

Comparative analysis of bilateral memoranda on anti-human trafficking cooperation between Thailand and three neighboring countries : what do the origin and the destination states agree upon?

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Comparative Analysis of Bilateral Memoranda on Anti-human Trafficking Cooperation between Thailand and Three Neighboring Countries: What Do the Origin and the Destination States Agree Upon?

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Abstract

In order to prevent, suppress and punish human trafficking, bilateral agreements between origin of victim countries and destination countries are crucial, because their cooperation involves cross-border activities such as repatriation of victims, extradition of criminals and information-sharing. This article analyzes three bilateral legal instruments between The Government of The Kingdom of Thailand and her three neighboring countries, namely The Royal Government of Cambodia, The Government of Lao People's Democratic Republic and The Government of The Union of Myanmar. The analysis will examine the legal status of the victim, the victim as witness in criminal proceedings, the victim protection programs, the recovery and restitution of damages, the process of repatriating the victim, and the prosecution of the criminal.

Keywords: Human Trafficking, Memorandum of Understanding, Origin country, Destination country, Bilateral Cooperation

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**Comparative Analysis of Bilateral Memoranda on Anti-human Trafficking Cooperation
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What Do the Origin and the Destination States Agree Upon?**

Miwa Yamada

1. Introduction

Since the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereafter the “Palermo Protocol”) was adopted in 2000 and came into force in 2003, many countries have enacted new laws on anti-human trafficking and revised their penal codes to comply with the definitions provided in the Protocol¹. While it is important to establish domestic legal systems to address the human trafficking issue, the problem cannot be solved by a single country’s implementation and enforcement of laws, because human trafficking often involves recruiters, facilitators, carriers, enforcers, and victims from more than one country.

Most countries in the world are categorized as origin of victim countries, destination countries, or transit countries, or two of them or all[UNODC 2006]. In order to address the problem of human trafficking, international cooperation on all three levels of human trafficking is essential, as stated in the Protocol and widely recognized, namely: prevention of human trafficking, prosecution of traffickers and protection of victims of human trafficking. Thus, international agreements, especially bilateral agreements between an origin country and a destination country, are necessary to make international cooperation concrete and functioning. In many cases of cross-border human trafficking, there are patterns and trends of human trafficking routes from one specific origin country to a specific destination country. Thus, a bilateral agreement between such two countries is crucial and indeed, such bilateral agreements have been concluded to deal with actual problems. Since international cooperation involves cross-border activities such as repatriation of victims, extradition of criminals and information-sharing, which inevitably touch upon national sovereignty and legal jurisdiction, the two countries must agree upon such matters in order to clear the way forward.

However, the two countries hold different positions: one is the origin of victims, and the other is the destination country where the victims are exploited. While they share the common goal of eradicating the problem, these different positions may lead to contradicting viewpoints and

¹ Japan revised its Criminal Code in 2005 to newly define a human trafficking crime in order to adopt the Protocol.

difficulties in reaching agreements on bilateral cooperation. All the provisions agreed upon in the agreement are applicable equally to both parties, and both parties have the same obligations and responsibilities to each other, both as the origin and the destination, and vice versa, because the provisions in a bilateral agreement do not specify one party country as the origin and the other as the destination. However, in reality, their positions do not change depending on the case. In cases of human trafficking across the border of two countries, one is always the origin and the other is the destination. Therefore, although the provisions in a bilateral agreement appear to be neutral for both parties, they surely reflect the reality of the unilateral movement of victims from one country to the other.

This article analyzes three bilateral legal instruments between The Government of The Kingdom of Thailand and her three neighboring countries, namely The Royal Government of Cambodia, The Government of Lao People's Democratic Republic and The Government of The Union of Myanmar. Although Thailand is the destination country in all of the relationships with the three neighboring countries, each legal instrument has its own features. This article aims to identify the common and different provisions in the three documents, especially in terms of the protection of victims and the prosecution of criminals where the positions of the origin country and the destination country are seen as opposite. In what way are the provisions different? If there are differences, why? Which provisions most effectively address a specific need, which do not? In order to combat human trafficking in the world, international cooperation, and especially bilateral legal cooperation, is essential. Many countries are striving to create bilateral agreements with their counterparts. Some countries, especially those regarded as destination countries, are still wary of being legally bound by such instruments and are struggling to determine whether such memoranda are effective to cope with the problem. The findings of this comparative analysis of the three legal instruments will be a useful reference for countries which are in an origin/destination relationship with the four countries considered here and the rest of the world as well.

The article first briefly describes the current situation of human trafficking between Thailand and the three neighboring countries, and their regional efforts which led to the conclusion of bilateral agreements. Second, it explains the viewpoints in analyzing the provisions of the agreements. Then, the analysis will examine the legal status of the victim, the victim as witness in criminal proceedings, the victim protection programs, the recovery and restitution of damages, the process of repatriating the victim, and the prosecution of the criminal. Finally, the article assesses the effectiveness of the provisions and considers the implications for future bilateral agreements to be concluded.

