

LEGAL REVIEW

THE IMPLEMENTATION OF LAW NUMBER 21 OF 2007
REGARDING THE ERADICATION OF TRAFFICKING IN PERSONS



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This publication was developed as part of the program “AMPUH: Advancing Measures to Prosecute Trafficking in Persons and Protect Victims of Trafficking”, supported by the Office to Monitor and Combat Trafficking in Persons (J/TIP) of the U.S. Department of State.

The contents of this publication have been consulted with various government and non-government agencies. The opinions expressed in this book are those of the authors and do not necessarily reflect the views of the United States Government.

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LEGAL REVIEW THE IMPLEMENTATION OF LAW NUMBER 21 OF 2007 REGARDING THE ERADICATION OF TRAFFICKING IN PERSON

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FOREWORD IOM

Trafficking in Persons (TIP) is an extraordinary crime with a growing and complex modus operandi that exploits people's rights and dignity. Moreover, people of all genders, ages, and backgrounds are vulnerable to and can be victims of TIP. In 2022, the Coordinating Ministry of Political, Legal, and Security Affairs mentioned that based on the data from the Ministry of Women Empowerment and Child Protection, noted that throughout 2019-2022 there were 1.331 victims of TIP, consisting of 1.291 women and children. Meanwhile, according to TIP data recorded by the International Organization for Migration (IOM) in 2022, women and children are the most vulnerable groups to being trafficked. IOM further highlighted the increasing number of male victims in 2022, where most victims work in fishing vessels, online gambling schemes, and as scamming administrators. This showed the existence of an ever-growing modus operandi, such as the transition of recruitment patterns and the exploitation that was previously done offline and now switched to online. Traffickers have incorporated information and communication technologies to interact, groom, exploit, and control victims.

The Government of Indonesia continues its efforts and commitment to eradicating the crime. The enactment of Law No. 21/2007 on the Eradication of Trafficking in Persons and the establishment of the Anti-Trafficking Task Force (ATTF) are two significant measures in place for handling TIP cases.

Fifteen years after the enactment of the anti-trafficking law, TIP is still a dire problem in Indonesia. The Trafficking in Persons Report that was released by the U.S. Department of State in 2022 downgraded Indonesia to the Tier 2 Watchlist from Tier 2 in the previous year. Some of the reasons for this downgrade are related to the law enforcement aspect which mentioned a mismatch between the Anti-Trafficking Law Number 21 of 2007 with the international legal framework. For example, the anti-trafficking law still requires a demonstration of force, fraud, or coercion to constitute child sex trafficking. Besides, the report also indicated a disparity in the law enforcers' knowledge regarding TIP and other related laws which hindered the law enforcement process.

Furthermore, the lack of skills, capacity, and different levels of understanding among law enforcement officials in analyzing the nexus between the implementation of the anti-trafficking law and its relation to other criminal acts as well as in identifying potential TIP cases remain major issues in combatting TIP cases. From the training activities, focus group discussions, as well as coordination meetings that have been conducted by IOM and the ATTF, law enforcement officials and civil society organizations, both at the national and sub-national levels, have agreed that review and evaluation of the 2007 anti-trafficking law become important to accommodate the growing trends in TIP issue, ensuring the rights of the witnesses and/or victims, especially through the restitution mechanism and answering all the problems have been faced by the ATTF in the efforts of the prevention, prosecution, and handling of the TIP issue.

According to the above-mentioned situation, IOM Indonesia collaborates with the Coordinating Ministry for Political, Legal, and Security Affairs, serving as the Second Chair of the National Anti-Trafficking Task Force, whose role is to conduct the coordination, synchronization, and control in order to strengthen the law enforcement efforts for the TIP issues, has conducted research entitled "Legal Review on the Implementation of Law Number 21 of 2007 on the Eradication of Trafficking in Persons" which developed by the Indonesia Judicial Research Society (IJRS). This publication was developed as part of the program "AMPUH: Advancing Measures to Prosecute Trafficking in Persons and Protect Victims of Trafficking", supported by the Office to Monitor and Combat Trafficking in Persons (J/TIP) of the U.S. Department of State.

This legal review aims to analyze the nexus between the implementation of the anti-trafficking law and its relation to other criminal acts, including Law No. 18/2017 on the Protection of Indonesian Migrant Workers, Law No. 6/2011 on Immigration, Law No. 35/2014 on Child Protection, and Prostitution in Indonesian Criminal Code (KUHP). This review will also provide an overview regarding the protection efforts for the witnesses and/or victims of trafficking, data collection issues between the national and subnational Anti-Trafficking Task Force, coordination between related Ministries/Agencies regarding case handling, as well as the investigation and prosecution of TIP cases.

IOM Indonesia wishes that all the findings and recommendations would benefit the Anti-Trafficking Task Force in ensuring effective law enforcement and providing comprehensive protection for witnesses and/or victims. IOM also hopes that this research will significantly contribute to the protection efforts and TIP case handling in Indonesia.

Jakarta, May 2023

Chief of Mission IOM Indonesia,

Jeffrey Labovitz

FOREWORD THE COORDINATING MINISTRY OF POLITICAL, LEGAL, AND SECURITY AFFAIRS OF THE REPUBLIC OF INDONESIA

Indonesia is the fourth most densely populated country globally, after India, the People's Republic of China, and the United States. Based on the data from the Directorate General of Population and Civil Registry, Ministry of Home Affairs, in 2022, the number of productive-age Indonesians (15-64 years old) will be 90.83 million people (69.3%); which will become a demographic dividend to the country.

This demographic dividend is a blessing for Indonesia because it creates a high number of productive workers to advance Indonesia's economy. Unfortunately, not all demographic dividends have a positive impact on Indonesia. The high number of the population is not equal to the available employment opportunities. In fact, many Indonesians are often unable to obtain a job according to their expertise. This has led many to work without proper documents and fall victim to trafficking in persons (TIP).

TIP exists in Indonesian society and is deeply rooted in every layer of society, especially in areas below the poverty line. TIP is particularly alarming in Indonesia because most victims are women and children. Data from the Ministry of Women Empowerment and Child Protection (KemenPPPA) in 2022, around 46.14% of TIP victims are children, and 50.97% are women.

Poverty is still the main factor that trapped many Indonesians into becoming victims of TIP. Some other factors are the low level of education and public awareness of the dangers of TIP, the involvement of some government officials in perpetrating the TIP network, the lack of optimal prevention and socialization carried out by the government, and the grandiose promises of recruiters. In addition, the trend of TIP cases and victims has also increased every year.

The increasing trend of TIP in Indonesia is due to the development of the modus operandi of TIP cases through the use of the internet and social media. In 2021 and 2022, the Government of Indonesia handled 1,262 Indonesian victims of this new trend of TIP. They were illegally recruited as online scammers to commit investment fraud, online gambling operators, fraud in the guise of money laundering, and other online scams. In addition, the spread of TIP activities on the internet and social media involving Indonesian citizens also occurs in various countries, especially in the ASEAN region. The most recent example is, in May 2023, the Government of Indonesia rescued 143 Indonesian citizens from the online scammer's network in the Philippines and 20 Indonesians in Myanmar.

Based on the results of coordination and control carried out by the Deputy V - for Public Order and Security Coordination of the Coordinating Ministry for Political, Legal, and Security Affairs, TIP cases that are still unresolved are caused by various things, including the unequal understanding and perception of law enforcement officials in identifying and handling TIP cases, lack of understanding and awareness of victims regarding TIP issues, including in preserving evidence which makes it often difficult to be processed, the perpetrators moved to various regions and countries, and it is still difficult to detect an international TIP syndicate network, as well as the existence of government officials and law enforcement officials who are directly involved in TIP activities, especially those that occur in border areas.

Furthermore, TIP activities commonly occur in Indonesia's border areas that serve as entry and exit points for non-procedural Indonesian migrant workers (PMI), such as in North Sumatra, the Riau Islands, and North Kalimantan. The high activity of migrant workers through non-procedural channels across

the border is due to the lack of community awareness of safe migration, lack of security in border areas, lack of understanding and capacity of border officers, as well as the presence of officers and the local community who assist in smuggling Indonesian migrant workers.

PMI are often referred to as foreign currencies ‘heroes’ due to the large number of remittances they contribute to the country. In 2020, Indonesian migrant workers abroad contributed 130.2 trillion rupiahs; in 2021, it amounted to 127.4 trillion rupiahs, and in 2022 it amounted to 135.8 trillion rupiahs. However, the risks they faced as migrant workers are quite high, including physical and sexual violence, unpaid salaries, work and salaries that are different from what was promised, and exploitation of working hours.

Kemenko Polhukam, following Presidential Regulation No. 22 of 2021 on the Anti-Trafficking Task Force (GT-PPTPPO), has been actively involved in the efforts to eliminate TIP as the Second Chair of the Anti-Trafficking in Persons Task Force in charge of law enforcement and development of TIP legal norms. As the Second Chair, Kemenko Polhukam is tasked with coordinating, evaluating, synchronizing, and monitoring law enforcement and developing TIP legal norms by ministries/institutions and local governments. This is in line with the commitment of the Coordinating Minister for Political, Legal, and Security Affairs through the statement of “Global Fight Against Non-Procedural Indonesian Migrant Workers” in April 2023 to continue to fight against TIP perpetrators, as well as to take firm action against government officials who are directly involved in TIP activities.

The Indonesian government will not be able to overcome this TIP problem alone. During the 42nd ASEAN Summit in Labuan Bajo, East Nusa Tenggara, the President of Indonesia, said that TIP must be eliminated jointly by all parties and across countries. There needs to be an active role from the community outside the government, including civil society and academics, in handling this unresolved problem. The TIP issue will not be resolved by only prioritizing law enforcement efforts; there needs to be a more in-depth research study conducted directly by experts who deeply examine the problems of TIP.

Furthermore, I really appreciate the efforts made by the International Organization for Migration (IOM) and the Indonesia Judicial Research Society (IJRS) through the AMPUH: Advancing Measures to Prosecute and Protect Victims of Trafficking program in conducting research related to combating TIP in Indonesia. As I explained above, until now, Indonesia has been unable to find an effective solution to eradicating TIP from its roots.

The study titled “Legal Review on the Implementation of Law No. 21 of 2007 on the Eradication of Trafficking in Persons” is one of the excellent steps in finding loopholes in problems related to the regulation of handling TIP in Indonesia. Moreover, this study also aims to analyze the nexus between the implementation of the anti-trafficking law and its relation to other criminal acts, including Law No. 18/2017 on the Protection of Indonesian Migrant Workers, Law No. 6/2011 on Immigration, Law No. 35/2014 on Child Protection, and Prostitution in Indonesian Criminal Code (KUHP). The study will be very beneficial input for law enforcement and to better prevent and assist victims of trafficking.

Once again, I would like to congratulate IOM Indonesia and IJRS on publishing the Legal Review: Implementation of Law No. 21 of 2007 on the Eradication of TIP. Hopefully, the results of this study can be useful for eliminating TIP in Indonesia and improving the quality of life of the nation's children in the future.

Jakarta, May 9, 2023

Police Inspector General Drs. Rudolf Alberth Rodja

Deputy V for Public Order and Security Coordination, Coordinating Ministry for Political, Legal, and Security Affairs (Kemenko Polhukam)

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LIST OF ABBREVIATION

ACTIP	ASEAN Convention on Trafficking in Persons Especially Women and Children
APH	<i>Aparat Penegak Hukum</i> (Law Enforcement Officer)
ART	<i>Asisten Rumah Tangga</i> (House Maid)
ASEAN ACT	ASEAN-Australia Counter Trafficking
ATTF	National Anti-Trafficking Task Force
BAP	<i>Berita Acara Pemeriksaan</i> (Police Investigation Report)
BP2MI	<i>Badan Perlindungan Pekerja Migran Indonesia</i> (Indonesian Migrant Workers Protection Body)
DPO	<i>Daftar Pencarian Orang</i> (Missing Persons List)
FGD	Focus Group Discussion
ICJR	Indonesia Criminal Justice Reform
IFF	Indonesia Fisherman Foundation
IJRS	Indonesia Judicial Research Society
IMO	Indonesia Maritim Organization
IOM	International Organization for Migration
JPU	<i>Jaksa Penuntut Umum</i> (Prosecutor)
K	<i>Kasasi</i> (Cassation)
KTP	<i>Kartu Tanda Penduduk</i> (Citizen Identity Card)
KUHP	<i>Kitab Undang-Undang Hukum Pidana</i> (Criminal Code)
LPSK	<i>Lembaga Perlindungan Saksi Korban</i> (Witness and Victim Protection Agency)
MvT	Memorie van Toelichting
Pid.Sus	<i>Pidana Khusus</i> (Special Crime)
PKL	<i>Perjanjian Kerja Lapangan</i> (Field Operation Contract)
PN	<i>Pengadilan Negeri</i>
PPMI	<i>Perlindungan Pekerja Migran Indonesia</i> (Protection of Indonesian Migrant Worker)
PPNS	<i>Penyidik Pegawai Negeri Sipil</i> (State Appratus Investigation Officer)
PP-TIP	<i>Pencegahan dan Pemberantasan TIP</i> (Prevention and Eradication of TIP)
PS	Partner Song

PSK	<i>Pekerja Seks Komersial (Sex Worker)</i>
PT	<i>PT (Limited Liability Corporation)</i>
SBMI	<i>Serikat Buruh Migran Indonesia (Indonesian Migrant Workers Union)</i>
SE	<i>Surat Edaran (Circular Letter)</i>
SIP3MI	<i>Surat Izin Perusahaan Penempatan Pekerja Migran Indonesia (Indonesian Migrant Worker Placement Company Permit)</i>
TIP	<i>Trafficking in Person</i>
TPKS	<i>Tindak Pidana Kekerasan Seksual (Sexual Violence Crime)</i>
TPPM	<i>Tindak Pidana Penyelundupan Manusia (People Smuggling Crime)</i>
UN	<i>United Nation</i>
UNODC	<i>United Nation Office on Drugs and Crime</i>
UNTOC	<i>United Nation Convention on Transnational Organized Crime</i>

CHAPTER I

INTRODUCTION



1. BACKGROUND

The year 2022 marks 15 years of the enactment of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses (TIP Law). In the span of such period, the Indonesian criminal justice system has undergone several reforms, especially in terms of legislation. For instance, in 2017, the Indonesian lawmakers enacted Law No. 18 of 2017 on Protection of Migrant Workers (Migrant Workers Law) that addresses provisions relating to work exploitation issues abroad. Lastly, Indonesia has also ratified ASEAN Convention on Trafficking in Persons Especially Women and Children (ACTIP) under Law No. 12 of 2017 on Ratification of ASEAN Convention on Trafficking in Persons Especially Women and Children. From another end, reforms also occur beyond the legislation sector. Each law enforcement agency also participates in the capacity building of its officers, as performed through several measures, such as the development of learning modules, trainings, and data collection on case handling, including the establishment of a taskforce for the prevention and eradication of Trafficking in Persons Offenses (the Anti-Trafficking Task Force / ATTF). Those measures certainly affect the handling of trafficking in persons offenses performed by law enforcers.

In 2019, the ATTF published a performance report outlining achievements, challenges, best practices, and recommendations from each work unit involved in the Taskforce. Within the scope of law enforcement, there are several achievements that should be appreciated. For example, the Supreme Court of the Republic of Indonesia and Prosecutor's Office of the Republic of Indonesia have independently issued internal rules in the form of guidelines for judges and prosecutors in handling cases involving women and children who face legal issues. In such guidelines, there are several victim-sensitive approaches that aim to accommodate a safe space for victims when participating the law enforcement process against TIP offenders. Nevertheless, there are several notes relating to challenges that are discovered almost at every law enforcement agency in handling TIP cases. One of them is the issue on the enforcement of the TIP Law and an overlapping understanding among law enforcers relating to the intersections between TIP Law with offenses under other Laws that frequently overlap each other.

In light of the above understanding, the Indonesia Judicial Research Society (IJRS), with supports from the International Organization for Migration (IOM), conduct a legal review and annotation of court decisions that aim to analyse the implementation of TIP Law that intersects with several related Laws. Such intersections are between TIP Law and : 1) Offenses on Non-Fulfilment of Prerequisites and documents (Migrant Workers Law); 2) People Smuggling Offenses (Immigration Law); 3) Child-Related Offenses (Child Protection Law); and 4) Offenses Relating to Prostitution/Panders (Criminal Law Code). The selection of these intersections of law are based on the input that are gathered before this activity begins. The research team hold a kick-off meeting that aims to lay out the work plan, and simultaneously seek feedbacks from stakeholders on the work plan and open the opportunity for sharing data and experiences from law enforcement agencies, government bodies, and civil society organizations.

2. RESEARCH QUESTIONS

According to the above background, this research shall address the following issues:

- a. How the TIP Law is enforced by judges and prosecutors in the event that there is an intersection between TIP with prostitution offenses, protection of migrant workers, child sexual exploitation, and people smuggling?
- b. What are the relevant factors that influence the enforcement of TIP Law in Indonesia?

3. METHODOLOGY

Process of collecting and selecting decisions

This research treats court decisions as its research objects. In this event, we shall collect court decisions on TIP cases that have been deemed as final and binding. To review the implementation of the TIP Law, decisions that are collected are not only limited to cases that are decided using the TIP Law, but also using other regulations that have the possibility of having intersections with TIP cases. Other regulations that will be analyzed in regards to their interconnection with the TIP Law are Law No. 18 of 2017 on Protection of Indonesian Migrant Workers (Migrant Workers Law)¹, Law No. 6 of 2011 on Immigration (Immigration Law)², Law No. 23 of 2002 in conjunction with Law No. 35 of 2014 on Child Protection Law (Child Protection Law)³, and Criminal Law Code (KUHP)⁴.

The time period of court decisions that will be analyzed is limited with the time span of the past 3 years (2018-2021). The collection of decisions will be performed through the web directory of Supreme Court decisions. The year 2018 is determined as the starting period for collection of decisions because Law No. 18 of 2017 on Protection of Indonesian Migrant Workers (Migrant Workers Law) was enacted in November 2017. Therefore, there must be a window to wait for its enforcement, and 2018 is deemed to be the proper year to analyze the interconnectedness between the TIP Law and Migrant Workers Law. Meanwhile, 2021 is determined as the closing period to avoid the existence of cases that have not yet reached a final and binding status because there are undergoing legal remedies in 2022.

The collection of decisions from the web directory of decisions prioritizes cases that provide decisions on the first level. This policy is taken because information that are available on first-level decisions are generally more comprehensive compared to decisions on appeal-level, cassation-level, or case-review-level. In the event that first-level decisions are not available, researchers will initially ascertain the completeness of information that is necessary before performing annotation.

This research focuses on the issues relating to the definition of trafficking in persons offenses as addressed under the Palermo Protocol and TIP Law. There are two core issues, namely the formulation of the definition and its implementation, especially the understanding of law enforcers relating to the definition of trafficking in persons offenses. Furthermore, this research will also focus on the overlapping regulatory frameworks on trafficking in persons offenses that intersect with 4 different offenses, namely people smuggling offenses, child protection offenses, placement of migrant workers offenses, and prostitution offenses. The issue relating to the overlapping of those four legal frameworks will be analyzed by giving comparisons using tables and analyses of decisions which the defendants should have been convicted using TIP provisions, but they are convicted using other criminal provisions. Moreover, this research does not constitute a generalization that represents all court decisions on existing TIP cases in Indonesia because this research is only limited to several court decisions that demonstrate the existence of overlapping between the TIP Law with those four other offence types.

Process of annotating decisions

¹ The following are several articles under the Migrant Workers Law that have the possibility of being intersected with the implementation of the PTPPO Law: Articles 79, 80, 81, 82 letter a, 82 letter b, 83, and 84. See, Prosecutor's Office of the Republic of Indonesia, Guideline for Handling Trafficking in Persons Offenses, (Prosecutor's Office of the Republic of Indonesia and IOM: Jakarta, 2021), pp. 56-58.

² The following are several articles under the Immigration Law that have the possibility of being intersected with the implementation of the PTPPO Law: Articles 113, 121 letter a, 122 letter a, 126 letter a, 126 letter c, 126 letter e, 127, 130. See, Prosecutor's Office of the Republic of Indonesia, Guideline for Handling Trafficking in Persons Offenses, (Prosecutor's Office of the Republic of Indonesia and IOM: Jakarta, 2021), pp. 59-60.

³ The following are several articles under the Child Protection Law that have the possibility of being intersected with the implementation of the PTPPO Law: Article 76 C, D, E, F, I, Article 79. See, Prosecutor's Office of the Republic of Indonesia, Guideline for Handling Trafficking in Persons Offenses, (Prosecutor's Office of the Republic of Indonesia and IOM: Jakarta, 2021), p. 58.

⁴ The following are several articles under the KUHP that have the possibility of being intersected with the implementation of the PTPPO Law: Articles 263, 277, 278, 285, 286, 287, 288, 289, 290, 292, 293, 294, 295, 296, 301, 304, 328, 329, 330, 331, 332, 333, 334, 335, 362, 363, 364, 365, 368, 369, 378, 506. See, Prosecutor's Office of the Republic of Indonesia, Guideline for Handling Trafficking in Persons Offenses, (Prosecutor's Office of the Republic of Indonesia and IOM: Jakarta, 2021), p. 64.

Annotation of decisions refers to the activities of summing important information in decisions into notes that aim to describe, comment, or criticize court decisions. In this research, the annotation of decisions is designated to analyze the implementation of the TIP Law by prosecutors and judges who frequently encounter difficulties due to the existence of intersection between TIP with four other offense types. Hence, researchers will annotate decisions that illustrate the implementation of the TIP Law when the examined cases have intersections with four other offense types. In this event, annotation may be performed on decisions that are deemed to be correct (best practice) or incorrect (bad practice) in enforcing the TIP Law. In short, for every case type, there are two possible annotation types that definitely depend on the availability of decisions.

For example:

Case type 1: intersection between TIP and Immigration Offenses

- a. Annotation of Decision No. 123/Pid.Sus/2018/PN.JKT.PST (best practice); and
- b. Annotation of Decision No. 345/Pid.Sus/2019/PN.JKT.PST (bad practice).

Process of public consultation

The first consultative meeting is performed by involving law enforcers (Aparat Penegak Hukum – APH), namely the police, prosecutors, and judges who have experiences in handling TIP cases. This meeting aims to receive inputs relating to the analysis on the implementation of the TIP Law on every case type. Besides, this forum is also expected to discover which factors that affect APH in enforcing the TIP Law, and alternative solutions that may be treated as recommendations in this research.

In addition, researchers will also perform interviews with several counsels from civil society organizations and advocates that have experiences in counseling TIP victims. These interviews aim to discover obstacles experienced by victims during the judiciary process of TIP cases. Besides, interviews also aim to perform validation on forms of exploitations that are suffered by victims, as incorporated in court decisions, and discover other modus that develop in TIP practices.

Process of Evaluating the Implementation of TIP Law

Asides from performing analysis on the implementation of TIP law through annotation of decisions, this research shall also address challenges and obstacles found in law enforcement. Such matter is addressed by referring to the findings from FGDs, interviews, and other sources in the form of predecessor researches, such as researches conducted by IOM, ASEAN ACT, Taskforce for the Prevention and Eradication of TIP, and several other sources. This analysis aims to complete research purposes, especially in terms of identifying practical issues encountered by law enforcers in eradicating TIP.

CHAPTER II
DEFINITION OF AND REGULATION ON
TRAFFICKING IN PERSONS OFFENSES



To analyze the existence of overlaps between trafficking in persons offenses (Tindak Pidana Perdagangan Orang – TIP) with other offenses, we use the definition of TIP as addressed under the Protocol to Prevent, Suppress, and Punish Trafficking in Persons especially Women and Children of 2000 (Palermo Protocol), as ratified by Indonesia under Law No. 14 of 2009. In addition, we shall also use the definition of TIP under the Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses (Law 21/2007).⁵

1. TRAFFICKING IN PERSONS OFFENSES ACCORDING TO PALERMO PROTOCOL

As an illustration, the Palermo Protocol was incepted as a response to the rising of transnational TIP transnational, and it contains at least 20 Articles that aim to: prevent, combat trafficking in persons, punish trafficking in persons offenders and protect, and assist victims of trafficking in persons offenses by respecting their human rights.⁶ Within the cross-border context, the purpose of the Palermo Protocol is to promote cooperation between the state parties to meet those objectives that have been mentioned earlier, both from countries of origin, transit countries and destination countries.⁷

The Palermo Protocol then defines TIP as follows “*Trafficking in Persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, force labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*”⁸

Of such definition under Article 3a of the Palermo Protocol, it may be inferred that there are 3 (three) core elements in the formulation of definition of TIP, among others:⁹ 1. Acts; 2. Means; and; 3. Purpose. For a clearer description, please see the table below:

Acts	Acts of recruiting, transporting, transferring, harbouring or receiving a person.
Means	Threat or force, coercion, abduction, fraud, deception, abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.
Purpose	Exploitation

As an important note, according to the definition in the above Article, it may be inferred that: **First**, if victims of trafficking in persons give consent to the exploitation that is intended against the victims as referred to under Article 3a of the Palermo Protocol, it is no longer relevant, provided that means as addressed under Article 3 letter a have been exhausted. **Second**, if against children, a recruitment, transportation, transfer, harbouring, or receipt of a child with the purpose of exploitation happens,

⁵ In reality, there are plenty international legal instruments that intersect with TPPO, but this research only adopts the international legal instrument of the Palermo Protocol of 2000 that has been ratified, and enacted by Indonesia under Law Number 14 of 2009 and Law Number 21 of 2007 on Eradication of Trafficking in Persons Offenses (Law 21/2007). See: 1) International Agreement for the Suppression of White Slave Traffic of 1904 and of 1910 with several amendments; 2) Convention on the Suppression of Trafficking in Women and Children of 1921; 3) International Convention of the Suppression of the Trafficking in Women of full age in 1933; 4) Convention of the Suppression of Traffic in Person and the Exploitation of the Prostitution of Others, of 1949, during which, the League of Nations has transformed into United Nations; 5) Convention on Elimination Against all form of Discrimination Against Women of 1979; 6) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children Supplementing The United Nations Convention Against Transnational Organized Crime/Palermo Protocol, incepted in 2000; 7) Within the regional scope, particularly the Southeast Asian, there is also a legal instrument relating to trafficking in persons offenses, namely Convention Against Trafficking in Persons, Especially Women and Children.

⁶ See Article 2 of Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

⁷ *Id.*,

⁸ *Id.*, Article 3a of Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

⁹ *Id.*,

although means as mentioned under Article 3 letter a are not performed, such act must still be categorized as trafficking in persons. **Third**, children as referred to under the Palermo Protocol refer to those who are 18 (eighteen) years old or under.

2. TRAFFICKING IN PERSONS OFFENSES ACCORDING TO LAW 21/2007

Law 21/2007 addresses the definition of TIP in Article 1 point 1 that is further addressed in Article 2 paragraph (1) of Law 21/2007 *“Any person who commits the recruitment, transportation, harbouring, transfer, movement, or receipt of a person by means of threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, despite achieving the consent of a person having control over another person, for the purpose of exploiting such person within the territory of the Republic of Indonesia, imposed with imprisonment sentence of 3 (three) years at minimum and 15 (fifteen) years at maximum and fines of Rp120,000,000.00 (one hundred and twenty million rupiah) at minimum and Rp600,000,000.00 (six hundred million rupiah) at maximum.”*

According to the above definition, there are 3 (three) core elements in the formulation of the Article, among others: 1. Acts; 2. Means; and; 3. Purpose. For a clearer description, please see the table below:

Acts	Recruitment, transportation, harbouring, transfer, movement, or receipt of a person
Means	Threat of force, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, despite achieving the consent of a person having control over another person
Purpose	Purpose of exploitation takes form as, but not limited to: prostitution, forced labour or services, slavery or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, transfer or, transplant body organs and/or tissues, abuse of energy or ability of a person by another party to obtain economic or non-economic benefits. ¹⁰

As an important note, offenses under Law 21/2007 are divided into 2 (two) types: formal and material. Formal offense means that offenders are criminally liable, but the exploitation has not happened (exploitation element is not proven), and material offense means that the exploitation must initially happen to be able to hold offenders criminally liable (exploitation element is proven).¹¹ The following are description on the categorization of offense types under the TIP Law according to the requirement of proving the exploitation element:

Formal Offenses under Law 21/2007	Material Offenses under Law 21/2007
Article 2 paragraph (1) of Law 21/2007	Article 2 paragraph (2) of Law 21/2007
Article 3 of Law 21/2007	Article 6 of Law 21/2007
Article 4 of Law 21/2007	Article 7 of Law 21/2007
Article 5 of Law 21/2007	Article 8 of Law 21/2007

¹⁰ See Article 1 point 7 of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses

¹¹ See Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses

CHAPTER III

ANNOTATION OF TRAFFICKING IN PERSONS OFFENSES (TIP) CASES AND CASES RELATING TIP ON DOMESTIC SCOPE



1. INTERSECTIONS BETWEEN SEXUAL EXPLOITATION OFFENSES AND PANDERS IN PROSTITUTION PRACTICES

a. Annotation of Bad Practice Decisions¹²

Prostitution means the activities of selling sexual services that provide various sexual activities with payments in return, either in the form of money or other things that have been agreed to.¹³ In such prostitution cycle, two elements that cannot be separated, namely Sex Workers (*Pekerja Seks Komersial* – PSK) who have the duties of providing sexual activities for the purpose of receiving payments from persons who have used their services, and panders or pimps who take the role as the caretaker, intermediary, and/or owner of PSK.¹⁴

The prostitution itself is frequently qualified as a form of trafficking in persons offenses (*Tindak Pidana Perdagangan Orang* – TIP). As abolitionists argue that prostitution violates women's rights, and for that reason, all sex workers are victims of trafficking in persons.¹⁵ On the other hand, Anugerah Rizki Akbari argues that in the prostitution offense, there is no victim, because sex workers certainly consciously and willingly perform such works, it would be a different case if there is an exploitation through the prostitution practice, then such event is classified into the trafficking in persons offenses.¹⁶ Those two schools have shown the existence of difference in interpretation relating to the position of sex workers in prostitution.

Hence, if the prostitution offense and trafficking in persons offense cannot be understood by law enforcers in precise and accurate manners, then such condition certainly shall result in unjust law enforcement, including the existence of error in the implementation of law that shall also affect the sentencing. Therefore, in this occasion, writers attempt to analyse decisions with prostitution dimension, but the Judge otherwise convicts using articles under the TIP Law. Such decision is the case number 61/Pid.Sus/2019/PN Bgl in the name of Hidayatuddin Alias Ayek Bin Daman Huli as the defendant (38 years old).

Primary issues

1. What are the differences in characteristics between the prostitution offense and trafficking in persons offense?
2. What is the regulatory comparison between Article 296 of KUHP, Article 506 of KUHP, Article 2 of TIP Law and Article 12 of TIP Law?
3. Is it accurate that two sex workers in the decision number 61/Pid.Sus/2019/PN Bgl are victims of trafficking in persons offense?

Analysis on Primary Issues

1) Differences in Characteristics between Prostitution and Trafficking in Persons Offenses

As mentioned beforehand that prostitution and trafficking in persons offense do not share the same position. The term “prostitution” derives from Latin “*prostitution (em)*”, to be “prostitution” in English that has the meaning of debauchery, promiscuity, non-decency, and later on became “*prostitusi*” in Indonesian

¹² See Appendix 1. Facts of the Case of Annotation of Decision No. 61/Pid.Sus/2019/PN Bgl

¹³ Teguh Suhendro, et.al, *Panduan Penanganan Tindak Pidana Perdagangan Orang*, 2021, (Jakarta: International Organization for Migration (IOM) Indonesia, 2021), p. 44, accessed on 4 October 2022, https://indonesia.iom.int/sites/g/files/tmzbd11491/files/documents/panduan-penanganan-tpo_lidwina-pradipta-put.pdf.

¹⁴ Zeti Utami and Hadibah Zachra Wadjo, “Perlindungan Hukum Terhadap Pekerja Seks Komersial Anak di Kabupaten Kepulauan Aru”, *SANISA Jurnal Kreativitas Mahasiswa Hukum*, Volume 1 Nomor 1, (April, 2021): 28, accessed on 3 September 2022, [https://fhukum.unpatti.ac.id/jurnal/sanisa/article/download/514/294#:~:text=Pekerja%20Seks%20Komersial%20\(PSK\)%20adalah.kepada%20banyak%20laki%20laki%20yang](https://fhukum.unpatti.ac.id/jurnal/sanisa/article/download/514/294#:~:text=Pekerja%20Seks%20Komersial%20(PSK)%20adalah.kepada%20banyak%20laki%20laki%20yang).

¹⁵ Jennifer K. Lobasz, *Constructing Human Trafficking: Evangelicals, Feminists, and an Unexpected Alliance*, (USA: Department of Political Science and International Relations, 2019), p. 46, accessed on 21 September 2022, <https://doi.org/10.1007/978-3-319-91737-5>.

¹⁶ Anugerah Rizki Akbari, “Perdagangan Orang”, the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons, 11 November 2022, Ashley Hotel Jakarta.

language.¹⁷

The definition of prostitution has also been expressed by several experts, for instance, according to James A. Inciardi, as quoted by Topo Santoso, that prostitution is the offering of sexual relationship to obtain money or other benefits.¹⁸ In addition, according to Iwan Bloch, prostitution is a form of extra-marital genital relationship to anyone in open manner and most likely followed with payment, either for intercourse, or other sexual activities that generate pleasure as expected by the relevant parties.¹⁹

Within the criminal law norms in Indonesia, the prohibition on prostitution practice is specifically addressed under Article 296 of KUHP that contains sentencing for anyone who deliberately organizes or facilitates obscene activities by other person with another person, and treat it as a living or habit. Moreover, Article 506 of KUHP also addresses the sentencing for anyone who benefits from such prostitution act. Within the Indonesian context, those two articles originally may only be imposed on panders or pimps, meanwhile, sentencing does not apply to prostitutes and their clients.

