



## LEGAL CASE ANALYSIS:

# TRINIDAD AND TOBAGO CASE INDONESIA PROTECTION & JUSTICE IN HUMAN TRAFFICKING OF MIGRANT FISHERS

### SYNOPSIS

In 2012, Indonesian fishers working on Taiwanese fishing vessels were left stranded off the coast of Trinidad and Tobago following the bankruptcy of the Taiwanese company. After their repatriation, Mr. Willy (hereafter the accused), Director of one of the two recruitment agencies which recruited the fishers - Karlwei Multi Global Ltd - was found guilty of document forgery to facilitate trafficking in persons. The accused was arrested on 29 May 2013 and charged with committing trafficking in persons (TIP) offences with the assistance of his agents (Marto and Darno) and document broker (Jai). The case was brought before the West Jakarta District Court on 6 March 2014.

The prosecutors indicted the accused on:

1) transporting people outside of Indonesian territory to be exploited (Art. 4 of Law on Elimination of Human Trafficking Crimes (Law 21 of 2007)); or if such was not fulfilled,

2) giving or entering false information on state documents with the aim of facilitating trafficking in persons (Art. 19 of Law No. 21 of 2007); or if such was not fulfilled, alternatively,

3) document forgery (Art. 263 of Indonesian Criminal Code).

The victims received assistance from the Indonesian Ministry of Foreign Affairs, National Agency for the Placement and Protection of Indonesian Overseas (now Migrant Workers Protection Agency), International Organization for Migration (IOM) Indonesia, and local non-governmental organisations (NGOs), i.e., Garda Buruh Migran Indonesia and Serikat Buruh Migran Indonesia (SBMI).

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

#### I. Victim Assistance

##### (Socio-Economic Support):

##### 1. Referral for Psycho-Social Supports:

Victims were not referred by Police and the Public Prosecutor to the Witness and Victim Protection Agency (LPSK) for psycho-social assistance and rehabilitation. At that time, LPSK was not a member of the Indonesian Anti-Trafficking Task Force. There were 56 victims, of which six were requested to provide testimonies before the court. The victims did not receive psychological counselling (ACTIP, Chapter 4, Article 10(b)).

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

[ii] ACTIP.pdf (asean.org)

## 2. Reintegration and Return Assistance:

Victims received assistance from the Indonesian Ministry of Foreign Affairs for their repatriation. Following their return home, the International Organization for Migration (IOM) Indonesia and Garda assisted them with rehabilitation and reintegration respectively (ACTIP, Chapter 4, Article 15).

### KEY RECOMMENDATION:

The Indonesian government should allocate sufficient resources to facilitate comprehensive return and reintegration<sup>[iii]</sup> assistance for Indonesians trafficked in a foreign country. Reintegration services should be targeted to each individual taking into consideration their safety and ongoing needs, and provide long-term as well as immediate assistance.

## II. Victim Protection (Justice Processes):

### 1. Safety in Providing Testimony:

All witnesses were present physically during the trial, and the court was open to the public. The prosecutor ensured that the accused could not have any form of communication to the victims except through him in order to ensure their protection. Nevertheless, the privacy and safety of the victims was compromised as the court was open and they could still be subjected to intimidation.

### 2. Legal Obligations for Legal Aid for Victims:

Victims were assisted firstly, by the IOM who referred the case to NGOs. The victims were helped a team of pro-bono lawyers and paralegal NGOs during the trial.

### KEY RECOMMENDATIONS:

- 1) Ensure engagement with LPSK from the start of the victim identification stage, enhance the development and implementation of mechanisms for a rights-based approach to victims in the justice process, particularly in critical areas of victim safety in court proceedings, measures to ensure victims may participate fully in justice processes the application of principles of restorative justice.
- 2) The Ministry develop standard operating procedures and clear messaging strategies for NGOs to obtain this support on behalf of victim clients.

## III. Right to Remedy:

### Estimation of Damages:

The amount of restitution IDR 1.1 billion (approx. AUD 98,600) was agreed upon between the lawyers, victims, and the accused and was facilitated by the prosecutors. Victims were each asked how much money they deemed proportional to the damage they suffered. No guidance was given as to an appropriate amount, leading to discrepancies between the individual amounts proposed. The prosecutors communicated the total amount of IDR 1.1 billion to the accused, who agreed to pay this amount in exchange for a lesser sentence.

