

# **Challenges and Priorities in Prosecuting and Adjudicating Trafficking in Persons Cases**

**Albert Moskowitz**

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## **Abstract**

This paper addresses some of the challenges faced by the criminal justice system in combating TIP in South East Asia and suggests some approaches that could be taken to address those issues.

For a number of reasons, including inadequate case reporting systems, lack of definitional uniformity and institutional reluctance to report case-related information, it is difficult to obtain data on the extent of the criminal justice response to TIP. What is known is that the number of prosecutions and convictions of traffickers worldwide is low.

Victims are usually essential to prove a human trafficking case, but prosecutors face a number of difficulties when dealing with traumatized victims who are suspicious of police and prosecutors. Frightened victims often provide untruthful or incomplete accounts to officials during the investigation stage which can undermine both the victim's credibility as a witness and later truthful evidence given during trial. Ensuring legal protection of victim-witnesses, who are vulnerable to influence from the trafficker, presents a further challenge.

States throughout the region have recently enacted new TIP legislation, the implementation of which has raised challenges for judges, prosecutors and police, specifically around victim detention, protection, prosecution and status. Successful prosecution under this new legislation will require an improved working relationship between trained investigators and skillful prosecutors.

Due to insufficient investigative techniques and prosecution tools, trafficking prosecutions rarely target the wealthy and powerful who run and profit from trafficking operations. While international legal cooperation is a complicated and difficult area of law, stronger international cooperation is critical to a successful criminal justice response to TIP.

Assistance should focus on destination states, particularly in establishing specialized and well-trained units to respond to trafficking cases. Developing standardized practitioner guidelines will ensure national programs are in compliance with minimum international standards. Further, donors could take steps to reduce the deficit in available data on the criminal justice response to TIP.

## **Table of Contents**

### **Introduction**

#### **Issue 1: Unreliable / Unavailable Case Data**

- 1.1. Technical barriers
- 1.2. Inadequate reporting systems
- 1.3. Definitional issues
- 1.4. Institutional resistance
- 1.5. Addressing the data issue

#### **Issue 2: Number and Quality of TIP Prosecutions**

- 2.1. Identifying victims
- 2.2. Complex and time-consuming prosecutions
- 2.3. The issue of victim credibility
- 2.4. Vulnerability to influence and intimidation
- 2.5. Need to develop corroborating evidence
- 2.6. Implementation issues in the new laws
- 2.7. Coordination between police and prosecutors
- 2.8. Fair trial concerns

#### **Issue 3. Targeting the Big Fish**

#### **Priorities for the Future**

- 4.1. Developing and implementing common standards
- 4.2. Specialization
- 4.3. Focus on destination States

### **Conclusion**

### **Bibliography**

### ***Annex: ASEAN Practitioner Guidelines***

# Challenges and Priorities in Prosecuting and Adjudicating TIP Cases

## Introduction

It is a commonly held view that the criminal justice response to the human trafficking problem has been largely inadequate. In support of this view, critics note that the number of trafficking convictions pales in comparison to the estimated number of trafficking victims worldwide. That estimate ranges between 800,000 and over 12,000,000 trafficking victims worldwide, while the global number of prosecutions is thought to be less than 1000.<sup>1</sup>

One issue is the accuracy of these estimates. In dealing with a crime like Trafficking in Persons (TIP) that is poorly reported, frequently unrecognized, inconsistently defined and conducted in secret, developing accurate victim statistics is a major problem. Similarly, on the judicial side, reliable case reporting is sporadic from country to country. Moreover, there is confusion about what charges qualify as trafficking or trafficking related crimes.

While recognizing the difficulty in compiling accurate and reliable statistics, there can be little doubt that under any reasonable estimate of the trafficking problem, the number of prosecutions and convictions of traffickers worldwide has been mostly insufficient to deter the criminals and to secure justice for the victims.

This paper will highlight three challenges to the criminal justice system in addressing the trafficking problem in South East Asia and suggest some approaches that could be taken to address those issues.

## Issue 1: Unreliable / Unavailable Case Data

As a preliminary matter, it is difficult to gauge the extent and effectiveness of the criminal justice system response without accurate information on the number and quality of the investigations and prosecutions being undertaken country by country in the region. Yet the Asia Regional Trafficking in Persons (ARTIP) Project has found that such basic case information is difficult to obtain. There seems to be several reasons for this.

### 1.1. Technical barriers

We note first that docketing systems in some countries make it difficult to identify, compile and analyze cases. To a large extent this is a resource and organizational problem.

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<sup>1</sup> Paul Holmes, Presentation to ASEAN Workshop on Criminal Justice Response to Trafficking in Persons, Bangkok, May 22-24, 2007. Note, however, that the US Department of State Trafficking in Persons Report, 2008, states that the number of TIP prosecutions worldwide in 2007 was 5,682. Retrieved 20 October 2008, from [www.state.gov/g/tip/rls/tiprpt/2008](http://www.state.gov/g/tip/rls/tiprpt/2008).

In Cambodia, for instance, a case will receive several different file numbers as it proceeds through the system, making it difficult to track and determine the status of a particular case. Complicating matters further, there is no easily accessible central office or docket book in which all cases are listed and kept up to date. Determining the status of a particular case in effect becomes a research project.

Even in countries with a centralized and accessible docketing system, the lack of computerization makes data retrieval and analysis time consuming and difficult. This means that obtaining total numbers of cases analyzed by significant categories, such as by gender of victim or accused, outcome of trial, length of sentence, statute charged, etc..., may not be easy to obtain. Indeed, requesting such information may require a time consuming hand review of files that places additional pressure on an already overworked and underfunded judiciary.

## **1.2. Inadequate reporting systems**

It has been observed that in some countries, case information from provincial courts to a central authority, such as the Ministry of Justice, where that information can be collected and analyzed, may not be reported on a consistent basis. Using Cambodia again as an example, provincial police are now required to submit regular reports on TIP investigations to the central specialist investigative unit, DAHT (Department of Anti-Human Trafficking) in Phnom Penh. That reporting system is ongoing. The courts, on the other hand, do not have a similar functioning program. While the Ministry of Justice is the nominal repository for case data on trafficking prosecutions from the provinces, it is experiencing difficulty gaining full cooperation from the provincial courts.