This prostitution practice has a different dimension with trafficking in persons offense. Legal norms in Indonesia that address trafficking in persons offenses have been addressed under specific frameworks (*lex specialis*), namely Law Number 21 of 2007 on Eradication of Trafficking in Persons Offenses (TIP Law).

Most researchers indeed agree that part of trafficking in persons is aimed for commercial sex purposes (Marisa B Ugarte et al, “Prostitution and Trafficking ...”, (2003) *Journal of Trauma Practice*, p. 114).²⁰ From national data as elaborated by United Nations Office on Drugs and Crime (UNODC), that in 2018, of 11,330 victims of trafficking in persons who were detected in 19 countries in West and South Europe, the highest form of exploitation is sexual exploitation at the rate of 44%, and followed with forced labour at the rate of 32%.²¹ This condition at least illustrates that prostitution and trafficking in persons shares interconnection, but originally, those two offenses have different characteristics.

Within the context of trafficking in persons, an event is deemed as a trafficking offense if it meets 3 (three) criteria or elements, namely process (acts), means, and purpose.²² The process encompasses how TIP acts are committed, means encompass means to perform process in order to reach the purpose, meanwhile purpose is the result that is expected to be reached from a series of process and means.²³ Of those 3 elements, according to Djuymto, exploitation becomes a special characteristic of trafficking in persons offenses.²⁴ The same opinion is shared by Anugerah Rizki Akbari who cited Global Report on Trafficking in Persons 2020,²⁵ that there are 3 (three) principles on the occurrence of trafficking in persons offenses, namely exploitation as the primary purpose, deprivation of independence of the

¹⁷ Wisnu Candra Erlangga, “PROSTITUSI ONLINE: Angka dan Penegakan Hukumnya (Studi Kasus di Wilayah Hukum Polres Magelang)”, Undergraduate Thesis, Faculty of Law of Universitas Muhammadiyah Magelang, 2020, p. 21, accessed on 4 October 2022, http://eprintslib.ummg.ac.id/1506/1/15.0201.0063_BAB%20I_BAB%20II_BAB%20III_BAB%20IV_DAFTAR%20PUSTAKA.pdf.

¹⁸ James A. Inciardi, *Criminal Justice* (Orlando: Harcourt Brace Javanovich, 1994), p. 81, as cited by Topo Santoso, 1997, *Seksualitas dan Hukum Pidana*, Jakarta. Ind-Hill-Co. p. 134.

¹⁹ I Dewa Gede Budiarta, I Wayan Suardana, and Putu Andhika Kusuma Yadnya, “Pengaturan Hukum Pidana Terhadap Pekerja Seks Komersial Dengan Sistem Online Dalam KUHP”, *Majalah Ilmiah Untab*, Vol. 18 No. 1 (Maret 2021): 100, accessed on 4 October 2022, <https://ojs.universitastaban.ac.id/index.php/majalah-ilmiah-untab/article/download/115/112>.

²⁰ *Id.*

²¹ UNODC, *Global Report on Trafficking in Persons 2020* (United Nations publication, Sales No. E.20.IV.3), 2021, *Global Report on Trafficking in Persons 2020*, p. 133, accessed on 15 November 2022, https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTIP_2020_15jan_web.pdf.

²² Teguh Suhendro, et.al, *supra* note 1, p. 35.

²³ *Id.*, pp. 24-25.

²⁴ Djuymto is a Judge at the District Court of South Jakarta, the information is gathered from the excerpt of the interview conducted on 17 November 2022 at the District Court of South Jakarta.

²⁵ *Id.*, p. 10. In UNODC, *Global Report on Trafficking in Persons 2020*, it is discovered that “Overall, 50 per cent of detected victims were trafficked for sexual exploitation and 38 per cent for forced labour, while 6 per cent were subjected to forced criminal activity and more than one per cent to begging. Smaller numbers were trafficked for forced marriages, organ removals and other purposes”.

victims, and existence of absolute control over victims.²⁶

In relation to the exploitation as the primary purpose, trafficking in persons is indeed a crime with special or specific intention (*spesialis dolus*).²⁷ This condition differs with the prostitution offense that does not contain any exploitative purposes. In this event, prostitution shall become part of trafficking in persons offenses if the exploitation is committed through such prostitution practices. Hence, prostitution practices do not necessarily always be trafficking in persons, but one form of trafficking in persons is an exploitation through prostitution.

In relation to the exploitation, Article 3 letter a of Palermo Protocol addresses that exploitation must encompass, at least, prostitution exploitation of another person or other forms of sexual exploitations, force labour or services, slavery or practices similar to slavery, servitudes or removal of body organs. The TIP Law also defines exploitation under Article 1 point 7, addressing that:

“Exploitation is an act with or without consent of victims encompassing, but not limited to, prostitution, force labour or services, slavery or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, or unlawfully remove or transplant body organs and/or tissues or abuse of one’s energy or ability by another party to obtain either economic or non-economic benefits”.

With the formulation of exploitation as addressed under the TIP Law, it becomes biased or dubious due to the existence of phrase *“with or without consent of victims”*. Such provisions otherwise open the school of thought that there are victims who consent to themselves being exploited in any forms. The dubious nature of this consent is further shown with the existence of Article 26 of TIP Law that *“consent of victims of trafficking in persons does not dismiss the prosecution of trafficking in persons offenses”*. This condition is different with the Palermo Protocol, whereas, irrelevancy of such consent does not relate to the use of ‘means’ although ‘means’ still become elements of the definition.²⁸ As Article 3 letter b clearly addresses that *“the consent of a victim of trafficking in persons to the intended exploitation set forth in sub-paragraph (a) of this article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used”*. Moreover, if the victims are children, the Palermo Protocol emphasizes that the consent from child trafficking victims shall be irrelevant, whether the ‘means’ have been used or not.²⁹

In connection with the consent of victims, this condition also leads to the next distinguishing factor between trafficking in persons and prostitution, namely the intention or willingness of involved sex workers. In trafficking in persons cases, commercial sex workers (*Pekerja Seks Komersial – PSK*) do not have any power or do not have any option to negotiate or refuse to offer sexual services.³⁰ In other words, they are put as sex slaves that are trafficked under forces to provide services.³¹ This condition differs with the concept of PSK in prostitution, whereas, they perform sexual activities on voluntary or self-willingness basis. However, if such consent is preceded with the existence of means/methods such as threats, forces, violence, abduction, fraud, deception, abuse of power or position of vulnerability, or other unlawful means to obtain economic or non-economic benefits, such condition is categorized as a prostitution act with the purpose of exploitation in trafficking in persons offenses. In other words,

²⁶ Anugerah Rizki Akbari, supra note 4.

²⁷ UNODC, The Role of ‘Consent’ in the Trafficking in Persons Protocol’, (United Nations Office on Drugs and Crime, 2014), p. 25, accessed on 15 November 2022, https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf

²⁸ p. 44

²⁹ Trafficking in Persons Protocol, Art. 3 (c).

³⁰ Yohannie Linggasari, “Prostitusi Artis Tak Tepat Dijerat UU Perdagangan Orang”, cnnindonesia.com, 13 Desember 2015, accessed on 3 October 2022, <https://www.cnnindonesia.com/nasional/20151213175400-12-97911/prostitusi-artis-tak-tepat-dijerat-uu-perdagangan-orang>.

³¹ Ramen Antonov Purba, “Harian Jurnal Asia”, Menyikapi Fenomena Prostitusi Artis Dari Segi Hukum, 2016, Through the website: <https://www.jurnalasia.com/Opini/Menyikapi-Fenomena-Prostitusi-Artis-Dari-Segi-Hukum/>, Accessed on 2 August 2016, as cited by Edi Yuhermansyah and Rita Zahara, “Kedudukan PSK Sebagai Korban Dalam Tindak Pidana Prostitusi”, LEGITIMASI, Vol. VI No. 2, (Juli-Desember, 2017): 310., accessed on 3 October 2022, <https://jurnal.ar-raniry.ac.id/index.php/legitimasi/article/download/3960/2579>.

sex workers in prostitution may be deemed as TIP victims if they are within the context of forced prostitution.³²

Asides from intention or willingness factor, another factor that distinguishes prostitution with trafficking in persons offenses is the involved parties. In TIP, the offenders are human traffickers, meanwhile, in prostitution, the offenders are brokers or intermediaries.³³ Human traffickers in the TIP Law refer to natural persons or corporations that commit acts and means/methods that aim to exploit which might occur in trafficking in persons practices.³⁴ Meanwhile, Brokers play the role of finding PSK, as the connector/intermediary between PSK with PSK's clients, and acting as the person in charge, manager, and security coordinator of all prostitution business activities.³⁵

Difference in Characteristics between Trafficking in Persons Offenses and Prostitution Offenses			
No.	Characteristics	Trafficking in Persons Offenses	Prostitution Offenses
1.	Purpose of exploitation	Has the primary purpose in the form of exploitation ³⁶	Does not have exploitation as the purpose
2.	Intention or willingness of sex workers	Without any consent or with consent that is committed with threat, force, violence, abduction, fraud, deception, abuse of power or position of vulnerability	With consent without any threat, force, violence, abduction, fraud, deception, abuse of power or position of vulnerability
3.	Offenders	Human traffickers, refer to natural persons or corporations that commit acts in the process and means with the purpose of exploitation that might occur in trafficking in persons practices.	Brokers, who have the duties as the connector/intermediary between PSK and PSK's clients, and as the person in charge, manager, and security coordinator of all prostitution business activities.

2) Regulatory Comparison between Article 296 of KUHP with Article 506 of KUHP, and between Article 2 of TIP Law with Article 12 of TIP Law

After knowing the differences in characteristics between prostitution and trafficking in persons offenses, the next issue is how law enforcers use relevant articles in KUHP and TIP Law for cases that have the dimensions of prostitution and trafficking in persons. Hence, in this section, regulatory comparison between prohibition on prostitution in Articles 296 of KUHP and 506 of KUHP, and regulation on prohibition of trafficking in persons in Article 2 of TIP Law and Article 12 of TIP Law shall be attempted to be explained.

Firstly, the comparison between Article 296 of KUHP that is categorized as felony and Article 506 of KUHP that is categorized as a misdemeanor. Citing the article written by R. Sianturi (Tindak Pidana di KUHP Berikut Uraianya, 1983), Article 296 of KUHP is made to combat prostitution, including

³² Ria, "Awat Salah Memahami Prostitusi Sebagai TPPO", hukumonline.com, 17 May 2016, accessed on 7 September 2022, <https://www.hukumonline.com/berita/a/awas-salah-memahami-prostitusi-sebagai-tpo-lt573b1ab569542>.

³³ "Perdagangan Manusia Dengan Motif Prostitusi di Mata Hukum", kompasiana.com, 30 December 2021, accessed on 3 October 2022, <https://www.kompasiana.com/putriprastiwi5265/61cd1dc89bdc4052b612b302/perdagangan-manusia-dengan-motif-prostitusi-di-mata-kuhp-dan-undang-undang-no-21-tahun-2007-tentang-pemberantasan-tindak-pidana-perdagangan-orang>.

³⁴ General Elucidation of Law Number 21 of 2007 on Eradication of Trafficking in Persons Offenses.

³⁵ Wahyu Adi Prasetyo, "Jaringan Sosial Prostitusi Peran dan Fungsi Mucikari di Lokalisasi Sanggahan Tretes", Departemen Antropologi FISIP Universitas Airlangga, p. 21, accessed on 4 October 2022, <http://journal.unair.ac.id/download-fullpapers-aun00b162039dfull.pdf>.

³⁶ According to Article 1 point 7 of PTPPO Law, exploitation is not only limited to prostitution, force labour or services or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, or unlawfully remove or transplant body organs and/or tissues or abuse energy or ability of a person by another person to obtain economic or non-economic losses.

despicable intercourses and aim to limit prostitution premises or houses.³⁷ According to Hoge Raad, Article 296 KUHP not only prohibits acts that violate the decency as committed explicitly in prostitution premises, but also acts that violate the decency as committed in secrecy.³⁸

Article 296 KUHP addresses that the 'intentional nature' of offenders must be aimed to 'cause' or 'facilitate' the commitment of acts that violate the decency by another person with third parties, and treat such intentional act as a living or habit.³⁹ According to Hoge Raad, the act of intentionally organizing or facilitating obscene acts with another person, namely the act of renting a room or providing a place to give opportunity to another person to commit the act of violating the decency with a third party.⁴⁰ Furthermore, relating to 'treating it as a habit' refers to if acts in question have been performed repeatedly and there is a certain connection.⁴¹

'Other person with another person' as referred to under Article 296 of KUHP is not mentioned specifically whether the subject is female with male, male with male, or female with female. However, it must be underlined that the subject that should be held responsible for the prostitution act is the "connector" or "intermediary" (broker), namely the person that causes or facilitates the obscene act by other person with another person, and treats it as a living or habit.⁴²

This condition matches the opinion from Anugerah Rizki Akbari, that Article 296 of KUHP, in principle, is designated to parties who are in the middle of two parties that agree to perform obscene acts, whereas, the party in the middle causes or facilitates those two parties to perform obscene acts in question, for instance, by providing a place, contacting clients, and others.⁴³ Similarly with argument from Djuyamto, that Article 296 of KUHP requires the offenders to provide certain facilitates that cause or facilitate obscene acts.⁴⁴

Provisions under Article 296 KUHP differ with Article 506 of KUHP, although both are usually used in prostitution cases because Article 506 of KUHP is more designated to those who act as pimps who benefit from the act of violating decency by a woman. Thus, the subject who is deemed to be held liable in Article 506 of KUHP is usually referred to as 'pimp' as the beneficiary.⁴⁵ To be classified as pimps, a person is not necessary to provide a room to commit the act of violating the decency, but it is sufficient if such person is proven obtaining benefits from the violating acts by a woman with a third party.⁴⁶

In addition, relating to 'obtaining benefits', Prof. Simons argues that the benefits in question refer to a '*materieel voordeel*' or 'benefits that are properties in nature'.⁴⁷ Lastly, Article 506 KUHP specifically emphasizes subject that performs obscene acts must involve a 'woman', either individually or with

³⁷ MYS, "Sekilas tentang Pasal Bordeelhouderij dalam KUHP", hukumonline.com, 12 May 2015, accessed on 5 October 2022, <https://www.hukumonline.com/berita/a/sekilas-tentang-pasal-ibordeelhouderij-i-dalam-kuhp-lt555198687e273>.

³⁸ Lamintang, P.A.F. Delik-delik Khusus (Tindak Pidana-Tindak Pidana Melanggar Norma-norma Kesusilaan dan Norma-norma Kpeaturan), (Bandung: Mandar Maju, 1990), p. 227, citing HR 11 November 1918, NJ 1919, p.6, W. 10349.

³⁹ *Id.*, p. 228.

⁴⁰ Lamintang, P.A.F. & Samosir, C. D. Hukum Pidana Indonesia, (Bandung: Sinar Baru, 1985), as cited by Fany Annisa Putri, "Penjatuhan Sanksi Pidana Oleh Hakim terhadap Pelaku Tindak Pidana Praktik Mucikari", Indonesian Journal of Criminal Law and Criminology (IJCLC) Volume. 3, Issue. 2, (July 2022), p. 106, accessed on 5 October 2022, <https://journal.umy.ac.id/index.php/ijclc/article/download/15528/7544>.

⁴¹ *Id.*, supra note 23, pp. 228-229.

⁴² Kadek Martha Hadi Parwanta, Made Sugi Hartono, and Ni Ketut Sari Adnyani, "Analisis Yuridis Tentang Pasal 506 Kuhp Sebagai Peraturan Utama Dalam Penanggulangan Tindak Pidana Prostitusi", e-Journal Komunitas Yustisia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum, Volume 4 Number 2 (August, 2021): 536, accessed on 5 October 2022, <https://ejournal.undiksha.ac.id/index.php/jatayu/article/view/38143/18920#:~:text=Pada%20Pasal%20296%20KUHP%20yang,penarik%20keuntungan%20atau%20pelaku%20langsung>.

⁴³ Anugerah Rizki Akbari, supra note 4.

⁴⁴ Djuyamto is a Judge at the District Court of South Jakarta, the information is gathered from the excerpt of interview conducted on 17 November 2022 at the District Court of South Jakarta.

⁴⁵ Kadek Martha Hadi Parwanta, Made Sugi Hartono, and Ni Ketut Sari Adnyani, supra note 30.

⁴⁶ Lamintang, P.A.F, supra note 23, p. 378.

⁴⁷ Simons, Leerboek I, p. 211, note no.4, as cited by Lamintang, P.A.F, supra note 23, p. 379.

another person (female or male). This condition differs with Article 296 of KUHP whose subjects are not specifically addressed.

Difference in Characteristics between Article 296 of KUHP and Article 506 of KUHP			
No.	Characteristics	Article 296 of KUHP	Article 506 of KUHP
1.	Types of offenses	Felony	Misdemeanour
2.	Criminal elements	Anyone who deliberately causes or facilitates obscene acts by other person with another person, and treats it as a living or habit	Anyone who benefits from obscene acts of a woman and treats it as a living
3.	Offenders	Connectors or Intermediaries (Brokers)	Pimps
4.	Role of offenders	Causing or facilitating obscene acts by other person with another person whether the offenders obtain benefits or not from such obscene acts	Benefitting from obscene acts of a woman without any participation to cause or facilitate the performance of such obscene acts
5.	Subjects who perform obscene acts	They are not specifically addressed, therefore the subjects might be female with male, female with female, or male with male	They are addressed in the article that subjects that perform obscene acts must involve a "woman"
6.	Criminal sentences	Imprisonment of one year and four months at maximum or fines at the amount of fifteen thousand rupiah at maximum	Confinement of one year at maximum

Afterwards, the comparison between Article 2 of TIP Law and Article 12 of TIP Law. First, Article 2 of TIP Law consists of two paragraphs that contain the elements of subjects of offenders, process/acts and same means, but the purpose and type of offense is different. Article 2 paragraph (1) and Article 2 paragraph (2) of TIP Law are both designated to anyone as offenders; committed with the existence of the process or act of: recruitment, transportation, harbouring, transfer, movement, or receipt of a person; and the existence of means or methods in the form of: threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, despite achieving the consent from the person having control over another person.

However, if observed from the purpose aspect, Article 2 paragraph (1) is designated to acts and means that have the purpose of exploiting persons, meanwhile Article 2 paragraph (2) refers to the results of persons being exploited. Hence, Article 2 paragraph (1) is deemed as a formal offense, meaning that the offense is deemed to have been fulfilled provided that the elements of an act in the formulation of the article are met, meanwhile Article 2 paragraph (2) is deemed as a material offense, meaning that the offense is deemed to have been met if the result that is required in the article occurs, namely the exploitation of persons.

Second, Article 12 of TIP Law is a formal offense and consists of the elements of subjects of the offenders, process/acts, and means. The element of offenders in question refers to anyone. Subsequently, the element of process/acts covers the use or abuse of TIP victims. The element of means refers to the performance of intercourses or other obscene acts with TIP victims, ordering TIP victims to continue

exploitation practices, or benefitting from the results of TIP.

In the formulation of Article 12 of TIP Law, there is a terminology of ‘victims of trafficking in persons offenses’, meaning that such article requires the existence of TIP victims. In relation to the determination of a person as TIP victim does not preliminary require a court decision or order from an agency, for instance the Witnesses and Victims Protection Agency (Lembaga Perlindungan Saksi dan Korban – LPSK) that declares such person is a TIP victim.⁴⁸ Whether the order of an agency or court decision exists or not, Judges in handling this case should be able to identify and determine according to their considerations in the decision that a person is a TIP victim according to the indicators on the existence of trafficking in persons offenses, as referred to Article 2, Article 3, Article 4, Article 5, and Article 6 of TIP Law.⁴⁹ Since the existence of a TIP victim within the context of Article 12 of TIP Law is important, the handling of cases should not be combined or cannot be separated from one context with another context.⁵⁰

From the description above, it may be inferred that Article 12 of TIP Law is used in a situation where previously, trafficking in persons offenses have occurred (see Article 2, Article 3, Article 4, Article 5, and Article 6 of TIP Law), which subsequently, the TIP victim is re-abused or reutilized by another offender who knows that the victim in question is a TIP victim.⁵¹ The abuse and utilization of such TIP victim is committed through various means, encompassing intercourses or obscene acts, ordering them for work, or benefitting from TIP results.

⁴⁸ Djuyanto is a Judge at the District Court of South Jakarta, the information is gathered from the excerpt of the interview conducted on 17 November 2022 at the District Court of South Jakarta.

⁴⁹ In the book of Guideline for Handling Trafficking in Persons Offenses, examples on several indicators that may be used as parameters to identify TPPO may be inferred from the activities in the areas of origin and areas of transit and may be inferred from TPPO stages, both against adult victims and child victims. For the complete version, please see Teguh Suhendro, et.al, Panduan Penanganan Tindak Pidana Perdagangan Orang, 2021, (Jakarta: International Organization for Migration (IOM) Indonesia, 2021), pp. 28-33, accessed on 4 October 2022, https://indonesia.iom.int/sites/g/files/tmzbd11491/files/documents/panduan-penanganan-tpo_lidwina-pradipta-put.pdf.

⁵⁰ Anugerah Rizki Akbari and Ahmad Sofian, the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses, 11 November 2022, Ashley Hotel Jakarta.

⁵¹ Anugerah Rizki Akbari, supra note 4.

Difference in Characteristics between Article 2 of TIP Law and Article 12 of TIP Law				
No.	Characteristics	Article 2 of TIP Law		Article 12 of TIP Law
		paragraph (1)	paragraph (2)	
1.	Types of offenses	Formal	Material	Formal
2.	Process/acts	Recruitment, transportation, harbouring, transfer, movement, or receipt of a person	Recruitment, transportation, harbouring, transfer, movement, or receipt of a person	Abuses or utilizes TIP victims
3.	Means/methods	Threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, despite achieving the consent from a person having control over another person	Threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, despite achieving the consent from a person having control over another person	Performing intercourses or other obscene acts with TIP victims, ordering TIP victims to continue exploitation practices, or benefitting from TIP results
4.	Purpose	To exploit such persons	To cause persons to be exploited	-
5.	Victims	TIP victims by the first offenders	TIP victims by the first offenders	TIP victims by the first offenders, then they are re-abused or reutilized by other TIP offenders

3) Analysis on the Assessment of Sex Workers in Case Number 61/Pid.Sus/2019/PN Bgl as Victims of Trafficking in Persons Offenses

In the case number 61/Pid.Sus/2019/PN Bgl, the Panel of Judges deems that the act of Hidayatuddin aka Ayek Bin Daman Huli as the Defendant fulfills the elements of Article 12 in conjunction with Article 2 of Law No. 21 of 2007 (TIP Law). In their considerations, Judges divide it into two elements, namely:

1. Anyone
2. Abuses or utilizes victims of trafficking in persons offenses by the way of ordering victims of trafficking in persons offenses to continue exploitation practices or benefits from the results of trafficking in persons offenses

The first element is deemed to have been fulfilled because the identity of the Defendant is in conformity with the indictment letter. However, against the second element, it is unfortunate because the panel of judges only duplicates or copies-pastes legal facts as described above without giving any considerations relating to the intention of the element of the article and connects it with the existing legal facts. After mentioning legal facts, the Panel of Judges directly concludes that the defendant has exploited ES and MOS, the witnesses, to benefit from prostitution activities.

Hence, in this occasion, it will be revisited whether it is true that ES and MOS, witnesses, are victims of trafficking in persons offenses? Or, in brief, is it true that this case is trafficking in persons offense? As described above in the primary analysis on the first issue, factors that distinguish between a prostitution case with a trafficking in persons case are the factor on the existence of the purpose of exploitation, the factor of intention or willingness of the persons involved, including sex workers (PSK), and the factor of offenders (brokers or human traffickers).

Firstly, from the aspect on the existence of the purpose of exploitation. The definition of exploitation has been incorporated in the national and international legal frameworks, for instance, the one that is addressed under Article 1 point 7 of TIP Law and Article 3 letter a of Palermo Protocol as described beforehand. If puts into context in this case, actually there are no methods or means that are used by the Defendant for the purpose of exploitation. In legal facts that are incorporated in the decision, the Defendant finds clients upon the request from ES and MOS, as witnesses, who later on based on an agreement between the defendant and both witnesses, the Defendant receives fees at the amount of Rp200,000.00 from each witness after both witnesses provide sexual services with clients that have been procured by the Defendant.

The agreement that occurs between the Defendant with ES and MOS cannot be necessarily deemed that the Defendant, with consents of both witnesses, committed sexual exploitation in the form of abuse of sexual body organs or other body organs of both witnesses to obtain benefits. Since, in this event, the Defendant did not use means such as threat, force, coercion, abduction, fraud, deception, abuse of power or position of vulnerability, or other unlawful means to obtain such economic benefits. Hence, it is clear that the act of the Defendant is not aimed to or to cause ES and MOS to be exploited.

The biased formulation of consents in the definition of exploitation in Article 1 point 7 of TIP Law that should be collectively criticized. The context of “with or without consents of victims” otherwise apparently negates the existence of victims of trafficking in persons who give consents for themselves to be exploited. In the event that victims of trafficking in persons are adults, then the ideal legal framework to be referred to is Article 3 letter b of Palermo Protocol that explicitly explains the irrelevancy of consents does not relate to the use of ‘means’, although ‘means’ still constitute element of the definition.⁵² Hence, when means that are addressed are not used, then the purpose of exploitation should have been not proven.

Secondly, from the aspect of intention or willingness. In this case, it has been mentioned that ES and MOS, as witnesses, who requested the Defendant to find guests/clients who wish to be provided with sexual intercourses by paying an amount of money. In addition, legal facts also describe that there has been an agreement between the Defendant with both ES and MOS, that after they provided sex intercourses to clients that have been procured by the Defendant, they pay fees to the defendant, each Rp200,000.00.

Based on such legal facts, it is clear that ES and MOS committed sexual acts on voluntary or personal willingness basis. In other words, in this case, there is no exploitation that is committed by the Defendant due to existence of consents from ES and MOS who have been legally capable, that are provided without any threat, force, coercion, abduction, fraud, deception, abuse of power or position of vulnerability, or other unlawful means.

Thirdly, from the aspect of offenders. The Defendant in this case is more suitable to be deemed as a broker due to his mere role as a connector/intermediary between ES and MOS as PSK with PSK’s clients, and his acting as the person in charge, manager, and security coordinator of all prostitution business

⁵² p. 44

activities, due to having provided a room and picked up witnesses after providing sexual intercourses to clients.

Hence, if viewed from the factor on whether there is a purpose of exploitation or not, the factor of intention/willingness and the factor of offenders, this case is not a trafficking in persons offense case, and thus, ES and MOS, as witnesses, are not victims of trafficking in persons offenses, instead, those two are more suitable deemed as PSK in a prostitution case. Therefore, considerations of the judges that declare the Defendant is convicted to be guilty of abusing or utilizing victims of trafficking in persons offenses is absolutely incorrect.

It would be different if in this case, the Defendant has the purpose of exploiting Ervita and Meri through prostitution activities. For instance, the Defendant recruits Ervita and Meri who are originated from Solo to work in a restaurant in Jakarta, when they arrive in Jakarta, both of them are forced to act as commercial sex workers who provide sexual intercourses to clients. Both of them work as sex workers without receiving any payments and they are only given meal once a day. If the condition is as mentioned before, such condition may position ES and MOS as victims of trafficking in persons, because they have been exploited by the Defendant, as preceded with the act of recruitment through fraud means.

In this case, Judges have also necessarily implemented Article 12 of TIP Law by assessing that ES and MOS as victims of trafficking in persons without giving any considerations and proving the existence of trafficking in persons offense from the preliminary stage. Although, originally, Article 12 of TIP Law may be used if trafficking in persons offense has occurred previously, whereas Judges in the case should have been able to identify and determine through considerations of the decision that a person is a TIP victim.⁵³

For instance, X has performed sexual exploitation on Y, whereas, Y is controlled and monitored by X to be used as a sex worker without being given any payments, unless for meal money and there is an obligation to meet revenue targets. X then sells Y to Z who is X's close friend to be used as a domestic worker (Asisten Rumah Tangga – ART). Z who knows that Y was previously employed as a sex worker without being paid by X, Z also does not give any payments to Y as ART, even Y is frequently forced to serve Z with sexual intercourses. Such example may be used to assess that Z has committed offense as referred to under Article 12 of TIP Law because Z has abused or utilized Y as a victim of trafficking in persons offense by the way of employing her and committing intercourses with her.

The next analysis after understanding that this case is a prostitution case, then the next question is which article that is more suitable to criminally process the defendant? In the indictment, Prosecutors have indicted using articles relating to prostitution, namely Article 296 of KUHP and Article 506 of KUHP. To determine which article is more suitable, then the role of the Defendant in this case should have been initially described, as follows:

1. Finding clients “guests”/persons/males who wish to be provided with sexual intercourse services;
2. Communicating correctly with ES and MOS to notify that there are guests that wish to be provided with sexual intercourse services;
3. Providing rooms number 07 and 08 at Hotel Rindu Alam within the area of Pantai Panjang, Bengkulu City, as the place for the performance of sexual intercourse services;
4. Picking-up ES and MOS after they have served sexual intercourses with guests.

With the role of the Defendant, the Defendant received fees at the amount of Rp200,000.00 both from

⁵³ Anugerah Rizki Akbari and Ahmad Sofian, the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses, 11 November 2022, Ashley Hotel Jakarta.

ES and MOS. The Defendant performed such practice since 2016. Specifically, ES and MOS have been procured with clients by the Defendant, 7 guests each.

As described beforehand, in Article 296 of KUHP, subjects that should have been held liable for the prostitution act is the “connector” namely the person who facilitates the obscene acts by other person with another person. Meanwhile, under Article 506 of KUHP, subjects are panders or pimps as the beneficiaries or direct offenders.⁵⁴

Observing the existing legal facts, the Defendant in this case is the third party that has facilitated obscene acts from two parties, namely ES and MOS with another person (clients). The act of facilitating obscene acts is performed by the way of finding clients, notifying the existence of clients to witnesses and providing rooms to have sexual intercourses. Such practice has been performed by the Defendant since 2016 and specifically for ES and MOS, there have been 7 guests that have been procured by the Defendant. Hence, this condition is deemed as a habit or living because it has been performed repeatedly. Hence, the Defendant is more suitable to be imposed with Article 206 of KUHP.

From the context of the fact that the Defendant collects benefits in the form of payment of fees at the amount of Rp200,000.00 for each sexual intercourse of each witness, this condition is not categorized of collecting benefits from obscene acts of a woman as referred to under Article 506 of KUHP. Such benefits are generated from the habit or living of the Defendant as the connector/intermediary between sex workers and clients. In this regard, Article 506 of KUHP may only be used if, for instance, there is another person (not the Defendant) who in secrecy always records every obscene act as committed by ES and MOS with the clients, and then such person sells those videos to the person’s friends and the person receives benefits in the form of payment of money. In such context, then such person should have been imposed with Article 506 of KUHP relating to collecting benefits from obscene acts of a woman and treating it as a living.

b. Annotation of Best practice Decisions⁵⁵

According to Kartono (1997), prostitution is the act of selling oneself by the way of selling bodies, honour and personality of many persons to satisfy sexual lusts in return of payments.⁵⁶ From such definition, it may be inferred that the nature of the prostitution act or a person who acts as a prostitute is: economic element in the form of payments; the general element in the form of partners that are not selective; and the continuance element in the form of activities that are performed several times.⁵⁷

Prostitution is frequently qualified as a form of trafficking in persons offenses. In addition to the prostitution market power that encourages the demand on trafficking of women and children,⁵⁸ majority of researchers also agree that part of trafficking in persons is also for commercial sex purposes (Ugarte et al., 2003; Wilson & Dalton, 2007).⁵⁹ Abolitionists also argue that all prostitutes are victims of trafficking in persons.⁶⁰

⁵⁴ Kadek Martha Hadi Parwanta, Made Sugi Hartono, and Ni Ketut Sari Adnyani, supra note 31.

⁵⁵ See Appendix 2. Facts of the Case of Annotation of Decision No. 365/Pid.Sus/2018/PN Smn

⁵⁶ Purwantiyastuti and Dian Savitri, “Kebermaknaan Hidup Pekerja Seks Komersial Ditinjau dari Konsep Diri”, *Jurnal Dinamika Sosial Budaya*, Volume 18, Number 2, (Desember, 2016): p. 264, accessed on 7 October 2022, <https://journals.usm.ac.id/index.php/jdsb/article/download/575/1544>.

⁵⁷ B. Simanjuntak, *Beberapa Aspek Patologi Sosial*, (Bandung: Alumni, 1981), p. 26, as cited by John Kenedi, *Menghadang Prostitusi Kajian Yuridis - Sosiologis Perda Nomor 24 Tahun 2000 Tentang Larangan Pelacuran Di Kota Bengkulu*, (Bengkulu: IAIN Bengkulu Press, 2016), p. 228, accessed on 7 October 2022, <http://repository.iainbengkulu.ac.id/4973/1/Menghadang%20Prostitusi.pdf>.

⁵⁸ Michael Shively, Kristina Kliorys, Kristin Wheeler, and Dana Hunt, *A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts*, (Washington: The National Institute of Justice, 2012), p. 12, accessed on 7 September 2022, <https://www.ojp.gov/pdffiles1/nij/grants/238796.pdf>.

⁵⁹ *Id.*

⁶⁰ Jennifer K. Lobasz, *Constructing Human Trafficking: Evangelicals, Feminists, and an Unexpected Alliance*, (USA: Department of Political Science and International Relations, 2019), p. 46, accessed on 21 September 2022, <https://doi.org/10.1007/978-3-319-91737-5>.

It must be understood that prostitution and trafficking in persons are two different acts. One factor that distinguishes prostitution and trafficking in persons is the factor of intention/willingness. In prostitution, sex workers perform sexual acts on voluntary or personal willingness basis, meanwhile sex workers in trafficking in persons do not wish to perform sexual acts, but they do not have any power to refuse such sexual acts. In other words, sex workers in prostitution are also victims of trafficking in persons within the context of forced prostitution.⁶¹

With the difference in characteristic, legal norms that prohibit such illegal acts certainly also different. Within the Indonesian context, the prohibition on prostitution practices is addressed under KUHP, namely Article 296 and Article 506, meanwhile, trafficking in persons offenses are specifically addressed under Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses (TIP Law).