2. Cross-border human trafficking between Thailand and Myanmar/Cambodia/Laos and legal framework as countermeasures

2.1 Outline of human trafficking in the region

The majority of the victims of human trafficking in the world are reportedly living in or are from Asian countries, and South East Asia is regarded as a hub of human trafficking especially for sexual exploitation [Shelley 2010:158]. Human trafficking is particularly serious in the Mekong region for geographical, socio-economic and political reasons³. In the region, there are countries with higher income levels adjacent to countries with lower incomes, and people move from the latter to the former in search of higher incomes and better socio-economic opportunities. Human trafficking in the region has three major patterns: Thailand as the destination country and others as the origin country, China as the destination country and others (except Thailand) as the origin country, and trafficking beyond the region to Malaysia, Singapore and East Asia, North America, Europe, the Middle East and South Africa. This paper considers the first pattern of human trafficking, as described below.

Thailand, with the biggest economy in the region, has huge demand for low-skill cheap workers in several industries such as agriculture, fishing, seafood processing, construction, manufacturing and the service sector, and domestic workers. In response to this demand, approximately 3 million workers have emigrated from neighboring countries into Thailand⁴. Due to their geographical location, people from the three countries cross the borders by unofficial routes, which makes them irregular and vulnerable to falling victim of human trafficking. Between 2001 and February 2011, Thailand provided shelter for 4,863 non-national victims of human trafficking: the top three being 1,792 from Laos, 1,576 from Myanmar and 1,376 from Cambodia⁵. Exploitation includes both sexual and labor. The figures demonstrate that cross-border human trafficking between Thailand and its three neighboring countries is a major problem that must be addressed by the countries.

2.2 COMMIT

Thailand took the initiative to create a regional framework to address the issue in the Mekong region, which resulted in establishing the Coordinated Mekong Ministerial Initiative against Human Trafficking (COMMIT) among six countries in the region, namely Thailand, Laos, Cambodia, Myanmar, Vietnam and China. In 2004 in Yangon, the countries concluded a Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater

³ ILO estimated in 2005 that about 9.49 million people were under forced labor in the Asia-Pacific region, most of whom were in the Mekong region.

⁴ As of August 2011, the official number of migrant workers from the three countries was 2,060,756 in total, 1,490,131 from Myanmar, 195,470 from Laos and 375,155 from Cambodia. Source from Department of Employment, Ministry of Labour, Thailand.

⁵ 54 from Vietnam, 35 from China. Source from Ministry of Social Development and Human Security.

Mekong Sub-Region⁶. The Memorandum requires member states to adopt the term “human trafficking” as defined in the Protocol, to take anti-human trafficking measures, to enact and enforce laws necessary therefor, and to reinforce cross-border cooperation. Article 28 states that the member states shall make action plans to secure the effectiveness of the Memorandum and to monitor the progress of implementation. The United Nations Inter-Agency Project on Human Trafficking (UNIAP) is designated to serve as the secretariat of the Memorandum. In 2005 in Hanoi, the first 3-year action plan, called COMMIT SPA 2005-2007, was adopted among the member states. This action plan served as a comprehensive blueprint for anti-human trafficking measures at regional, national and bilateral levels [UNIAP 2010]. During the period, anti-human trafficking laws were newly drafted and negotiations on bilateral memoranda were held among the member states. According to the parties involved, the drawing up, implementation and monitoring of action plans effectively put peer pressure on member states in positive ways. In other words, COMMIT functions as an effective regional framework by the member states which are able to take advantage of learning from the practices of other members and assess the comparative positions among the members. The negotiation and drafting of bilateral memoranda has stimulated member states.

2.3 Bilateral memoranda among COMMIT member states

The memorandum between Thailand and Cambodia concluded in 2003 was the first bilateral memorandum in the region. Since the start of the COMMIT process, seven bilateral memoranda have been concluded among the member states: namely Thailand and Laos in 2005, Cambodia and Vietnam in 2005, Thailand and Vietnam in 2008, Thailand and Myanmar in 2009, Myanmar and China in 2009, Vietnam and Laos in 2010 and Vietnam and China in 2010. Basically, all memoranda share the same structure and include the salient features of anti-trafficking measures such as prevention of human trafficking, prosecution of criminals and protection of victims. However, each memorandum reflects the bilateral relationship peculiar to the respective two countries at that time. The memoranda that were concluded later tend to contain more detailed provisions than the earlier ones. Since international agreements are agreed by the party states to be consistent with their respective domestic laws, bilateral memoranda on human trafficking inevitably reflect the provisions of respective domestic laws on human trafficking.

2.4 National laws on human trafficking

This section explains the main features of national laws on human trafficking of Thailand, Myanmar, Laos and Cambodia for the comparative analysis of bilateral memoranda. While Thailand and Myanmar have comprehensive human trafficking laws which provide for both punishment of criminals and protection of victims, Laos and Cambodia have criminal codes to punish human

⁶ Text is available at http://www.no-trafficking.org/resources_laws_regional.html

trafficking but lack comprehensive legal provisions regarding victim protection.

In Thailand, The Anti-Trafficking in Persons Act came into effect in 2008 following abolition of The Measures in Prevention and Suppression of Trafficking in Women and Children Act. The law contains comprehensive provisions for prevention, protection and prosecution. The Act's definition of exploitation includes sexual, labor, begging, and removal of organs, and the victims include male adults. A key feature of the act is its detailed provisions for both the investigative process and victim protection. It describes the possibility of the public prosecutor claiming compensation on behalf of the victim, and also permits temporarily working while waiting for such legal proceedings⁷. Overall, this act is the most advanced and well-drafted in light of the Palermo Protocol among the six COMMIT member states.