A related problem is that often trafficking statistics from the police are grossly inconsistent with the numbers reported by courts and prosecutors. To some extent such discrepancies can be attributed to differences in reporting regimes. But in many cases, the difference in reported cases reflects a lack of understanding and cooperation between police and prosecutors. What may seem like a good trafficking case to an investigator may be viewed quite differently by a prosecutor.

Differing standards in assessing evidence can contribute to confusion in the data and suspicion and misunderstanding between police and prosecutors. Police and investigators should be trained to understand the elements of proof necessary for a trafficking prosecution and to conduct the investigation and analyze the evidence collected in accordance with those elements.

## **1.3. Definitional issues**

There is a lack of uniformity on how to classify cases, resulting in inconsistency in the data reported. For example, should a case that started out as a trafficking investigation but ultimately was charged as a rape case, be viewed as a trafficking prosecution because the charge does not really reflect the true nature of the crime? Should smuggling cases be counted as trafficking prosecutions on the theory that the victim was moved from one place to another for purposes of work even if the evidence of coercion or exploitation is non-existent? What if the evidence of coercion and exploitation is present but is not sufficiently strong to warrant bringing TIP charges,

would that make a difference in whether to count a smuggling case as a TIP case? If the accused is charged with obstructing a trafficking investigation, can that be counted as a trafficking-related case?

The answers to these questions are not immediately obvious. Uniform guidelines are needed to provide assistance to the criminal justice community in compiling consistent data on trafficking cases.

#### **1.4. Institutional resistance**

We have also seen institutional resistance from prosecutors and courts to reporting case-related information. Such resistance is understandable with regard to ongoing prosecutions where public disclosure can compromise the integrity of the case or the privacy of victims and witnesses. But even where these factors are not at issue, there seems to be great reluctance, especially from the courts, to report on case specific details.

To some extent, this resistance may be based on a perceived threat to the independence of the judiciary. That is, any discussion about the details of a case could be seen as an attempt to influence, however indirectly, the objective and unbiased decision making authority of the court. Where, for example, an official from an executive branch agency, such as the MOJ, questions a judge about the details of a specific decision, those questions may be viewed as an implied criticism of the final ruling and a subtle warning that, in the future, similar cases should be decided differently. This is a real concern, especially in the trafficking arena, where subtle and not so subtle political pressures can be applied to increase prosecutions and convictions. This seems less of a concern, however, where the inquiry comes, not from a governmental ministry, but an independent source, such as an Non-Governmental Organisation (NGO) or international agency.

However, this reluctance can not be entirely justified by a legitimate concern to preserve judicial independence. Opposition to computerization of the courts or to developing a rational docketing system, for example, cannot be explained by reference to judicial integrity. Rather, such resistance may be caused by simple inertia and reluctance to change or it may be motivated by concern that greater transparency brings with it increased accountability resulting in closer scrutiny of workloads and case assignments or interference with corrupt practices.

#### **1.5. Addressing the data issue**

The ARTIP project does not have the capacity to engage seriously and consistently with the complex problems associated with unreliable and unavailable case data. Within the sphere of its own activities, ARTIP is nevertheless undertaking a range of measures aimed at enhancing its understanding of what is happening within the criminal justice process. For example, a case analysis system, currently under implementation, allows the project to collect data on human trafficking cases within the national criminal justice systems of partner countries . This enables the ARTIP project to follow the progress of a complaint through reporting, investigation, prosecution and judicial disposal. Trail observation is another means of seeking and securing reliable information on how the

system is operating and the challenges it is confronting. The information secured through these means is, however, incomplete and, while helping ARTIP to develop more targeted interventions, does little to address the entrenched obstacles outlined above.

## **Issue 2: Number and Quality of TIP Prosecutions**

The number and quality of TIP prosecutions tend to be low relative to the estimated number of victims for a number of reasons. As a general matter, it is unrealistic to expect that even well funded and resourced judicial systems are capable of handling a large volume of TIP cases. These cases are complex and time consuming and cannot be treated in a summary fashion, especially if international safeguards for fair trial and the rights of the accused are to be fully respected. Moreover, there are simply too many other criminal justice priorities that also must be addressed, such as terrorism, corruption and the trafficking in commodities such as drugs and arms. Another important consideration is many of the criminal justice systems in this region lack adequate funding, resources, and training and, as such, are not in a position to adjudicate large numbers of criminal cases.

Nevertheless, it is possible to isolate specific reasons why TIP cases are particularly difficult to prosecute effectively and in high numbers. First, TIP victims are not easily found, and without victims, TIP prosecutions are unlikely. Second, TIP prosecutions can be complex and difficult, requiring skills that generalist prosecutors may not possess. Third, prosecutors, judges and the police are learning the complexities of the new TIP laws recently enacted throughout the region, and they are finding that implementing those new laws has raised issues. Fourth, successful TIP prosecutions require close coordination between police and prosecutors, especially during the investigative stage. That kind of cooperative relationship is rarely the norm in the region.

### **2.1. Identifying victims**

Front line officials: police, border guards and customs agents are the criminal justice officials most likely to come into contact with victims of trafficking; yet there continues to be much confusion among front line officials about the difference between illegal migration, migrant smuggling and trafficking. As a result, a victim of trafficking may be mistakenly viewed as an illegal or smuggled migrant and, instead of being treated as a victim, he or she will be arrested, detained and deported as an illegal alien. Once the victim is detained and deported, the chances of securing a trafficking prosecution are almost zero.

Moreover, there is a built-in incentive for law enforcement to treat such cases as immigration violations if possible. That is because TIP cases are by their nature so much more labour intensive and time consuming than smuggling cases or immigration violations.