Lacking understanding of law enforcers on the difference between prostitution and trafficking in persons certainly will result in the occurrence of error in the implementation of law that obviously harms justice seekers (justitiabelen). Within the context of similar characteristics of the case and legal facts (comparable circumstances), but different law is implemented, this condition is prone to result in unwarranted sentencing disparity.

To show the correct and proper implementation of the law on cases with prostitution dimension that are frequently correlated with articles under the TIP Law, this article shall attempt to analyse a decision that may be deemed as a best practice Best Practice in the law enforcement of prostitution offenses in Indonesia. In this decision, the Defendant is charged using articles in the TIP Law, but the Judges deem that the Defendant is not an offender of trafficking in persons offense, instead, a prostitution offender. Such decision is under the case number 365/Pid.Sus/2018/PN. Smn in the name of Dwi Sukma Erlangga Bin Sarjono (21 years old) as the Defendant.

Primary Issues

1. What are considerations of the Panel of Judges in the case Number 365/Pid.Sus/2018/PN. Smn in the name of Dwi Sukma Erlangga Bin Sarjono as the Defendant?
2. Have the Panel of Judges correctly implemented the concept of intersection between prostitution offenses under KUHP and trafficking in persons offenses under the TIP Law in this case?

Analysis on Issues

- 1) Considerations of the Panel of Judges in the case Number 365/Pid.Sus/2018/PN.Smn in the name of Dwi Sukma Erlangga Bin Sarjono as the Defendant

In the case Number 365/Pid.Sus/2018/PN.Smn, the Panel of Judges assesses that the act of Dwi Sukma Erlangga Bin Sarjono, the Defendant, has fulfilled the elements in Article 296 of KUHP. The Judges' verdict differs from the charge of Public Prosecutors (Jaksa Penuntut Umum – JPU) who charge the Defendant using Article 12 of TIP Law. Interestingly, Judges initially consider the articles used in JPU's charge before determining which indictment that is suitable with the act of the Defendant. This condition may be suspected that the Panel of Judges has not found any certainty relating to which offense that is most suitable to be proven.

In considering Article 12 of TIP Law, the Panel of Judges divides the provisions into two elements, namely:

1. Anyone

⁶¹ Ria, "Awas Salah Memahami Prostitusi Sebagai TPPO", hukumonline.com, 17 May 2016, accessed on 7 September 2022, <https://www.hukumonline.com/berita/a/awas-salah-memahami-prostitusi-sebagai-tppo-lt573b1ab569542>.

2. Who abuses or utilizes victims of trafficking in persons offenses, by the way of performing intercourses or other obscene acts with victims of trafficking in persons offenses, ordering victims of trafficking in persons offenses to continue exploitation practices, or benefitting from results of trafficking in persons offenses.

The first element is deemed to have been proven because the Defendant confirms his identity both in the indictment letter and official report of examination. In addition, the defendant is also deemed to be physically and mentally healthy, including when proceeding the trials. However, in proving the second element, the Judges assess that the act of the defendant does not meet the element. In their considerations, it is mentioned that:

“... Panel of Judges does not find any victim of trafficking in persons or victim of exploitation from the act of the defendant because in this case, PD, as a witness, is an adult, aware of her act and has her share and expectation, and obtained benefits from her sexual acts and actively contacted the Defendant (...).”⁶²

Those considerations are provided after the Panel of Judges has considered legal facts relating to the role and involvement of Puspita Damaryanti in this case. Those legal facts mentioning the preliminary meeting with the defendant, PD gave her Twitter account to be managed by the defendant in order to find clients for commercial sex services. PD also played a role in determining the hotel and pay the hotel room to perform sexual intercourses. Afterwards, according to the conversation evidence in the screenshot between PD with the Defendant, PD was seen actively contacted the defendant.

With the non-fulfilment of the second element in Article 12 of TIP Law, the Panel of Judges did not agree that the act of the Defendant constitutes a trafficking in persons offense. Hence, the Panel of Judges deems that this case is not a trafficking in persons offense, then automatically, Article 2 of TIP Law should be not necessary to be proven because Article 12 TIP Law may only be used if trafficking in persons offenses have occurred previously (see Article 2, Article 3, Article 4, Article 5, and Article 6 TIP Law)⁶³, which later on, those TIP victims are re-abused or reutilized by other offenders who are actually aware that victims in question are TIP victims.⁶⁴ Therefore, Judges in handling cases should be able to identify and determine through their considerations in the decision that a person is a TIP victim according to indicators on the occurrence of trafficking in persons offenses.⁶⁵

Hence, the Panel of Judges in this case does not consider the first indictment, namely Article 2 of TIP Law, because considerations of the Judges under Article 12 of TIP Law have declared that “Panel of Judges does not find any victim of trafficking in persons or victim of exploitation from the act of the defendant”.⁶⁶ By considering the legal facts, the Panel of Judges then directly considers Article 296 of KUHP to be proven. In proving such article, the Panel of Judges divides the article into 2 elements, namely:

1. Anyone
2. Who deliberately causes or facilitates obscene acts by other person with another person and treats it as a living or habit.

In this case, the Judges deem that the Defendant fulfils elements in Article 296 of KUHP. As mentioned in the previous considerations, the first element “anyone” is deemed to be fulfilled because the Defendant

⁶² Decision Number 365/Pid.Sus/2018/PN Snn, Dwi Sukma Erlangga Bin Sarjono as the defendant, p. 17

⁶³ Inquisitorial of the predicate crime does not require a preliminary final and binding decision or order from an agency, instead, the inquisitorial may be performed in linear manner and be proportionally considered according to the existing facts.

⁶⁴ Anugerah Rizki Akbari, supra note 4.

⁶⁵ Anugerah Rizki Akbari and Ahmad Sofian, the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses, 11 November 2022, Ashley Hotel Jakarta.

⁶⁶ Decision Number 365/Pid.Sus/2018/PN Snn, Dwi Sukma Erlangga Bin Sarjono as the defendant, p. 17

confirms his identity both in the indictment letter and official report of examination, and the defendant is also deemed to be physically and mentally healthy, including when he was in trials.

Furthermore, in considering the second element that is also deemed to have been fulfilled, the Judges not only present legal facts as explained in the section of chronology of the case above. In this regard, the Judges also provide considerations relating to the explanation or intention of those two elements. Whereas, Judges explained that “intentionally” refers to the *memorie van toelichting* (MvT), the opinion from Drs. P.A.F Lamintang, S.H, the opinion from Mr. Tresna in his book *Azas-Azas Hukum Pidana*, and according to the concept in the criminal law. Judges also explain the intention of the element of “obscene” by referring to the Indonesian Dictionary and the opinion from R. Soesilo. Unfortunately, Judges do not provide any considerations relating to the intention of the element of “a living or habit”. Afterwards, by considering the existing legal facts, the Panel of Judges deems that both elements are fulfilled because the role of the Defendant who acts as the intermediary and connected PD with males who need sexual services, and the Defendant receives fees from PD from the role of the Defendant.

2) Implementation of the Concept of Prostitution Offenses and Trafficking in Persons Offenses

In this case, the identified practices are offers of sexual services that provide various sexual acts with payments in return in the form of money. However, in this event, it cannot be necessarily inferred that such practice is deemed as a form of exploitation within the trafficking in persons offenses. To determine whether PD is a sex worker in trafficking in persons or merely a sex worker in a prostitution practice, factors that must be considered and analysed are whether there is an exploitation committed by the Defendant, what is the intention/willingness of the Defendant, including PD as a sex worker, including the position of the Defendant, whether he acts as a human trafficker or a broker?

Firstly, in relation to whether there is an exploitation that is committed by the Defendant to PD or not. According to Article 1 point 7 of TIP Law, exploitation is defined as:

“an act with or without consents from victims, encompassing but not limited to prostitution, force labour or services, slavery or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, or unlawfully remove or transplant body organs and/or tissues or abuse of one’s energy or ability by another party to obtain either economic or non-economic benefits”.

The formulation of definition of exploitation in Article 1 point 7 of TIP Law above becomes biased or dubious with the existence of phrases “with or without consent of victims”, because it is as if negates the existence of victims of trafficking in persons who give consents for themselves to be exploited. The unclear formulation of exploitation is further shown with provisions in Article 26 of TIP Law that “the consent of victims of trafficking in persons does not dismiss the prosecution of trafficking in persons offenses”. This condition differs from the Palermo Protocol, whereas, irrelevancy of such consent does not relate to the use of ‘means’ although ‘means’ still become elements of the definition.⁶⁷ As Article 3 letter b clearly addresses that “the consent of a victim of trafficking in persons to the intended exploitation set forth in sub-paragraph (a) of this article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used”.

If it is contextualized in this case, then actually, there are no methods or means used by the Defendant for the purpose of exploitation. In legal facts as incorporated in the decision, PD agrees to cooperate with the Defendant in terms of prostitution practices, namely performing sexual intercourses with clients, and of such agreement, the Defendant also receives fees ranging from Rp150,000 – Rp400,000 from PD. However, such condition cannot be necessarily deemed that the Defendant, with consent from PD,

⁶⁷ p. 44

performs sexual exploitation in the form of abuse of sexual body organs or other body organs of PD to obtain benefits because, from the facts, the Defendant does not use any means such as threat, force, coercion, abduction, fraud, deception, abuse of power or position of vulnerability, or other unlawful means to obtain such economic benefits. Hence, in this case, it is clear that the act of the Defendant is not for the purpose or to make PD to be exploited.

Secondly, in relation to the intention/willingness. In terms of intention/willingness, sex workers in trafficking in persons are not willing to perform the provision of sexual services, meanwhile sex workers in prostitution perform sexual acts on voluntary or personal willingness basis. In other words, sex workers will be qualified as victims of trafficking in persons if the prostitution is performed for the purpose of exploitation, namely the existence of act without consents or with consents as performed using means such as threat, force, coercion, abduction, fraud, deception, abuse of power or position of vulnerability, or other unlawful means to obtain economic or non-economic benefits. Meanwhile, if sex workers perform prostitution activities without any unlawful means and based on their own willingness, then such condition does not constitute a victim of trafficking in persons.

Hence, as described above that the act of the Defendant is not for the purpose or to make PD to be exploited, then, from the aspect of intention/willingness, it may be concluded that the Panel of Judges is correct in considering that the act of the Defendant is not classified as a trafficking in persons offense, because, although in this case, the Defendant receives fees starting from Rp150,000 and for the last time at the amount of Rp400,000, but the Defendant does not perform any threat, force, coercion, abduction, fraud, deception, abuse of power or position of vulnerability, or other unlawful means to obtain such economic benefits.

In other words, PD as a sex worker in this case performs sexual acts upon her own wish and willingness. As incorporated in legal facts, that during the first meeting between the Defendant and PD, she herself who gave her Twitter account with the username CASSEY JOGJA to be later managed by the Defendant to find clients of commercial sex services. In addition, PD also played a role in paying hotel rooms to perform sexual intercourse services with clients. In the decision, Judges have also examined conversation evidence in the form of screenshot between PD with the Defendant, and according to Judges, PD actively contacted the defendant.

Therefore, from the aspect of intention/willingness, it also illustrates that PD is not a victim of trafficking in persons, instead, a sex worker in a prostitution offense. In the discourse, there is a different interpretation on the position of sex workers in prostitution. Anugerah Rizki Akbari, an academic, argues that in prostitution offenses, there are no victims, because sex workers are certainly aware and willing to perform such works.⁶⁸ Such argument is in line with criminology writers who classify prostitution into a victimless crime, meaning that those who are involved in the crime are adults with their own wish to be involved in illegal activities.⁶⁹

On the other hand, a different argument derives from the perspective of counsels of victims, for instance, as iterated by Said Niam, a public defender, that “sex workers are actually victims, namely victims of social, economic, environmental conditions, and others, but they are frequently unaware if they are the victims”.⁷⁰ Although there are two different perspectives, such different perspectives more or less mutually complete the information on sex workers in reality, considering that there is not a single person

⁶⁸ Anugerah Rizki Akbari, “Perdagangan Orang”, the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses, 11 November 2022, Ashley Hotel Jakarta.

⁶⁹ Topo Santoso, “Masalah Prostitusi”, *Jurnal Hukum & Pembangunan*, Issue No.4, Vol.26, (August, 1996): 325, accessed on 15 November 2022, <https://jurnal.hukumonline.com/doi/10.24127/jhk.v26i4.1551>.

⁷⁰ Said Niam, the discussion material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses, 11 November 2022, Ashley Hotel Jakarta.

who wishes or aims to be a sex worker. In this event, it must be underlined that sex workers are categorized as victims of trafficking in persons offenses if acts and means that are performed are for the purpose of exploitation.

Lastly, from the aspect of position of the Defendant. As described above, in this case, it is clear that the role of the Defendant is as a broker who acts as the connector/intermediary between PSK with PSK's clients.⁷¹ As broken down in legal facts, Dwi Sukma Erlangga Bin Sarjono, the Defendant, plays the following roles:

- a. Based on an agreement, the Defendant assists as a connector or intermediary between PD with males who request sexual services/intercourses
- b. Uploading images and identity of PD into the Twitter account of the Defendant, that was previously given by PD
- c. Contacting PD via Whatsapp if there are any males who request sexual services

Hence, it is clear that from the aspect of purpose of exploitation, intention/willingness, and the position of the offender, it is incorrect to impose the Defendant using articles under the TIP Law, because there are no act and means performed by the Defendant that have the purpose to and/or make PD to be exploited. Therefore, this case is not a trafficking in persons case, and thus, PD cannot be categorized as a victim of trafficking in persons offense.

From the above description, against the Defendant, it is more suitable to impose another article in the indictment, namely Article 296 of KUHP. In this event, the Defendant is a subject that should be held liable for prostitution act as referred to under Article 296 of KUHP because the Defendant acted as a "connector" that facilitates obscene acts by PD with another person.⁷² In accordance with the agreement between the Defendant and PD, the Defendant plays the role as an intermediary or connector between PD with males who request sexual services/intercourses. In this event, the Defendant manages the Twitter account of PD to find clients of commercial sex services and contacts PD via Whatsapp if there are males who request sexual services.

The act of the defendant is treated as a living or habit. According to Hoge Raad, it is treated as a habit if acts in question have been performed repeatedly, and between an act to the other act, there is a certain connection.⁷³ This condition also occurs in this case, the Defendant acts as a connector between PD with clients of sexual services, and it is performed more than once. On 13 May 2018, PD served guests around 4 times and on 23 May 2018 for 1 time. Afterwards, by performing such works, the Defendant receives fees ranging from Rp150,000 – Rp400,000 from PD every time he manages to successfully connect PD with clients. With the role of the Defendant, it is clear that the offense committed by the Defendant causes or facilitates obscene acts by other person with another person, and treats it as a living or habit, in line with the third indictment, namely Article 296 of KUHP.

⁷¹ Wahyu Adi Prasetyo, "Jaringan Sosial Prostitusi Peran dan Fungsi Mucikari di Lokalisasi Sanggahan Tretes", Departemen Antropologi FISIP Universitas Airlangga, p. 21, accessed on 4 October 2022, <http://journal.unair.ac.id/download-fullpapers-aun00b162039dfull.pdf>.

⁷² Kadek Martha Hadi Parwanta, Made Sugi Hartono, and Ni Ketut Sari Adnyani, "Analisis Yuridis Tentang Pasal 506 Kuhp Sebagai Peraturan Utama Dalam Penanggulangan Tindak Pidana Prostitusi", e-Journal Komunitas Yustisia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum, Volume 4 Number 2 (August, 2021): 535, accessed on 5 October 2022, <https://ejournal.undiksha.ac.id/index.php/jatayu/article/view/38143/18920#:~:text=Pada%20Pasal%20296%20KUHP%20yang,penarik%20keuntungan%20atau%20pelaku%20langsun>

⁷³ Lamintang, P.A.F, Delik-delik Khusus (Tindak Pidana-Tindak Pidana Melanggar Norma-norma Kesusilaan dan Norma-norma Kpeaturan), (Bandung: Mandar Maju, 1990), p. 204, citing HR 11 November 1918, NJ 1919, p. 6, W. 10349.

2. INTERSECTIONS BETWEEN SEXUAL EXPLOITATION OFFENSES AS TIP AND CHILD PROTECTION OFFENSES IN CHILD PROSTITUTION PRACTICES

a. Annotation of Best Practice Decisions⁷⁴

The discourse on exploitation in the trafficking in persons offenses must always be associated with Article 3(a) of Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children/UN Trafficking Protocol (Palermo Protocol). Those provisions do not define the definition of exploitation⁷⁵, but they explicitly mention the scope of acts that are covered into the category of exploitation, namely prostitution or other forms of sexual exploitation, force labour or services, slavery or practices similar to slavery, servitude, removal or transplantation of organs.⁷⁶ Moreover, the Travaux Préparatoires of Palermo Protocol mentions that the element of (obtaining) benefits by offenders is not included in the concept of exploitation.⁷⁷

If comparing the scope of exploitation under the TIP Law with the Palermo Protocol, we infer that there is a slight difference. The scope of exploitation under the TIP Law is seemingly broader compared to the Palermo Protocol. This condition is inferred from the addition in the scope of exploitative acts in the form of extortion, physical, sexual, reproductive organs abuse, or unlawfully remove or transplant body tissues or abuses energy or ability of other parties.⁷⁸ In addition, the exploitation concept in trafficking in persons in Indonesia explicitly mentions the existence of the purpose of obtaining either economic or non-economic benefits.⁷⁹

Other legal framework that also addresses exploitation is the Law on Child Protection. The prohibition of economic and/or sexual exploitation against children has been specifically addressed in Article 76I of Child Protection Law.⁸⁰ Although it is only limited to the forms of economic and/or sexual exploitations, but the scope of both exploitation types shares similarity with the scope as addressed under the TIP Law.⁸¹ Moreover, the payment of restitution to victims is also addressed both under the TIP Law⁸² and Child Protection Law.⁸³

There are similarities in regulating exploitation under TIP Law and Child Protection Law that results in offenders of child exploitation to be frequently indicted using those two legal frameworks. This condition may be inferred from several decisions on exploitation cases with these defendants: I Wayan Putu

⁷⁴ See Appendix 3. Facts of the Case of Annotation of Decision No. 302/Pid.Sus/2015/PN.Cbi

⁷⁵ United Nations, Analysis of Key Concept of The Trafficking in Persons Protocol, Vienna: Working Group on Trafficking in Persons, 2010, p. 9.

⁷⁶ *Ibid.*, See also UNODC (1), United Nations Conventions Against Transnational Organized Crime and The Protocol Thereto, New York: 2004, p. 42

⁷⁷ UNODC (2), Issue Paper: The Concept of "Exploitation" in The Trafficking in Persons Protocol, Vienna: United Nations, 2005, p. 7.

⁷⁸ Indonesia (1), Law on Eradication of Trafficking in Persons, Law No. 21 of 2017. State Gazette of 2007 Number 58, Supplement to the State Gazette Number 4720, Article 1 point 7.

⁷⁹ *Ibid.*,

⁸⁰ Indonesia (2), Law on Amendment to Law Number 23 of 2002 on Child Protection, Law No. 35 of 2014, State Gazette of 2014 Number 297, Supplement to the State Gazette Number 5606, Article 76I. The provisions read as follows "Any Person is prohibited from placing, neglecting, performing, ordering, or participating in performing economic and/or sexual exploitation against Children".

⁸¹ *Ibid.*, Elucidation of Point 43 Article 66. "Economically exploited" refers to the act with or without the consent of Children who become victims, including but not limited to prostitution, force labour or services, slavery or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, or unlawfully transfers or transplants body organs and/or tissues or abuses energy or ability of Children by another party to obtain economic benefits.

⁸² Indonesia (1), Article 48 paragraph (1).

⁸³ Indonesia (2), Article 71D paragraph (1).

Sujana⁸⁴, J Rusna⁸⁵, Rais Ramli⁸⁶, Yunengsih⁸⁷ and Guntur Supratman⁸⁸. Articles that are imposed in those child exploitation cases are generally Article 2 paragraph (1) of TIP Law and Article 88 in conjunction with 76I of Child Protection Law. Nevertheless, verdicts of decisions in response to those indictments differ. There are those that impose decisions by using the TIP Law and vice versa. The similar condition also occurs within the context of the payment of restitution.

Departing from the law enforcement situation above, a question is raised on how to distinguish between exploitation cases that fall under the category of trafficking in persons with child exploitation as referred to under the Child Protection Law. If the trafficking in persons offenses view “exploitation” as the key element, and although it only constitutes a “purpose” or “intention” to exploit (must be proven), the act has been covered in the category of trafficking in persons⁸⁹, then how about the exploitation as addressed under the Child Protection Law? Hence, it is important to dive further regarding the differences in characteristics between those two within the law enforcement context and how about the mechanism on the payment of restitution to victims of child exploitation.

Furthermore, a comparative review on those two provisions also must be completed with the analysis on the implication on the implementation of the TIP Law and Child Protection Law in relation to the inquisitorial process of trafficking in persons offense cases with child victims that intersects with child exploitation offenses. The analysis on the implementation of the law according to the TIP Law and Child Protection Law in Decision No. 302/Pid.Sus/2015/PN.Cbi with Guntur Supratman as the Defendant shall also be addressed in this chapter.

Identification of Issues

The primary issue in this annotation of decision is the use of the TIP Law and Child Protection Law in child exploitation cases. Deriving from such issue, the primary issues that will be answered in this annotation of the decision are:

1. What are differences in characteristics of exploitation within the contexts of trafficking in persons and child protection?
2. Are considerations of judges in Decision No. 302/Pid.Sus/2015/PN.Cbi with Guntur Supratman as the Defendant correct in implementing the concept of intersection of exploitation within the scope of TIP and child protection?
3. Is the implementation of restitution in this case deemed as proportional in granting recovery to the victims?

1) Exploitation in Trafficking in Persons Offenses and Child Protection Offenses

Exploitation is the key element of trafficking in persons offenses, whether the exploitation has happened or not.⁹⁰ Nevertheless, up to the current condition, there is no clear definition on the concept of

⁸⁴ Decision No. 421/K/PID.SUS/2015. An exploitation case with I Wayan Sujana as the defendant, using alternative indictment, namely First: Article 88 of Law No. 23 of 2022 on Child Protection or Second: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO or Third: Article 76 paragraph (1) in conjunction with Article 187 paragraph (1) of Law No. 13 of 2003 on Employment.

⁸⁵ Decision No. 890/Pid.Sus/2018/PN.Btm. An exploitation case with J Rusna as the defendant, using alternative indictment, namely First: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO or Second: Article 6 of Law No. 21 of 2017 on PTPPO in conjunction with Article 55 paragraph (1) point-1 of KUHP or Third: Article 88 in conjunction with 76I of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection.

⁸⁶ Decision No. 369/Pid.Sus/2021/PN.Nnk. An exploitation case with Rais Ramli as the defendant, using alternative indictment, namely First: Article 88 in conjunction with 76I of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection or Second: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO.

⁸⁷ Decision No. 368/Pid.Sus/2021/PN.Nnk. A case with Yunengsih as the defendant, using alternative indictment, namely First: Article 88 in conjunction with 76I of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection or Second: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO.

⁸⁸ Decision No. 302/Pid.Sus/2015/PN.Cbi. A case with Guntur Supratman as the defendant, using alternative indictment, namely First: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO or Second: Article 88 in conjunction with 76I of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection.

⁸⁹ Maria, Isabel Tarigan et al, Laporan Penelitian Pengaturan terkait Kekerasan Seksual dan Akomodasinya terhadap Peraturan Perundang-undangan di Indonesia, Jakarta: IJRS, ICJR, & PUSKAPA, 2022, p. 24.

⁹⁰ Maria Isabel Tarigan, et al, *Ibid*.

exploitation under the TIP Law and Palermo Protocol⁹¹. Only various forms of exploitative acts that are available. The TIP Law, for instance, addresses that exploitation is an act with or without the consent of victims, including but not limited to prostitution, force labour or services, slavery or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, or unlawfully remove or transplant body organs and/or tissues or the abuse of energy or ability of a person by another person to obtain either economic or non-economic benefits.⁹² Besides, it also covers sexual exploitation, namely the form of abuse of sexual body organs or other body organs to obtain benefits, including but not limited to prostitution and obscene activities.⁹³ Meanwhile, the Palermo Protocol mentions “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour, slavery or practical similar to slavery, servitude or the removal of organs”.⁹⁴

The exploitation concept can be associated with “obtaining benefits from another person/a situation with ways that harm victims (unfair advantage)”.⁹⁵ In trafficking in persons offenses, harming acts and means in the form of recruitment, transportation, transfer, movement or receipt of a person by the means of threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap, and giving payments or benefits. In addition, Aronowits adds several other means and acts that are frequently used in trafficking in persons, encompassing forces, threats to victims and/or victims’ family, abusive work condition and life, wage retention, isolation, dark magic, debt trap, emotional dependence, retention of personal documents, and working beyond the working hours.⁹⁶ According to Akbari, the exploitative condition in trafficking in persons illustrates the existence of “restriction of freedom” of victims by offenders, namely the existence of absolute control on victims.⁹⁷

Asides from trafficking in persons offenses, the exploitation element is also addressed in Article 76I on child exploitation under the Child Protection Law. Similar with the TIP Law, the Child Protection Law also fails to provide any definition on the exploitation itself. Nevertheless, differs with trafficking in persons, forms of exploitations under the Child Protection Law are only limited to economic exploitation and/or sexual exploitation.⁹⁸ The Child Protection Law defines economic exploitation as an act with or without the consent of the children, including but not limited to prostitution, force labour or services, acts or practices similar to slavery, processing, extortion, physical, sexual, reproductive organs abuse, removal or transplantation of body organs and/or tissues, and abuse of child’s energy by another party to obtain economic benefits.⁹⁹ Meanwhile, sexual exploitation is defined as the form of abuse of sexual body organs or other body organs of children to obtain benefits, but not limited to prostitution and obscene acts.¹⁰⁰ Child exploitation offenses do not require the existence of certain means to realize the exploitation, whereas, this condition differs from trafficking in persons offenses. The Child Protection Law only addresses the prohibition of placing, neglecting, performing, ordering, or participating in performing the exploitation. In addition, exploitation under the Child Protection Law is construed to must have happened, considering the non-existence of the phrase of purpose of exploitation and the elucidation emphasizing that exploitation is not necessary to occur as required in trafficking in persons offenses. On the other hand, types of benefits that may be obtained by offenders under the Child Protection Law only take form as economic benefits.

⁹¹ UNODC (2), p. 24

⁹² Indonesia (1) Article 1 point 7.

⁹³ *Ibid*, Article 1 point 8

⁹⁴ Protokol Palermo, Article 3(a)

⁹⁵ UNODC, Issue Paper: The Concept of “Exploitation” In The Trafficking in Persons Protocol, Vienna: United Nations, 2015, p.21

⁹⁶ Alexis Aronowitz, Human Trafficking, Human Misery: The Global Trade in Human Beings, Westport: Preager, 2009, pp. 58-60

⁹⁷ Anugerah Rizki Akbari, Diskusi Anotasi Putusan TPPO, as presented in the Focus Group Decision on Annotation of Decisions on Trafficking in Persons Offenses, as organized by the Indonesia Judicial Research Society (IJRS) and International Organization for Migration (IOM), 11 November 2022.

⁹⁸ Indonesia (2), Article 1 point 43.

⁹⁹ *Ibid*, Elucidation of Article 1 point 43.

¹⁰⁰ *Ibid*,

2) Differences in Characteristics of Trafficking in Persons Offenses with Child Victims and Child Exploitation Offenses

To distinguish child exploitation offenses as addressed in Article 88 in conjunction with Article 76i of Child Protection Law and trafficking in persons with child victims, then the aspect on the offenders may be analysed. Within the context of TIP, offenders are groups that operate in organized or systematic manners.¹⁰¹ This condition, according to Akbari, is the logical consequence from the regulation of TIP that derives from United Nation Convention Against Transnational Organized Crime (UNTOC).¹⁰² Meanwhile, within the context of exploitation under the Child Protection Law, offenders must be direct offenders.¹⁰³

Furthermore, Akbari assesses that the fulfilment of the purpose of sexual and/or economic exploitation as addressed under the Child Protection Law does not necessarily constitute trafficking in persons offenses.¹⁰⁴ It is because both the TIP Law and Child Protection Law address the purpose of exploitation as one of the elements. Referring to Article 88 in conjunction with Article 76l of Child Protection Law, the act that is committed with any means with acts as addressed in it,¹⁰⁵ provided that the acts result in economic and/or sexual exploitations against children, the act is categorized as child exploitation offenses. The same thing in principle also applies in exploitation in trafficking in persons offenses. However, the regulation under the Child Protection Law indirectly provides easiness in inquisitorial process because lawmakers do not include the aspect of means as one of the elements that must be proven. This condition is different with Article 2 paragraph (1) of TIP Law, where the means element must be proven and connected with the act (process) and the purpose of exploitation.¹⁰⁶

It should be noted, that the use of Article 2 paragraph (1) as the comparison is due to in various decisions on child trafficking, public prosecutors tend to use such article in the indictment¹⁰⁷ compared to Article 6 of TIP Law that addresses child trafficking. Article 6 of TIP Law addresses that means should not need to be proven in case of child victims, unfortunately, this condition only applies for the act of transferring and it is solely used when children have been exploited. Such restriction puts the use of Article 2 paragraph (1) to be more ideal to be used in trafficking in persons cases because it may encompass various forms of acts (may take form as other acts, such as placement, recruitment, and others) and in accordance with international standards where exploitation should not need to happen to prove the existence of exploitation.

¹⁰¹ See UNODC, United Nations Conventions Against Transnational Organized Crime and The Protocol Thereto, New York: United Nations, 2004, General Provision, p.42. See also Indonesia (1), Considering section: c. that trafficking in persons has expanded in the forms of organized and unorganized crimes, both cross-border and domestic ...”

¹⁰² Akbari, *loc.cit.*

¹⁰³ For example, parents who utilize their children as beggars and obtain benefits from the begging activities constitutes child exploitation offenses. However, if offenders are organized groups that exploit children, such practice constitutes trafficking in persons offenses.

¹⁰⁴ Akbari, *loc.cit.*

¹⁰⁵ The element of act in Article 88 in conjunction with 76l of Child Protection Law encompasses the act of “placing, neglecting, performing, ordering, or participating to perform...”

¹⁰⁶ *Ibid.*

¹⁰⁷ See indictment in Decision No. 421/K/PID.SUS/2015, Decision No. 890/Pid.Sus/2018/PN.Btm, Decision No. 369/Pid.Sus/2021/PN.Nnk, Decision No. 368/Pid.Sus/2021/PN.Nnk, Decision No. 302/Pid.Sus/2015/PN.Cbi, and Decision No. 396/ Pid.B/2012/PN.Cbd.

Differences in Characteristics of Trafficking in Persons Offenses and Child Exploitation Offenses			
No.	Differences in Characteristics	Trafficking in Persons Offenses (Article 2 paragraph (1) of TIP Law)	Child Exploitation Offenses (Article 76I in conjunction with 88 of Child Protection Law)
1.	Offenders	Work in organized and systematic manners (offenders are more than 1 person or a corporation)	Direct offenders
2.	Proving of elements	The inquisitorial process must prove the elements of acts (process), means, and purpose of exploitation	No need to prove the means element. But, it only requires to prove the acts element and economic and/or sexual exploitative purpose as addressed

Of various analyses above, it may be concluded that the scope of forms of exploitation in trafficking in persons and exploitation shares similarities, namely broad exploitation (prostitution, force labour or services, slavery or practices similar to slavery and others) and sexual exploitation. However, the distinguishing factor is, in trafficking in persons, the exploitation element must always be associated to means and acts that harm victims and the exploitation element should not need to happen to prove the existence of exploitation. Meanwhile under the Child Protection Law, means are not proven because they are not addressed and exploitation is construed to have occurred. Besides that, in trafficking in persons, offenders work in organized and systematic manners (offenders are more than 1 person), meanwhile, in child exploitation offenses, it is possible for the direct offenders to be merely 1 (one) person.

3) Considerations of Panel of Judges Concerning the Fulfilment of Elements of Trafficking in Persons Offenses in Decision No. 302/Pid.Sus/2015/PN.Cbi with Guntur Supratman as the Defendant

In Decision No. 302/Pid.Sus/2015/PN.Cbi, the Panel of Judges deems that the act of Guntur Supratman as the Defendant has fulfilled provisions in Article 2 paragraph (1) of TIP Law in conjunction with Article 55 paragraph (1) point-1 of KUHP. Such decision is in line with the charge submitted by Public Prosecutors (Jaksa Penuntut Umum – JPU). In provided considerations, the Panel of Judges breaks down elements in Article 2 paragraph (1) of TIP Law into 4 parts, namely:

1. Anyone
2. Who performs recruitment, transportation, harbouring, transfer, movement or receipt of a person
3. By the means of threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, despite achieving the consent from a person having control over another person
4. For the purpose of exploiting such person in the territory of the Unitary State of the Republic of Indonesia

The first element is deemed to have been proven because the defendant did not raise any objection to his full identity during the reading out of the indictment by Public Prosecutors.¹⁰⁸ In addition, the defendant is also deemed to be physically and mentally healthy, thus, he is considered to be legally capable in being held responsible for his acts.¹⁰⁹ Meanwhile, the second element, namely the recruitment act, the panel of judges deems that the act of the defendant fulfils such element with these considerations

¹⁰⁸ Decision No. 302/Pid.Sus/2015/PN.Cbi, p.36

¹⁰⁹ *Ibid*,

“... the panel views that the act of Yanti, a witness, in inviting DA, a witness, to work and later on introduce to Wulan, a witness, and Wulan seek for jobs through the defendant, whereas previously, DA was promised to be employed at a restaurant, and turned out that the job that was given to her was not in accordance with what has been promised to her...”¹¹⁰

Considerations of the panel of judges are based on legal facts relating to the involvement and role of the defendant with Wulan, a witness, in seeking jobs for DA. In the preliminary meeting with the defendant, DA was brought by Wulan and Yanti and she was promised to be employed at a restaurant. After such meeting, DA was brought to the defendant and Wulan to be introduced to Ko Awini, to be employed as a dancer at King Cross Club, not at a restaurant. During the work, DA must serve guests from the night time until dawn by only wearing the costume of bras and panties. According to such legal facts, the panel of judges deems that the element of recruitment act is deemed to have been fulfilled.