Prior to requisitor (the final charge), the accused paid two-third of the restitution to the prosecutors in cash, with the balance paid after the verdict. The team of lawyers decided the distribution of money between the victims. Before the trial, the accused paid each victim IDR 5,000,000 (approx. AUD 462) for salary compensation. The question that arises from these negotiation is if the payment of restitution in exchange for a lesser sentence a good practice? The trafficker received a one year sentence and not the minimum three years as mandated by the Law on Elimination of Human Trafficking Crimes, Article 4 (Law 21 of 2007).

### KEY RECOMMENDATION:

All law enforcement agencies, primarily the police and prosecutor office, should engage work together with LPSK in estimating restitution according to the law and existing guidance. Transparent protocols for the payment of restitution and compensation should be established for the benefit of the victims. More focus by the government should be given to access to remedy and whether it is good legal practice to cooperate with traffickers to get restitution with full adherence to the Law on Elimination of Human Trafficking Crimes (Law 21 of 2007).

[iii] According to the IOM's Handbook on Direct Assistance for Victims of Trafficking, reintegration includes the following elements: medical and psychological assistance, economic, legal and social support, vocational training, subsidized employment, job referrals.

## IV. International Cooperation:

### 1. Lack of Mutual Legal Assistance:

The Indonesian Embassy in Caracas, Venezuela, as the closest embassy, in coordination with the IOM Trinidad and Tobago, and Trinidad and Tobago's Division of Immigration, assisted in repatriating 203 migrant fishers. Despite the Indonesian court ruling this as a case of trafficking, no information was available as to whether Trinidad and Tobago government was undertaking legal action against the vessels.

The lack of practical legal framework and precedent impacted the prosecution of the Taiwanese company (particularly, since Taiwan is not a member of ASEAN). Both Indonesia's Law No. 21 of 2007 and Article 18 paragraph (2) ACTIP contain provisions regarding mutual legal assistance. ACTIP encourages mutual legal assistance when criminal offences occur. For example, through sharing intelligence, data and information; cooperation in law enforcement to identify, assist, and protect victims and prosecute offenders; extradition; and international cooperation for the confiscation. In contrast, Law No. 21 of 2007 is not as comprehensive and indirectly refers to Law No. 1 of 2006 regarding mutual legal assistance. Under Article 50 Paragraph (3) of Law No. 21 of 2007, the court can order the prosecutors to confiscate an entity's assets. However, this provision only applies to a domestic legal entity.

Article 37 of the Convention against Transnational Organized Crime and Article 1 of the Palermo Protocol ensures that in any cases that arise under the Palermo Protocol to which States concerned are parties, all the general provisions of the Convention apply. This includes Article 18(7) of the Convention which provides that where there is no mutual legal assistance treaty in force between a State party seeking cooperation and the State party from whom cooperation is sought, the rules of mutual legal assistance set forth in the Convention apply. This includes taking evidence or statements from persons, executing searches and seizures, and freezing, and any type of assistance that is not contrary to the domestic law of the requested State party.

### 2. Lack of Mutual Legal Assistance with Asset Tracing and Seizure:

There is a significant gap between ACTIP, domestic law, and the decision to regulate asset tracing, freezing, and seizure, for example, under the Anti-Money Laundering Law. According to Article 32, Law No. 21 of 2007, investigators and prosecutors can order financial service providers to freeze the assets of suspects, while Article 50, paragraph (3) states that the court will instruct the prosecutors to seize and auction the suspect's assets if restitution is not paid. Yet, there is no way to implement both legal provisions, and as such, the powers are not exercised. Only recently, the Attorney General's Office enacted Regulation No. 7 of 2020 on Asset Recovery. In contrast, ACTIP, Article 17, is explicit in suggesting that the State Party have a clear regulation on confiscation and seizure.

#### KEY RECOMMENDATION:

Local knowledge on international investigative cooperative mechanisms to obtain information/evidence and extradition of accused perpetrators, such as bilateral MLAs, ASEAN MLAT etc should be improved, and state-to-state legal cooperation, especially in relation to the seizure of accused property, should be improved. Investigating and determining the barriers in place needs to be undertaken. In circumstances where a state is not a member of ASEAN, the Convention against Transnational Organized Crime can facilitate mutual legal assistance.

**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 research involved a desk review of legal documents pertaining to the case, supplemented by semi-structured interviews with key stakeholders in justice, law enforcement and civil society and, where feasible, semi-structured interviews with trafficking survivors involved in the cases.**