But even if front line officials are well trained to recognize trafficking victims and are motivated to do so, it is often very difficult to identify trafficking victims, particularly during the transit phase of the operation. Many trafficked persons, men as well as women, begin their journey as smuggled migrants – having contracted an individual or

group to assist their illegal movement in return for financial benefit. In a classic migrant smuggling situation, the relationship between migrant and smuggler is a voluntary, short-term one – coming to an end upon the migrant’s arrival in the destination country. However, some smuggled migrants are compelled to continue this relationship in order to pay off large transportation costs. It is at this late stage that the end-purposes of trafficking (debt bondage, extortion, use of force, forced labour, forced criminality, forced prostitution) will become apparent.<sup>2</sup>

The link between trafficking and migrant smuggling highlights one of the main obstacles to identification of trafficked persons. Trafficking involves the intention to exploit. Such intent will often not manifest itself until after the “movement” phase is over. It may therefore be impossible for a front line officer to recognize a trafficked person as such until the initial movement is completed. But by then, the victim is trapped in the very exploitative situation which ‘proves’ that he/she is something other than a migrant and out of reach of law enforcement.

Complicating the victim identification process is the lack of good intelligence on traffickers and trafficking patterns and the very limited proactive investigative techniques routinely employed by law enforcement agencies in the region. Law enforcement agencies in the region are essentially in a reactive posture with regard to trafficking allegations and do not as a rule act on intelligence to conduct proactive investigations to locate and liberate victims.<sup>3</sup>

## **2.2. Complex and time consuming prosecutions**

Except in the rare case of a proactive, intelligence-led investigation, victims are usually essential to prove a human trafficking case. The victim is often the only witness who is in a position to give a full account of the crime. Other witnesses, such as police officers, neighbors and medical personnel, for example, know only part of the story, but the trafficking victim can talk about all three phases of the trafficking experience. Only the victim can recount in detail how he/she was recruited, transported and exploited.

But dealing effectively with victims can be very difficult for prosecutors unaccustomed to the types of emotional and psychological problems that trafficking victims often exhibit. Such victims are often reluctant or incapable of cooperating effectively with investigators and prosecutors. This reluctance or inability to cooperate can be caused by a range of factors including trauma, fear and personal characteristics or vulnerabilities of the individual victim.

### ***Trauma***

By the time prosecutors and investigators make contact with victims of trafficking, the victims have usually been exposed to physical and/or mental abuse over significant periods of time. Such long term abuse is typical in trafficking cases because the trafficker’s purpose is to squeeze as much profit from the victim for as long as possible.

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<sup>2</sup> See Anne Gallagher and Paul Holmes, ‘Developing an Effective Criminal Justice Response to Trafficking in Persons: Lessons from the Front Line’, 18 *International Criminal Justice Review* (2008).

<sup>3</sup> Further on this, see the accompanying paper by Willem Pretorius, ‘Law enforcement responses to Trafficking in Persons in South East Asia’.

The control techniques employed by traffickers can include beatings, rapes, threats, isolation, starvation, drug addiction and imprisonment. Such abusive treatment over long periods of time can have a devastating impact on the ability of a victim to recall and articulate events coherently.

In addition, the victim may come to identify with the traffickers and minimize or deny their culpability.

### ***Fear***

Victims of trafficking are afraid of many things, but especially they fear:

- Retaliation from the trafficker who may harm the victim or his/her loved ones in retaliation for helping the prosecution;
- Prosecution that will imprison or deport the victim for crimes committed while under the influence of the trafficker;
- Shame, particularly in sex-trafficking cases, that the victim's families and communities will blame and ostracize them;
- Confronting or having to face the trafficker in court.

Prosecutors who do not understand these fears and the reasons for them will not be able to assist the victims to overcome their emotions and testify effectively in court.

### ***Personal Characteristics***

Victims of trafficking may exhibit disadvantages common to vulnerable populations including, limited education, poor communication skills, poor analytical abilities, lack of sophistication and unfamiliarity with the environment within which they find themselves. Complicating all of this is the fact that many victims find themselves in an irregular situation, in a foreign country and unable to speak the local language. Physical and psychological trauma can exacerbate these problems. Victims of trafficking may be distrustful of criminal justice officials and their motives – often because of previous bad experiences.

Prosecutors without the training and necessary support and resources to effectively deal with these victim issues are ill prepared to handle trafficking cases. As a consequence, the cases are often delayed and then dropped or charged under a different crime to avoid having to deal with what is viewed as a non-cooperative victim.

In addition to the trauma, fear and suspicion that victims of trafficking often bring to the case, there are additional issues complicating the prosecutor's job: victim credibility and vulnerability to influence and intimidation.

### **2.3. The issue of victim credibility**

Credibility of the victim's account is frequently undermined by inconsistent statements given by the victim during the investigation stage to the police or to others, such as victim support agencies. During initial interviews, traumatized, frightened and deeply

suspicious victims may provide incomplete or even untruthful accounts to officials. Later, when the victim has had time to heal and has developed a sufficient degree of trust and confidence in the police and prosecutors, a full and truthful statement from the victim can be taken. But the prior inconsistent statements given earlier during the investigation do not disappear. They remain and will be used by defense counsel to cross examine the victim to cast doubt on the victim's veracity and to suggest that, in view of the varying stories, the victim is not a trustworthy witness.

The prosecutor must have the experience to recognize the problem and not to dismiss the case simply because there are credibility issues. He or she must also have the patience to build trust with the victim and the skill to prepare the victim to explain the reasons for the discrepancies in a way that is understandable to the court.

The credibility of the victim can also be called into question when his or her account appears to be in conflict with common sense or the physical evidence. The victim's failure to escape from the exploitative situation, for example, is often an issue in TIP cases. In some cases, the victims may not be detained at the venue of exploitation or physically restrained in any way, or they may encounter law enforcement officers on several occasions during their exploitation or have other opportunities to escape - and yet they do not do so. This appears to defy common sense. Under such circumstances, the defense attorney/lawyer or the Judge will question whether the victim was really in a coercive and exploitative situation.