In the third element, the panel of judges deems that the elements of debt trap and fraud of identity have been fulfilled with the following considerations:

“...the act of the defendant, Wulan, a witness, and Yanti, a witness, who promised DA, a witness, to be employed as a server at a restaurant and gave payment in the form of debt in advance to DA and her mother and she will be able to pay such money when DA receives wage is a form of fraud and “debt trap” and besides that, there was another act, namely “fraud” of identity of DA who actually did not have Residency Identity Card (KTP) (because she has not reached 17 years old) but it was orchestrated that as if she is an adult and 19 years old ...”

The panel of judges deems that the element of debt trap is fulfilled based on legal facts that the defendant and Imam, a witness, order DA's parents to sign a blank receipt with a total debt in advance of Rp5,500,000 (five million and five hundred thousand rupiah).¹¹¹ Besides that, during the trip to Bogor when transporting DA to home, the defendant and Imam brought a KTP with new identity for DA. This fact is reinforced with the evidence in the form of KTP in the name of Debi Sinta, but using the face image of DA, a statement from Febbiandri Suharto (Head of Grogol Subdistrict), a witness, who mentions that such KTP is not a KTP that is issued by the Grogol Sub-District Office, and from the result of checking the Residency Identity Number (Nomor Induk Kependudukan – NIK) in the Residency Administration System (SIK) concerning the unmatching signature of the head of sub-district in the KTP's column. Based on such condition, the panel of judges deems that the element of identity fraud is fulfilled.

Furthermore, in this case, the panel of judges deems that the act of the defendant fulfils the fourth element, namely the purpose of exploitation, because the role of the defendant that results in DA to work in a nightclub and wearing sexy costumes from 19.00 GMT+7 until morning although she was 15 years old. DA must escort guests in drinking alcoholic beverages and experienced sexual harassment (her breasts were touched).¹¹² Nevertheless, according to the writer, the considerations on the fulfilment of the fourth element must also be supported with other legal facts relating to the role of the defendant in picking-up and monitoring DA that show the absolute control over DA (restriction of freedom). The existence of control over DA forces DA to escape from her house because she refuses to escort guests anymore.¹¹³

¹¹⁰ *Ibid*, hal. 39

¹¹¹ *Ibid*, pp. 40-41.

¹¹² *Ibid*, p. 42

¹¹³ *Ibid*,

Fulfilment of Elements of Trafficking in Persons Offenses in Decision No. 302/Pid.Sus/2015/PN.Cbi with Guntur Supratman as the Defendant		
No.	Elements	Legal Facts
1.	Acts (process)	The Defendant with Wulan, a witness, sought a job for DA (victim) by promising her to work at a restaurant, instead, she was employed as a dancer at the King Cross Club owned by Ko Awın. The act of the defendant fulfils the element of recruitment act
2.	Means	<ol style="list-style-type: none"> 1. Debt trap by providing debts in advance to DA's mother, that must be paid with DA's wages. 2. Identity fraud by creating a new forged KTP for DA in the name of DA, falsifying the age of the victim, and signature of the official that issues the KTP.
3.	Purpose of Exploitation	Sexual exploitation which the victim was requested to only wear sexy clothes (bras and panties) during the work of escorting guests until dawn, drinking alcoholic beverages, experiencing sexual harassments (breasts were touched)

Within the context of characteristics of the offenders who work in organized and systematic manners, the panel of judges emphasized on the cooperation between the defendant with Wulan, Yanti, and Ko Awın (Wanted List/DPO), up to the performance of a series of acts that fulfil the elements of trafficking in persons offenses. This condition may be inferred from considerations of the panel of judges stating:

"...that from the facts above, between the defendant, Yanti, and also Wulan, a series of acts that interconnect with each other with the same intention and purpose may be inferred, thus, all elements of an offense are fulfilled..."¹¹⁴

According to the description above, it may be concluded that the act of the defendant fulfils elements of trafficking in persons offenses as referred to under Article 2 paragraph (1) of TIP Law.

4) Proportionality on the Implementation of Restitution in Decision No. 302/Pid.Sus/2015/PN.Cbi with Guntur Supratman as the Defendant

In the charge No. REG PERK:PDM 125/CBN/05/2015 as submitted by Public Prosecutors, one of the primary charges that is requested is the imposition of the obligation on payment of restitution by the defendant, Wulan Sari and Yanti Binti Ardita in joint and several liability to DA.¹¹⁵ The amount of restitution that is requested by LPSK amounts to Rp356,300,200 (three hundred and fifty-six million three hundred thousand and two hundred rupiah) substitutable with 1 (one) month of confinement.¹¹⁶ Such amount is generated from the accumulation of fees that have been expended when undergoing the trial process at the amount of Rp43,450,000 (forty-three million and four hundred and fifty thousand rupiah) and education fees at the amount of Rp312,850,200 (three hundred and twelve million eight hundred and fifty thousand and two hundred rupiah).¹¹⁷

In the considerations, the panel of judges argues that the payment of restitution may only be granted for the first component, namely actual fees that are expended by the victim during the trial process.¹¹⁸ The panel of judges provides considerations based on provisions on the payment of restitution in Article

¹¹⁴ *Ibid*, p. 45

¹¹⁵ *Ibid*, p.3

¹¹⁶ *Ibid*,

¹¹⁷ *Ibid*, pp. 45-46

¹¹⁸ *Ibid*,

48 paragraph (2) of TIP Law. Such provisions address that restitution that may only be requested is compensation to the loss of assets or incomes, sufferings, fees for medical and/or psychological treatments, and/or other losses as suffered due to trafficking in persons.¹¹⁹ Other losses in this case encompass the loss of assets, basic transportation fees, lawyer's fees or other fees in connection with the legal process or loss of incomes as promised by the offenders.¹²⁰ This argument is reinforced with the similar regulation under the Regulation of the Government on Restitution for Children as Victims of Offenses.¹²¹

According to the above considerations, the panel of judges orders restitution to the defendant at the amount of Rp15,000,000 (fifteen million rupiah) substitutable with 1 (one) month of confinement, as paid independently and not in joint and several liability.¹²² However, such amount should be added with the same restitution order as imposed to two other defendants, namely Wulan and Yanti in a separate case. Hence, in total, victims are entitled to receive restitution at the amount of Rp45,000,000 (forty-five million rupiah) from the defendants. Such amount is slightly higher than the Variables of actual fees as requested by LPSK. Nevertheless, this practice opens up opportunity for victims to not receiving restitutions with the same amount from 2 other defendants (Wulan and Yanti), considering the case of those defendants is separated.

b. Annotation of Bad Practice Decisions¹²³

Trafficking in persons offenses involving child victims have intersections with other offenses relating to child exploitation as addressed under the Law on Child Protection (Child Protection Law). The prohibition of economic and/or sexual exploitations against children is specifically addressed in Article 76I of Child Protection Law.¹²⁴ Although it is only limited to the forms of economic and/or sexual exploitations, but the scope of both types of exploitations is similar to the scope as addressed under the TIP Law.¹²⁵ Moreover, the payment of restitution to victims is also addressed both under TIP Law¹²⁶ and Child Protection Law.¹²⁷

The existence of regulation on exploitation under the TIP Law and Child Protection Law results in offenders of child exploitation to be frequently indicted using both laws. This condition may be inferred from several exploitation cases with these defendants: I Wayan Putu Sujana¹²⁸, J Rusna¹²⁹, Rais Ramli¹³⁰,

¹¹⁹ *Ibid*, see also Indonesia (1), Article 48 paragraph (2)

¹²⁰ *Ibid*,

¹²¹ Indonesia (3), Regulation of the Government on Payment of Restitution for Children as Victims of Offenses, Regulation of the Government No. 43 of 2017, State Gazette of 2017 Number 219, Supplement to the State Gazette Number 6131, Article 3. Restitution for Children as victims of offenses takes forms as:

- a. compensation for loss of assets;
- b. compensation for suffering due to offenses; and/or
- c. reimbursement of medical and/or psychological treatments

¹²² Decision No. 302/Pid.Sus/2015/PN.Cbi, p.47.

¹²³ See Appendix 4. Facts of the Case of Annotation of Decision No. 421 K/PID.SUS/2015

¹²⁴ Indonesia (2), Law on Amendment to Law Number 23 of 2002 on Child Protection, Law No. 35 of 2014, State Gazette of 2014 Number 297, Supplement to the State Gazette Number 5606, Article 76I. The provisions read as follows "Any Person is prohibited from placing, neglecting, performing, ordering, or participating in performing economic and/or sexual exploitation against Children".

¹²⁵ *Ibid*, Elucidation of Point 43 Article 66. "Economically exploited" refers to the act with or without the consent of Children who become victims, including but not limited to prostitution, force labour or services, slavery or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, or unlawfully transfers or transplants body organs and/or tissues or abuses energy of ability of Children by another party to obtain economic benefits.

¹²⁶ Indonesia (1), Article 48 paragraph (1).

¹²⁷ Indonesia (2), Article 71D paragraph (1).

¹²⁸ Decision No. 421/K/PID.SUS/2015. An exploitation case with I Wayan Sujana as the defendant, using alternative indictment, namely First: Article 88 of Law No. 23 of 2022 on Child Protection or Second: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO or Third: Article 76 paragraph (1) in conjunction with Article 187 paragraph (1) of Law No. 13 of 2003 on Employment.

¹²⁹ Decision No. 890/Pid.Sus/2018/PN.Btm. An exploitation case with J Rusna as the defendant, using alternative indictment, namely First: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO or Second: Article 6 of Law No. 21 of 2017 on PTPPO in conjunction with Article 55 paragraph (1) point-1 of KUHP or Third: Article 88 in conjunction with 76I of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection.

¹³⁰ Decision No. 369/Pid.Sus/2021/PN.Nnk. An exploitation case with Rais Ramli as the defendant, using alternative indictment, namely First: Article 88 in conjunction with 76I of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection or Second: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO.

Yunengsih¹³¹ and Guntur Supratman¹³². Articles that are used for those child exploitation cases are generally Article 2 paragraph (1) of TIP Law and Article 88 in conjunction with 76l of Child Protection Law. Nevertheless, verdicts to those indictments are different. There are those that impose decisions using TIP Law and vice versa. The similar condition also happens within the context of payment of restitution.

Departing from the above law enforcement situation, a question is raised on what forms of indictments that are correct for the act that has the dimensions of trafficking in persons involving child victims and child exploitation? Hence, it is important to dive deeper on the correct forms of indictments for the acts of trafficking in persons offenses that intersect with other offenses to avoid any error in implementing the law. In addition, it must also be addressed regarding the fulfilment of restitution rights to children as victims of trafficking in persons. The analysis on the implementation of law according to TIP Law and Child Protection Law in Decision No. 421/K/Pid.Sus/2015 with I Wayan Sujana as the Defendant shall also be addressed in this chapter.

Identification of Issues

The primary issue in the annotation of this decision is the use of TIP Law and Child Protection Law in cases that have the purpose of exploiting children. From such issue, the primary issues that will be answered in this annotation of the decision are:

1. Does the act of I Wayan Sujana, the Defendant, fall into the category of trafficking in persons offenses?
2. What is the correct form of indictment for trafficking in persons offenses involving child victims and child exploitation offenses that both have the purpose of exploitation?
3. What about the performance of restitution in Decision No. 421/K/Pid.Sus/2015 with I Wayan Sujana as the Defendant?

1) Act of I Wayan Sujana as the Defendant Constitutes Trafficking in Persons Offenses

In Decision No. 421/K/Pid.Sus/2015, the Panel of Judges deems that the act of I Wayan Sujana as the defendant has fulfilled provisions under Article 88 of Child Protection Law. Such decision differs with the cassation ground of Public Prosecutors stating that the existence of error in the implementation of law by the panel of judges of the District Court of Mataram.¹³³ In this event, public prosecutors argue that the act of the defendant constitutes trafficking in persons offenses. Public Prosecutors deem that the defendant has fulfilled all elements in the second indictment relating to trafficking in persons, namely the elements of acts (process), means, and purpose of exploitation.¹³⁴

Public prosecutors deem that the fulfilment of elements of trafficking in persons offenses is based on legal facts and evidences during the trial process. The element of receipt of a person is a form of acts (process) that is deemed to have been fulfilled based on legal facts "...Nuri Sherlina, as the Victim witness, gave the testimony, "Mommy Yosi then introduced the witness to the Defendant using the words, "This is the victim witness", then Putu Sujana, the defendant, came over to the witness and said, "victim witness?" and then he further questioned, "have you ever worked at another place?" besides that, he also asked "can you drink?" after that, the defendant also asked the age of the victim witness and the witness answered "17 years old", the Victim witness also confirms the BAP of witness dated 9 September 2013 Number 7,

¹³¹ Decision No. 368/Pid.Sus/2021/PN.Nnk. A case with Yunengsih as the defendant, using alternative indictment, namely First: Article 88 in conjunction with 76l of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection or Second: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO.

¹³² Decision No. 302/Pid.Sus/2015/PN.Cbi. A case with Guntur Supratman as the defendant, using alternative indictment, namely First: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO or Second: Article 88 in conjunction with 76l of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection.

¹³³ Decision No. 421/K/Pid.Sus/2015, p. 12.

¹³⁴ Decision No. 413/Pid.Sus/2013/PN.Mtr, p. 50

when the defendant said “If there is any guest who asks the age of the victim witness, make it older, don’t answer 17 years old, and then a Residency Identity Card (KTP) will be made.”¹³⁵ These facts are in line with statements from HH, a witness, who state the similar things.¹³⁶ Moreover, the statements of Siska Ratna Dewi, a witness, also emphasize that the defendant has ever introduced Nuri Sherlina, the victim, to guests when she worked as a PS at Cafe Mekar.¹³⁷ In addition, the role of the defendant as the manager of Cafe Mekar is held fully responsible for the operation of Cafe Mekar and the supervision,¹³⁸ thus, if there is any recruitment of new PS at Cafe Mekar, the signing of the work contracts will be through the defendant.¹³⁹ According to Any Suryani, the Expert, recruiting a person who signs up for job has already been covered in the definition of recruitment and the proper recruitment system is through identity checking.¹⁴⁰ According to such condition, then the element of recruitment of a person is deemed to have been fulfilled.

As for the element of means, Public Prosecutors deem the means used are holding hostage, abuse of position of vulnerability and debt trap. Within the context of holding hostage, Public Prosecutors deem this element to have been fulfilled from facts in the court stating that the Defendant issues the restraining rules for new PS in the form of quarantine period.¹⁴¹ During the quarantine period, the victim witness was prohibited from going outside the Cafe’s area for 2 weeks.¹⁴² Even when the victim was ill, she cannot be treated because she was guarded by 3 security guards.¹⁴³ Such statements are confirmed by these witnesses: HH, Made Sukartana (Chief Security of Cafe Mekar), Saiful Bahri (security) and Susilawati.¹⁴⁴ Meanwhile, for the fulfilment of the element of abuse of position of vulnerability, it is deemed to have been proven because the Defendant still employed the victim witness who was realized to be at the age of 17 years old to sell alcoholic beverages at Cafe Mekar as stated by the Victim witness, Heni and Siska.¹⁴⁵ Public prosecutors deem that the Defendant has deliberately abused the position of vulnerability of the Victim witness as a teenager who needs a job for family matters because of being induced by the promise of Roswati (wife of the defendant) who promised a good job, airplane ticket, accommodation and free meals that eventually the victim was willing to work at Cafe Mekar.¹⁴⁶ In addition, the position of the defendant as the manager who let the victim to work overtime, experienced sexual harassment, up to non-payment of wages, stresses that there is a non-level playing field between those two.¹⁴⁷ Such imbalance makes the defendant to have the power and abuses that power to hold control over the vulnerability of the victim as the PS worker at Cafe Mekar.

Furthermore, the element of debt trap is deemed to have been fulfilled because a clause in the work agreement between the victim witness and HH states that “Article 11, in principle, obliges PS to give 25% of her income to Cafe Mekar through the PS coordinator each month and Article 12, in principle, states if PS leaves for more than 1 day or in absence for 3 consecutive days, she is considered to resign and her rights on calling charge and the 25% deposit that is paid each month from their incomes is considered to be given up and becomes the assets of the company and she must pay compensation at the amount of

¹³⁵ Decision No. 421/K/Pid.Sus/2015, p. 32.

¹³⁶ *Ibid*,

¹³⁷ *Ibid*,

¹³⁸ *Ibid*, p.29. Roles of the defendant as the Manager of Cafe Mekar and as the person responsible for the operation and supervision of Cafe Mekar are proven with Work Contract Number 096/MBCK/XI/2011 from Ms. K.WOLINI as the Owner of Restaurant, Cafe, Karaoke, Homestay and Billiard Cafe Mekar.

¹³⁹ *Ibid*,p. 34.

¹⁴⁰ *Ibid*,

¹⁴¹ *Ibid*, p. 37

¹⁴² *Ibid*,

¹⁴³ *Ibid*,

¹⁴⁴ *Ibid*,

¹⁴⁵ *Ibid*,

¹⁴⁶ Decision No. 413/Pid.Sus/2013/PN.Mtr, p. 69

¹⁴⁷ IOM, Pedoman Penegakan Hukum dan Perlindungan Korban Penanganan Tindak Pidana Perdagangan Orang, Jakarta: IOM, 2009, p.23

Rp10,000,000.¹⁴⁸ The existence of those clauses make the victim witness and HH to back out from their intention to resign because both of them were requested to pay Rp10,000,000.¹⁴⁹ Public prosecutors deem that such clauses are unfair to one party and they are prohibited under the contract law (*misbruik van omstandigheden*).¹⁵⁰ According to Any Suryani, clauses that are unfair to one party, in this term is the victim as PS, are qualified as the form of “debt trap”.¹⁵¹

Furthermore, the element of purpose of exploitation is declared to be proven due to the existence of physical and sexual abuse as shown by the victim.¹⁵² Public prosecutors deem that the proving of such element may be inferred from the testimony of the victim that states “...in the second night, the guests were awful, attempting to kiss cheeks and lips of the witness, the witness attempted to break off, but one of the guests hugged from the back, and then groped breasts of the witness. At that time, the witness felt uncomfortable, thus the witness exited the room and met Putu Sujana, the defendant. The defendant asked why the witness exited the room, and then the witness said “pi, we should cancel the guest” and then the defendant said “well, wait for Mommy first”.¹⁵³ The victim witness also adds that at that time, Roswati (Mommy Yosi) did not show up and the witness continuously experienced harassment in the Pub area. However, as a manger, the defendant otherwise let it happened and did not stop the harassment experienced by the witness.¹⁵⁴ Such testimony is reinforced with the testimony from HH stating that when the witness was at work and received inappropriate treatments, both the defendant and Roswati have never warned guests or stopped the harassment acts.¹⁵⁵

For the purpose of other exploitation that is deemed to have been fulfilled is the abuse of energy and ability of the victim. This condition is proven by the testimony from Siska stating that PS must work from noon until morning and every overtime, the defendant was always present.¹⁵⁶ As a result of the overtime work, the victim witness caught typhus due to exhaustion.¹⁵⁷ Not to mention that the victim was still classified as a minor with a prohibition from working longer than 3 hours.¹⁵⁸ In addition, incomes of the victim witness during works were deliberately dismissed from the recap of bill charges by Roswati, thus, during the work, the victim witness has never received any incomes from calling charges.¹⁵⁹ Although the dismissal was performed by Roswati, however, as a manger, the Defendant has the duties of receiving the reports on bill recaps and the taking-order notes each day, thus, it is the obligation of the Defendant to request correct information on such reporting.¹⁶⁰ Such condition is reinforced with the fact that when the victim witness and other witnesses worked, the defendant was always present at Cafe Mekar.¹⁶¹ As a result, although the victim witness has worked for hours at Cafe Mekar,¹⁶² the victim still did not receive any payments.

Asides from those elements, according to the Work Contract Number 0125/MBCKH/III/2012 dated 24 March 2012, it mentions that there is a superior-subordinate relationship between the Defendant

¹⁴⁸ *Ibid*, p.40

¹⁴⁹ *Ibid*, p.41

¹⁵⁰ *Ibid*,

¹⁵¹ *Ibid*, p.42

¹⁵² Decision No. 421/K/Pid.Sus/2015, p. 19

¹⁵³ *Ibid*, p.20

¹⁵⁴ *Ibid*,

¹⁵⁵ *Ibid*,

¹⁵⁶ *Ibid*, p.23

¹⁵⁷ *Ibid*,

¹⁵⁸ Indonesia (3), Law on Employment, Law No. 13 of 2003, State Gazette of 2003 Number 39, Supplement to the State Gazette Number 4279, Article 76.

¹⁵⁹ Decision No. 421/K/Pid.Sus/2015, p. 25

¹⁶⁰ Obligation of the defendant in receiving reports on bill recaps is based on witness testimonies from Siska, I Wayan Andika, Hendri Hendriadi, PS Coordinator of Mommy Rere, and PS Susilawati. See Decision No. 421/K/Pid.Sus/2015, p. 26

¹⁶¹ Decision No. 421/K/Pid.Sus/2015, p. 19

¹⁶² Proven with the evidence of taking-order notes and calling charges of Cafe Mekar that record the name of the victim.

with Roswati (Mommy Yosi) as a person who recruits PS at Cafe Mekar.¹⁶³ In terms of performance of operational of PS and recruitment of PS, Roswati as a witness must report periodically to the Defendant as the manager.¹⁶⁴ Referring to testimonies of witnesses,¹⁶⁵ cooperation and coordination between the defendant and Roswati may be inferred from various situations, starting from the introduction of the victim witness as PS candidate, age falsification¹⁶⁶, the decision to cancel or not cancel guests¹⁶⁷, removal of names from bill recaps¹⁶⁸ and not imposing sanctions to Roswati because of recruiting the victim who was a minor and still recruited the victim to work¹⁶⁹. In other words, the defendant is deemed to know the whole recruitment process up to the performance of works of the victim witness at Cafe Mekar. Of various processes, characteristics of the offenders of trafficking in persons who work in organized and systematic manners in the performance of such act.

According to the description above, it may be concluded that the decision of the panel of judges declaring that the defendant is proven of committing the offense of economically and/or sexually exploiting children as addressed under Article 88 of Child Protection Law¹⁷⁰ is deemed to be incorrect, because, from various conformities of witness testimonies and evidences that are gathered, both show that a series of activities that were performed by the defendant constitute trafficking in persons offenses. Unfortunately, the panel of judges fails to consider reasons and arguments submitted by Public Prosecutors concerning the fulfilment of elements of trafficking in persons offenses. In their considerations, the panel of judges deems the whole series of activities of the defendant and grounds for cassation as submitted by prosecutors fulfil the elements of article 88 of Child Protection Law.¹⁷¹ However, such considerations are only based on mere legal facts, and fail to give comprehensive considerations on the differences between those two articles and offenses.

¹⁶³ Decision No. 421/K/Pid.Sus/2015, p. 14

¹⁶⁴ *Ibid*,

¹⁶⁵ Vitim Witness, Heni, Siska, Saeful, Saefudin, Made Sukartana, Susilawati and Mommy Rere as witnesses

¹⁶⁶ Decision No. 421/K/Pid.Sus/2015, p. 32

¹⁶⁷ Decision No. 421/K/Pid.Sus/2015, p. 20

¹⁶⁸ Decision No. 421/K/Pid.Sus/2015, p. 26

¹⁶⁹ *Ibid*, pp.29-30. According to the statement from Mommy Rere as a witness, if PS who are recruited are underage and do not possess KTP, then such PS must be returned and PS coordinator must be terminated. Unfortunately, such act of Roswati as a witness was not punished because Roswati is the defendant's wife.

¹⁷⁰ *Ibid*, p.50

¹⁷¹ *Ibid*, pp.47-49

Fulfilment of Elements of Trafficking in Persons Offenses in Decision No. 421/K/Pid.Sus/2015 with I Wayan Sujana as the Defendant		
No.	Elements	Legal Facts
1.	Acts (process)	The element of receipt of a person is fulfilled because the Defendant accepted Nuri Sherlina as a PS at Cafe Mekar and introduced the victim as a new PS to guests as inferred from testimonies of the victim witness, HH and Siska.
2.	Means	<p>The element of holding hostage is fulfilled based on facts that the Defendant issued a quarantine rule for 2 weeks for the victim witness who was accepted to work at Cafe Mekar. During the quarantine period, the victim witness and other witnesses were not permitted to go out of the Cafe's area. This condition is in line with testimonies of the victim witness, HH, Made Sukartana (Chief Security of Cafe Mekar), Saiful Bahri (security) and Susilawati.</p> <p>The element of abuse of position of vulnerability is fulfilled because the Defendant deliberately employed the victim who was 17 years old to serve guests in drinking alcoholic beverages as a PS with working hours exceeding the permitted working hours. Besides that, wife of the defendant (Roswati) deliberately induced the victim with a decent job, free airplane ticket, accommodation and meals that led the victim to be interested to work at Cafe Mekar.</p> <p>The element of debt trap is fulfilled because the clause in the work agreement of the victim states that 25% of incomes of the victim must be paid to Cafe Mekar and the victim must pay compensation at the amount of Rp10,000,000 if she resigns.</p>
3.	Purpose of Exploitation	<p>The element of physical and sexual abuse is fulfilled by the fact that Nuri Sherlina has been physically and sexually abused according to the statements from Nuri Sherlina, Heny Handayani and Siska Ratna Dewi, namely that during the work, the victim must wear sexy clothing and received sexual harassment from guests, such as kissing cheeks and lips, hugging, groping breasts, inserting hands into the clothing or fondling, and inviting to have intercourses.¹⁷²</p> <p>The element of abuse of energy and ability is fulfilled because Nuri Sherlina was obliged to work until later than 02.00 o'clock in the morning, and did not receive any wages from working in February 2013 because the name of the victim was removed from billing charges by Roswati who is under the coordination of the defendant.¹⁷³</p>

2) Correct Form of Indictment in the Inquisitorial Process of TIP Cases Involving Child Victims

In relation to child exploitation, in general, articles used in indictments are Article 2 paragraph (1) of TIP Law¹⁷⁴ and Article 88 of Child Protection Law¹⁷⁵. Those two articles are used because both possess the element of purpose of exploitation in the formulation, although the regulation under the Child Protection Law is not as detailed under TIP Law because it only addresses acts and the purpose of exploitation. This position that determines the correct form of indictment for the combination of both articles. There are

¹⁷² Decision No. 421/K/Pid.Sus/2015, pp. 20-23. See also Decision No. 413/Pid.Sus/2013/PN.Mtr, pp. 50-51.

¹⁷³ *Ibid*, pp. 24-25. See also Decision No. 413/Pid.Sus/2013/PN.Mtr, pp. 50-51.

¹⁷⁴ Article 2 paragraph (1) of PTPPO Law: "Anyone that performs the recruitment, transportation, harbouring, transfer, movement, or receipt of a person by the means of threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments of benefits, despite achieving the consent of a person holding control over another person, for the purpose of exploiting such person within the territory of the Republic of Indonesia..."

¹⁷⁵ Article 88 of Child Protection Law: "Any Person who economically or sexually exploits children with the intention to benefit oneself or another person" Article 76l: "Any Person is prohibited from placing, neglecting, performing, ordering, or participating in performing economic and/or sexual exploitation against Children"

parties who argue that the combination of those two articles in the indictment is alternative in nature. Meanwhile, the other school states that the correct form is subsidiarity.

The first school argues that the use of alternative indictment is more appropriate because those two articles are not under the same law and those two articles possess the same element of acts, namely the purpose of exploitation.¹⁷⁶ The other reason is because of the practicality purpose due to easier inquisitorial process.¹⁷⁷ In alternative indictment, prosecutors and judges have the freedom in choosing which indictment that will be proven without giving regards to the order.¹⁷⁸ In terms of alternative indictment between TIP Law and Child Protection Law, for instance, prosecutors and judges may choose either of those indictments to be proven. As a logical consequence, if choosing the TIP Law, then the three elements of acts, means and purpose of exploitation must all be proven, meanwhile, if using the Child Protection Law, it is sufficient to only prove the elements of acts and purpose of exploitation, or in other words, the proving of elements in articles under the Child Protection Law should be easier compared to the TIP Law.

In practice however, judges have the tendency of proving the child exploitation cases by solely using the Child Protection Law, although such cases actually fall under the category of trafficking in persons offenses. This condition may be inferred from various decisions with these defendants: I Wayan Sujana, J Rusna¹⁷⁹, Rais Ramli¹⁸⁰ and Yunengsih¹⁸¹. In the case involving J Rusna who exploited a 14-year-old child in Batam, a series of processes, means and exploitation have been fulfilled, but the judges still impose decision using the Child Protection Law.¹⁸² Similar condition also occurs in the decision with I Wayan Sujana as the defendant, whereas, prosecutors decide to prove article 2 paragraph (1) of TIP Law because all elements are deemed to be fulfilled, but in considerations, judges otherwise consider article 88 of Child Protection Law.¹⁸³

Meanwhile, the second school argues that the use of subsidiarity indictment in child exploitation cases is more appropriate to ascertain there is no error in the implementation of law.¹⁸⁴ In addition, those two articles also address different criminal sentences from one another. Criminal sentences in Article 2 paragraph (1) of TIP Law are higher¹⁸⁵ compared to Article 88 of Child Protection Law.¹⁸⁶ Furthermore, the use of subsidiarity indictment requires judges to initially consider the primary indictment, if the primary indictment is not proven, then the subsidiary indictment must be proven and so on.¹⁸⁷ If it is associated with the use of Article 2 paragraph (1) of TIP Law and Article 88 of Child Protection Law, judges must consider both articles to prove the offense committed by offenders. Akbari and Bambang Pristiwanto

¹⁷⁶ Erny Mustikasari, Senior Primary Prosecutor at the Attorney General's Office of the Republic of Indonesia, as presented in the interview dated 17 November 2022.

¹⁷⁷ *Ibid.* See also Anugerah Rizki Akbari, Diskusi Anotasi Putusan TPPO, as presented in the Focus Group Decision on Annotation of Decisions on Trafficking in Persons Offenses, as organized by the Indonesia Judicial Research Society (IIRS) and International Organization for Migration (IOM), 11 November 2022

¹⁷⁸ Mary Margaretha Saragi, Bentuk-bentuk Surat Dakwaan, accessed from <https://www.hukumonline.com/klinik/a/bentuk-bentuk-surat-dakwaan-lt4f4c5a4ea3527> on 06 December 2022.

¹⁷⁹ Decision No. 890/Pid.Sus/2018/PN.Btm. An exploitation case with J Rusna as the defendant, using alternative indictment, namely First: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO or Second: Article 6 of Law No. 21 of 2017 on PTPPO in conjunction with Article 55 paragraph (1) point-1 of KUHP or Third: Article 88 in conjunction with 76l of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection.

¹⁸⁰ Decision No. 369/Pid.Sus/2021/PN.Nnk. An exploitation case with Rais Ramli as the defendant, using alternative indictment, namely First: Article 88 in conjunction with 76l of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection or Second: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO.

¹⁸¹ Decision No. 368/Pid.Sus/2021/PN.Nnk. A case with Yunengsih as the defendant, using alternative indictment, namely First: Article 88 in conjunction with 76l of Law No. 35 of 2014 on Amendment to Law No. 23 of 2022 on Child Protection or Second: Article 2 paragraph (1) of Law No. 21 of 2017 on PTPPO.

¹⁸² Decision No. 890/Pid.Sus/2018/PN.Btm. See also, ICJR, Perlu Segera Mereformasi Kebijakan Anti Perdagangan Orang di Indonesia, accessed from <https://icjr.or.id/perlu-segera-mereformasi-kebijakan-anti-perdagangan-orang-di-indonesia/> on 06 December 2022.

¹⁸³ Decision No. 421/K/Pid.Sus/2015, pp. 47-50.

¹⁸⁴ Mustikasari, *loc.cit.*, See also Akbari, *loc.cit.*

¹⁸⁵ Criminal sentences in Article 2 paragraph (1) of PTPPO Law are imprisonment sentence of 3 years at minimum up to 15 years at maximum and fines sentence of Rp120,000,000 at minimum and Rp600,000,000 at maximum.

¹⁸⁶ Criminal sentences in Article 88 of Child Protection Law are imprisonment sentence of 10 years at maximum and/or fines sentence of Rp200,000,000 at maximum

¹⁸⁷ Lilik Mulyadi, Hukum Acara Pidana Normatif, Teoretis, Praktik dan Permasalahannya, Bandung: PT Alumni, 2012, pp.117-118

argue that the use of subsidiarity indictment may serve as the temporary “lock” to prevent any error in the implementation of law in child exploitation cases that use both articles.¹⁸⁸ Such conclusion is taken because, in practice, law enforcers probably face difficulties in identifying acts that have the purpose of exploitation, whether the case falls under the trafficking in persons or general exploitation.¹⁸⁹ Such condition occurs because according to Ahmad Sofyan, the Child Protection Law does not provide clear and juridically measured elements concerning the exploitation itself.¹⁹⁰

Unfortunately, up to the current condition, there is no indictment that uses combination of both articles using the subsidiarity indictment. The zero use of subsidiarity indictment, according to Mustikasari, is due to views of several prosecutors who believe that the use of subsidiarity in indictment is only possible within a single law¹⁹¹, for instance, Article 338 and Article 340 of KUHP. Although, subsidiarity indictment may use different provisions with similar characteristics of an act and criminal sentences may range from the gravest to the lightest.¹⁹² Another reason for the infrequent use of subsidiarity indictment is related to the burden of proof. Burden of proof in subsidiarity indictment is deemed to be higher than alternative indictment because it must consider all articles that are indicted. According to Bambang, this condition relates to the huge amount of caseloads solicited by law enforcers.¹⁹³ Hence, in practice, law enforcers tend to choose the most practical inquisitorial process.¹⁹⁴

As described above, in child exploitation cases that use Article 2 paragraph (1) of TIP Law and Article 88 of Child Protection Law, it is advised that the formulation of indictment uses the subsidiarity type because, although both of them have the element of purpose of exploitation, but those two offenses are different. Trafficking in persons offenses have a different dimension with child exploitation offenses because the former has the characteristics of being organized and systematic in the performance of the series of activities.¹⁹⁵ Hence, to avoid any error in the implementation of law that might harm justice seekers, the use of subsidiarity indictment is deemed to be a correct choice. Such recommendation is given also to ascertain there is no unwarranted sentencing disparity in similar cases due to differences in imposition of articles and sentencing.