In 2004, Myanmar became the first country in the region to join the Palermo Protocol, and the next year it enacted a comprehensive human trafficking law, called The Anti-Trafficking in Persons Law⁸. Under the law, the Central Body for Suppression of Trafficking in Persons (CBTIP), chaired by the Interior Minister, was established⁹. In CBTIP, there are three working groups: one in charge of the prevention of human trafficking led by the Vice Minister of the Interior, the second in charge of the legal framework and criminal prosecution chaired by the Vice Attorney-General, and the third in charge of the reintegration and rehabilitation of victims led by the Vice Minister of Social Welfare, Rescue and Resettlement. The definition of human trafficking includes the sale, purchase, lending and hiring, in addition to recruitment, transportation, transfer, or receipt of persons, as defined in the Protocol¹⁰. Another addition is that debt bondage is listed as an example of exploitation¹¹. There is an article to punish fraudulent adoption, marriage, and forging of documents for the purpose of human trafficking¹². Chapter V provides safeguards for the protection of the rights of victims and Chapter VI contains provisions specifically for women, children and youths¹³.

In Laos, human trafficking is defined in a chapter of the Law on Development and Protection of Women¹⁴. Article 24 defines human trafficking in the same way as the Palermo Protocol; however, it mentions only women and children as victims, not males. Article 25

⁷ Sections 35 and 36.

⁸ The State Peace and Development Council Law No. 5/2005.

⁹ Article 5.

¹⁰ Article 3(a).

¹¹ Debt bondage means the pledging by the debtor of his/her personal labour or services of a person under his/her control as payment or security for a debt, when the nature or length of service is not clearly defined or when the value of the services as reasonably assessed is not applied toward the liquidation of the debt (Article 3 (a) Explanation (3)).

¹² Article 26.

¹³ "Child" is defined as a person less than 16 years old, and "youth" from 16 to less than 18 years old (Article 3 (j) and (k)).

¹⁴ Chapter 1 Combating human trafficking of women and children, Part IV Protection of Women and Children against Trafficking and Domestic Violence, Law on Development and Protection of Women (No. 08 NA, 22 October 2004).

enumerates the rights of the victim. Article 26 refers to criminal proceedings. Article 134 in the Penal Code, which was revised in 2005, provides the same definition as the Palermo Protocol. This redundancy creates confusion among legal enforcement officers in Laos¹⁵.

In Cambodia, The Law on Suppression of Human Trafficking and Sexual Exploitation that was passed by the National Assembly on 20 December 2007, and approved by the Senate on 18 January 2008. The law does not have a comprehensive definition of human trafficking as defined in the Palermo Protocol. Article 8 of the law defines the act of unlawful removal of a person, and more severe punishment is given when the act is conducted for sexual exploitation or across border. Article 13 defines the act of unlawful removal in exchange for value, and when the act is conducted for sexual exploitation or across border, the punishment is more severe. This law lacks provisions for protecting victims. In December 2010, new penal code came into effect. It does not contain the crime of human trafficking, but it has provisions defining kidnapping and unlawful removal of minors, which may overlap some provisions of the Law stated above.

3. Comparative Analysis of Bilateral Memoranda

3.1 Analysis points

The provisions in bilateral memoranda are worded so as to be equally applicable to both parties. There is no provision requiring a specific act to be conducted by one party. Nonetheless, in cross-border human trafficking between two countries, one state is usually the origin country of victims and the other is the destination country. The position of being either the origin or the destination does not reverse, and the relationship between origin country and destination country is static, rather than interchangeable. This clearly shows the contrast between the two countries, one as the origin and the other as the destination.

In terms of the protection of victims, the origin state wants to have wide-ranging protection for victims, because they want to protect their own citizens. However, for the destination country, more detailed and wide-ranging protection of victims may incur a greater burden and more obligations, because protection requires providing, among others, shelter, food, physical and mental care for the victim until repatriation to the origin country. While the origin state wants maximum protection, the destination state wants to minimize it. There is thus a sharp contrast between the origin and the destination in neutrally worded provisions in bilateral memoranda.

Bilateral cooperation is also required in the investigation, arrest and prosecution of criminals who commit cross-border crimes. Specifying to what extent both parties will cooperate means drawing a line of demarcation between the two parties, because their respective legal jurisdiction does not cross borders and can never be shared. Criminal proceedings will be conducted

¹⁵ Interview with an official of Ministry of Justice, Laos in December 2010.

in accordance with the domestic laws of either of the two parties. In a case where citizen A is trafficked from country A to country B and citizen B is arrested as a suspect by officials B, officials A cannot take part in the investigation, let alone the prosecution, though officials A can effectively assist the investigation by helping the victim to serve as a witness if permitted by the national laws of country A and country B and an agreement between them. While officials A are eager to cooperate with the investigation and prosecution by officials B in country B, officials B tend to be reluctant to allow officials A to step into their jurisdiction. Vice versa, officials B cannot conduct an investigation in country A.

