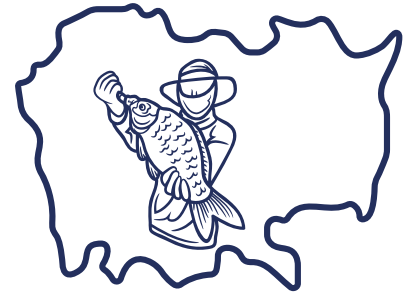


LEGAL CASE ANALYSIS:

CAMBODIA 'GIANT OCEAN' CASE PROTECTION & JUSTICE IN HUMAN TRAFFICKING OF MIGRANT FISHERS



SYNOPSIS

Between 2010-2011, 80 Cambodian men were trafficked onto foreign-flagged, Taiwanese-owned fishing vessels, against the recruitment agency 'Giant Ocean International Fishery CO LTD' (hereafter, Giant Ocean).

The case is notable because it was the first criminal case in Cambodia in which a legally registered recruitment agency was charged with offences under Cambodia's Law on Suppression of Human Trafficking and Sexual Exploitation (2008).

It set a legal precedent in human trafficking cases in 3 important respects in Cambodia:

1. recognising that legal/ registered recruitment businesses may facilitate human trafficking through deceptive recruitment;
2. securing the successful conviction of a foreign national (Taiwanese) on human trafficking charges, and;
3. being the first case of a conviction for human trafficking of fishing crew.

GAPS IN PROTECTION AND JUSTICE

The assessment of gaps in protection and justice draws on a rights-based approach to Trafficking in Persons, assessed against standards laid out in the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), and other relevant international standards. ACTIP's Chapter 4, 'Protection', is particularly relevant to this assessment.

A rights-based approach includes the following principles: victim identification, non-criminalisation and conditionality, right to information about rights, right to legal assistance, right to remedy (ASEAN-ACT no date).^[i]

The assessment below also provides relevant Chapters/ Articles in the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015).^[ii]

I. Victim Protection (Socio-Economic Support):^[iii]

1. Capacity to Deliver Support:

Assistance to the victims in the case was provided solely by NGOs, due to lack of state provision in Cambodia.

The limited financial resources and trained personnel meant that the victims did not receive adequate and tailored assistance (ACTIP, Chapter 4, Article 14.14).

2. Assessing Victims' Needs:

There was no Victim Needs Assessment (VNA) made by either the government or NGOs in this case, which meant that socio-economic support were not tailored to the specific needs of individual victims.

[i] Victim Rights - ASEAN-Australia Counter Trafficking (aseanact.org)

[ii] ACTIP.pdf (asean.org)

[iii] Many of the gaps discussed in this Fact Sheet were also identified by Hagar Cambodia (2015). See: reintegration-of-cambodian-trafficked-men-summary (1).pdf

The various NGOs involved in providing support did communicate with each other and coordinated responses accordingly. However, lack of financial capacity meant support fell short of needs.

The support was also not uniformly applied by the different NGOs assisting victims in the case, as some victims were provided with only partial vocational training or livelihoods assistance (ACTIP, Chapter 4, Articles 14.10 & 14.12).

3. Reintegration:

Assistance with reintegration was provided by the supporting NGOs. However, for most victims this assistance was limited to coordinating return and a small amount of financial support upon arrival to Cambodia. Some victims were provided with longer term financial support (such as livelihoods assistance) and/ or health interventions, but these were not uniformly applied, depending on the capacity of the NGOs. Victims were not able to be supported in the medium to long term because of lack of NGO resources and loss of contact with most of the victims (Chapter 4, Article 14. 11).

KEY RECOMMENDATION:

Enhance victim protections through the development and application of a uniformly applied, comprehensive Victim's Needs Assessment. With the realisation of a VNA, enhance efforts to further build the capacity of both government and civil society/ non-government organisations to deliver appropriate socio-economic and health interventions in the short and medium to long term.

II. Victim Protection (Justice Processes):

1. Safety in Providing Testimony:

There was no video link provided for plaintiffs to provide testimony virtually, and there were times where the victims/witnesses were in the same room as the defendant either during testimony or in the conclusion of the process. This is problematic as the presence of the defendant could be threatening to the victim in terms of providing clear testimony against the perpetrator. The trials were also public. Furthermore, NGO staff supporting the victims during testimony were not qualified social workers (ACTIP Chapter 4, Article 6 & Chapter 5, Article 16.7).

2. Legal Obligations for Legal Aid for Victims:

With no government provided legal assistance, NGOs provided pro bono legal support. However, this was limited, and due to the duration of the cases. 25 victims were ultimately left unrepresented when 2 of the 3 NGOs' human and financial resources were exhausted. Specifically, the assisting lawyers resigned, and the NGOs did not have qualified legal assistants to continue.

3. Confronting Traffickers:

Only one of the victims was brought to the court to give testimony. Whilst the victims and civil parties had the opportunity to give victim statements to support the case, they were not provided with the opportunity to confront their trafficker directly about their experiences and the ongoing impact of these experiences on their wellbeing.

KEY RECOMMENDATIONS:

- 1) Conduct a detailed assessment of the strengths and weaknesses of the protective measures already in place as against the obligations in the ACTIP and international guidelines on victim protection in justice processes.
- 2) Enhance implementation of existing mechanisms for a rights-based approach to victims in the justice process, particularly in key areas of victim safety during court proceedings, legal aid by which to ensure victims may be able to participate fully in justice processes and application of principles of restorative justice.
- 3) Establish additional victim protective measures as necessary, drawing on the assessment.