3) Obstacles on the Performance of Restitution for Victims of Trafficking in Persons Offenses

In the Decision with I Wayan Sujana as the defendant, there is no performance of restitution for victims by prosecutors and judges. If referring to considerations and the decision of the panel of judges, it may be understood why restitution is not granted, because the law that serves as the ground of considerations is Law No. 23 of 2022 on Child Protection that does not address restitution for children. This decision is a cassation decision, hence, prosecutors still refer to the indictment in the decision of the district court that uses Child Protection Law of 2022, although the year when this cassation decision was imposed, Law No. 35 of 2014 on Amendment to Law No. 23 of 2002 on Child Protection has been in force. Under the new Child Protection Law, the framework on restitution for children as victims of offenses is newly

¹⁸⁸ Akbari, *loc.cit.* See also Bambang Pristiawanto, Deputy Assistant to the Coordinating Ministry of Political, Legal, Defense and Security Affairs, as presented in the interview on 30 November 2022.

¹⁸⁹ Said Niam, LBH Apik, Diskusi Anotasi Putusan TPPO, as presented in the Focus Group Decision on Annotation of Decisions on Trafficking in Persons Offenses, as organized by the Indonesia Judicial Research Society (IJRS) and International Organization for Migration (IOM), 11 November 2022. Said explains that in cases that have the purpose of exploitation, APH frequently discuss whether such act falls under the category of TPPO or general child exploitation.

¹⁹⁰ Ahmad Sofyan, Diskusi Anotasi Putusan TPPO, as presented in the Focus Group Decision on Annotation of Decisions on Trafficking in Persons Offenses, as organized by the Indonesia Judicial Research Society (IJRS) and International Organization for Migration (IOM), 11 November 2022.

¹⁹¹ Mustikasari, *loc.cit.*

¹⁹² *Ibid.*, See also Lilik Mulyadi, *loc.cit.* See also, Mary Margaretha Saragi, *loc.cit.*

¹⁹³ Bambang Pristiawanto, *loc.cit.*

¹⁹⁴ Mustikasari, *loc.cit.*

¹⁹⁵ Akbari, *loc.cit.*

addressed, specifically in Article 71D¹⁹⁶ and Regulation of the Government No. 43 of 2017 as well.¹⁹⁷

If it is linked with the case of I Wayan Sujana as the Defendant, actually prosecutors may submit the restitution application for Nuri Sherlina as the victim of offenses. Interestingly, Prosecutors as the one who deem that the act of I Wayan Sujana as the defendant constitutes trafficking in persons offense, but they did not apply for restitution for victims in their charge¹⁹⁸ and cassation grounds.¹⁹⁹ Although, if compared to the Child Protection Law in that period, the TIP Law addresses in details concerning the payment of restitution for victims. Besides from TIP Law, prosecutors may refer to Law No. 13 of 2006 on Protection of Witnesses and Victims (before being replaced with Law No. 31 of 2014²⁰⁰ and Regulation of the Government No. 44 of 2008 on Grant of Compensation, Restitution, and Aid to Witnesses and Victims.²⁰¹

Inexistence of restitution applications serves as a brief description on the lacking restitution applications in trafficking in persons cases. The research conducted by IJRS in 2021 mentions that of 372 TIP cases, only 17% of them that contain restitution applications and 12% that are granted by the panel of judges.²⁰² With the same vein, the Supreme Court confirms the existence of challenges on rare decisions that grant restitutions to victims.²⁰³ The research conducted by ICJR in 2021 states that non-existence of guideline relating to restitution applications that are available to be used by law enforcers serves as one of the obstacles on lacking restitution applications.²⁰⁴ As a response to such situation, in 2022, the Supreme Court enacted Regulation of the Supreme Court No. 1 of 2022 on Procedures for Settlement of Applications and Payments of Restitution and Compensation to Victims of Offenses (Perma 1/2022). Perma 1/2022 addresses the requirements and submission of applications, deposit of restitution funds, consolidation of applications, examination and payment of restitutions.

Furthermore, another obstacle that is discovered takes form as the non-existence of a technical guideline for seizure and auction of assets of the convicts to pay restitution to the victims²⁰⁵ has been answered in Perma 1/2022. Perma 1/2022 addresses that in the event that the defendant fails to pay restitution, then Prosecutors are authorized to seize assets of the offenders and/or third parties, and auction those assets for the payment of restitution within 14 (fourteen) days.²⁰⁶ If the assets that are seized and auctioned are insufficient to pay restitution, then the defendant is imposed with the confinement sentence or substitute sentence in proportional manner in accordance with the amount of restitution that has been paid.²⁰⁷ Such provisions complement Decree of the Assistance of the Attorney General for General Offenses Number: 3718/E/EJP/11/2012 dated 28 November 2012 on the application for restitution that addresses the technical guideline for the determination of value of restitution as filed by victims.²⁰⁸ Those provisions

¹⁹⁶ Indonesia (3), Law on Amendment to Law No. 23 of 2002 on Child Protection, Law No. 35 of 2014, State Gazette of 2014 Number 297, Supplement to the State Gazette Number 5606, Article 71D "Any Child who becomes the victim as referred to in Article 59 paragraph (2) letter b, letter d, letter f, letter h, letter i, and letter j is entitled to file right on restitution to the court that becomes the liability of the offender"

¹⁹⁷ Indonesia (4), Regulation of the Government on Payment of Restitution to Children as Victims of Offenses, Regulation of the Government No. 43 of 2017, State Gazette of 2017 Number 2019, Supplement to the State Gazette Number 6131, Article 2 paragraphs (1) and (2).

¹⁹⁸ Decision No. 413/Pid.Sus/2013/PN.Mtr

¹⁹⁹ Decision No. 421/K/Pid.Sus/2015

²⁰⁰ Indonesia (5), Law on Amendment to Law No. 13 of 2006 on Protection of Witnesses and Victims, Law No. 31 of 2014, State Gazette of 2014 Number 293, Supplement to the State Gazette Number 5602, Article 7A ayat (1).

²⁰¹ Indonesia (6) Regulation on the Government on Grant of Compensation, Restitution, and Aid to Witnesses and Victims, Regulation of the Government No. 44 of 2008, State Gazette of 2008 Number 89, Supplement to the State Gazette Number 4860, Article 20

²⁰² IJRS, Indeksasi Putusan Tindak Pidana Perdagangan Orang, unpublished.

²⁰³ ICJR, *loc.cit*

²⁰⁴ *Ibid*,

²⁰⁵ Leo Wisnu Susanto, Minim, Hakim Kabulkan Restitusi Korban TPPPO, <https://www.validnews.id/nasional/minim-hakim-kabulkan-restitusi-korban-tppo>, accessed on 06 December 2022.

²⁰⁶ Indonesia (7), Regulation of the Supreme Court on Procedures for the Settlement of Applications for and Payment of Restitution and Compensation to Victims of Offenses, Regulation of the Supreme Court No. 1 of 2022, Official Gazette of 2022 Number 2055, Article 30 paragraph (11).

²⁰⁷ *Ibid*, Article 30 paragraph (12) in conjunction with Article 8 paragraph (13).

²⁰⁸ Gesti Permatasari, Handri Wirastuti, & Antonius Sidik Mulyono, Pelaksanaan Pemberian Restitusi Terhadap Korban TPPPO: Studi Kasus di Kejaksaan Negeri Indramayu, *Soedirman Law Review* Vol.1 No.1, 2019, Purwokerto: Fakultas Hukum UNSOED, p. 61.

are expected to be able to overcome obstacles in practice if assets of the offenders are not equivalent to the value of restitution requested by victims of trafficking in persons offenses.²⁰⁹

Another basic obstacle is that most victims of trafficking in persons do not know their rights on the payment of restitution.²¹⁰ The flow of restitution applications requires an application from victims to LPSK, investigators or public prosecutors to the Chief of the Court.²¹¹ With such provisions, if victims do not know their rights on restitution, then it would be impossible for victims to file restitution applications to such agencies. Lack of socializations becomes the root cause of such obstacle. Moreover, law enforcers believe that they do not have the obligation to provide information on the payment of restitution to victims of trafficking in persons.²¹²

Lastly, in terms of payment of restitution to children as victims of trafficking in persons offenses, besides from referring to Perma 1/2022, we can also refer to Regulation of the Government on Payment of Restitution to Children as Victims of Offenses and Guideline of Prosecutor's Office Number 1 of 2021. Those two legal frameworks address in detail regarding the mechanism for restitution applications for children as victims of offenses. Guideline 1/2021 addresses that specifically for child victims, the parties that represent child victims may file for restitution during investigation or prosecution stages without going through LPSK.²¹³ This guideline also gives the direction for Public Prosecutors to enter into coordination with LPSK for the examination of completeness of such restitution applications, including in terms of receipt of application documents and decree of LPSK that contains applications and considerations from LPSK regarding restitution applications.²¹⁴ Such applications will then be followed-up with the preparation of application letters on notification of restitution to the Suspects/Defendants. Public Prosecutors may also enter into coordination by performing summons to LPSK or in the form of written assistances to analyse the basis of assessment or calculation of the value of restitution as applied by victims.²¹⁵

²⁰⁹ *Ibid*, Of all data on the payment of restitution in TPPO cases in Indramayu during 2017-2019, they show that not a single offender that has the ability to pay restitution, pp. 58-59. See also Bobby Anwar Maarif, Diskusi Anotasi Putusan TPPO, as presented in the Focus Group Decision on Annotation of Decisions on Trafficking in Persons Offenses, as organized by the Indonesia Judicial Research Society (IJRS) and International Organization for Migration (IOM), 11 November 2022.

²¹⁰ *Ibid*, p. 62.

²¹¹ Indonesia (5), Article 7A paragraph 3 and Indonesia (7), Article 5 paragraph (4)

²¹² Farid Prawoto, Validation Meeting: Kajian Penerapan UU No. 21 Tahun 2017 tentang Pemberantasan Tindak Pidana Perdagangan Orang, organized on 12 Desember 2022 in Jakarta, IJRS & International Organization for Migration.

²¹³ Maria I Tarigan et al, Buku Saku Pedoman Akses Keadilan Bagi Perempuan Dan Anak Dalam Penanganan Perkara Pidana, Jakarta: Kejaksaan Agung RI, IJRS, AIPJ2, 202, p.39

²¹⁴ *Ibid*, pp. 122-123

²¹⁵ *Ibid*.

CHAPTER IV

ANNOTATION OF TRAFFICKING IN PERSONS OFFENSES (TIP) CASES AND CASES RELATING TO CROSS-BORDER TIP



1. INTERSECTIONS BETWEEN TRAFFICKING IN PERSONS OFFENSES AND PROTECTION OF MIGRANT WORKERS OFFENSES

a. Annotation of Bad Practice Decisions²¹⁶

Trafficking in persons offense (TIP) cases are cases that have many challenges in every criminal justice system stage. UNODC made a list of obstacles in the settlement of TIP cases, both on the stages of preliminary investigation and investigation, prosecution up to trial proceedings. Of those three criminal justice system stages, the obstacle that always arises is the difficulty in identifying the occurrence of trafficking in persons offenses.²¹⁷ This condition may open an opportunity for the occurrence of case misidentification, thus such case might fall under the category of lesser felonies.²¹⁸ For example, in Malaysia, law enforcers occasionally experience difficulties in distinguishing between force labour that falls under the category of trafficking in persons or that falls under the offenses relating to employment.²¹⁹ Thailand also experiences similar difficulties in determining the definition of trafficking in persons within the context of force labour.²²⁰ In addition, such difficulty phenomenon in identifying trafficking in persons in Indonesia may also lead to the use of other criminal provisions other than TIP that are easier to be proven.²²¹

Hence, this annotation shall review the knowledge of law enforcers in identifying trafficking in persons offenses in the case in question, specifically, relating to the issue on overlapping between Article 4 of TIP Law with Article 85 letter a of PPMI Law, the choice of form of indictment by Public Prosecutors, the considerations of the Panel of Judges in imposing decision to the case in question, and consequences from failures in identifying the act of the offenders.

1) Overlapping and Differences between Article 4 of TIP Law and Article 85 letter a of PPMI Law

The overlapping regulation phenomenon may be caused by intersecting provisions. The TIP Law defines trafficking in persons in Article 1 point 1 as:

“the act of recruitment, transportation, harbouring, transfer, movement, or receipt of a person by the means of threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, to achieve the consent from the person having control over another person, either committed domestically or cross-border, for the purpose of exploitation or resulting the person to be exploited.”

Of such definition, there are three core variables, namely:²²²

1. Acts that take form as recruitment, transportation, harbouring, transfer, movement, or receipt of a person.
2. Means that take form as threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, to achieve the consent from the person having control over another person, either committed domestically or cross-border.
3. Purpose that takes form as exploitation or resulting in a person to be exploited.

²¹⁶ See appendix 5. Facts of the Case of Annotation of Decision No. 22/Pid.Sus/2021/PN Tgl

²¹⁷ Bauloz, C., M. Mcadam and J. Teye, 2021. Human trafficking in migration pathways: trends, challenges and new forms of cooperation. In: World Migration Report 2022 (M. McAuliffe and A. Triandafyllidou, eds.). International Organization for Migration (IOM), Geneva. p. 17.

²¹⁸ *Ibid.*

²¹⁹ United Nations Office on Drugs and Crime. “The concept of “exploitation” in the trafficking in persons protocol.” Issue Paper (2015). p. 44.

²²⁰ *Ibid.* p. 70.

²²¹ Attorney General's Office and IOM, “Sistem Peradilan Pidana Indonesia dalam Penanganan Tindak Pidana Perdagangan Orang dan Tindak Pidana Lintas Negara Lainnya” p. 9.

²²² Justitia Avila Veda, et al, Panduan Penanganan Tindak Pidana Perdagangan Orang Tahun 2021, International Organization for Migrant, p. 24.

In regards to the definition of the exploitation itself as referred to in Article 1 point 7 is:

“an act with or without the consent of victims, including but not limited to prostitution, force labour or services, slavery or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, or unlawfully removes or transplants body organs and/or tissues or abuses energy or ability of a person by another person to obtain either economic or non-economic benefits.”

It may be inferred that TIP has a broad scope, namely with the existence of process, means and purpose. From those variables, it is very possible that there are various other offenses that may be covered in trafficking in persons process. This condition opens up the opportunity for intersections to occur. Besides, the definition of exploitation as mentioned above also does not provide any definition on the exploitation at all. Meanwhile, the definition only consists of the minimum list relating to forms of acts that are covered in the exploitation.²²³ In its elucidation, the TIP Law only provides a definition for slavery and practices similar to slavery, and force labour. Such condition otherwise gives a window for different interpretations that eventually also result in inconsistencies on whether an act is deemed as an exploitation or not.²²⁴

In the case in question, the act of the defendant is indicted alternatively using Article 4 in conjunction with Article 48 paragraph (1) of TIP Law in conjunction with Article 55 paragraph 1 point (1) of KUHP or Article 85 letter A of PPMI Law in conjunction with Article 55 paragraph 1 point (1) of KUHP.

TIP Variables	Article 4 of TIP Law	Article 85 letter a of PPMI Law
Process	bringing Indonesian nationals out of the territory of the Republic of Indonesia	placing Indonesian Migrant Workers in jobs that are not in accordance with Work Agreements that have been agreed to and signed by Indonesian Migrant Workers as referred to in Article 71 letter a.
Means	-	
Purpose	with the intention to be exploited outside the territory of the Republic of Indonesia	

Although there is no element of means as addressed in the definition of TIP under Article 1 Point 1 of TIP Law, however, the most important element in Article 4 of TIP Law still lies on the element of “..to be exploited.” Thus, Article 4 of TIP Law is in principle the same with the definition of TIP in general, namely prohibiting the existence of the purpose of exploitation, but within the context of bringing Indonesian nationals abroad, and without inserting the element of means. Meanwhile, in Article 85 letter a of PPMI Law, the prohibited act is placing Indonesian Migrant Workers (Pekerja Migran Indonesia – PMI) in jobs that are not in accordance with work agreements that have been agreed to and signed by PMI, meaning that there is an inconsistency between the agreement at the beginning with the reality.

Against those two articles, in the Guideline for Handling Trafficking in Persons Offenses of 2021 as issued by the Prosecutor’s Office, the PPMI Law is classified as an offense relating to TIP. The following is the table on comparison between TIP variables with PPMI Law in the Guideline for Handling Trafficking in Persons Offenses of 2021.²²⁵

²²³ United Nations Office on Drugs and Crime. “The concept of “exploitation” in the trafficking in persons protocol.” Issue Paper (2015). p.24.

²²⁴ *Ibid.* p.114.

²²⁵ Guideline for Handling Trafficking in Persons Offenses of 2021, International Organization for Migrant, p. 35.

TIP Variables	PPMI Law
Employing migrant workers that is not in accordance with what was promised, even in illegal jobs	Placing migrant workers in jobs that are not in accordance with work agreements, thus harming the migrant workers (Article 82 letter a)
	Placing migrant workers in jobs that are in contradictory with laws and regulations (Article 82 letter b)

Such table shows TIP Variables under the TIP Law in general and compare them with Article 82 of PPMI Law. However, there is no further explanation found on the table of comparison in the Guideline for Handling Trafficking in Persons Offenses of 2021 issued by the Prosecutor's Office.

Regarding the overlapping between the TIP Law with the PPMI Law, Anugerah Rizki Akbari and Erni Mustikasari explain that both legal frameworks have huge differences, namely the PPMI Law that has administrative characteristic relating to prerequisites for migrant workers, meanwhile the TIP Law addresses matters relating to the exploitation offenses against humans.²²⁶ If there is any intersection, such intersection solely refers to modus performed for the occurrence of trafficking in persons offenses. For instance, the offenders who wish to convince the victims to work in a place, then the offenders offer work contracts with high salaries, but in reality, the otherwise happens. Such condition is often used as a modus in trafficking in persons offenses.²²⁷ Hence, those two legal frameworks cannot be compared, although sometimes, provisions under the PPMI Law are frequently used as trafficking in persons modus.

In relation to such matter, modus to commit TIP frequently intersects with offenses under other laws. Besides from the intersection that might occur, namely with the modus of offering work contracts to victims, however, in reality, it is different with what was promised in contracts, another intersection between Article 85 letter a of PPMI Law with Article 4 of TIP Law is that victims of offenses of those two articles are both located abroad.

Erni Mustikasari and Anugerah Rizki Akbari add that the primary difference between trafficking in persons offenses with other offenses is the existence of variables of process, means, purpose of exploitation, and offenders having control over victims.²²⁸ It means that victims cannot be free or exit from their activities as they wish to. Meanwhile, the PPMI Law, specifically in Article 85 letter a, Anugerah Rizki Akbari explains that the function of such article is only limited to the difference between contents of work contracts with what happens in reality,²²⁹ meaning that the process, means and purpose of exploitation are not necessary to be considered in such article.

Such view is also in line with the Guideline for Handling Trafficking in Persons Offenses of 2021 issued by the Prosecutor's Office that provides several modus operandi that might aid Public Prosecutors in identifying trafficking in persons offenses that involve migrant workers, namely:²³⁰

²²⁶ Anugerah Rizki Akbari, "Perdagangan Orang", the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons, 11 November 2022, Ashley Hotel Jakarta and Erni Mustikasari, a Functional Prosecutor under the General Crime Deputy to Attorney General of the Attorney General's Office of the Republic of Indonesia, the information is obtained from the excerpt of an interview conducted on 17 November 2022.

²²⁷ Anugerah Rizki Akbari, "Perdagangan Orang", the material was presented in the Focus Group Discussion, Ashley Hotel Jakarta.

²²⁸ Anugerah Rizki Akbari, "Perdagangan Orang", the material was presented in the Focus Group Discussion, Ashley Hotel Jakarta and Erni Mustikasari, a Functional Prosecutor under the General Crime Deputy to Attorney General of the Attorney General's Office of the Republic of Indonesia, the information is obtained from the excerpt of an interview conducted on 17 November 2022.

²²⁹ Anugerah Rizki Akbari, "Perdagangan Orang", the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons, 11 November 2022, Ashley Hotel Jakarta.

²³⁰ Justitia Avila Veda, et al, Panduan Penanganan Tindak Pidana Perdagangan Orang Tahun 2021, International Organization for Migrant, p. 35.

1. Recruitment to work as a Domestic Worker abroad by promising high salaries;
2. Medical test that is performed improperly and victims are given fit money as debt traps;
3. No formal trainings organized at Job Training Centers or other training centers as verified by the Government;
4. Victims are not given language or orientation trainings before working abroad;
5. If victims wish to resign, victims are forced to pay compensations in a huge amount;
6. Victims frequently work with very long working hours;
7. Victims suffer from tortures/abuses;
8. Salaries of victims are not paid by their superiors.

Thus, it is clear that the TIP Law and PPMI Law have a fundamental difference. The TIP Law addresses offenses relating to exploitation as committed against humans, meanwhile, the PPMI Law is an administrative law that addresses prerequisites relating to migrant workers, even if there are any intersections, such intersections are only limited to modus of trafficking in persons and both victims are located abroad. To determine whether such act falls under the category of Article 85 letter a of PPMI Law or Article 4 of TIP Law, then the difference is that Article 4 of TIP Law requires the existence of process and purpose, namely the process of bringing victims abroad and the purpose of exploitation. To determine an exploitation, it may be inferred from activities performed by victims, whether they lead to slavery practices, force labour and others. In assessing such activities, indicators as mentioned above might be helpful, such as debt traps, the existence of control by the offenders over the victims, unpaid salaries and others. In addition, such acts are designated to obtain benefits from the victims. Differ from Article 85 letter a of PPMI Law, the scope is only limited to the difference between work agreement with the actual condition that happens to migrant workers.

	TIP Law (Article 4 of TIP Law)	PPMI Law (Article 85 letter a of PPMI Law)
Similarities	<ul style="list-style-type: none"> • Bringing victims overseas • Victims are located abroad 	<ul style="list-style-type: none"> • Placing migrant workers • Victims are located abroad
Differences	There is a purpose of exploiting victims (force labour, slavery, the existence of control by offenders over victims)	It is designated to administrative violations relating to differences between work agreements with actual conditions and does not include the exploitation element

2) Formulation of Forms of Indictment Letters

In the case in question, the form of indictment letter that is chosen is an alternative form. The use of alternative indictment form, according to Van Bemmelen, happens because public prosecutors do not know which act, whether the one or the other one that will be proven in the court and when there is doubt from public prosecutors, which regulation that will be enforced by judges.²³¹ Besides from those two reasons, Van Bemmelen adds that between one indictment with another, it must exempt each other. The classic example of an alternative indictment is theft or fencing.²³²

Anugerah Rizki Akbari states that the formulation of an alternative indictment between the TIP Law with PPMI Law shows that Public Prosecutors do not have precision in formulating their indictment because

²³¹ Andi Hamzah, "Hukum Acara Pidana Indonesia Edisi Revisi." Jakarta: Sinar Grafika (2001), p.181.

²³² *Ibid.*

Article 4 of TIP Law with Article 85 letter a of PPMI Law do not exempt each other.²³³

Erni Mustikasari states that choosing the alternative indictment form in cases is usually performed because it makes it easier for Public Prosecutors in the inquisitorial process compared to using the subsidiarity indictment.²³⁴ Slightly different from Erni Mustikasari, one of Prosecutors in the Directorate of TPTLN argues that in such case, the subsidiarity indictment cannot be used because TIP Law and PPMI Law address two offenses that are addressed under two different laws and regulations.²³⁵

In relation to the issue in determining the form of indictment in the case in question, the act of the defendant and its connection with *concursum idealis*, *concursum realis* or *voortgezette handeling* should be initially addressed. If such act is a *concursum idealis*, as a logical consequence, the indictment is formulated in alternative or subsidiarity form, considering that *concursum idealis* occurs if an act may fall under more than one criminal provisions.²³⁶ However, if the form of the act is a combination of several acts that must be deemed to be separated or a *concursum realis*, then the proper form of indictment is the cumulative form.²³⁷ Meanwhile, *voortgezette handeling* occurs if, among those acts, there is a certain connection, hence those acts are deemed as a continuing act, then the form of indictment is the single form.²³⁸

Concerning such issue, the opinion from Van Bemmelen on article 250ter Sr.²³⁹ must also be considered which addresses “Trafficking women and minor children”. In this criminal act, although it only mentions “Women” and “minor children”, it is a certainty that the defendant, in bringing or abducting such women is accompanied with forces, threats or inducements and corners such women to perform obscene acts with another person.²⁴⁰ In terms of transferring several women in a single occasion and happens from the same decision, then the defendant is guilty in committing a continuance criminal act of trafficking women.²⁴¹ However, when there is a different decision by the defendant in collecting women, then such act falls under the scope of combination of acts, meaning that the defendant performs trafficking of women for several times.²⁴²

Connected with the case in question, the facts that the Defendant transfers victims illegally because the defendant does not possess SIP3MI, draws up work contracts with victim witnesses that are not registered at the ministry of transportation, and there are violations of work contracts compared to the facts in reality, then similar with the Article 250ter Sr. above, in accordance with the explanation from Van Bemmelen, that the act of the defendant in the case is categorized as a continuance criminal act. The purpose of the defendant regarding those acts is to perform exploitation against victim witnesses. As a consequence, all acts, such as violations of work agreements, illegal transfer due to non-possession of SIP3MI, are absorbed into the trafficking in persons offense in the Article 4 of TIP Law. Hence, the correct indictment in light of the act of the defendant that constitutes *voortgezette handeling* is single indictment.

The error in choosing the form of indictment in the case in question by using an alternative indictment opens up opportunity for the defendant to be imposed using incorrect criminal provisions, moreover,

²³³ Anugerah Rizki Akbari, “Perdagangan Orang”, the material was presented in the Focus Group Discussion, Ashley Hotel Jakarta.

²³⁴ Erni Mustikasari, a Functional Prosecutor under the General Crime Deputy to Attorney General of the Attorney General's Office of the Republic of Indonesia, the information is obtained from the excerpt of an interview conducted on 17 November 2022.

²³⁵ Prosecutor at the TPTLN Unit of Attorney General's Office of the Republic of Indonesia, the information is obtained from the excerpt of an interview conducted on 29 November 2022.

²³⁶ See article 63 of KUHP.

²³⁷ See article 65 of KUHP.

²³⁸ See article 64 of KUHP.

²³⁹ Article 297 of KUHP.

²⁴⁰ Mr.J.M. Van Bemmelen. *Hukum Pidana 1 Hukum Pidana Bagian Material Umum*, (Bandung: Binacipta,1984). p.218.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

in this case, the TIP Law that addresses matters on trafficking in persons is equivalently compared with the PPMI Law that only addresses administrative provisions relating to migrant workers. Further impacts relating to this condition shall be explained in the next section.

3) Incorrect Implementation of Provisions by the Panel of Judges

Decision of the Panel of Judges of the District Court of Tegal against the Defendant in Decision No. 22/Pid.Sus/2021/PN Tgl, is incorrect. To understand such incorrect decision, initially, we must understand how the Panel of Judges in the case considers elements in the article. Against the alternative indictment submitted by Public Prosecutors, the Panel of Judges directly decides to consider the second form of indictment of JPU, namely Article 85 letter a of PPMI Law in conjunction with Article 55 paragraph (1) point-(1) of KUHP.

In regards to the considerations on the element of “Placing Indonesian Migrant Workers in Jobs that are Not in Accordance with Work Agreements that Have Been Agreed to and Signed by Indonesian Migrant Workers,” the Panel of Judges in their considerations explains that:²⁴³

“Considering, that the contents of PKL address rights and obligations of candidates of Vessel Crews, such as wages, insurance, 2 (two) year contract onboard of the Long Xin 629 vessel, however, it does not address working hours and meals-beverages for Crews;”

“Considering, that Cerren Dorrromeus Solum, Don Bosco Resa Lohonauman, and RFA as witnesses gave testimonies in court that when boarding Long Xin 629, meals that were served are fish baits that were no longer fresh, sometimes they were rotten and the beverages were from seawater that was distilled, causing RFA to fall ill, even EP passed away due to asphyxiation and his body became swollen:”

“Considering, that on board of the vessel where witnesses worked, witnesses worked for 18 (eighteen) hours, and may be longer, in a day;”

“Considering, that naval work agreements address working hours that are arranged to be in shifts (article 6.1.3), but the reality was different from what was agreed to. Such Naval Work Agreements also do not address meals and beverages that are consumed when on board of the vessel and the existence of a crew who passed away on board, the body will be scattered at the sea ...”

Against such considerations, it seems that the Panel of Judges was too compelling in using Article 82 letter a of PPMI Law. In those considerations, it may be inferred that actually the facts of non-conformity between work agreements and the actual facts in reality only relate to the issue on work shifts. If referring to Article 85 letter a of PPMI Law that addresses the issues on non-conformity between work agreements with the actual condition, as a logical consequence, the defendant is only punished relating to the sole violation relating to the issues on work shifts without regarding the existence of facts that there was a crew who passed away, scattering of body, improper meals and beverages and the issues on working hours that may be longer than 18 hours/day. Those conditions happen because those matters are not addressed in any agreements, hence, those issues are not covered within the scope of Article 82 letter a of PPMI Law. The fact of transferring abroad on board of Long Xing 629 Vessel and that PT LPB does not enter into cooperation with such party is a part of process variable under the TIP Law that is also not considered.

Asides from legal facts at the beginning, if testimonies of witnesses, LY, a witness, and statement from the

²⁴³ The full considerations of the Panel of Judges may be read in Decision No. 22/Pid.Sus/2021/PN Tgl. pp 109-116, considerations that are shown are considerations that directly relate to elements.

defendant in the decision are analysed, there are several important facts that can be drawn relating to the act of the defendant indicating to the direction of Article 4 of TIP Law, but they are not included in legal facts by the Panel of Judges and no considerations are given.

4) Purpose of Exploitation

- a. That all victim witnesses explained the existence salary cuts to pay debts to PT LPB during the departure process.
- b. That Cerrren, Don Bosco and Gunawan as witnesses explained that the remaining salaries that were received from the original USD 300 became USD 50 after deducting salary cut, deposit funds and funds for family that have not been received for 14 months.
- c. That all victim witnesses stated that in the contracts, there are available sanctions if they unilaterally terminate work relationship, therefore, victim witnesses refrain their intention due to being afraid from being imposed with those sanctions;
- d. LY, as a witness and the treasurer of PT LPB, acknowledged that there were benefits obtained by PT LPBP from the transfer of vessel crews from the agency at the amount of USD 30/person, and benefits at the amount of Rp3,000,000.- from 6-time salary cuts of vessel crews;
- e. The defendant also explained that there were benefits at the amount of USD 30/person obtained by PT LPB, but relating to benefits at the amount of Rp3,000,000.-, the defendant did not deny such fact by mentioning that the one who knows more regarding such matter is Lely.

In regards to legal facts that are presented by the Panel of Judges in their decision and by connecting the conformity of testimonies of victim witnesses, LY and statement from the defendant that are not considered by the Panel of Judges as mentioned above, all elements of Article 4 of TIP Law should have been fulfilled.

Variables of Article 4 of TIP Law	Provisions	Facts that are Discovered in Trials	
Process	Bringing Indonesian nationals out of the territory of the Republic of Indonesia	Transfer was performed by air on 14 February 2019 by PT LPB	
Purpose	with the intention to be exploited out of the territory of the Republic of Indonesia	Work Conditions	<ul style="list-style-type: none"> • Working for 18 hours/day, even longer at certain occasions • Meals that are provided derived from fish baits that have rotten and beverages deriving from distillation of seawater • Salaries are not paid for 14 months
		Control over victims	<ul style="list-style-type: none"> • There are debt traps from the offenders to the victims using the payment mechanism by cutting salaries by the offenders • There are available sanctions if victims unilaterally cancel work contracts
		Benefits of offenders	<ul style="list-style-type: none"> • PT LPB obtains USD 30 from the agency of any vessel crew that was transferred • PT LPB also obtains benefits at the amount of Rp3,000,000.- by cutting salaries of victims

The choosing of indictment with the above considerations clearly shows the overlook of testimonies of witnesses that were presented without any considerations. Besides, the choosing of this indictment also constitutes a form of failure of the Panel of Judges in identifying trafficking in persons offenses that otherwise the act is only identified as an administrative offense as contained in the second indictment. Although, in the considerations relating to the second indictment, the Panel of Judges has mentioned several legal facts that serve as strong indicators, such as improper work conditions, ranging from meals derived from rotten fish baits, beverages from distilled seawater, working hours that may be longer than 18hours/day, up to there was a vessel crew who passed away due to an illness suffered by the crew due to such poor work conditions.

In regards to the facts that victim witnesses are entangled in the practices of debt traps and threatened sanctions if they resign, these conditions should have been considered in identifying trafficking in persons offenses. Such practices are wishes of the offender to justify the offender's acts in forcing victims to continue to work to be able to pay their debts from the previous recruitment fees.²⁴⁴

5) Consequences from Failures in Identifying the Act of the Offenders

Failures in identifying the act of the offender will lead to non-fulfilment of rights of victims. Primary rights of victims of trafficking in persons offenses are recovery, restitution, compensation and satisfaction and guarantees of non-repetition.²⁴⁵ Those primary rights basically encourage victims to be given attention on physical and psychological impacts from the occurred offenses, the existence of recognition on losses inflicted by the offender and criminal liability of the offender on the offense as committed by the offender. Asides from resulting in the non-fulfilment of rights of victims, the failure in identifying the offender may also impact to the difficulty in eradicating trafficking in persons practices.