How the provisions for identification and recognition of the victim are articulated also reflect the contrasting positions between the origin and destination countries. Identification of the victim is conducted where the victim is found, i.e. in the destination country under the laws of that country. In the aforementioned example, citizen A is identified as a victim in country B by officials B under the laws of country B. Officials A cannot take part in the identification process in country B. While country A can request that their citizens be treated and identified as victims in an appropriate way, the decision to identify citizen A as a victim is up to officials B in accordance with the laws of country B. Identification of the victim by officials A under the laws of country A may not correspond precisely to the identification by officials B under laws B in country B. For country A, in order to secure the fair and appropriate treatment of would-be victims from country A, and for country B, in order to conduct the identification to the extent permitted by the laws of country B, the provisions for identification of the victim in the bilateral memorandum must be carefully written.

Further, the provisions of the memorandum depend on the signing ministry of each party state. Differences among signing ministries will certainly lead to different positions in the negotiation and conclusion of a memorandum between the two parties. In any country, several governmental institutions are involved in policies and practices to counter human trafficking problems. They include ministries of the interior or public security in charge of border-controlling and public security, police in charge of rescuing and identifying victims and investigating and arresting traffickers, and the ministry of social welfare or women's affairs in charge of the protection and rehabilitation of victims. While the former puts emphasis on suppressing crime, the latter focuses on protecting victims. Further, ministries of foreign affairs are involved in terms of international agreements and ministries of labor in terms of the labor exploitation type of human trafficking. The power politics of multiple players in a state will affect the negotiation and implementation of a memorandum.

Based on the points described above, the memoranda between Thailand/Cambodia, Thailand/Laos and Thailand/Myanmar are compared and analyzed.

3.2 Comparative analysis of provisions

All three memoranda generally follow the Palermo Protocol regarding the definition of human trafficking. However, only women and children are explicitly defined as victims in Thailand/Cambodia, because at the time of the agreement in 2003, both Thai and Cambodian anti-human trafficking laws recognized only women and children as victims. In 2008, both countries enacted anti-human trafficking laws which cover male victims.

The Thailand/Cambodia memorandum gives examples of exploitation in addition to the definition of human trafficking. They include, but are not limited to, the following: prostitution, forced or exploitative domestic labor, bonded labor and other forms of hazardous, dangerous and exploitative labor, servile marriage, false adoption, sex tourism and entertainment, pornography, and begging and slavery by the use of drugs on children and women. This list deliberately enumerates forms of exploitation which are suffered by victims in actual cross-border human trafficking between Thailand and Cambodia. This was the first bilateral memorandum between two countries in the Mekong region. Thailand took the initiative to set up a legal framework within the region, which resulted in COMMIT as explained above.

The irrelevancy of the consent of the victim in case where one of the means defined in the definition of human trafficking is used is provided in Thailand/Cambodia and Thailand/Myanmar, but not in Thailand/Laos. Thailand/Laos also lacks a provision that children are victims even if either means is not used. Children are defined as persons under eighteen years old in the three memoranda.

As pointed out, the origin and destination countries have different views on the extent to which they can commonly standardize the criteria for identifying victims. Once a person is identified as a victim, the person is given protection. Conversely, if a person is not identified as a victim, the person is not a victim to be protected under the memorandum and the destination country is not obliged to provide support. In Thailand/Cambodia and Thailand/Laos, there are no provisions regarding the criteria for identifying victims. Therefore, Thailand as the destination country identifies Cambodian or Lao victims according to her own criteria. The origin country can do nothing but accept the results of such identification. In Thailand/Myanmar, it is provided that the parties shall cooperate to establish common criteria¹⁶. This demonstrates Myanmar's great concern as the origin country about the identification of victims from her country conducted in Thailand. Mutually agreed identification criteria, rather those unilaterally set by the destination country, facilitates mutual commitment and cooperation at an early stage. In this sense, Thailand/Myanmar provides more concrete mutual cooperation than Thailand/Cambodia and Thailand/Laos.

3.2.1 Legal status of the victim

Once identified as the victim of human trafficking, what kind of legal status is given to the

¹⁶ Article 7 The parties shall make best effort to identify victims of trafficking in person. Mutually agreed-upon victim identification criteria should be developed to guide the process of identification.

victim? Thailand/Cambodia provides that trafficked children and women shall be considered victims, not violators or offenders of the immigration law¹⁷. Such provision is not contained in Thailand/Laos. Thailand/Myanmar has more detailed provisions that victims of trafficking in persons should not be prosecuted by either party for illegal entry or exit from the country, or for other offenses arising as a direct consequence of trafficking in persons, and shall not be detained in any law enforcement or immigration detention center while waiting for repatriation¹⁸. Meanwhile, Thailand/Cambodia provides for immunity of Cambodian victims from prosecution under immigration law for illegal entry to Thailand, and Thailand/Myanmar provides for not only illegal entry of Myanmar victims to Thailand but also illegal exit of Myanmar victims from Myanmar. However, all memoranda lack provisions to allow the victim to stay for a certain period, which makes the victim feel unsettled till repatriation¹⁹. Needless to say, neither memorandum contains a provision for allowing permanent residence in the destination country in the event that repatriation to the origin country is not in the best interest of the victim.