The prosecutor must be able to anticipate this issue and to effectively respond to it at trial. He or she must understand that the answer to the question of why the victim did not escape lies in the psychological control exercised over the victim by the trafficker. The prosecutor must be able to marshal the evidence to explain to the judge that the victim was alone in a strange location; isolated from contact with other compatriots; unable to communicate in their first language; denied possession of identity and travel documents; denied contact with family; disorientated by constant movement and re-location; subject to repeated physical and sexual abuse; denied access to police assistance through fear of the consequences; required to engage in physically dangerous and exploitative work on a daily basis for very long hours: all of which is likely to be endured while having to exist under a regime of threats or reprisals against themselves or their families if they seek to escape.

#### **2.4. Vulnerability to influence and intimidation**

Even if the prosecutor can overcome credibility issues and the initial reluctance of the victim to cooperate and provide a full and truthful account, the victim may be vulnerable to intimidation and influence from the trafficker.

Traffickers, of course, will do whatever it takes to avoid the lengthy prison sentences provided by the sentencing schemes of the newly enacted TIP laws, including paying off or threatening the victim or his or her family. Indeed, prosecutors in the region have told us that one of the biggest reasons why trafficking cases fail is that victims have been co-opted by the traffickers prior to trial.

Protecting the victim from the traffickers or their associates prior to the trial is difficult and time consuming. Traffickers can get to the victim in many ways, often using family members of the victim to persuade the victim to cease cooperating with the prosecutor. The prosecutor must be aware of the problem and take steps to try to insulate the victim. Such steps include remaining in constant contact with the victim, building a strong relationship of trust and confidence with the victim, securing the pretrial detention of the accused, expediting the trial and explaining to the victim his or her rights for compensation under the law.

But frequently, all attempts to prevent witness tampering fail and the victim will either run away or change his or her story, exonerating the accused. The prosecutor must be prepared to deal with this situation, doing what is possible to save the prosecution. This can include persuading the victim to continue cooperating and to recant any untrue statement exonerating the accused, seeking additional evidence to replace the testimony of the victim, bringing obstruction charges against the trafficker, or using the victim's prior truthful statement as evidence at the trial in the absence of the victim's cooperation.

## **2.5. Need to develop corroborating evidence**

Corroborative evidence is any reliable evidence which tends to support any part of the account of the victim.

Where victims can be convinced to act as witnesses and protected from interference pending trial, case experience from around the world highlights one common fact: the critical importance of being able to corroborate the account of the victim-witness. This is because the victim's testimony alone may not be enough to carry the prosecutor's burden of proof. There are several reasons for this.

Some victims are not good witnesses. They become easily confused, are unable to remember facts or put them in chronological order, have poor language skills or cannot overcome fear and nervousness.

Even if the victim is a persuasive witness, that testimony alone may not be enough to tip the balance in favour of the prosecution. The credibility of the victim-witness will always be subject to intense scrutiny and challenge by lawyers acting for the traffickers. Good defence attorneys know that in a trafficking case, the prosecution is built upon the evidence and testimony of the victim and that if the defence lawyer can damage the victim's credibility the prosecution is bound to fail.

Developing corroborative evidence can be a time consuming and difficult process. Often this evidence is located through eyewitness testimony or through a careful search of the crime scene or the home or business of the accused. Sometimes corroborative evidence can be found in a parallel financial investigation establishing the receipts and expenditures of the accused or through the examination of the physical evidence by an expert who can render a persuasive opinion on a crucial issue in court.

Conducting appropriate evidence searches, effectively working with cooperating witnesses, dealing with experts or overseeing a complex financial investigation takes expertise and skill. Prosecutors and investigators without the requisite experience and knowledge will be unable to recognize the need for corroboration, know how and where to find that evidence, and be successful in developing that evidence for use in court.

## **2.6. Implementation issues in the new laws**

States throughout the region have recently enacted new TIP legislation. These new laws reflect to varying degrees many of the provisions of the UN Protocol on Trafficking in Persons. They tend to extend protection to a broad variety of exploitative conduct and cover men as well as women and children. Their sentencing schemes are strengthened, and key definitions often reflect those adopted by the international community in the UN Protocol. As such these laws represent a step forward in the development of an effective anti-trafficking legal framework.

However, these laws also represent enforcement and implementation challenges. Specifically, important issues of victim detention, victim protection, victim prosecution, and victim status are not always addressed clearly or effectively in these statutes.

In Malaysia, for example, the new TIP law requires that foreign victims of TIP be detained pending the outcome of the prosecution.<sup>4</sup> This may have a counterproductive impact, discouraging victims from admitting their victim status and cooperating with authorities. Prosecutors and investigators will have to implement this statute in a way that does not undermine prosecution efforts.

In Cambodia, the new TIP Act<sup>5</sup>, while very thorough in describing a broad array of conduct prohibited by the statute, fails to fully address victim protection issues, leaving the criminal justice system to grapple with those concerns without express legal authority or guidance.

While the new Thai anti-trafficking statute makes clear that victims of trafficking cannot be prosecuted for crimes committed in connection with a trafficking scheme<sup>6</sup>, the law in Cambodia, for example, is silent on that important point. The law in Myanmar touches on this issue but leaves it up to the Central Body to determine “whether or not it is appropriate to take action against the trafficked victims for any other offense arising as a direct consequence of trafficking in persons.”<sup>7</sup> Thus investigators and prosecutors are often uncertain on how to proceed in cases where the TIP victim may have committed criminal acts while under the control of the traffickers. This can have important repercussions in trying to convince fearful and suspicious victims that their cooperation will not lead to further pain and suffering.

Similarly, the legal status of victims liberated from an exploitative situation in a foreign jurisdiction is sometimes not made clear in these new laws, although the new Thai law

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<sup>4</sup> Articles 44; 51(3)(a)(ii), *The Anti-Trafficking in Persons Act 2007* (Act 670), Malaysia.

<sup>5</sup> *The Law on Suppression of Human Trafficking and Sexual Exploitation* (NS/RKM/0208/005), Cambodia.