6) Proportionality of Sentencing

The imprisonment sentences under Article 85 letter a of PPMI Law do not have any minimum sentence, otherwise, only maximum criminal sentences that are addressed, namely no longer than 5 years. Meanwhile, Article 4 of TIP Law determines a minimum imprisonment sentence, namely no shorter than 3 (three) years, and determines a maximum imprisonment sentence of no longer than 15 (fifteen) years.

Asides from having a difference from the perspective of imprisonment sentence, Article 85 letter a of PPMI Law and Article 4 of TIP Law also address different fines sentences. Article 85 letter a of PPMI Law determines a maximum fines sentence at the amount of Rp5,000,000,000.00 (five billion rupiah) at maximum. Meanwhile, Article 4 of Law 21/2017 addresses fines sentence of Rp120,000,000.00 (one hundred and twenty million rupiah) at minimum and Rp600,000,000.00 (six hundred million rupiah) at maximum.

With the discrepancy in criminal sentences, the error in identifying the act of the defendant may lead to non-proportional sentencing against the act committed by the offender.

7) Hindering the Existence of Restitution

It is very possible that victims in trafficking in persons offenses suffer from physical and psychological injuries.²⁴⁶ Even in several cases, those cause the victims to pass away.²⁴⁷ Hence, the restitution aspect is very important for victims. The PPMI Law does not address the restitution mechanism for victims of

²⁴⁴ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford: Oxford University Press, 2011), 20.

²⁴⁵ Bauloz, C., M. Mcadam and J. Teye, 2021. Human trafficking in migration pathways: trends, challenges and new forms of cooperation. In: *World Migration Report 2022* (M. McAuliffe and A. Triandafyllidou, eds.). International Organization for Migration (IOM), Geneva. p. 19.

²⁴⁶ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford: Oxford University Press, 2011), p. 20.

²⁴⁷ *Ibid.*

offenses, different from the TIP Law that clearly addresses the availability of restitution mechanism for victims in Article 46 – Article 50 of TIP Law. In addition, the TIP Law also provides the authority for Public Prosecutors to perform search and seizure of assets that will be very helpful in restitution later on. Hence, although victims may file for restitution through LPSK, they will still face various obstacles later on due to the limited authority of Public Prosecutors under the PPMI Law.

8) Failures in Identifying the Root of Trafficking in Persons Practices

To overcome trafficking in persons practices, statistical data on such offenses are very necessary. The International Organization for Migration (IOM) also recognizes that the identification of trafficking in persons may assist the empowerment of research and capacity to identify the cause of offenses.²⁴⁸ In addition, with the existence of data on trafficking in persons, then data administration relating to which groups that are vulnerable to become victims and modus operandi of the offenders may also be identified. This measure is important to serve as a guideline in the formulation of policies as an effort to eradicate trafficking in persons offenses.

b. Annotation of Best Practice Decisions²⁴⁹

Trafficking in persons offenses are frequently difficult to be identified. One of the causes is the difficulty from law enforcers themselves in identifying trafficking in persons.²⁵⁰ The party who is most harmed due to the failure in identifying trafficking in persons is obviously the victims. However, it might be otherwise when the lacking understanding of trafficking in persons result in an error in the implementation of law that harms the defendants. The difficulty in identifying trafficking in persons by law enforcers may be understood considering that variables in trafficking in persons that are broad, encompassing process, means and purpose. The process variable refers to acts committed by the offenders against victims, such as recruitment and transfer. The means variable may take form as threat, use of force, abduction, holding hostage and others. Meanwhile, the purpose element refers to the condition that is expected to happen to victims, namely the existence of exploitation.²⁵¹ In addition, parameters for the occurrence of exploitation practices do not have clear definition, considering it only takes form as a minimum list of acts that are deemed as exploitation, such as slavery, servitude, physical abuse and others.²⁵² The difficulty in identifying TIP may encourage law enforcers to use other criminal provisions that are less complicated to prove criminal liability.²⁵³

In light of that, this annotation shall observe the knowledge of law enforcers relating to TIP, specifically relating to how Public Prosecutors formulate the Indictment Letter and considerations of the Panel of Judges in Decision No. 168/Pid.Sus/2020/ PN Pml relating to the case. Additionally, the overlapping issue and differences between Article 4 of TIP Law with Article 81 of PPMI Law shall initially be addressed.

1) Overlapping and Differences between Article 4 of TIP Law with Article 81 of PPMI Law

Article 4 of TIP Law addresses “Anyone who brings Indonesian nationals out of the territory of the Republic of Indonesia with the intention of exploiting such persons outside the territory of the Republic of Indonesia”. From the formulation of such article, it may be inferred that Article 4 of TIP Law only consists of process and purpose elements.

²⁴⁸ Laczko, Frank, and Marco A. Gramegna. “Developing Better Indicators of Human Trafficking.” *The Brown Journal of World Affairs* 10, no. 1 (2003): p.187.

²⁴⁹ See Appendix 6. Facts of the Case of Decision No. 168/Pid.Sus/2020/ PN Pml

²⁵⁰ Bauloz, C., M. Mcadam and J. Teye, 2021. Human trafficking in migration pathways: trends, challenges and new forms of cooperation. In: *World Migration Report 2022* (M. McAuliffe and A. Triandafyllidou, eds.). International Organization for Migration (IOM), Geneva. p. 17

²⁵¹ Justitia Avila Veda, et al, *Panduan Penanganan Tindak Pidana Perdagangan Orang Tahun 2021*, International Organization for Migrant, p. 24.

²⁵² United Nations Office on Drugs and Crime. “The concept of “exploitation” in the trafficking in persons protocol.” *Issue Paper* (2015). 24

²⁵³ Attorney General's Office and IOM, “Sistem Peradilan Pidana Indonesia dalam Penanganan Tindak Pidana Perdagangan Orang dan Tindak Pidana Lintas Negara Lainnya” p. 9.

Meanwhile, Article 81 of PPMI Law addresses “Natural persons who perform the placement of Indonesian Migrant Workers as referred to under Article 69”. From the formulation of such article, it may be inferred that the scope of Article 81 of PPMI Law is only limited to violation of administrative requirements when performing the transfer of migrant workers.

Such condition is also explained by Anugerah Rizki Akbari and Erni Mustikasari that in general, the difference between the TIP Law with the PPMI Law is its function.²⁵⁴ The PPMI Law is used when there is an administrative violation in regards to the requirements for transfer of migrant workers, meanwhile, the TIP Law addresses provisions relating to exploitation offenses against persons.²⁵⁵ Hence, it is possible that there are any intersections, but no overlapping may occur. Akbari adds that the intersection may occur if, during the transfer of migrant workers abroad to be exploited is committed by natural persons, such condition frequently happens as a TIP modus.²⁵⁶ Besides that, there is another intersection where victims are both located abroad. Thus, besides from the intersection in relation to the process element, another intersection is the location of victims.

	TIP Law (Article 4 of TIP Law)	PPMI Law (Article 81 of PPMI Law)
Similarities	<ul style="list-style-type: none"> • Bringing victims abroad • Victims are located abroad 	<ul style="list-style-type: none"> • Placing migrant workers • Victims are located abroad
Differences	There is a purpose of exploiting victims (force labour, slavery, control by offenders over victims)	Designated for administrative violations relating to transfer as performed by natural persons and does not contain the exploitation element

Against the intersection issue, Erni Mustikasari and Andi explain that the distinguishing factor between the TIP Law with the PPMI Law is the existence of process, means and purpose variables under the TIP Law.²⁵⁷ In addition, the existence of control by offenders over victims that also serves as a distinguishing parameter between the TIP Law with other legal frameworks.²⁵⁸

2) Formulation of Form of Indictment Letter

In regards to the formulation of indictment letter, for the case in question, the chosen form of indictment is the alternative indictment. Choosing alternative indictment is performed if the act falls under several categories of offenses, therefore, the qualification that is violated can yet be ascertained.²⁵⁹ The alternative indictment leads the prosecutors to formulate their indictment in tiers with each tier exempts one another.²⁶⁰ Anugerah Rizki Akbari explains that for TIP Law with PPMI Law, both laws cannot be put into alternatives, because they do not exempt one another.²⁶¹

²⁵⁴ Anugerah Rizki Akbari, “Perdagangan Orang”, the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons, 11 November 2022, Ashley Hotel Jakarta and Erni Mustikasari, a Functional Prosecutor under the General Crime Deputy to Attorney General of the Attorney General’s Office of the Republic of Indonesia, the information is obtained from the excerpt of an interview conducted on 17 November 2022.

²⁵⁵ *Ibid.*

²⁵⁶ Anugerah Rizki Akbari, “Perdagangan Orang”, the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons.

²⁵⁷ Erni Mustikasari, a Functional Prosecutor under the General Crime Deputy to Attorney General of the Attorney General’s Office of the Republic of Indonesia, the information is obtained from the excerpt of an interview conducted on 17 November 2022 and Andi Jefry, Head of TPPO Taskforce of TPTLN Unit of Attorney’s General Office of the Republic of Indonesia, the interview was conducted on 29 November 2022.

²⁵⁸ *Ibid.*

²⁵⁹ See SE-004/J.A/11/1993 on the Formulation of Indictment Letters.

²⁶⁰ *Ibid.*

²⁶¹ Anugerah Rizki Akbari, “Perdagangan Orang”, the material was presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons.

As inferred from the case, starting from the process variable by getting the victims through agents at the beginning, followed by the transfer process by preparing the necessary documents, up to the transfer and exploitation practices then all of the acts above must be deemed as a unity because there is a certain connection that is designated to exploitation practices. As the consequence, the proper form of indictment based on such legal facts is the single indictment.²⁶²

3) Considerations of Panel of Judges

The Panel of Judges in this case deems that the defendant is proven of committing offense under Article 4 of TIP Law in conjunction with 55 paragraph (1) point-1 of KUHP. The considerations on the element of “Bringing Indonesian nationals out of the territory of the Republic of Indonesia with the intention of exploiting the persons outside of the territory of the Republic of Indonesia”, the Panel of Judges properly breaks down the elements of Article 4 of TIP Law. Aspects that are considered relating to TIP variables by the Panel of Judges are as mapped in the table below:

Variables of Article 4 of TIP Law	Provisions	Facts Discovered in Trials	
Process	Bringing Indonesian nationals out of the territory of the Republic of Indonesia	The defendant prepared all departure documents, including the departure tickets for victim witnesses	
Purpose	with the intention of exploiting those persons outside of the territory of the Republic of Indonesia	Work Conditions	<ul style="list-style-type: none"> • There are debt trap practices; • Debt traps that are imposed are not in accordance with the actual expenses by the offender; • Available sanctions in the form of a sum of money that must be paid by victims if they unilaterally terminate the contracts; • Restriction of movements of victims due to vessels have never anchored
		Control over victims	<ul style="list-style-type: none"> • Salaries that are unpaid for 14 months, only in the form of wiring of small amount of money to victims' families; • Cuts are made against salaries for payments of debts to the offender and deposit funds • Working for 18 hours/day, even for 30 Hours. • Coercion from vice foreman to Yusup as the victim witness • Discrepancy in work placement that should have been in South Korea, but altered to China
		Benefits of the Offenders	The offender obtains benefits at the amount of 15 Million rupiah from five victim witnesses and obtains USD 30/month for any person that is transferred

²⁶² For the full version, see explanation in Annotation of Decision No. 22/Pid.Sus/2021/PN Tgl.

First, relating to the process variable in Article 4 of TIP Law, namely the element of “bringing”, this variable raises a dilemma, considering that the TIP Law itself does not provide any definition relating to bringing. It is only mentioned that bringing is a part of recruitment. On that note, a question is raised on how far an act of the defendant may be deemed as bringing? Should the defendant physically accompany the victims from Indonesia up to the destination place of exploitation? Or, is it sufficient to only send victims without being physically present at the destination place to fulfil the element of bringing?

The process variable in Article 4 of TIP Law is very limited, differs from Article 2 of TIP Law that formulates recruitment, transportation, harbouring, transfer, movement, or receipt. If the interpretation of the element of “bringing” is rigidly defined, namely there must be a physical participation, then in this case, the element of “bringing” is not fulfilled. However, if the broad interpretation is adopted, namely simply by sending the victims without being physically present at the destination place, then this condition shall blur the element of “transfer” in other articles. The limitation of process in Article 4 of TIP Law in theory very restricts the scope of criminalization of trafficking in persons with victims that are exploited abroad.

Inaccurate formulation of norms by legislative members in TIP Law within this context may serve as a hindering factor in law enforcement efforts in eradicating trafficking in persons offenses.²⁶³ In this case, the interpretation of the element of “bringing” is not explicitly explained by the Panel of Judges, but the intention of the Panel of Judges concerning the element of “bringing” may be inferred from the following considerations.

*Considering, that afterwards, MUHAMMAD YUSUP, MUHAMMAD YANI, AZUAR and RISKI PANGGAREZA as witnesses **were brought to Indonesia Fisherman Foundation (IFF) in East Jakarta by the Defendant** from Pemalang upon orders from JONI KASIYANTO Aka JONI, a witness, on 13 February 2019;*

*Considering, that afterwards, on 14 February 2019, MUHAMMAD YUSUP, MUHAMMAD YANI, AZUAR, RISKI PANGGAREZA and BERNARDUS MATURBONGS as witnesses **were brought by ABUR, a witness, from Indonesia Fisherman Foundation (IFF) to the Soekarno-Hatta Airport to fly to Busan, South Korea;***

In regards to such facts, the Panel of Judges has been wise in determining the element of “bringing”, specifically in Article 4 of TIP Law, should be broadly interpreted.

Second, relating to the variable of purpose of exploitation, the Panel of Judges may properly identify the act of the defendant as a trafficking in persons offense. One form of exploitation in Article 1 point 7 is force labour. Force labour is defined as a work condition that arises through means, plans, or patterns that are intended for a person to be certain that if the person does not perform certain works, then the person or the person’s dependents will suffer, either physically or psychologically. Such condition happens to victim witnesses, namely with the availability of fines sanction if they unilaterally cancel the contracts. In addition, there were also coercion practices suffered by Yusup as a Witness during the work.

UNODC also provides indicators relating to force labour, namely when workers have long working hours, low salaries and workers are not officially registered.²⁶⁴ In the above legal facts, victim witnesses work for 18 hours/day even up to 30 hours and salaries were not paid for 14 months. If any, such payments were only transferred in small amounts to victims’ family.

In regards to legal facts on the existence of debt traps and restriction of movement of victim witnesses

²⁶³ Laczko, Frank, and Marco A. Gramegna. “Developing Better Indicators of Human Trafficking.” *The Brown Journal of World Affairs* 10, no. 1 (2003): p.183.

²⁶⁴ UNODC, *Global Report on Trafficking in Persons 2020* (United Nations publication, Sales No. E.20.IV.3). p.109.

due to vessels have never anchored for 14 months, such condition may be deemed as a form of control by the offender on victims. The form of control by the offender is generally performed through three methods, namely building loyalty, creating a dependency condition and use of threats or forces.²⁶⁵ Debt trap is a form of measure in creating a dependency condition from victims to the offender.²⁶⁶ Usually, this condition is preceded with the modus of assisting victims in preparing all requirements for the departure.²⁶⁷ Such practices also become the means of the offender to justify the offender's acts to victims and to prevent the possibility of victims running away or filing a report.²⁶⁸

Furthermore, relating to benefits that are obtained by the offender at the amount of 15 million and USD 30/month from every person who is transferred, such condition matches with the definition in Article 1 point 7 that treats benefits as a purpose from the performance of exploitation forms.

Accurate identification of trafficking in persons by the Panel of Judges shows that the Panel of Judges is capable of distinguishing between offenses under the TIP Law with the PPMI Law. The Panel of Judges is capable of distinguishing when an act falls under the modus of TIP and when it falls under the PPMI Law.

The success of law enforcers in identifying trafficking in persons yields positive results to victims. Primary rights of victims of trafficking in persons are recovery, restitution, compensation and satisfaction and guarantees of non-repetition.²⁶⁹ With the imposition of sentences as an offender within the context of trafficking in persons offenses, then the state indirectly has provided security to victims. Moreover, the acknowledgement on the existence of vile acts that were committed by the offender against victims may also be deemed as the fulfilment of rights of victims.

With the imposition of decision using Article 4 of TIP Law, then the restitution mechanism may also be performed. In the decision, the Panel of Judges imposes restitution from the offender to victims with a total of Rp557,985,196.- (five hundred fifty-seven million nine hundred and eighty-five thousand one hundred and ninety-six rupiah). In addition, the success in identifying trafficking in persons may also be a learning experience for many parties, both academics and law enforcers to study and understand the patterns of trafficking in persons offenses, their modus operandi and causes of trafficking in persons as a form of support to eradication of trafficking in persons practices.

2. INTERSECTIONS BETWEEN TRAFFICKING IN PERSONS OFFENSES AND PEOPLE SMUGGLING OFFENSES WITHIN THE CONTEXT OF ASYLUM SEEKERS

In the performance of this Annotation of decision, there are 2 groups of decisions, firstly are decisions with bad practices that analyse intersections between trafficking in persons offenses with people smuggling, consisting of 2 decisions on the first level.²⁷⁰ Meanwhile, the second group are court decisions that are accompanied with better practices in breaking down differences between trafficking in persons with people smuggling.²⁷¹ The analysis in this annotation shall be combined to avoid any repetition of discussion narratives, both in the group of decisions with bad practices and best practiceBest Practices.

1) Analysis on Legal Frameworks

²⁶⁵ Ryszard W. Piotrowicz, Conny Rijken, and Baerbel Heide Uhl, *Routledge Handbook of Human Trafficking* (Abingdon, Oxon: Routledge, 2018), p.540.

²⁶⁶ *Ibid.*

²⁶⁷ Scarpa, Silvia. *Trafficking in Human Beings: Modern Slavery* (Oxford: Oxford University Press, 2011), p. 20.

²⁶⁸ *Ibid.*

²⁶⁹ Bauloz, C., M. Mcadam and J. Teye, 2021. Human trafficking in migration pathways: trends, challenges and new forms of cooperation. In: *World Migration Report 2022* (M. McAuliffe and A. Triandafyllidou, eds.). International Organization for Migration (IOM), Geneva. p. 19.

²⁷⁰ See appendix 7. Facts of the Case of Decision No. 3/Pid.Sus/2021/PN Lsm dan Putusan Perkara No. 6/Pid.Sus/2021/PN Lsm

²⁷¹ See appendix 8. Facts of the Case of Decision No. 647/Pid.Sus/2021/PN Kis

In enforcing of those three decisions, there is an underlying issue on how to actually distinguish between trafficking in persons offenses with people smuggling offenses. For that purpose, legal frameworks and doctrines shall be initially explained to understand the differences.

Definition of Trafficking in Persons

The definition of Trafficking in Persons may be inferred in Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses. Under such legal framework, Trafficking in Persons is defined as:

“the act of recruitment, transportation, harbouring, transfer, movement, or receipt of a person by the means of threat, use of force, abduction, holding hostage, fraud, deception, abuse of power or position of vulnerability, debt trap or giving payments or benefits, resulting in achieving the consent of a person having control over another person, either committed domestically or cross-border, for the purpose of exploitation or resulting in the person to be exploited.”

If we analyse further, the definition addressed under Law No. 21 of 2007 is the translation of definition of trafficking in persons as addressed in UN’s Protocol of 2000 on Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)²⁷² that has been signed by the Indonesian government as addressed in the general elucidation of Law No. 21 of 2007, explaining that the enactment of Law No. 21 of 2007 is a manifestation of Indonesia’s commitment on Palermo Protocol.

In the Palermo Protocol, trafficking in persons is defined as:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

The definition above is informally translated as follows:

“Perdagangan orang” berarti perekrutan, pengangkutan, pemindahan, penyembunyian atau penerimaan orang, melalui ancaman atau penggunaan kekerasan atau bentuk paksaan lainnya, penculikan, penipuan, tipu muslihat, penyalahgunaan kekuasaan atau posisi kerentanan atau pemberian atau penerimaan pembayaran atau manfaat untuk mencapai persetujuan seseorang yang memiliki kendali atas orang lain, untuk tujuan eksploitasi.

Eksplorasi harus mencakup, sekurang-kurangnya, eksploitasi pelacuran orang lain atau bentuk-bentuk lain eksploitasi seksual, kerja atau layanan paksa, perbudakan atau praktik-praktik yang mirip dengan perbudakan, perhambataan atau pengambilan organ;

Article 3 of Palermo Protocol also explains

“(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;”

“(b) Persetujuan dari korban perdagangan orang pada eksploitasi yang dimaksud dalam subparagraph (a) dalam pasal ini tidak relevan ketika cara-cara yang dimuat dalam dalam subparagraph (a) telah dilakukan;”

²⁷² Adopted by the General Assembly resolution 55/25 on 15 November 2000

“(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;”

“(c) Perekrutan, pengangkutan, pemindahan, penyembunyian atau penerimaan anak dengan maksud eksploitasi harus dianggap sebagai “perdagangan orang” walaupun tidak melibatkan cara-cara yang dimuat dalam subparagraph (a) dalam pasal ini;”

“(d) “Child” shall mean any person under eighteen years of age.”

“(d) “Anak” berarti setiap orang dibawah 18 tahun.”

Furthermore, Article 5 paragraph 1 of Palermo Protocol states that each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses set forth in Article 3 of Palermo Protocol, when committed intentionally.

State party shall also adopt such legislative and other measures as may be necessary to establish as criminal offenses: a) subject to the basic concepts of its legal system, attempting to commit an offense established in accordance with paragraph 1 of this article; b) participating as an accomplice in an offense established in accordance with paragraph 1 of this article; c) organizing or directing other persons to commit an offense established in accordance with paragraph 1 of this article.²⁷³

In relation to the definition of trafficking in persons, there are several international law instruments that explain the definition or elucidation on the definition of trafficking in persons.

In the travaux préparatoires of the Palermo Protocol, only a small part of explanation provided,²⁷⁴ then such explanation is supplemented with the Guideline for the establishment of laws and regulations relating to this protocol, namely Legislative Guide For The Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime with version 2020 as the latest version.²⁷⁵

UNODC’s Checklist Criminalization of Trafficking under the Protocol addresses the classification of criminal elements of trafficking in persons, namely:²⁷⁶

a. **Acts (perbuatan yang dilakukan):**

- i. Recruitment
- ii. Transportation
- iii. Transfer
- iv. Harbouring
- v. Receipt of persons

b. **Means (cara/ bagaimana dilakukan)**

- i. Use of force
- ii. Threat of the use of force

²⁷³ Article 5 of Palermo Protocol, Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

²⁷⁴ https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, p 347

²⁷⁵ https://www.unodc.org/documents/human-trafficking/2020/TIP_LegislativGuide_Final.pdf

²⁷⁶ UNODC, Checklist Criminalization of Trafficking under the Protocol <https://www.unodc.org/documents/human-trafficking/Checklist%20-%20criminalization%20under%20the%20Protocol.pdf>

- iii. Other forms of coercion
- iv. Abduction
- v. Fraud
- vi. Deception
- vii. Abuse of power or of a position of vulnerability
- viii. Giving or receiving payments or benefits to achieve the consent of a person having control over another

c. **Purpose (tujuan/mengapa dilakukan)**

- i. Prostitution
- ii. Other forms of sexual exploitation
- iii. Forced labour or services
- iv. Slavery
- v. Practices similar to slavery
- vi. Servitude
- vii. Removal of organs

As mentioned beforehand, several aspects in the Palermo Protocol have been further defined in Travaux préparatoires: United Nations Convention against Transnational Organized Crime. The definitions of means of trafficking in persons as addressed in such document are:²⁷⁷

1. Abuse of position of vulnerability is referred to a situation where a person that is involved does not have any actual and acceptable alternative besides from accepting or being involved as victims.
2. Another explanation in relation to prostitution exploitation or other practices relating to sexual exploitation, despite of how the law of state party addresses prostitution; for example, if the state criminalizes prostitution.
3. Transfer/removal of children's organs with consents from parents or guardians for medical dan therapy purposes is not considered as trafficking in persons
4. Illegal adoptions also classify as practices similar to slavery

Previously, the discussion of this document also addresses recommendations on the definition in the Palermo Protocol, as performed before Palermo Protocol is passed, in negotiation texts, namely:

1. The definition of sexual exploitation that is divided between sexual exploitation on adults, namely force prostitution, sexual servitude or involvement in production of pornographic materials, whereas, such works are performed without any offers given in freely and based on consents.²⁷⁸ Meanwhile, sexual exploitation on children refers to prostitution, sexual servitude or use of children in pornography.²⁷⁹
2. Force labour refers to all works or services extracted from a person under threat or use of force or coercion, whereas, such person does not offer oneself in free condition or based on informed consents.²⁸⁰
3. Slavery refers to a status or condition of a person having partial or whole power over ownership of another person²⁸¹
4. Servitude refers to dependency status or condition of a person that [cannot be justified] is

²⁷⁷ https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, p. 347

²⁷⁸ https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, p. 341

²⁷⁹ https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, p. 341

²⁸⁰ https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, p. 310

²⁸¹ https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, p. 343

forced by another person to provide any services and it is believable that such person does not have any alternatives other than performing services

Further explanation on elements of trafficking in persons are explained in legislative guideline, as follows:

Element of Acts

1. Element of acts encompasses recruitment, transportation, transfer, harbouring, receipt of persons that is alternative in nature, and it is stressed that movement of victims is not mandatory.
2. Recruitment is a process of attracting a person in a process that may be performed using various methods, may be performed in verbal, through advertisements or online means via internet.
3. Transporting refers to performing a process of transfer of control from one person to another person.
4. Harbouring refers to providing accommodation from the departure point, transit point, destination point before or when arrived at the exploitation point, or this act may be performed by hiding the existence of a person, this act may simply be defined as confining a person.
5. Receipt of persons correlates with the transportation process, by receiving the persons at the designated point, or accepting for employment process, receiving may also be defined without any process preceding to it, for instance, the change in work environments from certain parties to another party, from the legal one to be exploitative.

Element of Means

1. Elements of threat and force refer to legal provisions of each state, including psychological, psychological, emotion and economic income threat and force.
2. Element of use of force may also refer to domestic legal provisions, may also take form as extortion, threat and other unjustified forms, coercion that basically is the umbrella terminology that explains matters on force, physical and psychological abuse
3. Abduction may be defined as a form of holding hostage a person, namely in the form of an act of depriving freedom of a person without consent, or restrict the person's freedom, often times, it involves the use of threat, force, or both practices
4. Fraud and deception are two similar form of acts. Deception refers to an act or dispute that makes a person to believe something that is false. Meanwhile, fraud refers to deceiving another person with the purpose of gaining something from such person. Within the context of trafficking in persons, fraud and deception often involve false misinterpretation on the nature of jobs which victims of trafficking in persons are recruited, location of jobs, their end users, residence and work conditions, among others, legal status at the destination state, and certain travel conditions. In many cases, deception and fraud are used in combination with threats, forces, or coercion practices
5. Position of vulnerability is a condition that causes a person to experience negative conditions relating to cultural, economic, political and environmental factors that cause the position of vulnerability. Meanwhile, the abuse of position of vulnerability must contain two variables: proof that the position of vulnerability exists, and proof of abuse. Such vulnerability may take place before or be resulted by trafficking in persons offenders. The position of vulnerability that takes place beforehand generally relates to poverty, physical or mental disabilities, old or young age, gender, pregnancy, culture, language, belief, family status and special status. Meanwhile, the vulnerability resulted by trafficking in persons offenders relates to isolation of language, social and culture, special status, dependency caused by drug dependency or emotional and romantic

attachment or using cultural and religious practices and rituals. Children are always be in the position of vulnerability

6. Giving or receiving payments or benefits to achieve the consent of such person. The giving of benefits must be associated with the achievement of consent from a person having control over victims; for instance, paying a sum of money to parents to allow their children to be exploited

It must be noted that similar to the Palermo Protocol, the key element of trafficking in persons offenses is “exploitation,” and only the “purpose” or intention to exploit that must be proved to exhibit trafficking in persons offenses. The exploitation is not needed to happen.

UNODC in 2015 issued a publication relating to the exploitation element. The international community concludes that the exploitation element is not legally defined, including in the Palermo Protocol. Exploitation in the general and broad explanation is defined consistently as a person taking benefits, vulnerability, situation of another person unjustly. Of twelve states that were surveyed by UNODC, only Canada that explains a single definition of exploitation, that exploitation is a condition resulting in persons to provide energy or services by binding the person in works or conditions that may be estimated to cause persons to believe that the person’s security or freedom may be threatened if they fail to provide, offer to provide energy or services. To prove an exploitation, offenders make victims to provide or offer energy or services with gradual fear.

Basically, forms of exploitations that are created are not limited, enabling forms of abuse of energy of a person. However, it is emphasized that the exploitation element is a formal element that may also be fulfilled based on the knowledge or intention.

Definition of People Smuggling

Furthermore, the definition of people smuggling according to the international law is addressed in the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime²⁸² which is passed to prevent and combat the smuggling of migrants and also to promote cross-border cooperation to end smuggling of migrants, by also protecting the rights of smuggled migrants.²⁸³ This protocol may be deemed as a new response to the inexistence of international policies addressing irregular migrations that happen in the United States of America and Europe within the period of 1980s up to 1993 in its peak, when Gold Venture case happened involving a Chinese vessel with migrants onboard that paid a sum of money to board the vessel and they were suggested to disembark at sea and swim to reach the land, which later triggers the response on the first policy concerning people smuggling by the International Maritime Organization (IMO)²⁸⁴ as the origin of the establishment of Protocol on People Smuggling.

This protocol is closely related to Convention on Organized Crime that is supplemented by 3 protocols, namely Protocol on Smuggling of Migrants, Trafficking in Persons, especially Women and Children and Trafficking in Firearms.²⁸⁵

Smuggling of migrants is defined as the procurement that is designated to obtain, directly or indirectly, financial or other material benefits, of the illegal entry of a person into a State Party of which the person

²⁸² UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, accessed on: <https://www.refworld.org/docid/479dee062.html>

²⁸³ Article 2, UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, accessed on: <https://www.refworld.org/docid/479dee062.html>

²⁸⁴ Anne T. Gallagher AO and Fiona David, 2014, The international law of migrant smuggling, f Cambridge University Press, p. 29

²⁸⁵ *Ibid*, p. 36

is not a national or a permanent resident. “Illegal entry” refers to crossing borders without complying with the necessary requirements for legal entry into the receiving State; Meanwhile, “fraudulent travel or identity document” refers to any travel or identity document: (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or (iii) That is being used by a person other than the rightful holder.

In relation to the efforts of criminalizing the smuggling of migrants, this protocol mandates that any State Party must adopt the law and other measures that may be necessary to establish it as an offense, an act that is committed deliberately and to obtain, either directly or indirectly, financial or other material benefits, in the forms of these acts:

- (a) Smuggling of migrants;
- (b) Persons that perform the following acts with the purpose of enabling the smuggling of migrants:
 - (i) Producing a fraudulent travel or identity document;
 - (ii) Procuring, providing or possessing such a document;
- (c) Enabling a person who is not a national or permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

Criminalization must also available to these acts:

- a. Attempting to commit such offense (all, (a), (b), and (c)) subject to the basic concepts of its legal system
- b. Participating as an accomplice in an offense established in acts (a), (b) (i) or (c), meanwhile for (b) (ii), subject to the basic concepts of its legal system
- c. Organizing or directing other persons to commit an offense in (a), (b), and (c)

It must be stressed that Sanctions for acts addressed in this protocol must be designated to the group of organized crime and not designated, per se, to the migration or to migrants.²⁸⁶ There are 2 important variables in this offense that must be fulfilled, that there must be an initial intention to illegally provide entry access, and there must be the second intention to obtain financial or other material benefits.²⁸⁷ The protocol not only addresses the illegal entry, this protocol neutrally addresses whether a person who enters illegally is imposed with violation/alleged as a criminal or not.²⁸⁸

There is a document that explains the definition of criminalization elements of people smuggling, namely the travaux préparatoires. This document explains matters in relation to the element of “financial or other material benefits” that it must be ascertained that such activity is designated to obtain benefits, does not contain the activity that provides supports to migrants under humanitarian cause or based on familial relationship, including supports from religious groups or non-profit organizations.²⁸⁹ The regulatory focus in this protocol explicitly refers to the act of providing or facilitating the smuggling of migrants.

As for the act of performing all prohibited acts as mentioned above, the document explains the obligation to address aggravating sentences, according to these circumstances:

- (a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

²⁸⁶ https://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf, p. 340

²⁸⁷ https://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf, p. 342 paragraph 35

²⁸⁸ https://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf, p. 347

²⁸⁹ https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, p. 489

(b) That entail inhumane or degrading treatment, including for exploitation, of such migrants.