3.2.2 Victim as witness in criminal proceedings

For effective prosecution of the suspect in criminal proceedings, it is indispensable that the victim serves as a witness. However, victims are usually reluctant to act as a witness due to fears of being threatened or retaliation by the criminal. Even worse, the victim may make statements in favor of the criminal. Furthermore, acting as a witness in criminal proceedings further delays the return to one's own country; the legal proceedings will take at least a few months, and could take years to complete²⁰. For the victim to serve as a witness in a trial, their safety as well as other incentives need to be secured. In Thailand/Cambodia, the police and other appropriate authorities of the relevant state offer a protection program to secure the safety of victims and eyewitnesses from retaliation or menace during and after the judicial proceedings as deemed necessary²¹. Similarly in Thailand/Laos, it is provided that the relevant agencies of the two countries shall formulate protection plans to ensure the safety of victims, especially women and children, as appropriate from revenge or threats

¹⁷ Article 7 further states that trafficked children and women shall not be prosecuted for illegal entry to the country; trafficked children and women shall not be detained in an immigration detention center while waiting for the official repatriation process.

¹⁸ Offenses arising as a direct consequence of human trafficking are mainly prostitution and illegal working in the destination country. The two countries have laws to prohibit prosecution and foreign labor in general.

¹⁹ It is worth noting that The Anti-Trafficking in Persons Act of Thailand has a provision stating that a competent official may assist the trafficked person to obtain permission to stay in Thailand and be temporarily allowed to work in accordance with the law when necessary (Article 37).

²⁰ For example, in the Ranya Paew case, an infamous case of human trafficking for labor exploitation, the victims were rescued in August 2006, and the first conviction in the case was made in February 2011.

²¹ Article 15.

during and/or after the legal proceedings²². In Thailand/Myanmar, an article provides that the parties shall formulate an action plan to protect trafficking victims, especially women and children, and witnesses from revenge or threats during and after judicial proceedings²³. While the three memoranda pledge to secure the safety of victims against threats from traffickers, none of them mentions the financial security of the victims. Delayed repatriation may cause a further burden for the victim, because they need to earn a living for themselves and their family at home²⁴.

3.3.3 Victim protection programs

In a bilateral relationship, the destination country has an obligation to provide protection and support to the victim. As the position of origin and destination usually does not change, the origin country is keen to avoid specifying detailed burdens under victim protection programs.

In Thailand/Cambodia, it is stated that shelter and protection shall be provided to the victims according to the policy of each state²⁵. Similarly, Thailand/Laos provides an article stating that the concerned institutions of the parties shall provide temporary housing and appropriate protection to the victims in accordance with the policies of each country²⁷. Thailand/Myanmar provides that the relevant authorities and organizations of the parties shall provide temporary shelter and appropriate protection to the victims of trafficking in persons²⁸. All contain “in accordance with the policies of each party.” These wordings demonstrate the governments’ reluctance to commit themselves in terms of protection of non-citizens.

3.3.4 Recovery and restitution of damages

Enabling a victim to exercise his/her right to seek compensation and restitution is a main purpose of anti-human trafficking laws, and is not limited to the criminal aspects of human trafficking. The origin country desires to make it as easy and quick as possible for her citizen victims to be compensated for damage, however, such legal proceedings fall under the jurisdiction of the destination country, which makes it more difficult and delayed in practice.

Thailand/Cambodia provides that the parties shall undertake appropriate measures, which may include legal reform and legal aid, to ensure effective legal remedies to victims of trafficking²⁹. Unlike the other two memoranda, Thailand/Cambodia refers to the possibility of legal reforms of the party states. It is inferred that this memorandum was concluded at a time when both countries

²² Article 13.

²³ Article 17.

²⁴ Article 37 of Thai law provides the possibility of granting a work permit to the victim while waiting for legal proceedings, but this is not reflected in any bilateral memoranda.

²⁵ Article 7 (b).

²⁷ Article 6.

²⁸ Article 9.

²⁹ Article 8.

intended to enact new laws on human trafficking³⁰. Thailand/Laos stops short of stating that the victims shall receive justice and legal protection³¹. Thailand/Myanmar provides that the parties shall undertake appropriate measures, which may include legal aid, to ensure effective legal remedies for victims of trafficking in persons³². Claims for specific remedies which the victim can make are listed in Thailand/Cambodia and Thailand/Myanmar, which include restitution of the victim's property confiscated or obtained by authorities, compensation for damage caused by the offender, and payment by the offender for unpaid services. It also states that victims shall have access to the due legal claim process for criminal justice, recovery of damages, and other judicial remedies³³. No specific claim is prescribed in Thailand/Laos. Regarding restitution of the victim's property, Thailand/Cambodia states it as any undisputed personal property and belongings that have been confiscated or obtained by authorities in the process of detention or other criminal procedures. However, Thailand/Myanmar states those obtained in the process of being rescued or other criminal procedures. Clearly, a few years after the start of the COMMIT process, they use proper terms to describe the victim to be rescued, and not to be detained. Thailand/Cambodia has a provision stating that the proceeds of trafficking crimes may be confiscated and managed according to the laws of the relevant country, but neither Thailand/Laos nor Thailand/Myanmar refers to such proceeds³⁴.