III. Right to Remedy:

1. Estimation of Damages:

Regarding compensation, there were no formal mechanisms by which to assess the impact of the crime on the victims' wellbeing in terms of past, current and future damage. The judge decided on the compensation amount, which was equal for all victims, on the request made by the victims themselves. A VNA (see I. 3, above) could have assigned a more accurate figure in estimating the amount of compensation. Regarding restitution, unpaid wages grossly underestimated without reference to contract stipulations regarding salary (ACTIP Chapter 4, Article 13).

2. Non-payment of Compensation and Restitution:

The case reached a guilty verdict in 2014. However, while compensation and restitution orders were made, the victims are yet to receive these as of October 2022. Initially, the main reason for this was because the perpetrator (sentenced to 10 years jail) made continual appeals to her judgement.

Subsequently, and as the original decision of the court was upheld (2020), the perpetrator has:

- a) declared no assets from which compensation and restitution payments may be paid and, consequently;
- b) refused to pay the plaintiffs. If the perpetrator does not pay, the plaintiff will need to file another complaint requesting for the force execution of civil remedies, a process which will require extensive time and resources. If the plaintiff does not have sufficient resources to hire a lawyer to file the complaint, or have a pro bono lawyer pursue the case, they will be unable to access compensation (ACTIP, Chapter 4, Article 13 & Chapter 5, Article 5).

3. Lack of Civil/ Government Fund to Guarantee Remedy:

In the absence of an effective mechanism by which to enforce the judgement on remedy, Cambodia does not have a government fund by which to guarantee payment of remedy. (ACTIP, Chapter 4, Article 13 & Chapter 5, Article 5).

KEY RECOMMENDATIONS:

- 1) The role of the state in both providing free legal assistance and in the enforcement of remedy needs to be clarified, including the establishment of transparent processes by which to estimate compensation and restitution, and by which to ensure victims receive remedy made in the judgement.
- 2) A government fund for victim compensation should be established.
- 3) A legal aid database of lawyers offering pro bono legal assistance be established to enable victims to pursue legal assistance and obtain compensation without having to rely on NGOs with limited capacity.

IV. International Cooperation:

1. Lack of Cooperation during Investigation & Prosecution:

Five (5) of the six (6) perpetrators escaped to Taiwan and remain at large; they were unable to be prosecuted. There is no currently agreed cross-border cooperation mechanism between Taiwan and Cambodia to extradite the perpetrators. Furthermore, there was an agency in Singapore which was charged as the middle agent which prepared contracts between workers and boat owners. Cambodia and Singapore did not co-operate on the case despite both being members of ASEAN and both having ratified the ACTIP (Chapter 6, Articles 18, 19 & 20). The ASEAN Mutual Legal Assistance Treaty (ASEAN MILAT), ratified by all ASEAN states, also contains detailed provisions for international cooperation.^[iv]

2. Lack of Cooperation on the Confiscation of Assets:

One of the main barriers with payment of damages to the victims and civil parties was the convicted offender's lack of assets in Cambodia and the lack of ability to draw on the assets of Giant Ocean. Seizure of assets held in Taiwan, including profits from Giant Ocean, could have significantly expedited the payment of damages to the plaintiffs. (ACTIP Articles 21 & 22).

KEY RECOMMENDATIONS:

- 1) Improve implementation of existing formal mechanisms (UNCAC, UNTOC, ASEAN MLAT) to enhance the effectiveness of investigation and prosecution within relevant jurisdictions. This would involve addressing implementation challenges, such as procedural knowledge, and practical challenges, such as language barriers and locating witnesses cross-jurisdictionally.

[iv] Nexus Institute provides one such example: ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases (unodc.org)

KEY RECOMMENDATIONS (CONT):

Simultaneously, further research into good practice examples of informal cooperation mechanisms is needed to provide models for cooperation where formal mechanisms may not be appropriate.

2) Further research is needed to identify the challenges in investigating and prosecuting crimes associated with the trafficking of migrant fishers in jurisdictions beyond ASEAN, especially jurisdictions of international manning/ recruitment agencies, fishing fleet operators, and fishing vessel personnel.

ADDITIONAL RECOMMENDATIONS

The overarching recommendation from this analysis is for greater adherence to key Articles in ACTIP, as well as other relevant binding and non-binding international standards.

Two (2) additional recommendations are made here:

- 1) Tailored key stakeholder capacity-building training building on relevant victim protection frameworks for the ASEAN region.^[v]
- 2) Monitoring and evaluation of measures adopted from the recommendations provided above.

V. Prevention of Trafficking:

1. Vulnerability to Re-trafficking:

Because of the significant gaps in reintegration processes, remedial justice, and victim protections (especially socio-economic supports) victims may remain vulnerable to re-trafficking, either as fishing crew or in other sectors. Interviews with twelve (12) victims and/ or family members in 2015 revealed ongoing financial and relational vulnerabilities of victims (ACTIP Chapter 3, Article 11, Clause 4).

KEY RECOMMENDATION:

The definition and scope of prevention of trafficking be expanded to include interventions based on the ongoing vulnerability of victims to re-trafficking.

This fact sheet is one of a series co-produced through a joint research project by La Trobe University and ASEAN-ACT.

The research project aims to critically evaluate the gaps in justice and protection in the human trafficking and forced labour of migrant fishers from Southeast Asia.

The Giant Ocean analysis is based on a desk review of legal documents pertaining to three (3) separate trials heard in the Phnom Penh Municipal Court between 2014-2020, five (5) interviews with key informant stakeholders, and twenty-five (25) interviews with victim plaintiffs/ witnesses.

[v] Victim-protection-frameworks-in-SE-Asia-NEXUS-winrock-final-1.pdf