<sup>6</sup> Section 41, *Anti-Trafficking in Persons Act B.E. 2551 (2008)*, Thailand.

<sup>7</sup> Section 13, *The Anti-Trafficking in Persons Law* (2005), Myanmar.

does address this issue with specificity<sup>8</sup> and the law in Myanmar directs the Central Body to “coordinate with the relevant Ministries for the temporary residence [of a TIP victim] in Myanmar...”<sup>9</sup> Again, any uncertainty here makes it more difficult for investigators and prosecutors to effectively inform and protect reluctant victims.

Finally, the decision to prosecute TIP cases may require approval from a high level, non-prosecutive body. This is the scheme employed in Myanmar where the new TIP law gives the Central Body the ultimate authority to approve any TIP prosecutions.<sup>10</sup> This extra layer of review can delay prosecutions resulting in the possible loss or contamination of crucial evidence.

## **2.7. Coordination between police and prosecutors**

Because of the complexities of TIP prosecutions, it is crucial that prosecutors and investigators work closely together throughout the investigative and trial stages. The early involvement of prosecutors is especially useful in developing a relationship of trust and confidence with the victim. Creating such a bond is the best way to obtain victim cooperation and protect against interference from the traffickers. The involvement of the prosecutor also allows the prosecutor to assess victim credibility, identify additional evidence needed to strengthen the case and to direct the investigation accordingly.

Of course, the usefulness of early involvement of prosecutors depends to a large degree on the expertise, skill and enthusiasm of the prosecutor in handling trafficking cases. Assuming the availability of well trained and highly committed prosecutors, a team approach should be used in investigating and prosecuting TIP cases.

In some States in this region, however, there is a sharp divide between police and prosecutors. This divide is usually a matter of practice and habit rather than a requirement under the law. For example, prosecutors in Thailand have told us that they see the need to work more closely with the police during the investigative stage and express frustration that in most cases this does not happen. When asked why this is so, the prosecutors refer to certain legal restrictions; but when pressed, they acknowledge that closer cooperation is not legally prohibited but that the long standing practice and attitudes make changing relationships difficult.

In other States, such as Cambodia, prosecutors have the legal authority to oversee investigations, but in practice appear not to exercise that authority aggressively, remaining largely passive during the investigative stage.

The failure to create a good working relationship between trained investigators and skillful prosecutors is an important factor in the criminal justice system to adequately respond to trafficking crimes.

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<sup>8</sup> Section 37, *Anti-Trafficking in Persons Act B.E. 2551 (2008)*, Thailand, provides that where the trafficking victim is a foreign national who was exploited in Thailand, the victim may obtain a temporary visa to legally remain and work in Thailand pending the completion of criminal proceedings, to obtain medical treatment, finish a program of rehabilitation or make a claim for compensation.

<sup>9</sup> Section 15, *The Anti-Trafficking in Persons Law (2005)*, Myanmar.

<sup>10</sup> Section 9, *The Anti-Trafficking in Persons Law (2005)*, Myanmar.

## **2.8. Fair trial concerns**

In addition to the barriers to effective prosecutions of TIP cases noted above, fair trial procedural rules that must be in place to assure that the fundamental rights of the accused are vigorously respected complicate and delay the trial process. Procedural rules protecting the integrity of the trial means at a minimum that the accused must have time to prepare a defense, question witnesses testifying for the prosecution and present witnesses on his or her behalf at the trial. The practical impact of these rights is to slow down the adjudicative process. While this makes prosecution difficult and time consuming, enforcing basic procedural guarantees is of fundamental importance to assure that a fair and correct verdict is obtained.

But such guarantees are not deeply entrenched in all judicial systems in the region. This raises the concern that political pressure to increase TIP prosecutions may in fact result in increased numbers, to be sure, but that the cases prosecuted may be minor and of questionable quality. This is particularly true where fair trial procedures are not firmly in place or up to international standards.

Prosecutors and judges must know the basic standards necessary to assure a fair trial and have the courage to insist that those standards be met in every case.

### **Issue 3: Targeting the Big Fish**

In addition to relatively low prosecution rates, the prosecutions that are undertaken rarely target the wealthy and powerful who run and profit most from the trafficking operations. It may be that few trafficking networks in the region operate on a large scale involving rich and powerful heads; that trafficking crimes in the region are not being committed by highly structured criminal organizations making large profits, but are instead small and loosely associated “mom and pop” operations trafficking few victims and generating relatively modest amounts of money. The extent to which that may be true is not clear. What is clear is that investigative techniques and prosecution tools are insufficient to conduct the kind of investigations and prosecutions likely to find and convict the big players.

First, proactive investigation techniques, such as working with informants and undercover operatives and conducting covert information gathering operations, which can be effective in developing the evidence needed to make cases against crime bosses, are not often used in this region in TIP cases. This is partly because local investigative agencies do not have the resources or the training to conduct this type of investigation; but also because the laws are not in place to permit evidence collected in this way to be used in court.

Second, a common and highly effective strategy used by many prosecutors and investigators “to go up the chain” and secure evidence against those who run a criminal enterprise is to seek the cooperation of accomplices who can testify against the higher ups in exchange for a reduced sentence or a lesser charge. That strategy, however, is not commonly used in this region. In civil law systems, prosecutors are not allowed the kind of broad discretion to make charging decisions and sentencing recommendations

routinely accorded prosecutors in common law systems. Moreover, testimony from culpable accomplices is viewed with deep distrust and under some rules of procedure may not be considered as evidence. And finally, plea bargaining is viewed suspiciously as dealing with criminals and, as such, is an unsavory and dangerous practice open to corruption and beneath the dignity of the courts to sanction. Be that as it may, experience has shown that working with cooperating accomplices is an important tool against criminal leadership and without that tool as an available investigative option, securing convictions against those who operate trafficking businesses will continue to be rare.