The explanation of the element “endanger” in the legislative guideline as established by UNODC on the models of smuggling that endanger, for instance, using shipping containers that are clearly dangerous for migrants, but the regulation of the state must also address in broader scope of such condition of endangerment, for instance, when false documents are used lead to inhumane or degrading treatment.²⁹⁰

The explanation on “inhumane or degrading treatment” that it is performed without derogating the scope of implementation of trafficking in persons that also involves the exploitation element.²⁹¹ If there is no consent or the consent is obtained unlawfully, as addressed in the Protocol on Trafficking in Persons, then such act may also constitute a trafficking in persons.²⁹²

In relation to the protection of victims of people smuggling, the Protocol addresses that there is no implementation of such Protocol that affects the fulfilment of human rights in relation to the international law on rights of refugees and the principle of non-refoulement of refugees.²⁹³

According to those elements, actually in the international frameworks, there are minimum regulatory obligations concerning people smuggling, as shall be compared in the table below, by observing the compatibility as addressed under Law No. 6 of 2011 on Immigration

Elements that must be available according to the Protocol on People Smuggling	Elements that are fulfilled in the regulatory framework of Law No. 6 of 2011 on Immigration
Procurement	<ul style="list-style-type: none"> • bringing • ordering to bring • either organized or unorganized (Article 120 paragraph (1))
Illegal entry of person into a state	that does not possess legitimate right to enter the Indonesian Territory or exit the Indonesian Territory and/or enter territory of another state (Article 120 paragraph (1))
To obtain financial or other material benefits	has the purpose of obtaining benefits, either directly or indirectly, for oneself or for another person
Persons that perform the following acts with the purpose of enabling the smuggling of migrants: (i) Producing a fraudulent travel or identity document; (ii) Obtaining, providing, or possessing such a document	There is no limitation to only regarding financial benefits or other material benefits, therefore, these 2 specific acts are not addressed for the purpose of people smuggling
Enabling a person who is not a national or permanent resident to remain in the State concerned without complying with the necessary requirements in unlawful manner	There is no limitation to only regarding financial benefits or other material benefits, therefore, these 2 specific acts are not addressed for the purpose of people smuggling

²⁹⁰ https://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf, p. 46, para 48

²⁹¹ https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf, p. 489

²⁹² https://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf, p. 347, para 49

²⁹³ Article 19 paragraph (1), UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, accessed on: <https://www.refworld.org/docid/479dee062.html>

<ul style="list-style-type: none"> (a) Attempting to commit such act (all, (a), (b), and (c)) (b) Participating as an accomplice in all acts, unless Obtaining, providing or possessing such a document; (c) Organizing or directing other persons to commit all acts 	<p>Addressed in KUHP to be the subject of criminalization in regards to attempting and assisting</p> <p>Article 1 point 12 of Law No. 6 of 2011 provides the definition of corporation and Article 136 explains that Article 120 may be used to entangle corporations, but Article 120 and its elucidation does not provide definition of “person” that also includes corporations</p>
<p>Aggravating circumstances:</p> <p>All prohibited acts as mentioned above, the document explains the obligation to address aggravating sentences according to these circumstances:</p> <ul style="list-style-type: none"> (a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) That entail inhuman or degrading treatment, including for exploitation, of such migrants. 	<p>No aggravating circumstances that are addressed</p>

According to the table above, under the Indonesian legal framework under the Law No. 6 of 2011 on Immigration, the regulation on People Smuggling is not completely addressed by fulfilling core indicators of people smuggling, for example, limiting the act solely to the act of “bringing”, while the act of “bringing” is closely related to the actual offender, meanwhile, the element that should have been addressed is “procurement” that translates to all acts of procuring, including owning a business regarding this matter.

Provisions in protocol and its legislative guideline address that there should be material or financial benefits that become absolute prerequisite, moreover, it is explained that activities that provide support to migrants with humanitarian cause or based on familial relationship, supports from religious groups and non-profit organizations are excluded. Meanwhile, Law No. 6 of 2011 does not clearly define “benefits”, whether they refer only to material benefits or not. Law No. 6 of 2011 addresses the act of falsifying documents per se, but there is no provision explaining such act if it is performed with the purpose of smuggling persons.

The most unfortunate condition relating to the lack of legal frameworks in Indonesia concerning people smuggling are no provisions relating to aggravating sentences if people smuggling is committed with endangering circumstances and aggravating sentences if there are exploitative practices.

2) Differences between Trafficking in Persons with People Smuggling

Key elements of the international definition on smuggling of migrants are

1. Acts: Procurement of illegal entry of a person into a state where such person is not a permanent resident of such state
2. Purpose: for financial benefits or other material benefits

The focus is explicitly given to the person who procures or facilitates the smuggling of migrants. Meanwhile, for trafficking in persons, the key elements are acts, means and purpose, that are more complex and focus on the vulnerability of victims.

With people smuggling that is initially deemed as an illegal procurement process, there is a decision to characterize persons that become objects of people smuggling not as victims, hence exempting them from

victim supports and protection provisions as addressed in Article 25 of Convention on Organized Crime, including access to compensation and restitution. However, in several discourses, persons that become the target of grave smuggling (with aggravating conditions: endangering and exploitative circumstances) are victims of offenses in Article 25 of the Convention due to the existence of potentials of inhumane or degrading treatment, including being classified as trafficking in persons.²⁹⁴

Both Protocols on People Smuggling and Trafficking in Persons address substantive provisions that have parallel or overlapping elements and most likely involve many similar sectors of policies, legislative and administrative in the Governments of States that intend to be state parties to one or both Protocols.²⁹⁵ Protocol on Trafficking in Persons that relates to the protection of trafficked persons, including several important protective provisions. However, provisions relating to trafficking in persons address more advanced provisions compared to people smuggling. Specifically, State Parties are obliged to:

- Protect the privacy and identity of victims of trafficking in persons in cases and as far as the domestic laws permit, including attempting to treat the legal process to be in confidential, provided that such condition is made possible according to domestic laws
- Ascertain that in trafficking in persons cases, the victims receive information on relevant trial and administrative process, and supports that enable their views to be expressed and considered during the criminal process
- Attempt to provide physical security of victims of trafficking in persons within their territory
- Ascertain that the domestic laws provide the possibility for victims to obtain compensation
- Consider to adopt legislative measures or other suitable measures to provide physical, psychological and social recoveries to victims of trafficking in persons
- Housing, counselling, and information in language that is understandable by victims; medical, psychological, and material supports, and work, education, and training opportunities

Protocol on Smuggling of Migrants does not address substantive provisions relating to protection and supports for those that have been smuggled. This Protocol intentionally retains the “victims” status of those persons, meaning that they cannot be automatically referred to provisions on protection and supports to victims of Convention and it is also possible from general standards on obligations relating to victims of felonies – at least, unless and until it can be shown that they are victims of other felonies (such as sexual assault), or victims of trafficking in persons or aggravating conditions to people smuggling, namely endangering and exploitative circumstances.

According to the description above, differences between People Smuggling with Trafficking in Persons are listed in the following table:

²⁹⁴ UNODC Model Law, https://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf, p. 43

²⁹⁵ Legislative Guide, https://www.unodc.org/pdf/crime/legislative_guides/04%20Legislative%20guide_Smuggling%20of%20Migrants%20Protocol.pdf, pp. 247, 323

No.	Distinguishing Aspects	Trafficking in Persons	People Smuggling
1.	Key Elements	<ul style="list-style-type: none"> • Acts • Means • Purpose 	<ul style="list-style-type: none"> • Acts • Purpose
2.	Acts	Acts as mentioned above may be performed legally or illegally	Procurement that must be illegal, it is impossible to be legal
3.	Scope	<ul style="list-style-type: none"> • Domestic • International 	International
4.	Means		No specific unlawful means
5.	Purpose	Exploitation	Financial benefits
6.	Relationship between Offenders and Victims	Exploitative	Commercial
7.	Vulnerability of victims	Victims do not have control	Victims have control over the price of services and target/destination of smuggling from offenders
8.	Malicious nature	Focused on protection of individuals, because there is an element of means that contradicts with freedom of individuals	Focused on state public order interests, because it concerns on legal/illegal nature
9.	Views to victims	It is deemed that victims that require aids to return their independence	It is deemed “solely” as a subject because it only relates to the use of illegal services
10.	Element of Exploitation	Must exist, either as a purpose or has taken place	<ul style="list-style-type: none"> • As an aggravating condition • There is a condition where the exploitation also takes place, that actually may also result in the occurrence of trafficking in persons
11.	Regulation on rights of victims	The importance on fulfilment of rights of victims is explicitly addressed	Rights of victims become relevant if there are aggravating circumstances

In this event, exploitation circumstances may take place in people smuggling, with the following conditions: **In the first scenario**, smugglers/offenders comply with the agreement and migrants are safely transported to the destination state without any danger or exploitation. The relationship between smugglers and migrants is terminated, and only the state’s right that is violated. This scenario encompasses cases that are successful both for smugglers and smuggled individuals, hence this scenario tends to be undetected. No exploitation takes place.

In the second scenario, smugglers comply with the agreement, but migrants are eventually exploited in the destination state. However, such form of exploitation is the direct consequence of migrants’ status as migrants without any documents, not due to the smuggling itself. There is a possibility that the agreed prices for smuggling services are disproportionally higher than funds that are owned by migrants before commencing the travel. This has higher possibility to happen in long-distance travels and/or from the states with inferior currencies. Hence, migrants may be deceived to pay higher fees compared to the “market price”, but this does not necessarily constitute exploitation relating to works.

In the third scenario, smugglers do not comply with the agreement and migrants are exploited as a direct consequence. Exploitation may take place in various means, including as a result of force or fraud. In this scenario, migrants probably still have several exit options, but the costs to exit possibly too high (for instance, the possibility of long-term imprisonment sentence, as followed with extradition). In other cases, it is possible that victims do not have any available options – situation that may be similar with abduction. Travel may be commenced with full consent from migrants, but then it transforms to be trafficking in persons, whereas, migrants are forced to work and/or held hostage in a place that violates their consents. From the migrants' perspective, the illegal entry effort is unsuccessful. Information that are gathered by migrants before the travel turn out to be inaccurate, or they become fraud victims. In other words, for migrants with this scenario, there is a transformation/transition from people smuggling to trafficking in persons.

In the legal framework on people smuggling, this condition is declared as aggravating circumstances. As explained in the Legislative Guide, “this form of aggravating circumstance may take form as complete parallel violation, such as aggravated smuggling, or provisions that require the court to consider longer or graver sentences” in situations where the underlying violation has been determined and existence of aggravating circumstances (danger and exploitation). However, as noted in the Model Law against the Smuggling of Migrants by UNODC, the important aspect is that there is a relevant condition, “offenders are imposed with graver sentences compared to if this circumstance does not exist.”

3) Analysis on Legal Issues on Decisions

Decisions fail to breakdown differences between TIP and TPPM

According to the explanation addressed in the analysis on legal frameworks, then the key aspect to distinguish between Trafficking in Persons Offenses (Tindak Pidana Perdagangan Orang – TIP) with People Smuggling Offenses (Tindak Pidana Penyelundupan Manusia – TPPM) is the consent or vulnerability of victims. If it is ascertained that the illegal movement of persons from state territory happens, then if law enforcers connect such condition with trafficking in persons, the element of consent or vulnerability of victims becomes the key element that must be examined.

The first group of decisions, namely Decision No. 3/Pid.Sus/2021/PN Lsm with Basri Sihombing (BS) as the defendant and Decision No. 6/Pid.Sus/2021/PN Lsm with Nunung Fauziah Binti Sumarno (NF) as the First Defendant and James Maarseven Pasaribu (JMP) as the Second Defendant, containing charges and decisions in both cases that use Article 10 of Law No. 21 of 2007 on assisting or attempting to commit trafficking in persons offenses, are sentenced with the same sentences as referred to under Article 2, Article 3, Article 4, Article 5, and Article 6, while in those cases, the element of vulnerability of victims may be tested through examination of victim witnesses.

Moreover, if we observe the nature of trafficking in persons as explained above, namely that this offense harms the protection of individuals, differs from people smuggling that is deemed as an offense that harms the state sovereignty, or an offense that violates state authority.

Lack of Best Practices

In the second group of decisions, namely Decision No. 647/Pid.Sus/2021/PN Kis with Deni Franciska Alias Deni (DF) as the defendant, public prosecutors and judges also directly use Article 120 paragraphs (1) (2) of Law No. 6 of 2011 on Immigration relating to people smuggling, In this regard, legal facts that are gathered by judges attempt to describe that the act as committed by the defendant only relates to the aspect of illegally sending a person outside the Indonesian territory, namely Malaysia, by breaking down “Defendant sent TKI to Malaysia alongside with Rembes by using a boat containing TKI and the Defendant obtained wages/benefits at the amount of Rp2,000,000.00 (two million rupiah) as paid by Rembes to the

Defendant;" from such facts, the specific role in services/procurement with material/financial benefits may be inferred.

Aggravating Aspect on the Existence of Endangering or Exploitative Circumstances

In the legal framework of Article 120 of Law No. 6 of 2011 on Immigration concerning smuggling, there is an underlying note, namely non-existence of aggravating circumstances as mandated by the Protocol on People Smuggling, namely if such act is committed in endangering circumstances or existence of exploitative practices, but such aggravating circumstances are not addressed in the Law, hence, in practice, they are not considered at all, meanwhile, the indictment addresses endangering and exploitative practices that potentially take place, namely if money is demanded from victims in the shelter, and then transportation of victims will be performed using vessels with 3x8m dimension for 17 persons, also in the shelter, victims are only given 3 meals per day with the value of Rp20,000 that has the potential of endangering circumstances that will be experienced by victims. In judges' considerations on aggravating circumstances, such conditions are not considered.

4) General Issues on the Implementation of Criminal Law

Enforcement of Attempt Offense

The first group of decisions, namely Decision No. 3/Pid.Sus/2021/PN Lsm with Basri Sihombing (BS) as the defendant and Decision No. 6/Pid.Sus/2021/PN Lsm with Nunung Fauziah Binti Sumarno (NF) as the First Defendant and James Maarseven Pasaribu (JMP) as the Second Defendant, that contain charges and decisions in both cases that use Article 10 of Law No. 21 of 2007, the Article 10 of Law No. 21 of 2007 explains that the attempt must refer to Article 2, Article 3, Article 4, Article 5, and Article 6, hence, Article 10 itself is not a stand-alone offense, meanwhile, the act must refer to trafficking in persons offense in other articles, and in nature, attempt also serves as the expansion of liability or Strafausdehnungsgrund,²⁹⁶ not a stand-alone act.

5) Issues on Criminal Procedural Law

Error in formulating indictments

In the second group of decisions, namely Decision No. 647/Pid.Sus/2021/PN Kis with Deni Franciska Alias Deni (DF) as the defendant, the decision should have been an acquittal decision, because legal facts that serve as the basis for the imposition of decision is the act of the defendant that the defendant has ever sent TKI using a boat, but such act is cancelled due to robbery threat that leads the defendant to return, but regarding this fact, the Judges state that the element of "committing an act that has the purpose of obtaining benefits, either directly or indirectly, for oneself or another person" is fulfilled. Although, such series of acts is not included in the indictment, because the indictment only breaks down the harbouring of victims.

Although, the Indictment Letter, according to Circular of the Attorney General of the Republic of Indonesia Number: Se-004/J.A/11/1993 plays a central position in the examination of criminal cases in Courts and the Indictment Letter serves as the basis and restricts the scope of examination, it demands the ability/skill of Public Prosecutors in formulating the Indictment Letter. Article 143 paragraph (2) of Criminal Procedural Law (Kitab Undang-Undang Hukum Acara Pidana – KUHAP) also states that Public Prosecutors formulate indictment letters that are accompanied with dates and signed, and contain: full name, place of birth, age or date of birth, sex, nationality, place of domicile, religion and occupation of suspects. And then, there is also an obligation to describe in accurate, clear and complete manners on offenses that are indicted by mentioning the time when and place where offenses are committed. In the standard of KUHAP, Indictment Letters that fail to meet the provisions on those descriptions must be

²⁹⁶ Utrecht, Hukum Pidana I, Universitas Padjajaran: 1958, pp. 392 - 393

deemed to be null and void. Hence, this stresses the crucial role of indictment.

3. INTERSECTIONS BETWEEN TRAFFICKING IN PERSONS OFFENSE AND OTHER TRAFFICKING IN PERSONS OFFENSES

a. Annotation of Bad Practice Decisions²⁹⁷

In this case, both defendants are charged separately using the same articles in both indictments, namely Article 2 paragraph (1) of TIP Law; or Article 4 of TIP Law; or Article 10 of TIP Law. Against Agus Matius Wiranata as the defendant in decision No. 924/Pid.Sus/2019 PN Ptk, the defendant is convicted beyond reasonable doubt of committing offense in the first alternative indictment (Article 2 paragraph (1) of TIP Law). Meanwhile, against WS as the defendant in decision No. 919/Pid.Sus/2019 PN Ptk, the defendant is declared to be not proven beyond reasonable doubt of committing offense as indicted in the first, second, or third indictment.

Trafficking in persons offenses that use the modus of bride by order involve many parties in the series of activities. As for this case, there is Wu Ai Hu as the marriage broker in China who acts as the sponsor of WS as the defendant who acts as the marriage broker in Jakarta who provides foreign males from China, Agus Matius Wiranata as the defendant acts as a matchmaker agent who provides Indonesian females to WS upon request from Mommy Lusi, Aphen, and Heliana as 'matchmakers' in Pontianak. In practice, involved parties in such series of activities do not know each other and work directly, resulting in difficulties for law enforcers in determining criminal liability against involved parties.

In addition, TIP Law, specifically Article 2 paragraph (1) and Article 2 paragraph (2) do not provide specific limitations relating to the criteria on fulfilment of the exploitation element. Such condition may result in different views among law enforcers in determining when an act has the purpose of exploitation as associated with existing trafficking in persons modus, such as bride by order that is performed cross-border. Hence, this Section shall address several legal issues from those two decisions, as divided into the following questions:

1. What are the criteria for the fulfilment of the exploitation element under the TIP Law if associated with considerations of the panel of judges on the fulfilment of the exploitation element in decisions No. 924/Pid.Sus/2019 PN Ptk and No. 919/Pid.Sus/2019 PN Ptk?
2. How about the accuracy in proving indicted articles in these cases, especially relating to the act of bringing a person into the territory of the Republic of Indonesia to be exploited outside the territory of the Republic of Indonesia?

1) Analysis on the Proving of Exploitation Element

According to the indictment letter that is formulated in alternative manner against Agus Matius Wiranata as the Defendant in decision No. 924/Pid.Sus/2019/PN Ptk and WS as the defendant in decision No. 919/Pid.Sus/2019 PN Ptk, the Panel of Judges in both cases considers the fulfilment of elements in Article 2 paragraph (1) of TIP Law as charged by Public Prosecutors. In the decisions, the panel of judges convicts Agus Matius Wiranata as the defendant to be guilty in committing offense as referred to in Article 2 paragraph (1) of TIP Law in conjunction with Article 55 paragraph (1) point-1 of KUHP. Meanwhile, WS as the defendant is declared to be not guilty in committing offense as indicted in the first, second, or third indictment.

There is an interesting point in considerations of the Panel of Judges in both cases relating to the fulfilment of the exploitation element in Article 2 paragraph (1) of TIP Law, especially relating to when acts of the

²⁹⁷ See appendix 9. Facts of the Case of Decisions No. 924/Pid.Sus/2019/PN Ptk and No. 919/Pid. Sus/2019 PN Ptk

defendants in these cases may be declared to have fulfilled the exploitation element, of which, there are different views by the Panel of Judges in each case. Points of considerations of the Panel of Judges relating to the fulfilment of the exploitation element in these cases are as follows:

	Agus Matius Wiranata	WS
Role of the Defendant (Acts)	Recruiting Indonesian females	Harbouring and transferring foreign males from China
Role of the Defendant (Means)	Abuse of position of vulnerability and giving payments	Giving payments
Considerations of the Panel of Judges Relating to the Fulfilment of the Exploitation Element	<ul style="list-style-type: none"> • Marriage that is performed constitutes a form of abuse of position of vulnerability of SE as a witness who does not have feasible alternatives. • Such marriage restricts the basic freedom and results in the deprivation of freedom of SE. • Values of marriage and the existence of conditional agreement in such marriage indicates the purpose of exploitation against SE as a witness, although it has not constituted exploitation as a material offense. However, the formal offense has took place. 	<ul style="list-style-type: none"> • The essence of the performance of TIP is the existence of victims and those victims are aimed to be exploited or resulting in them being being exploited. • The issue in this case is the matchmaking, and the ones that become victims are Indonesian females. • The defendant acts as the provider of grooms from China.
Decision	Sentencing	Acquittal

Such comparison raises a question relating to the parameter on the fulfilment of the exploitation element under the TIP Law that is implemented by the panel of judges in deciding a case, especially Article 2 paragraph (1) and 2 paragraph (2) of TIP Law that are formal and material offenses, and its relation to the limitations on the fulfilment of the exploitation element in the practices of bride by order. Currently, the definition of exploitation provided by the TIP Law is as follows:

“The act with or without the consent from victims, including but not limited to prostitution, force labour or services, slavery or practices similar to slavery, servitude, extortion, physical, sexual, reproductive organs abuse, or unlawfully removes or transplants body organs and/or tissues or abuses energy or ability of a person by another person to obtain either economic or non-economic benefits²⁹⁸.”

Academic script of the TIP Law further mentions several forms of other exploitations beyond forms that are mentioned in the definition of exploitation under the TIP Law, one of them is servile forms of marriage, as described as an institution or practice where²⁹⁹:

1. A female, without any right to refuse, is promised or married for a payment of money or other rewards, as given to the parents, guardians or her family or persons or other groups; or
2. Husband of such female to another person upon payment of money or other properties; or
3. A widower with her husband passed away, inherited to another person.

²⁹⁸ Law of the Republic of Indonesia Number 21 of 2007 on Eradication of Trafficking in Persons Offenses, Art. 1 point 7.

²⁹⁹ Research and Development Center of the Supreme Court of the Republic of Indonesia, Naskah Akademis: Trafficking Perdagangan Manusia, Jakarta: Badan Litbang Diklat Kumdil Mahkamah Agung RI, 2007, p. 20

Means that are performed by the defendant in performing marriages between Indonesian females with foreign nationals from China are classified as a form of exploitation through servile forms of marriage. This condition may be inferred with such marriages being preceded with Agus Matius as the defendant who is promised a sum of money by WS if the defendant successfully procures Indonesian females to be married with foreign males from China. At the beginning, such payment of money will be performed if Indonesian females who are procured by the defendant have been successfully married and brought to China. Nevertheless, payment of money as promised by WS has been paid when those Indonesian females have been successfully married in Indonesia.

According to the statement from Agus Matius as the defendant, acting as a witness in the trial of WS as the defendant, the purpose of Agus Matius as the defendant when performing such matchmaking is to obtain the dowry money from WS that is originated from Wu Ai Hu as the manager of marriage broker in China. In the event of matchmaking involving SE, Agus Matius as the defendant is assisted by Heliana and Apheng who play roles in finding Indonesian females to be married, namely SE. Such act is performed by Apheng with the purpose of obtaining dowry money at the amount of between Rp20,000,000 and Rp30,000,000 and 'matchmaking' service fee at the amount of Rp10,000,000. The same with Heliana who obtains money at the amount of Rp5,000,000 from Agus Matius as the defendant as service fee, and money at the amount of Rp10,000,000 as the dowry money of SE that is taken by Heliana after being received by SE from Agus Matius as the defendant. This condition shows that the marriage performed by the defendants and other parties, namely Heliana and Apheng, is solely performed to obtain benefits. Moreover, Agus Matius as the defendant explains that the marriage process in Indonesia is only for formality purposes and the official marriage will be performed when arriving in China.

Servile forms of marriage or bride by order modus are businesses that pose brides to risky and vulnerability conditions from economic, information, and legal perspectives, both before and after the marriage is performed. Often times, brides in bride by order modus are originated from the regions that are economically underprivileged, encouraging themselves to take risks to reach a better future³⁰⁰. Confirmed by the reason of SE in performing the marriage, although according to her statement, without any dowry money and promise of proper live, SE would not be willing to marry Qu Baiyun because such marriage is solely performed due to her economic demands.

Although the academic script of TIP Law states that servile forms of marriage is a form of other exploitations, but a clear limitation on the fulfilment of the exploitation element between the enforcement of Article 2 paragraph (1) and Article 2 paragraph (2) of TIP Law is still necessary to identify whether an act has the purpose of exploiting a person or not. According to Wertheimer, on the most general level, exploitation occurs when a person takes unfair advantage from another person. In the situation of exploitation, Wertheimer explains that a person (A) obtains benefits when another person (B) is harmed and A will abuse the vulnerability of such person. According to Wertheimer, in terms of trafficking in persons, the law does not address the former, but focuses on the second situation, namely when B is transferred³⁰¹.

Furthermore, it is explained that the central element from Wertheimer's view on exploitation is the fundamental ground of the definition of trafficking in the Palermo Protocol³⁰². If those two views are

³⁰⁰ Alexis A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings*, (Westport: Praeger Publishers, 2009), p. 122

³⁰¹ Sasha Poucki and Jennifer Bryson Clark, "Conceptualizing the Exploitation of Human Trafficking" dalam *The SAGE Handbook of Human Trafficking and Modern Day Slavery* (SAGE Publications, 2019), p. 4.

³⁰² Article 3 letter (a) of Palermo Protocol addresses as follows:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

combined, then the essence of trafficking in persons lies on the element of ‘means’ that create the possibility of end purpose of trafficking in persons, namely exploitation³⁰³. As argued by Anugerah Rizki Akbari, an academic from Criminology Department of University of Indonesia, that the primary purpose of trafficking in persons is to exploit victims, as addressed under the Palermo Protocol and TIP Law. From the formulation of the offenses, the TIP Law puts more emphasis on means for the purpose of exploitation, namely through forces or threats³⁰⁴.

Clark and Poucki argue that instead of attempting to perform inductive search on the similarities between various examples of exploitative acts in the Palermo Protocol, exploitation should have been understood by using the Wertheimer’s theory which may conclude the understanding on the exploitation concept according to considerations of unlawful force measures as addressed in the Palermo Protocol³⁰⁵. In this case, Clark and Poucki view that exploitation examples as provided by the Palermo Protocol serve as the basic condition to ascertain that such crime encompasses activities that may be inferred to be legal, but in them, there are force means and methods within the series of trafficking that take place³⁰⁶.

In relation to the limitations on the fulfilment of exploitation element in bride by order practices, if viewing the examples of this case, according to Anugerah Rizki Akbari, exploitation may be inferred to take place if, from the beginning, the offenders know that when victims are transferred to China, they will have improper lives³⁰⁷. This condition shows that the matchmaking practices in bride by order does not necessarily constitute trafficking in persons offenses. The emphasis on identifying the existence of trafficking in persons still lies on the purpose of exploiting a person. As Aronowitz argues that the bride by order constitutes a trafficking in persons offense if a person marries another person with the purpose of exploiting such person³⁰⁸. The exploitation in this event may be committed through various means, such as marrying a person to force the spouse to perform prostitution, or exploitative domestic works. In this event, according to Aronowitz, the “Husband” may play a role within the cycle of trafficking in persons or as an individual who feels entitled to exploit his spouse³⁰⁹.

Hence, in this case, to be able to identify whether the acts of both defendants have the purpose of exploitation or not, the intention of the defendants in marrying Indonesian females with foreign males from China and transferring them to China must be assessed. To prove the existence of the purpose of exploitation from the defendants is another challenge itself from the inquisitorial perspective in trials when such exploitation has not happened materially. The proving of the purpose of exploitation may be reinforced from material acts in the acts and means of the defendants that illustrate the existence of the purpose of exploitation. For instance, in the act of recruitment, there are means, such as fraud or debt trap that is later must be dived deeper to show that the defendants have the purpose of exploitation over victims even though the exploitation has not happened materially.

2) Analysis on the Proving of Articles in Indictment under TIP Law

Indictment letters in these cases are formulated in alternative forms with these articles used in the indictments, Article 2 paragraph (1) of TIP Law in conjunction with Article 55 paragraph (1) point-1 of KUHP; or Article 4 of TIP Law in conjunction with Article 55 paragraph (1) point-1 of KUHP; or Article 10 of TIP Law in conjunction with Article 55 paragraph (1) point-1 of KUHP. The panel of judges in both

³⁰³ *Id.*, p. 5.

³⁰⁴ Presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons, on 11 November 2022, at Hotel Ashley Jakarta Wahid Hasyim.

³⁰⁵ Poucki and Clark, *supra* note 4.

³⁰⁶ *Id.*, p. 7

³⁰⁷ Presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons, on 11 November 2022, at Hotel Ashley Jakarta Wahid Hasyim.

³⁰⁸ Aronowitz, *supra* note 3, p. 124.

³⁰⁹ *Id.*

cases with separate charges considers the first article in the indictment as addressed in the charges of Public Prosecutors. In their decisions, against the case with Agus Matius as the defendant, the defendant is convicted to be proven, beyond reasonable doubt, of committing offense in the article in the first indictment, namely Article 2 paragraph (1) of TIP Law in conjunction with Article 55 paragraph (1) point-1 KUHP. On the other hand, against WS as the defendant, the Panel of Judges imposes an acquittal decision with the reason that there is a different intention between WS as the defendant with Agus Matius as the defendant relating to matchmaking that is performed and the act of WS as the defendant fails to fulfil the intention as the person who performs, orders or participates. Besides that, according to the considerations of the Panel of Judges, WS as the defendant plays a role as the provider of foreign grooms from China, and the victims are Indonesian females. Hence, the Panel of Judges considers that WS as the defendant is not the party who performs the recruitment of a person with the position of vulnerability for the purpose of exploitation.

Article 2 paragraph (1) of TIP Law addresses the elements of acts, means, and purpose of exploitation in trafficking in persons offenses. If associated with the acts of the defendants in this case, of series of acts and means addressed in Article 2 paragraph (1) of TIP Law, then the recruitment act through the abuse of position of vulnerability for the purpose of exploitation within the territory of the Republic of Indonesia is the element that is closest to series of acts of the defendants. However, there is a possibility on the implementation of other articles under the TIP Law that intersect with Article 2 paragraph (1) to be implemented in this case, namely Article 3 of TIP Law that addresses the act of bringing a person into the territory of the Republic of Indonesia to be exploited within or outside of the territory of the Republic of Indonesia.

According to the excerpt of the interview with Prosecutor, Article 3 of TIP Law is more accurate to be used in case Indonesia is the transit state of a series of trafficking in persons offenses, similar to acts of the defendants in this case³¹⁰. This condition is in line with opinion from Anugerah Rizki Akbari that there are two models of acts in Article 3 of TIP Law, namely bringing a person from outside the territory of the Republic of Indonesia to be exploited within the territory of the Republic of Indonesia, or bringing a person into the territory of the Republic of Indonesia to be exploited outside the territory of the Republic of Indonesia (transit). Besides from the intersection with Article 3 of TIP Law, if it is traced back to the formulation of articles in the indictment in this case, between Article 4 and Article 10 of TIP Law, according to Prosecutors, it would be more accurate if judges consider Article 10 of TIP Law in relation to the attempt in assisting or performing trafficking in persons offenses. To help the analysis, intersections of articles in this section may be described as follows:

³¹⁰ Interview with Prosecutors, on 29 November 2022, performed online via Zoom Meeting.

Table of Characteristics of Articles under the TIP Law				
	Article 2 paragraph (1)	Article 3	Article 4	Article 10
Offenders	Anyone	Anyone	Anyone	Anyone
Acts of Offenders	<ul style="list-style-type: none"> • Divided into three series of elements: • Acts: • Recruitment; • Transportation; • Harboring; • Transfer; • Movement; • Receipt of a person • Means: • Threat; • Use of force; • Abduction; • Holding hostage; • Fraud; • Deception; • Abuse of power or position of vulnerability; • Debt trap or giving payments or benefits, despite achieving the consent from the person having control over another person <p>Purpose: To exploit such person</p>	Entering a person into the territory of the Republic of Indonesia with the intention of being exploited within the territory of the Republic of Indonesia or another state	Bringing Indonesian nationals out of the territory of the Republic of Indonesia with the intention of being exploited outside the territory of the Republic of Indonesia	Assisting or attempting to commit trafficking in persons offenses
Victims	Indonesian nationals and foreign nationals	Indonesian nationals and foreign nationals	Indonesian nationals	Indonesian nationals and foreign nationals
Place of Crime	Within the territory of the Republic of Indonesia	Within the territory of the Republic of Indonesia or in another state	In another state	Within the territory of the Republic of Indonesia or in another state

Article 2 paragraph (1) and Article 3 of TIP Law have intersecting elements from three aspects, namely: first, the act of offenders in bringing a person into the territory of the Republic of Indonesia; second, victims that might be Indonesian nationals or foreign nationals; and third, the place where the act or purpose of exploitation takes place, namely within the territory of the Republic of Indonesia with the available alternatives of locus delicti in Article 3 of TIP Law. According to the excerpt of the interview with Prosecutor, basically, Article 2 paragraph (1) is designated for the act of offenders with the intention of exploiting victims within the territory of the Republic of Indonesia. Differs from Article 3 of TIP Law, the act of the offenders in bringing another person from outside into the territory of the Republic of

Indonesia is not solely to exploit within the territory of the Republic of Indonesia, but it also applies for transit acts with the purpose of exploitation outside of the territory of the Republic of Indonesia. This condition is emphasized in the elucidation of Article 3 of TIP Law that provisions under Article 3 “intended that the territory of the Republic of Indonesia as the destination or transit state”. According to Prosecutors, if from the beginning, offenders have the intention to directly exploit victims within the territory of the Republic of Indonesia, then it is more accurate for Article 2 paragraph (1) of TIP Law to be implemented.

In this case, if a series of acts are only deemed as the act of WS in bringing foreign males from China into the territory of the Republic of Indonesia to be married with Indonesian females in Pontianak, then such act is classified as a series of acts addressed in Article 2 paragraph (1) of TIP Law. However, the intention of the defendants from the beginning must be taken into considerations, namely to bring Indonesian females and foreign males from China to China after being married in Indonesia, but the act was only performed up to the marriage in Indonesia before the defendants were arrested by the police. This condition leads to elements in Article 10 of TIP Law concerning the act of assisting or attempting trafficking in persons offenses. The attempt (poging) in committing offense is addressed in Article 53 paragraph (1) of KUHP consisting of three elements, namely: (1) the existence of intention; (2) preparation of act; (3) unfinished act, not solely due to the offenders’ own will.

