

Challenges and Priorities in Prosecuting and Adjudicating Trafficking in Persons Cases

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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.

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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 1000.¹

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.

¹ 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.

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.²

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.³

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.

² 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).

³ 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.