Third, improving the sharing of information, the moving of evidence and the extradition of accused are crucial to successfully target high value suspects who operate trafficking schemes without regard to international borders. But international cooperation in TIP cases in the region is sporadic at best. Language issues make it difficult for law enforcement and prosecutors from different countries to communicate easily. Also, international cooperation is a specialized and complicated area of the law, and few prosecutors and investigators understand the diplomatic and legal issues and practices involved. Finally, the legal tools facilitating international cooperation are available, such as the International Covenant on Transnational Organized Crime (CTOC) and the MLAT (ASEAN), but many States in the region have been slow to ratify them. Thus, for example, only 5 States have ratified the MLAT (ASEAN) to date<sup>11</sup>, and only 7 States have either ratified or acceded to the CTOC<sup>12</sup>. Stronger commitment to international cooperation by States and practitioners is necessary to eliminate safe havens for owners and operators of large scale trafficking businesses.

Finally, corruption cannot be ignored as a reason why there have been so few cases brought against the rich and powerful profiting from human trafficking. Payoffs to, or threats directed against, judges, prosecutors, and witnesses can derail investigations and destroy prosecutions. Indeed, endemic corruption has a corrosive effect on TIP prosecutions. Victims and witnesses will not cooperate with a system that they perceive as unable to protect them or to secure justice. Moreover, the new TIP laws enacted throughout the region will not, in all likelihood, reduce instances of corruption. In fact, they may have the opposite effect, as traffickers with resources will redouble efforts to avoid the lengthy jail sentences imposed under the new laws.

#### **4. Priorities for the Future**

Given the challenges confronting prosecutors, police and judges in addressing the trafficking problem, it is useful to consider how best to use scarce resources to assist the criminal justice system in strengthening its response. Below are three suggested priorities.

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<sup>11</sup> Brunei, Lao PDR, Malaysia, Singapore and Vietnam. A sixth State, Indonesia, is in the process of submitting ratification documents to the Secretariat.

<sup>12</sup> Cambodia, Malaysia, Philippines, Singapore, Lao PDR, Myanmar and Brunei.

## **4.1. Developing and implementing common standards**

Identifying basic principles and good practices for an effective response to TIP provides a roadmap to practitioners and policy makers as to what must be done to bring anti-trafficking programs into compliance with minimum international standards. Common standards also provide an important foundation for cooperation between countries in the prosecution of TIP cases.

In this respect, ARTIP has been working closely with ASEAN through the Senior Officials Meeting on Transnational Crime (SOMTC) to create a set of Practitioner Guidelines which reflects regional priorities and policies in providing just such a roadmap. These Guidelines were developed with reference to generally accepted international law and practice<sup>13</sup> and in discussions with practitioners and policy makers from all the ASEAN Member States who provided extensive feedback and drafting suggestions. After much discussion and consideration by the Member States, a final version of the Practitioner Guidelines was formally adopted by the SOMTC at the annual meeting in Vientiane in June, 2007.

The Practitioner Guidelines focus is on the prosecution and adjudication of TIP cases and is organized around two broad themes: Evidential Matters and International Cooperation. Under Evidential Matters, the Guidelines addresses the need to strengthen the legal framework surrounding trafficking, emphasizes the importance of specialization for prosecutors and police who work on TIP cases, provides guidance on how to effectively manage victims as witnesses, deals specifically with handling child victims, and identifies principles and practices that should be applied during trials of TIP cases. International Cooperation is given a separate heading under the Guidelines and covers practices and principles for operational cooperation as well as formal cooperation under legal principles of MLA and extradition.

Adoption of these Guidelines reflects a common understanding within the region on the steps that must be taken to strengthen national responses to TIP and facilitate cooperation between countries. Articulating those steps makes it more likely that concrete progress will be achieved.

A copy of the ASEAN Practitioner Guidelines is attached.

## **4.2. Specialization**

As noted above, one of the principles set forth in the Practitioner Guidelines is the importance of establishing a specialist response to TIP cases within the criminal justice system. (See Section B of the Guidelines.) Specialist units within the police and prosecutors' office specially trained and dedicated to handling TIP cases have proven effective in generating high quality cases resulting in convictions and appropriate punishment. This is not surprising, since TIP cases are complex and involve legal and factual issues unique to these cases. The legal expertise and practical litigation skills so important to successful prosecution of TIP cases can best be developed in specialist units solely dedicated to these cases.

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<sup>13</sup> As set out in detail in Gallagher and Holmes.

Moreover, membership in elite specialist units tends to foster a high level of commitment and dedication to the mission of that unit. This commitment and enthusiasm will inevitably generate more and better investigations and prosecutions.

Additionally, specialist units within the police and the prosecutors' offices complement one another. Since both specialist police and specialist prosecutors are likely to be small units that will work together, be trained together and are dedicated to achieving the same objectives, closer operational cooperation between the police and the prosecutors can be expected over time. This is crucial, as we have seen, to improve the quantity and quality of TIP investigations and prosecutions.

Finally, specialist units can be tasked, not only with handling the most sensitive TIP cases, but also with advising and assisting their generalist colleagues in dealing with minor or routine TIP cases assigned to them. To be able to effectively perform this advisory function, a system must be devised to assure that the specialist office is notified of all TIP cases pending in the country at any one time. Thus the specialist office will be in a good position to take the lead in collecting basic data on TIP cases nationwide, thus providing the government and the public with reliable and timely TIP case related information.

Of course, resource limitations and low case volume may make establishing specialist units impractical in some countries. Nevertheless, where feasible, dedicated units can be an effective tool against TIP and demonstrates in very concrete terms that country's will and commitment to strengthen its criminal justice response to TIP.

#### **4.3. Focus on destination states**

Destination states in the region, such as Thailand, should be the most active in investigating and prosecuting TIP cases. These are the countries where large numbers of victims are transported to work in garment factories, shrimp processing plants, brothels or on fishing boats. Yet the number of cases prosecuted there is not large.

Given the limited resources available to assist the various criminal justice systems in the region, it makes sense to focus efforts where the greatest impact can be anticipated. An increase in the number and quality of prosecutions in Thailand, for example, should result in significant numbers of liberated victims, the disruption of major trafficking operations, and the arrest of the owners of those operations.