3.3.5 Repatriation of victims

The main purpose of concluding a bilateral memorandum between two countries is to agree on the process for repatriating victims from the destination country to the origin country of the victim. In other words, repatriation is the *raison d'être* for such memoranda. The destination country desires to minimize the period of sheltering the victim while needing the victim to stay for as long as is necessary to serve as a witness in the criminal proceedings. In contrast, the origin country is required to receive the victim as her citizen as swiftly as possible if the victim so desires, but cannot receive the victim without deliberate preparations to do so, including proper identification of the victim and his/her family and ensuring appropriate conditions so as not to adversely affect the victim after returning. It is necessary to strike an appropriate balance for the timing of repatriation for both the origin country and the destination country and, most of all, for the best interest of the victim.

All three memoranda contain a provision for setting up a focal point for each party to

³⁰ Anti-human trafficking laws of Thailand and Cambodia came into effect in 2008, coincidentally the same year.

³¹ Article 6.

³² Article 11.

³³ Article 8, Thailand/Cambodia and Article 11, Thailand/Myanmar.

³⁴ Article 8 (b), Thailand/Cambodia. It is interesting to note that the memorandum between Cambodia and Vietnam concluded in 2005 stipulates that offenders shall return to the victim the unjust property which they obtained by trafficking or exploitation of women and children (Article 6.2). It allows a wider range of claims by the victim than in Thailand/Cambodia.

arrange and implement repatriation. In Thailand/Laos, it is provided that the victims, especially women and children, must have been registered or have their domiciles or residence in the accepting country or must be certified as residents thereof by the local authorities of the latter³⁵. This demonstrates the cautiousness of the government in receiving the victim from the destination country. Thailand/Laos lacks provisions prohibiting deportation of the victim or requiring the parties to consider the best interest of the victims. Thailand/Myanmar has more detailed specifications than Thailand/Cambodia and Thailand/Laos, because it was concluded after gaining practical experience with repatriation cases. It names specific organizations to serve as focal points for both parties, and also provides Standard Operating Procedures to be jointly developed by the parties³⁶.

3.3.6 Prosecution of criminals

Provisions for cooperation on criminal prosecution reveal the extent to which the party states commit themselves beyond their jurisdiction. Thailand/Cambodia provides that the law enforcement agencies in both countries, especially at the border, shall work in close cooperation to uncover domestic and cross-border trafficking of children and women³⁷. Thailand/Laos states that the institutions responsible for law enforcement in both countries, particularly in the border areas, shall closely cooperate with one another to uncover trafficking in persons, especially women and children, both within the territory and across the border³⁸. While the two memoranda thus provide for cooperation not only across the border but also in cases of domestic trafficking, Thailand/Myanmar limits such cooperation to cross-border cases only³⁹. In terms of cooperation on information exchange, Thailand/Cambodia and Thailand/Laos state that the relevant authorities in both countries shall cooperate in exchanging information concerning trafficking cases, and list trafficking routes, places of trafficking, identification of traffickers, and networks of trafficking methodologies of trafficking⁴⁰. Thailand/Myanmar includes the wording “subject to national laws”⁴¹.

4. Conclusions

Among the three memoranda, Thailand/Myanmar is drafted in the most specific, sophisticated manner, having some provisions that the other two lack and narrowly wording some

³⁵ Article 14 (b).

³⁶ Article 18 (c) and Article 19.

³⁷ Article 10.

³⁸ Article 9.

³⁹ Article 13 “The parties’ departments responsible for law enforcement shall closely cooperate to uncover and investigate cross-border trafficking in persons, especially women and children, at origin, transit and destination areas.”

⁴⁰ Article 13, Thailand/Cambodia and Article 12, Thailand/Laos.

⁴¹ Article 16.

provisions that the other two do not. As explained above, Thailand/Cambodia was made by the initial efforts of Thailand/Cambodia in 2003 and the memorandum paved the way for creating COMMIT among the six GMS countries in 2004. Having COMMIT, Thailand/Laos was then concluded. Thailand and Myanmar negotiated and drafted their memorandum after gaining experience of human trafficking cases between the two countries⁴². Though this is the first such memorandum that Myanmar has concluded, the memorandum contains necessary, sometimes narrowly tailored provisions, reflecting its position as the origin country. It demonstrates that Myanmar referred to the precedent memoranda between Thailand/Cambodia and Thailand/Laos in the framework of COMMIT.

To summarize the findings, first, the purpose of these memoranda is to ensure cooperation between the origin and the destination countries in spite of their contrasting positions. Such contrast is greatest in the prosecution of criminals and the protection of victims. The memoranda provide legal cooperation for the suppression of human trafficking such as prosecution of transnational traffickers, extradition and mutual legal assistance, however, they do not prescribe solutions for the dilemma between early repatriation of the victim, and the victim serving as a witness in a trial for effective prosecution and conviction. As explained, the memoranda provide for the safety of the victim from threats by the trafficker, but do not provide other financial and social securities. If the victim is permitted to decide whether to stay for the criminal proceedings or not⁴³, the government should support the victim to facilitate their participation, because the memoranda are intended to suppress human trafficking in practice.

