preventive Measures, MOU

Nation states maintain their grip on immigration, and this is making 'safe migration' costly and time-consuming. The recent tendency of destination states towards more restrictive immigration policies has increased the number of undocumented migrants who are more vulnerable to human trafficking. Even worse, nation states' so-called 'safe migration' systems have fermented a hotbed of labour exploitation, the worst case being human trafficking.¹⁸

The relationship between the anti-trafficking framework and migration policy is presented in Figure 3 below:

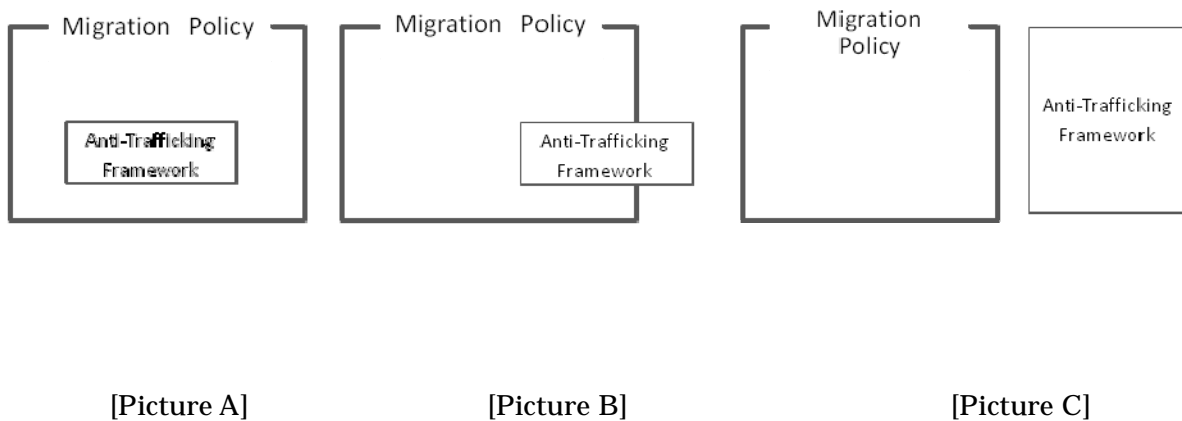


Figure 3: Migration Policy and the Anti-Trafficking Framework

In Picture A, anti-trafficking is integrated and mainstreamed in migration policy, in which human trafficking is recognized as the worst form of migration.

In Picture B, migration policy gives consideration to anti-trafficking, and at least the structural linkage between migration and human trafficking is recognized. If such linkage is recognized, trafficking will not be regarded as the issue of immigration control, and repatriation of victims will not be regarded as the only solution.

In Picture C, the anti-trafficking framework is outside of migration policy, and the two are not coherent or linked. The human trafficking issue is separated from the

¹⁸ In Japan under the system of 'Skill Traineeship' (Ginou Kensyuu-sei), small and medium-sized factories and farmers employ workers mainly from China, Indonesia, Thailand and other designated countries. Under the pretext of traineeship, this system enables Japanese employers suffering from a labour shortage to hire unskilled foreign workers at the lowest payment. The Japanese labour market is not open to unskilled foreign workers; however, such workers come to Japan under the pretext of being trainees.

migration issue, and they are under the jurisdictions of separate agencies. This includes the case where safe migration is recognized as a preventive measure against human trafficking at the policy level, but the implementation is not synthesized between an agency in charge of labour migration and that of anti-trafficking. For example, in Thailand, the Ministry of Labour is very eager to expel undocumented migrant workers who were left out of the national verification process, and the ministry has intensified its crackdown by establishing a special unit. During the course of finding, arresting and deporting undocumented migrant workers, no screening is conducted to identify victims of human trafficking. At the same time the Ministry of Social Development and Human Security has been trying to show visible improvements in terms of the protection of victims, but undocumented migrant workers who are most vulnerable to human trafficking have been left outside the scope of the country's anti-trafficking framework and remain outside unless identified as victims of human trafficking.

5. Conclusion

While human trafficking has been popularized and the anti-trafficking framework has developed, drawing considerable attention at the international as well as regional level, policies toward the people whose movements do not come under the category of human trafficking are left exclusively with individual countries. Governments tend to use their own anti-trafficking framework to gloss over their lack of human rights-based migration policy and framework as a whole. Each state uses its own discretion in deciding whom to let enter its territory. Only when identified as the victim of human trafficking is an undocumented migrant exempted from penalty for breaking immigration law.

As aptly remarked at the end of Thailand's Act against trafficking in persons, "For the best interest of trafficked persons, it is expedient to enact this Act."¹⁹ Considering the significant number of labour migrants from Myanmar to Thailand and the demand of the Thai economy for their labour, the country's anti-trafficking framework should be situated under labour migration policy. It is necessary to strengthen supervision of and compliance with labour standards and to protect migrant workers' labour rights, and not to leave the terrible conditions where labourers turn out to be victims of human trafficking. It is equally important to improve the working conditions and surroundings of non-trafficked migrants as to enrich the protection and assistance for the victim. Otherwise, would-be victims will eventually become victims. Arguably the inner meaning of the human-trafficking offense is the exploited person

¹⁹ The Anti-Trafficking in Persons Act 2008 of Thailand

who is not identified as a victim. The anti-trafficking framework should serve the best interest of the victim; still, it should not be one which might adversely affect the interest of the would-be victim who is not identified as a victim according to the law.

References

Regional Thematic Working Group on International Migration including Human Trafficking [2008] *Regional Report on International Migration in East and South-East Asia*, IOM, Regional Office for Southeast Asia, Bangkok.