Efforts then should focus on working with countries like Thailand to strengthen anti-trafficking programs thereby, for example, assisting in creating litigating specialist units, providing training and ongoing guidance to those units, and providing support for the specialist unit to take a leading role to foster closer international cooperation on TIP cases within the region.

## **Conclusion**

For a number of reasons, including inadequate case reporting systems, lack of definitional uniformity and institutional reluctance to report case-related information, it is difficult to obtain data on the extent of the criminal justice response to TIP. What is known is that the number of prosecutions and convictions of traffickers relative to the estimated number of victims worldwide is low.

There are many reasons for this disparity. Prosecutors face difficulties when dealing with traumatized victims who are suspicious of police and prosecutors. Frightened victims often provide untruthful or incomplete accounts to officials during the investigation stage which can undermine both the victim's credibility as a witness and later truthful evidence given during trial. Ensuring legal protection of victim-witnesses, who are vulnerable to influence from the trafficker, presents a further challenge. Implementation of new anti-TIP laws has proven problematic for judges, prosecutors and police, specifically with respect to victim detention, protection, prosecution and status issues. Prosecution of TIP cases benefits from close cooperation between trained investigators and skillful prosecutors. This team approach is not yet the norm in this region. Finally, insufficient investigative techniques and prosecution tools result in few prosecutions of the rich and powerful who run and profit from trafficking operations.

Many of these issues are not unique to TIP prosecutions but are part of broader problems within judicial systems that cannot be fixed quickly or easily. Nevertheless, within the context of the criminal justice response to trafficking, efforts should focus on destination states, particularly in establishing specialized and well-trained units to respond to trafficking cases and to take the lead in gathering data and fostering cross border cooperation, and in developing and implementing standardized practitioner guidelines to ensure that national programs are in compliance with minimum international standards and to provide a measure to gauge improved response.

## **Bibliography**

Gallagher, Anne and Holmes, Paul. 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line', *International Criminal Justice Review*, Vol. 18, No. 3, 2008, pp. 318-343.

Holmes, Paul. Presentation to ASEAN Workshop on Criminal Justice Response to Trafficking in Persons, Bangkok, May 22-24, 2007 (ARTIP: 2007).

United States Department of State, *Trafficking in Persons Report 2008*. Retrieved 20 October 2008, from [www.state.gov/g/tip/rls/tiprpt/2008](http://www.state.gov/g/tip/rls/tiprpt/2008).



## **CRIMINAL JUSTICE RESPONSES TO TRAFFICKING IN PERSONS: ASEAN PRACTITIONER GUIDELINES**

**[As finalized by the ASEAN Ad-Hoc Working Group on Trafficking in Persons, 25 June 2007, Vientiane, Lao PDR; and endorsed by the 7<sup>th</sup> ASEAN Senior Officials Meeting on Transnational Crime, Vientiane, Lao PDR, 27 June 2007]**

***The overall objective of these Practitioner Guidelines is to assist the criminal justice agencies of ASEAN Member Countries in their goal of securing justice for victims and ending the impunity of traffickers.***

### **Part One - Evidential Matters**

#### **A. Strengthening of the Legal Framework**

1. All forms of trafficking in persons and related crimes should be specifically criminalised in accordance with applicable international standards.
2. Penalties for those convicted of the crime of trafficking in persons and related crimes should be commensurate with the gravity of the crime.
3. Offences of trafficking in persons, together with trafficking in persons related crimes are recommended to be predicate offences in respect of money laundering legislation.
4. In order to ensure that there are no safe havens for traffickers, States are encouraged to either extradite or prosecute alleged offenders.
5. Existing and future bilateral and multilateral extradition and mutual legal assistance treaties should be applicable for trafficking in persons and trafficking-related crimes.
6. To the extent possible, the legal framework should enable victims to seek and receive remedies including compensation from appropriate sources including from those convicted of trafficking in persons and related offences.

## **B. Specialisation and Co-operation**

1. A specialist investigation capacity within national police forces is key to a strong and effective criminal justice response to trafficking in persons. Front-line law enforcement officials should also understand the crime of trafficking and their responsibility to provide an initial response.
2. Prosecution agencies should also develop a specialist response capacity. A number of prosecutors - appropriate to the current and anticipated caseload - should be specially trained and designated to undertake the preparation and presentation of TIP and related prosecutions.
3. Priority should be given to the development and delivery of specialist training for any designated prosecutors.
4. If the caseload does not yet warrant a specialist prosecutorial response, then the prosecutorial agency should designate a focal point for TIP related cases.
5. A number of judges, appropriate to the current and anticipated caseload, should be specially prepared and designated to undertake the management and adjudication of TIP related trials.
6. All prosecutors and judges should be sensitized to understand the crime of trafficking and informed of the applicable legal framework.
7. There should be close co-operation between investigators and prosecutors, including at the specialist level, at the earliest possible stages in trafficking cases in order to ensure strong prosecution cases.

## **C. Management of the Victim as a Witness**

1. Prosecutors and investigators should work closely to secure the consent and co-operation of victims of trafficking to act as victim-witnesses and to provide evidential statements.
2. To the extent possible, victims of trafficking should not be charged or prosecuted in relation to crimes committed by them that are a direct consequence of an act of trafficking in persons.
3. Victims of trafficking should, as provided in domestic law, be provided with prompt access to protection and shelter.
4. Administrative and/or legal provisions should be put in place to enable consenting and co-operating victim-witnesses to remain in the country for the purposes of assisting with the investigation and / or testifying in criminal proceedings.

5. Specialist prosecutors and victim support agencies should cooperate to support victims throughout their involvement as witnesses in criminal proceedings.
6. The privacy of victims of trafficking should be respected and their personal particulars should remain confidential, to the extent provided by law.
7. To the extent possible, efforts should be made to expedite criminal proceedings in trafficking cases to reduce the stress and pressure endured by victims when having to wait for long periods of time to testify at trial.

#### **D. Special Measures for Child Victims**

1. The special needs of child victims of trafficking as well as their special rights to protection, care and support should be recognised and respected by all criminal justice agencies.