Second, although bilateral memoranda have been concluded between two party countries to cooperate on anti-human trafficking, the memoranda also define the limitations of such cooperation. In other words, the memoranda demarcate the line between the respective jurisdictions of each state. This is clearest in the provisions regarding victim identification in the destination country and victim reintegration in the origin country. Identification of the victim is the exclusive jurisdiction of the destination country. Victims are identified in the destination country by officials of the country according to their laws. Although it would be beneficial and efficient if the origin country could be involved in the identification process in the destination country, such engagement is not articulated in the memoranda. Even if two countries have the same definition of victims of human trafficking in their respective national laws, each national law is implemented and enforced independently by respective legal officials. On the other hand, regarding follow-up of the victim

⁴² For example, the Ranya Paew case, in which 63 migrant workers from Myanmar were identified as victims being exploited at a shrimp processing factory in Samut Sakorn in 2006. In another case, 54 Burmese migrants died by suffocation in a covered truck while being transferred from Ranong to Phuket for labor in 2008.

⁴³ Article 8(d) of Thailand/Myanmar states that the principle of voluntariness should be considered throughout the victim's participation in judicial proceedings.

after repatriation, the origin country does not want the involvement of the destination country. Once the origin country receives its victims back, it controls their treatment, though the memoranda prescribe cooperation of the origin and destination countries on repatriation and reintegration. Further, the memoranda consider only repatriation and reintegration of the victim, and do not consider other options such as legally staying and working in the destination country. Thus, the bilateral memoranda prescribe rules for non-invasion of mutual jurisdiction, rather than prescribe extra-territorial cooperation between them.

Finally, the memoranda are characterized by their signatory ministries. The signatory ministry for the Government of Thailand is the Ministry of Social Development and Human Security, that for Cambodia is the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, that for Laos is the Ministry of Labour and Social Welfare, and that for Myanmar is the Ministry of Home Affairs. While the expertise of the signatory ministers of Thailand, Cambodia and Laos is protection of the victim, the signatory ministry for the government of Myanmar is an institution for border control and criminal investigation. The importance of the Palermo Protocol is its comprehensive provisions to address both issues: protection of the victim, and arrest, prosecution and conviction of the trafficker. Accordingly, modern laws on anti-human trafficking are drafted to cover both issues. However, the priority given in the national policies and practices of respective countries differs depending on the signatory ministry. Anti-human trafficking policies and practices should be handled through inter-ministerial cooperation. In reality, a ministry is in charge of matters prescribed by its legal base, and ministries exist within their power politics. Thus, the bilateral negotiation and implementation of memoranda depends on which ministry is the signatory. Whether a party state is capable of mobilizing inter-ministerial efforts depends on the position of the signatory ministry within the government. It is observed that cooperation on victim protection and repatriation is relatively well developed when the primary jurisdiction of both signatory ministries is social welfare. However, in such cases there may be little progress in cooperation on investigation and criminal proceedings⁴⁴. It is desirable to overcome the demarcation of respective jurisdiction of parties and ministries in order to make bilateral agreements effective and function for combating human trafficking and for the best interest of victims.

⁴⁴ Interestingly, Myanmar concluded a Memorandum of Understanding with China in 2009. China's signatory ministry is the Ministry of Public Security. While mutual understanding on the suppression of human trafficking was easily reached, there was a different understanding on the protection of victims. In Myanmar/China, provisions for victim protection are not fully stipulated in comparison with the three memoranda analyzed herein partly due to lack of such provisions in China's national law. Myanmar/China may adversely affect subsequent negotiations and conclusions of MOUs between China and other GMS countries.

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Texts of the three Memoranda are available at

http://www.no-trafficking.org/resources_laws_regional.html

Table: Comparison of the Three Bilateral Memoranda of Understanding

	Thailand/Cambodia (2003)	Thailand/Laos (2005)	Thailand/Myanmar (2009)
Definition of Human Trafficking	recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat, 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. Article 2(a)	same as left Article 2(a)	same as left Article 2(a)
Victim	children and women Article 2(a)	not limited	not limited
Consent of Victims	irrelevant if a means used Article 2(b)	not provided	irrelevant if a means used Article 2(b)
Children Victims	regardless of use of means Article 2(c)	not provided	regardless of use of means Article 2(c)
Children	under 18 Article 2(d)	under 18 Article 2(b)	under 18 Article 2(d)