#### **E. Witness Protection Issues**

1. Victim-witnesses and where necessary, their families, should be protected from reprisals from their traffickers.
2. The privacy of victim-witnesses is to be protected at all times, to the extent provided by law.
3. To the extent possible under domestic law, the physical re-location of consenting victim-witnesses, including to second or third countries, should be considered where such relocation is necessary to protect them.

#### **F. Trial Issues**

1. Prosecutors and investigators should work closely to secure the consent and co-operation of victims of trafficking to testify in the trial of their traffickers in those cases where their testimony is necessary for the prosecution.
2. In the interests of justice and victim protection, trafficking in persons related trials should be commenced and completed without undue delay. Mechanisms such as preliminary hearings should be considered where possible.
3. In order to make trials less stressful for testifying victim-witnesses, a range of alternatives to testifying in open court should be explored; this may include the opportunity to testify from behind a screen, or at a closed session of the trial proceedings or by means of a video link.

4. Other practical court support measures could include: pre-trial court room visits, escorts to and from court buildings, the use of separate entrances to the court building, private waiting areas and the regular provision of information concerning the conduct of the trial from the prosecution side throughout the court proceedings.
5. It is the responsibility of both the prosecutor and the judge to ensure that a fair trial takes place in accordance with applicable international standards.

## **Part Two - International Operational and Legal / Judicial Co-operation**

### **A. International Operational Co-operation**

1. Efforts should be made to increase deployment of coordinated specialist investigator-prosecutor investigation teams at the international level.
2. There should be increased collaboration in the use of specialist investigative techniques in international investigations.
3. Regional training workshops on the management of coordinated investigation teams and implementation of specialist investigative techniques should be developed.
4. National multi-agency border liaison units should be established, especially at identified border “hot spots” to improve the capacity and quality of cross-border co-operation.
5. Relevant agencies should be encouraged and supported in effective use of modern information and communications technology at all levels to facilitate closer and faster co-operation.
6. Operational international co-operation measures should be closely coordinated with other appropriate regional structures such as the Heads of Specialist Trafficking Units (HSU) Process, Interpol and joint meetings of ASEAN law enforcement agencies.

### **B. International Legal / Judicial Co-operation - General**

1. The use of the principle of “extradite or prosecute” is encouraged as a guide for all actions in relation to the prosecution of cross-border trafficking in persons cases.
2. Where possible, extra-territorial provisions should be attached to trafficking in persons laws and related statutes as a further measure to remove safe havens for traffickers.

3. ASEAN Member States should review and harmonise domestic law to the extent possible to ensure that extradition and mutual legal assistance provisions are able to function effectively.

### **C. International Legal / Judicial Co-operation - Extradition**

1. The conclusion and effective implementation of bilateral extradition treaties will be an important step forward in ending impunity for traffickers.
2. Where extradition is not possible because of the absence of a treaty, alternative means, such as the use of the UN Convention against Transnational Organised Crime, where applicable, or other arrangements at the international, regional or bi-lateral level and on a case-by-case basis, could be considered.
3. In appropriate transnational cases where traffickers could be prosecuted in two or more States, alternative means at the international, regional or bilateral levels could be considered to assess and coordinate criminal proceedings and, where appropriate, consider the transfer of criminal proceedings to the most appropriate State in the interests of the proper administration of justice.
4. Consideration should be given, where appropriate, to the development of specific legal provisions to facilitate the transfer of criminal proceedings in cross-border cases in the ASEAN region.

### **D. International Legal / Judicial Co-operation - Mutual Legal Assistance in Criminal Matters**

1. The Treaty of Mutual Legal Assistance in Criminal Matters Among Like-Minded ASEAN Member Countries (MLAT) is a major step forward in ending impunity for traffickers and should be ratified by all ASEAN Member States as soon as possible.
2. All practitioners are encouraged to accept and utilise the MLAT templates as published on the website of the Treaty Secretariat and there should be closer and quicker communication between Central Authorities and prosecutors in trafficking cases involving mutual legal assistance requests.
3. Where possible, States are encouraged to enable the use and admissibility of video conference evidence in court and courts so enabled should be fully equipped and resourced for the use of video evidence.
4. Requests of mutual legal assistance should be in accordance to established procedures in the Treaty of Mutual Legal Assistance in Criminal Matters Among Like-Minded ASEAN Member Countries (MLAT). States should accord high priority to and expedite requests relating to trafficking cases.

5. Requested States should promptly acknowledge receipt of trafficking in persons related MLAT requests and provide the Requesting State with regular updates on the progress of the request.
6. Consideration should be given to amending domestic legislation to ensure that measures are taken to identify, trace and freeze or seize proceeds of crime derived from trafficking in persons for the purpose of eventual confiscation.
7. Consideration should also be given to concluding bilateral or multi-lateral treaties, agreements or arrangements to enhance the effectiveness of international legal / judicial cooperation on trafficking in persons cases.
8. Members of the judiciary, prosecutors and specialist investigators should receive training and support on international legal / judicial co-operation measures, with particular emphasis on the use and admissibility in court of evidence obtained through international judicial co-operation.
9. Research into the current application of international legal / judicial co-operation and anti-money laundering measures in relation to trafficking in persons cases should be undertaken in the ASEAN region and the results should be widely disseminated.

#### **E. Networking**

1. Close operational co-operation between specialist investigators and prosecutors is an essential component of an effective response to trafficking in persons and a regional network of specialist prosecutors similar to the current Heads of Specialist Trafficking Units (HSU) Process should be developed.
2. Any regional network of specialist prosecutors should establish the closest possible operational links with the HSU Process to ensure close collaboration.
3. A regional programme should be developed to foster close so-operation and networking between specialist investigators, prosecutors and Central Authority legal officers and include activities such as regional training workshops, seminars and retreats.
4. To facilitate regional networking, a specific website should be created to enable specialists to communicate informally with each other to share best practice lessons and to serve as a regional specialist contact directory for nominated focal points.