Example of Trafficking	prostitution, forced or exploitative domestic labour, bonded labour and other forms of hazardous, dangerous and exploitative labour, servile marriage, false adoption, sex tourism and entertainment, pornography, begging and slavery by the use of drugs Article 3	examples not listed	examples not listed
Victim Identification	not provided	not provided	mutually agreed victim identification criteria should be developed to guide the process of victim identification. Article 7
Legal Status of Victim	not prosecuted for illegal entry to the country Article 7(a)	not provided	not prosecuted for illegal entry to or exit from the country, and for any other offences arising as a direct consequence of trafficking. Article 8(a)
	not detained in immigration detention center. Put under the signing Ministries. Article 7(b)		not detained in any law enforcement or immigration detention centres. Put under department in charge of social welfare or temporary shelter. Article 8(b)

	security ensured. Article 7(c)		security and privacy ensured. Article 8(c)
	treated humanely in the process of protection, repatriation, judicial proceedings Article 7(d)		treated humanely in the process of protection, repatriation, judicial proceedings. Voluntariness considered in the victim's participation in judicial proceedings. Article 8(d)
			Sensitive procedures required for children. Article 8(e)
Victim as Witness in Criminal Proceedings	Police shall secure safety of victims and eyewitnesses from retaliation or menace during and after judicial proceedings. Article 15	Concerned agencies shall make plan to ensure safety of victim from revenge or threats during the conduct and/or after legal proceedings. Article 13	formulate plan to ensure safety of victim and witness from revenge or threats during and after judicial proceedings. Article 17
Victim Protection Programs	shelter and protection shall be provided according to each state policy Article 7(b)	receive justice and legal protection while awaiting the completion of official repatriation. Temporary housing and appropriate protection to be provided according to each state policy. Article 6	receive legal protection while awaiting the completion of official repatriation. Temporary shelter and appropriate protection to be provided according to each state policy. Article 9

	safe shelter, health care, access to legal assistance, and other imperative for protection given to the victim and immediate family Article 9	legal assistance, health care and other measures for protection of the victim and immediate family. Article 8	safe shelter, legal assistance, appropriate communication between victims and families back home, and health care and other necessary measures for protection of the victims and their families. Article 12
Recovery and Restitution of Damages	legal reform and legal aid Article 8	provide due and just legal assistance to the victim. Article 7	undertake appropriate measures including legal aid to ensure effective legal remedies for victim. Article 11
	victim may claim restitution of undisputed personal properties that was confiscated by authorities in the process of detention or other criminal procedure Article 8(a)		victim may claim restitution of undisputed personal properties that was confiscated by authorities in the process of being rescued or any criminal procedure. Article 11(a)
	Proceeds of crime of trafficking shall be liable for confiscation Article 8(b)		may claim compensation from the offender of any damages caused by trafficking. Article 11(b)
	Victim may claim payment for unpaid services from offender Article 8(d)		may claim payment for unpaid services from offender. Article 11(c)
	access to due process to claim for criminal justice, recovery of damages and other judicial remedies Article 8(e)		access to due process to claim for criminal justice, recovery of damages, and other judicial remedies. Article 11(d)

Repatriation	use diplomatic channel to inform other repatriation arrangement in advance Article 16(a)	inform in advance names and data relating victims through diplomatic channels for arranging. Article 14(a)	inform in advance names and data relating victims through diplomatic channels for arranging. Article 18(b)
	conducted in the best interest of victim Article 16(b)	Victim must have been registered or have their domicile or residence in the accepting country or are certified as residents thereof by the local authorities. Article 14(b)	develop joint Standard Operating Procedures to assist safe and timely repatriation and reintegration. Article 18(c)
	victim shall not be deported. Article 16(c)		victim shall not be deported but repatriated in their best interest. Article 18(d)
	focal point to be set up. Article 17(a)	focal point to be set up. Article 15	focal point to be set up. Article 19
	safety of victims to be provided. Article 17(c)(iii)	ensure the safety of victim. Article 15(b)(3)	ensure the safety of victim. Article 19(c)
			follow-up of returned victims and sharing information thereon and outcomes, keeping the best interest of the returnee. Article 19(d)
Prosecution of Criminals	law enforcement agencies, especially at the border shall take work in close cooperation to uncover domestic and cross border trafficking. Article 10	law enforcement institutions, in particular border areas, shall cooperate to discover trafficking both within the territory and across border. Article 9	law enforcement agencies shall cooperate to uncover and investigate cross-border trafficking at origin, transit and destination areas. Article 13

	promote bilateral cooperation in prosecution, extradition, mutual judicial assistance in criminal proceedings. Article 12(a)	promote bilateral cooperation to combat trafficking such as prosecution of transnational traffickers, extradition, mutual assistance in criminal matters. Article 11(a)	promote bilateral cooperation in prosecution of transnational traffickers, extradition and mutual legal assistance in criminal matters. Article 15(a)
	afford mutual legal assistance in investigation, prosecution and judicial proceedings. Article 12(b)	afford mutual legal assistance in prosecution according to existing agreements signed by both. Article 11(b)	afford mutual legal assistance in investigation, prosecution and judicial proceedings while taking into account the best interest of victims. Article 15(b)
	cooperate in exchange of information concerning trafficking cases, e.g. trafficking routes, places of trafficking, identifications of traffickers, network of trafficking, methodologies of trafficking, and data on trafficking. Article 13	cooperate in compiling and exchange data and information and collecting evidence relating to trafficking such as routes, places, networks, means and methods including personal records of traffickers. Article 12	Subject to national laws, cooperate in compiling and exchanging data and information, and collecting evidence relating to trafficking such as routes, places, networks, means and methods of trafficking including personal information and criminal records of traffickers. Article 16
Signatory Ministries	Ministry of Social Development and Human Security/Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation	Ministry of Social Development and Human Security/Ministry of Labour and Social Welfare	Ministry of Social Development and Human Security/Ministry of Home Affairs