Article 10 of TIP Law also applies for the act of assisting the attempt to commit trafficking in persons offenses. There is a case similar with cases in this analysis, namely Decision Number 400/Pid.Sus/2019/PN.Ktp with Kintim as the defendant, which is a trafficking in persons with the bride by order modus against Indonesian nationals to China with the promise of proper lives. The defendant in such case persuades, ascertains victims, and gives money to victims’ family with the purpose of obtaining benefits from the defendant’s services³¹¹. The purpose of defendant in such case is similar with the purpose of Agus Matius as the defendant and WS as the defendant who perform the matchmaking to obtain benefits from their services. In decision Number 400/Pid.Sus/2019/PN.Ktp, the panel of judges decides the case using Article 10 of TIP Law. Hence, observing the series of events in the case with Agus Matius as the defendant and the case with WS as the defendant, then it would be more accurate for the Panel of Judges to prove Article 10 of TIP Law in relation to attempts in assisting or committing trafficking in persons offenses.

b. Annotation of Best Practice Decisions³¹²

There are several best practice Best Practices in the settlement of this case that shall be analysed in the following sections:

1) Considerations of the Panel of Judges on the Fulfilment of Elements of Articles in Indictments

Mujiono as the defendant is indicted with the indictment letter as formulated alternatively. In considerations, the panel of judges considers Article 4 of TIP Law as the first alternative indictment. There are several noteworthy factors relating to how the panel of judges considers the fulfilment of elements in Article 4 of TIP Law.

In relation to the element of “bringing”, the panel of judges gives broader considerations relating to the fulfilment of such element. According to the panel of judges, the element of “bringing” is not strictly limited to the act of bringing a person that must be accompanied by the offenders. Meanwhile, the act of bringing may be performed using transportation means or transportation or other transfer means or

³¹¹ Justitia Avila Veda, et. al., *Panduan Penanganan Tindak Pidana Perdagangan Orang*, (Jakarta: International Organization for Migration (IOM) Indonesia, 2021), pp. 125-126.

³¹² See appendix 10. Facts of the Case of Decision No. 19/Pid.Sus/2020/PN Jkt.Tim

departing without the offenders accompanying the person. In regards to the act of the defendant in this case, the defendant indirectly accompanies the departure of student candidates to Taiwan.

The panel of judges then considers the fulfilment of “exploitation” element by considering the act of defendant that abuses the position of vulnerability of student candidates as high school graduates who wish to pursue high education abroad. In addition, there are means performed by the defendant in exploiting those student candidates, such as debt traps to student candidates through request of departure fees, leading to the loan that has never been expended by student candidates. Eventually, salaries that were received by students when they worked in Taiwan ran out and even minus NT 5000 to repay debt instalments due to debt traps orchestrated by the defendant. This condition results in economic losses and psychological harms to student candidates. The panel of judges deems that the exploitation element has been fulfilled when salaries of the students were fully expended to repay debts and the defendant has obtained benefits from the departure and sending of workers through the modus of studying abroad.

If referring to three principles of trafficking in persons as presented by Anugerah Rizki Akbari, an academic at the Criminology Department of Universitas Indonesia, by citing Global Report on Trafficking in Persons 2020, that the occurrence of trafficking in persons offenses encompasses (1) exploitation as the primary purpose; (2) existence of absolute control over victims; and (3) restriction of freedom of victims³¹³.

Considerations of the panel of judges relating to the fulfilment of “exploitation” element in this case are in line with Wertheimer’s opinion that exploitation generally happens when a person gains benefits over losses suffered by another person by abusing the vulnerability of such person³¹⁴. When the exploitation element is attached to a person, conceptually, it generally relates to the vulnerability of such person that becomes the object of exploitation³¹⁵. As explained in The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol by UNODC, namely “To exploit a person is to use a weakness in order to gain substantial control over the person’s life or labor.”³¹⁶

According to elucidation under the TIP Law, a form of exploitation is forced labour that is defined as “work conditions that arise through means, plans, or patterns intended for a person to be certain that if the person does not perform certain works, then the person or person’s dependents will suffer physically or psychologically.”³¹⁷ ILO Convention No. 29 defines force labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” Furthermore, relating to voluntariness, ILO stresses that the voluntariness must be understood as persons are involved in activities without the persons’ free will, or after they are involved, they find that they cannot leave works within a reasonable time period, and without any payments or other rights³¹⁸.

One of general mechanisms used by offenders of trafficking in persons offenses is debt trap as a form of control over victims. Generally, debts may occur from travel expenses for smuggling persons to the destination country, or debts may arise in the form of continuous financial exploitation, even after the debts have been repaid by victims, they cannot leave freely³¹⁹. Similar to the act of the defendant in this case that falls under the category of exploitation in the form of force labour and existence of debt trap.

³¹³ Presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses, on 11 November 2022, at Hotel Ashley Jakarta Wahid Hasyim.

³¹⁴ Sasha Poucki and Jennifer Bryson Clark, “Conceptualizing the Exploitation of Human Trafficking” dalam The SAGE Handbook of Human Trafficking and Modern Day Slavery (SAGE Publications, 2019), p. 4.

³¹⁵ UNODC, The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol, (Vienna: United Nations, 2015), p. 21

³¹⁶ *Id.*

³¹⁷ Elucidation of Law Number 21 of 2007 on Eradication of Trafficking in Persons Offenses.

³¹⁸ UNODC, supra note 3, p. 31.

³¹⁹ Alexis A. Aronowitz, Human Trafficking, Human Misery: The Global Trade in Human Beings, (Westport: Praeger Publishers, 2009), p. 57

Student candidates initially willing to work in Taiwan as part of the program of simultaneous studying at university and working as offered by the defendant. However, there are debt traps that make student candidates to must work without obtaining benefits because the incomes must be used to repay such debts. In this condition, student candidates are unable to leave their works because there are debts that must be repaid. On the other hand, from losses suffered by student candidates, the defendant obtains benefits. Therefore, this condition that is referred as the panel of judges as a form of exploitation resulting in economic losses and psychological harms to those student candidates.

2) Aspect of Settlement of Cases in Other Countries

According to the chronology of this case, Asep Muhtar, a witness, objects the salary cut up to minus NT 5000 and then the witness reported it to the Department of Manpower in Taiwan and forwarded such report to the Taiwanese Police, hence, the passport of Asep Muhtar was returned by the Taiwan Ensunny Spring Agency Co.Ltd. Afterwards, the witnesses were placed at Nantau Shelter for 3 (three) months to be inquired by the Taiwanese Police and were present at trials for 2 times before finally the Taiwanese Prosecutor's Office decided and permitted witnesses to return to Indonesia and proceed with legal process against the Agency that exists in Indonesia. Meanwhile, cases that have been reported in Taiwan will continue to be processed and assisted by Taiwanese Police and Indonesian Economy and Trade Office (Kantor Dagang dan Ekonomi Indonesia – KDEI).

However, relating to the process of this case in Taiwanese court, the panel of judges does not consider such condition in this case. According to the excerpt from the interview by Djujanto, a Judge at the District Court of South Jakarta, the judges should have broader perspectives on felonies that occur in the globalization era, especially trafficking in persons offenses that relate to cross-border felonies. Judges must consider aspects that are broader than mere losses on national scope, but also losses of another state (international)³²⁰. Furthermore, according to Djujanto, to perform cross-border settlement, the legal system needs to be revisited, for instance, the existence of an extradition agreement, and also the ability of law enforcers in settling cross-border cases³²¹.

Asides from settlement through Taiwanese court, there is a defense from the university that students have the independence to choose their place of work and there should be no forces to work. Furthermore, the university states that they have initiated an investigation on allegation of torture and promises to restore unpaid salaries, and will instruct the partnering company to comply with employment law³²².

3) Aspect of Restitution in Court Decisions

In this case, Asep Muhtar and Ana Mariana as witnesses file for restitution at the amount of Rp150,000,000 (one hundred and fifty million rupiah). Provisions concerning restitution have been addressed in Article 48 paragraph (2) of TIP Law that restitution is granted and also addressed in the verdict of court decision on trafficking in persons offenses cases. In this decision, the panel of judges imposes decision with the verdict that also orders the defendant to pay restitution to Asep Muhtar and Ana Mariana as victim witnesses at the amount of Rp50,000,000 (fifty million rupiah) with joint and several liability against Mujiono as the defendant and Lukas as a witness. If they are unable to pay restitution, then the defendant is imposed with substitutable confinement sentence for 3 (three) months.

The amount of restitution granted by the Panel of Judges in the case is lower than what was requested. From procedural aspect, the authority on calculating the amount of compensation in granting restitution

³²⁰ Interview with Djujanto, 17 November 2022, conducted in the District Court of South Jakarta.

³²¹ *Id.*

³²² Taipei Times, "University, broker deny overworking 19 first-year students from Indonesia", 30 June 2019, accessed on 3 November 2022. <https://www.taipeitimes.com/News/taiwan/archives/2019/06/30/2003717869>

lies on Witnesses and Victims Protection Agency (Lembaga Perlindungan Saksi dan Korban – LPSK)³²³ to determine the appropriateness, time period, and amount of fees necessary for the grant of aids according to the authority of doctors, psychiatrists, psychologists, hospitals, and/or medical rehabilitation centers³²⁴.

The ground for deciding restitution below the amount that was requested in this case is not accompanied with further considerations by the Panel of Judges in the decision. According to the excerpt of interview with Djuyamto, a Judge at the District Court of South Jakarta, if judges do not break down considerations of their verdicts, then such condition falls under the category of judges' error that later on, a case review legal remedy may be exhausted³²⁵. The ground for case review on the basis of judges' error or a manifest error as addressed in Article 263 paragraph (2) letter c of Criminal Procedural Law (KUHP), namely:

“Request for Case Review is performed on the basis of:

- a. *if there are new conditions that raise a strong allegation, that if such condition had been known when the trial was ongoing, the result will be a pure acquittal decision or dismissal of all legal prosecutions or prosecutions of public prosecutors cannot be accepted or against such case, a lesser criminal provision is implemented;*
- b. *if in various decisions, there is a statement that a factor has been proven, however, the factor or condition as the basis and ground of decision that is declared to be proven, otherwise has contradicted with one another;*
- c. *if such decision has clearly shown judges' error or a manifest error.”*

Against several opinions of academics on the scope of this matter, such as M. Yahya Harahap argues that the judges' error or manifest error encompassing including a factor that does not fulfil legal provisions³²⁶. In addition, Adami Chazawi argues that the scope of ground of such case review consists of four factors, firstly, legal considerations or verdicts of decisions have clearly contradicted legal principles and norms. Secondly, verdicts of decisions that are completely not supported with legal considerations. Thirdly, judicial decisions that are misleading, either misleading on facts (*feitelijke dwaling*), or misleading on laws (*dwaling omtrent het recht*). Fourthly, courts have interpreted a norm that clearly violates the intention of lawmakers concerning the establishment of such norm³²⁷.

Opinion from Djuyamto relating to case review on non-existence of judges' considerations in deciding the restitution amount below what was requested is in line with the second opinion of Adami Chazawi, that verdicts that are not supported with legal considerations fall under the scope of case review due to judges' error. According to the excerpt of interview with Djuyamto, the ground for considerations of assessment on the amount of restitution should have been based on the proportionality between losses with the capacity of the offenders to pay. This measure is performed for compensation to still be able to be paid and does not exceed the capacity of the offender that may result in restitution to be unable to be paid by the offenders³²⁸. This reason is in line with the opinion from the counsels from Said Niam, Public Lawyer of LBH APIK, that in practice, the proportionality between losses with the ability of the defendant to pay restitution is necessary for restitution applications to not only be granted in decisions, but to be enforceable to accommodate justice to victims³²⁹.

³²³ Law of the Republic of Indonesia Number 31 of 2014 on Amendment to Law Number 13 of 2006 on Protection of Witnesses and Victims, Art. 12A paragraph (1) letter j.

³²⁴ Regulation of the Government Number 7 of 2018 on Grant of Compensation, Restitution, and Aid to Victim Witnesses, Art. 41.

³²⁵ Djuyamto, supra note 8.

³²⁶ Muhammad Yasin, “Makna Kekhilafan Hakim atau Kekeliruan yang Nyata”, Hukumonline.com, 3 July 2016, accessed on 6 December 2022, <https://www.hukumonline.com/berita/a/makna-kekhilafan-hakim-atau-kekeliruan-nyata-lt5778a934e3ab2/>

³²⁷ *Id.*

³²⁸ Djuyamto, supra note 8.

³²⁹ Presented in the Focus Group Discussion on Legal Review on the Implementation of Law No. 21 of 2007 on Eradication of Trafficking in Persons Offenses, on 11 November 2022, at Hotel Ashley Jakarta Wahid Hasyim.

In its development, Regulation of the Supreme Court Number 1 of 2022 on Procedures for Settlement of Applications for and Payments of Restitution and Compensation to Victims of Offenses. Under such framework, there are provisions that after restitution applications are filed, judges examine documents of restitution applications and provide legal assessment on evidences presented in courts and consider them in the decisions³³⁰. Decisions must contain several aspects, namely³³¹:

- a. Statements on the grant or refusal of restitution applications;
- b. Ground for grant or refusal, either partially or the whole restitution applications; and
- c. Amount of restitution that must be paid by defendants or defendants' parents in case the defendants are children and/or third parties.

Hence, judges are allowed to decide below the amount of restitution requested if it is accompanied with considerations that are incorporated in breakdown of judges' description in the decisions. Judges' considerations in deciding such amount of restitution may be based on the consideration on proportionality between losses suffered by the defendant with the ability of the defendant to pay restitution for the fulfilment of rights of victims.

³³⁰ Regulation of the Supreme Court Number 1 of 2022 on Procedures for the Settlement of Applications for and Payment of Restitution and Compensation to Victims of Offenses, Art. 8 paragraph (11).

³³¹ *Id.*, Art. 8 paragraph (12).

CHAPTER V

CHALLENGES AND OBSTACLES IN HANDLING TRAFFICKING IN PERSONS OFFENSES CASES



In analyzing the legal system, there are several variables affecting the success of a legal system in achieving the expected purpose. Lawrence M. Friedman expresses that the success of the law depends on three elements, namely the legal substance, legal structure, and legal culture.³³² The legal substance relates to the frameworks of laws and regulations, legal structure relates to law enforcers and their institutions, and legal culture relates to matters affecting the operation of law, either by citizens or the government.

1. ASPECT OF LEGAL SUBSTANCE

a. Overlapping Criminal Provisions

From regulatory framework, criminal provisions under the TIP Law basically have followed the formulation in the Palermo Protocol. Nevertheless, in the domestic ratification process, lawmakers should perform harmonization to prevent any overlapping or dualism of regulatory frameworks on offenses. For example, annotation in cases involving children above shows that the regulation on exploitation under the TIP Law and Child Protection Law that are not accompanied with the method to distinguish those offenses if the victims of exploitation are children.

Such intersecting regulatory may lead to uncertain law enforcement, resulting in injustice to the parties. For offenders, this condition has the potential of making them to be harmed due to incorrect imposition of articles or being imposed with graver sentences compared to what should have been. For victims, this confusion may dismiss rights of victims to the truth and other rights as specifically addressed under the TIP Law. Moreover, this situation could be abused as “open table” for law enforcers (Aparat Penegak Hukum – APH) to commercially transact articles that may be imposed on offenders.

Intersections of criminal provisions are recently found from the enactment of Law No. 12 of 2022 on Sexual Violence Offenses (TPKS Law). The new regulation on sexual violence offenses (Tindak Pidana Kekerasan Seksual – TPKS) addresses criminal provisions that are similar with offenses that are prohibited under the TIP Law. Relating to the TPKS Law, there are provisions that specifically prohibit offenses of acts using certain means leading to sexual exploitation.³³³ This framework certainly raises questions, especially for APH, because the TIP Law basically addresses similar provisions that are covered in article 2 of TIP Law.

Nevertheless, the TPKS Law addresses a solution that essentially takes form as provisions that lock the special characteristic of sexual violence, therefore such acts should have been enforced by referring to provisions under the TPKS Law. In this event, the article in question is Article 4 letter j. This provision essentially serves as the ground for TPKS Law to continue to prevail based on the *lex specialis* principle if there are similar criminal provisions on sexual violence under other laws.

Furthermore, KUHP 2022 also explicitly addresses in its closing provisions that revoke Articles 2 and 22 of TIP Law when KUHP 2022 enters into force.³³⁴ However, KUHP 2022 does not revoke all offenses under the TIP Law, meaning that other articles under the TIP Law continue to prevail. On the other hand, the enforcement of Article 2 of TIP Law that is replaced by Article 459 of KUHP 2022 basically does not undergo significant changes and only undergoes adjustment pertaining fines sentence that refers to Article 79 of KUHP 2022.

³³² CSA Teddy Lesmana, Pokok-Pokok Pikiran Lawrence M Friedman; Sistem Hukum Dalam Perspektif Ilmu Sosial, <https://nusaputra.ac.id/article/pokok-pokok-pikiran-lawrence-meir-friedman-sistem-hukum-dalam-perspektif-ilmu-sosial/>, accessed on 25 January 2023.

³³³ Article 12 UU TPKS

³³⁴ Article 630 paragraph (1) letter p of KUHP 2022

b. Weak Regulation on Restitution

Law Number 21 of 2007 on Eradication of Trafficking in Persons has given huge attention to victims, namely in the form of restitution that must be paid by trafficking in persons offenses offenders as compensation to victims,³³⁵ and to guarantee rights of victims to obtain medical rehabilitation, social rehabilitation, return, and social reintegration from the government if victims experience physical and psychological harms due to trafficking in persons offenses³³⁶.

Lacking considerations of law enforcers, both Prosecutors and Judges, also constitutes a separate challenge in the efforts to fulfil restitution rights of victims. As depicted in decision No. 19/Pid.Sus/2020/PN.Jkt.Tim, the panel of judges decides the amount of restitution below the amount that is requested by victims without being accompanied with considerations that are incorporated in decisions. In relation to this, Djuyamto, a Judge at the District Court of South Jakarta, argues that the judges should have provided considerations in deciding the amount of restitution and the unavailability of breakdown on considerations of judges on the verdict of decisions constitutes a form of judges' error which triggers case review legal remedy to be filed against using the ground on existence of judges' error or a manifest error³³⁷. This condition is in line with Article 197 of KUHAP that the inexistence of considerations that serve as the ground for the determination of mistake of the defendants causes the decisions to be null and void.

Regulation of the Supreme Court Number 1 of 2022 on Procedures for the Settlement of Applications for and Payment of Restitution and Compensation to Victims of Offenses addresses several aspects that must be provided by judges in decisions relating to restitution, one of them is the reason to grant or refuse, either partially or the whole restitution applications³³⁸. Furthermore, Djuyamto explains that considerations in deciding the amount of restitution should be based on the proportionality between losses suffered by victims with the capacity of the defendants in paying restitution³³⁹.

Asides from the challenge in the forms of lacking considerations of Judges relating to the fulfilment of restitution rights of victims, the next substantial challenge is the performance of restitution payment itself. According to Article 48 of TIP Law, the payment of restitution is performed within 14 (fourteen) days from the announcement of decisions that have secured the final and binding status. In the event that the restitution is not paid within such time period, the court imposes a warning letter to the restitution payor, and if such warning letter is not imposed within 14 (fourteen) days, then the court orders public prosecutors to seize assets of the convicts and auction those assets for the payment of restitution.³⁴⁰ If offenders are unable to pay restitution, then offenders are imposed with substitutable confinement sentence of no longer than 1 (one) year.³⁴¹

Those provisions above otherwise harm restitution rights of victims because there is no force measure mechanism in terms of seizure of assets or properties of offenders to be later auctioned in order to pay restitution to victims. The weakness of this regulation is further shown with the existence of available options for offenders to not pay restitution and replace it with confinement sentence if such offenders are unable to pay restitution, whereas, the assessment on the inability of such offenders is not supported with adequate mechanism to prove the veracity of the condition. This situation is in line with the opinion from Bobi Anwar Ma'arif as the General Secretary to Indonesian Migrant Workers Union

³³⁵ Law Number 21 of 2007 on Eradication of Trafficking in Persons Offenses, Art. 48.

³³⁶ *Id.*, Art. 51.

³³⁷ Interview with Djuyamto, 17 November 2022, conducted at the District Court of South Jakarta.

³³⁸ Regulation of the Supreme Court Number 1 of 2022 on Procedures for the Settlement of Applications for and Payment of Restitutions to Victims of Offenses, Art. 8 paragraph (12) letter b.

³³⁹ Djuyamto, *supra* note 4.

³⁴⁰ PTPPO Law, art. 50 paragraphs (1), (2) and (3).

³⁴¹ *Id.*, art. 50 paragraph (4).

(Serikat Buruh Migran Indonesia – SBMI) that the availability of substitution mechanism in the forms of confinement sentence results in the enforcement of restitution to be not optimally performed and may harm the victims because the offenders have the option to not pay restitution and substitute it with confinement³⁴². As data from LPSK in 2021 show that in 2021, the amount of restitution to victims reaches Rp7.43 billion, of that figure, judges only grant decisions for Rp3.71 billion. Unfortunately, the amount of restitution that is paid by offenders to victims was only at Rp279.53 million.³⁴³

2. ASPECT OF LEGAL STRUCTURE

a. Ineffective Performance of Ministries/Agencies in Handling TIP

Within the context of law enforcement, there are several agencies that essentially may contribute to the handling of TIP cases, but they have limited authorities. In TIP cases involving migrant workers, National Board for Protection of Indonesian Migrant Workers (Badan Pelindungan Pekerja Migran Indonesia – BP2MI) is deemed as the competent agency that understands practices in unveiling TIP practices under the guise of distribution of Indonesian workers abroad. Unfortunately, BP2MI does not have the authority to be involved in case handling, either as the investigator or as the preliminary investigator. Although, according to one of the Prosecutors who handles TIP cases, the role of BP2MI is needed as the civil servants acting as investigators (Penyidik Pegawai Negeri Sipil – PPNS).³⁴⁴

Within the context of recovery of victims, although rights of victims have been incorporated in legal norms, however, the grant of such rights in practice often facing obstacles. Take right to restitution as an example, Erni Mustikasari as the Senior Primary Prosecutor of the Prosecutor's Office of the Republic of Indonesia deems that prosecutors on regional level experience difficulties in communicating with Witnesses and Victims Protection Agency (Lembaga Perlindungan Saksi dan Korban – LPSK) in relation to the calculation of the amount of restitution that should be paid by the offenders to victims, considering that the LPSK as the authorized agency to calculate compensation in terms of payment of Restitution only exists in Jakarta.³⁴⁵

b. Non-optimal Monitoring and Evaluation (Money) and Data Integration

One of the efforts performed by the government to optimize the prevention and eradication of trafficking in persons in Indonesia is by establishing the Taskforce for Prevention and Handling of Trafficking in Persons Offenses (PP-TIP Taskforce) under regulation of the president in 2008. Such taskforce is divided into 2, namely central taskforce as chaired by the Coordinating Minister for Human Resources Development and Culture and regional taskforces as chaired by Vice Governors or Provincial Regional Secretaries.³⁴⁶ Among various duties mandated, one of the important duties of the PP-TIP Taskforce is performing the reporting on monitoring and evaluation.³⁴⁷ Reporting on monitoring is performed in tiers and periodic³⁴⁸ namely through annual, mid-term and end-term evaluations.³⁴⁹ Evaluation is performed against National Action Plan (Rencana Aksi Nasional – RAN) for the central taskforce and Regional Action Plan (Rencana Aksi Daerah – RAD) for regional taskforces.

³⁴² Bobi Anwar Maarif, the Opinion was presented in the performance of FGD, 11 November 2022.

³⁴³ Mutia Fauzia, "LPSK: Eksekusi Restitusi Pelaku Kejahatan Rendah, Ada Kelemahan Regulasi", nasional.kompas.com, 4 March 2022, accessed on 9 January 2023, <https://nasional.kompas.com/read/2022/03/04/09410771/lpsk-eksekusi-restitusi-pelaku-kejahatan-rendah-ada-kelemahan-regulasi>.

³⁴⁴ Herry Wiyanto, the Opinion was presented in the performance of FGD, 12 December 2022.

³⁴⁵ Erni Mustikasari, the Opinion was presented in the Interview, 17 November 2022.

³⁴⁶ KPPPA & IOM, Petunjuk Teknis Operasional Gugus Tugas Pencegahan & Penanganan Tindak Pidana Perdagangan Orang, Jakarta: IOM, p.40.

³⁴⁷ Regulation of the President of the Republic of Indonesia No. 22 of 2021 on Amendment to Regulation of the President No. 69 of 2008 on the Taskforce for Prevention and Handling of Trafficking in Persons Offenses, Article 4 paragraph (2) letter i.

³⁴⁸ *Ibid*, Article 16

³⁴⁹ Regulation of the President of the Republic of Indonesia No. 69 of 2008 the Taskforce for Prevention and Handling of Trafficking in Persons Offenses, Article 26.

Monitoring and evaluation that are on target ideally may be very helpful in the process of planning future programs and policies within the sectors of prevention and eradication of trafficking in persons. Unfortunately, within the context of sub-taskforce of law enforcement and development of legal norms in PP-TIP Taskforce, such ideal goal has not fully been realized due to several factors. First, indicators for the assessment of targets of the action plan within the sector of law enforcement focus on the number of achievements, for instance, the number of TIP cases handled, number of offenders who are imposed with sentences, the number of victims who are granted with restitution and rate of seizure of assets of TIP offenders.³⁵⁰ Such indicators fail to answer challenges discovered in practice in terms of law enforcement of TIP cases, such as, what about the inquisitorial process of TIP cases that intersect with other offenses, lacking number of restitution applications, and no available decisions that impose execution of assets. The Annual Report of Ministry of Women Empowerment and Child Protection (Kementerian Pemberdayaan Perempuan dan Perlindungan Anak – KPPPA) in 2018 actually mentions those challenges,³⁵¹ but the action plan that is formulated is not on point in answering those challenges. Bambang Pristiwanto states that the focus of achievement is given to the number of points, making it difficult to measure the value and quality of TIP law enforcement and to identify obstacles that are discovered in practice.³⁵² From a research conducted by IJRS, for instance, it mentions of 435 TIP cases that were decided by courts during 2019-2021, at least there are 40 cases that are not TIP.³⁵³ Besides, such research also finds that of 372 TIP cases, only 17% of them that contain restitution applications and 12% that are granted by the panel of judges.³⁵⁴ The law enforcement situation in practice is not depicted in indicators and achievements of the TIP action plan, both on central and regional levels.

Second, data on handling of TIP cases that have not been integrated. Currently, data on TIP handling are registered separately by each member of the taskforce.³⁵⁵ In the TIP Rakornas 2022, Mahfud MD mentioned that the government should encourage an integrated data system to be able to trace law enforcement of TIP cases, especially from the investigation up to prosecution stages.³⁵⁶ Departing from such condition, a negative impact from the unavailability of integrated data is the difficulty in observing and monitoring case handling in transparent and accountable manners. Data play a pivotal role in assisting and directing acts in the taskforce to be more informed and target-based.³⁵⁷ For instance, to know TIP characteristics in certain locations, the availability of service providers for TIP victims and other information, up to designing the evidence-based plan for TIP handling.³⁵⁸ However, the purpose of data usage by the taskforce may be challenging to be realized if the required data are still scattered at various institutions.

In answering such challenges, the PP-TIP Taskforce must encourage the development of integrated database for TIP handling³⁵⁹ and ascertain that the standards for collection and reporting are properly managed by members of the taskforce that report their data periodically.³⁶⁰ Through solid data support and possession of established standards, then we may have a comprehensive description of TIP offenses in Indonesia,³⁶¹ resulting in monitoring and evaluation that may be optimally operated.³⁶² Results of those

³⁵⁰ PP-TPPO Taskforce, Laporan Kinerja Gugus Tugas PP-TPPO 2015-2019, Jakarta: Gugus Tugas PP-TPPO, p.86

³⁵¹ KPPPA, Laporan Tahunan 2018: Pencegahan dan Penanganan Tindak Pidana Perdagangan Orang, Jakarta: KPPPA, p.46.

³⁵² Bambang Pristiwanto, Deputy Assistant to the Coordinating Ministry for Politics, Law, Land and Security, as presented in the interview on 30 November 2022.

³⁵³ IJRS, Indeksasi Putusan Tindak Pidana Perdagangan Orang (unpublished), *ibid*.

³⁵⁴ *Ibid*,

³⁵⁵ KPPPA & IOM, Petunjuk Teknis Pendataan dan Pelaporan Data Tindak Pidana Perdagangan Orang, Jakarta: KPPPA, 2019, p.15

³⁵⁶ KPPPA, Rakornas TPPO: Komitmen Pemerintah Cegah dan Tangani Kasus Perdagangan Orang, 14 September 2022, <https://kemenpppa.go.id/index.php/page/read/29/4111/rakornas-tpo-komitmen-pemerintah-cegah-dan-tangani-kasus-perdagangan-orang>.

³⁵⁷ KPPPA & IOM (1), Petunjuk Teknis Operasional Gugus Tugas Pencegahan dan Penanganan Tindak Pidana Perdagangan Orang, Jakarta: IOM, 2019, p.66

³⁵⁸ *Ibid*,

³⁵⁹ See <https://kemenpppa.go.id/index.php/page/read/29/4111/rakornas-tpo-komitmen-pemerintah-cegah-dan-tangani-kasus-perdagangan-orang>.

³⁶⁰ KPPPA & IOM (2), Petunjuk Teknis Pendataan dan Pelaporan Data Tindak Pidana Perdagangan Orang di Indonesia, Jakarta: IOM, 2019, p. 25

³⁶¹ *Ibid*, p.21

³⁶² PP-TPPO Taskforce, *op.cit*, p.iii (monitoring and evaluation may properly operate with a support from an integrated database).

relevant monitoring and evaluation contribute the encouragement of formulation of evidence-based and on-target TIP policies.

3. ASPECT OF LEGAL CULTURE

a. Capacity of APH: Non-levelled knowledge of APH and Difference in perception among APH regarding the implementation of law

To achieve the indicator as the state of law, a matter that must be given the attention relates to the success of law enforcement that refers to the process of performing measures to enforce and evident functions of legal norms. One of the factors affecting the success of law enforcement depends on the quality of law enforcers (APH) themselves. Within the context of enforcement of eradication of trafficking in persons offenses, the quality of APH may be assessed from the ability of APH in handling trafficking in persons offenses cases.

In several annotations of decisions that have been performed, several weaknesses of APH are identified, for instance, Judges in giving considerations and proving offenses committed by the Defendants, such as in decision Number 61/Pid.Sus/2019/PN Bgl, the Panel of Judges in breaking down the proving of elements in Article 12 in conjunction with Article 2 of TIP Law only copies and pastes legal facts without providing any considerations relating to the intention of the elements in the article and connect them with existing legal facts, which eventually the Panel of Judges directly concludes that the defendant is proven of fulfilling elements in the article because the defendant has exploited the victims to obtain benefits from prostitution activities. Lacking considerations of Judges in examining and deciding a case certainly may harm the justice, especially for the offenders.

Lack of considerations by law enforcers, both Prosecutors and Judges, also constitutes a separate challenge in the efforts of fulfilling restitution rights of victims, as depicted in decision No. 19/Pid.Sus/2020/PN.Jkt. Tim, the panel of judges decides the amount of restitution below the amount as requested by the victims without being supported with considerations incorporated in the decision. In relation to this, Djuyamto, a Judge at the District Court of South Jakarta, argues that judges should have inserted considerations in deciding the amount of restitution, because, non-existence of breakdown of considerations of judges on the verdict of decisions constitutes a form of judges' error which a case review legal remedy may be brought against on the ground of the existence of judges' error or a manifest error³⁶³. This condition is in line with Article 197 of KUHP that the inexistence of considerations serves as the ground for the determination of mistake of the defendants that results in decisions to be null and void

In addition, within the context of the enforcement of eradication of trafficking in persons offenses, differences in perception or comprehension among APH, both the Police, Prosecutors and Judges, often occur, and such difference in perception blurs the enforcement of legal norms. According to annotations of decisions that have been performed, it is discovered that difference in interpretation of legal norms frequently occurs under the TIP Law and other related laws. In annotations of decisions of TIP Law and KUHP for instance, although decision Number 61/Pid.Sus/2019/PN Bgl and decision Number 365/Pid.Sus/2018/PN Smn share similar characteristics on chronology of cases, but Judges in both decisions impose verdicts using different articles.³⁶⁴ With the same vein, difference in comprehension occurs between Public Prosecutors and Judges in Decision Number 365/Pid.Sus/2018/PN Smn, whereas Public Prosecutors deem that the offender has violated Article 12 of TIP Law, but Judges in their considerations deem that such case is not a trafficking in persons offense because sex workers in the case are not victims

³⁶³ Interview with Djuyamto, 17 November 2022, conducted at the District Court of South Jakarta.

³⁶⁴ Decision Number 61/Pid.Sus/2019/PN Bgl and decision Number 365/Pid.Sus/2018/PN Smn, both are prostitution cases that according to legal facts, the offenders are correctly imposed with Article 296 KUHP. However, decision Number 61/Pid.Sus/2019/PN Bgl, Judges otherwise convict offenders using Article 12 of PTPTPO Law.

of TIP.

Besides, in several cases, it is discovered that Public Prosecutors who are incorrect in using the form of indictment, such as in Decision Number 413/Pid.Sus/2013/PN. Mtr, Public Prosecutors use the alternative form of indictment between Article 2 paragraph (1) of TIP Law and Article 88 of Child Protection Law. The choice of Public Prosecutors in using alternative indictment in the case is deemed to be incorrect because it may result in error in the implementation of law because Article 88 of Child Protection Law and Article 2 paragraph (1) of TIP Law both have the element of purpose of exploitation. Ideally, the use of subsidiarity indictment form should be encouraged. The existence of vagueness of the acts element and means element that are not addressed under the Child Protection Law causes law enforcers to experience difficulties in identifying the act that has the purpose of exploitation in practice, whether it falls under TIP or general exploitation. Hence, by using the subsidiarity indictment, it obliges prosecutors and judges to prove and consider all articles that are indicted and serves as an effort to prevent error in the implementation of law.

Meanwhile, in Decision No. 22/Pid.Sus/2021/PN Tgl, Public Prosecutors also use the alternative indictment form between Article 4 of TIP Law with Article 85 letter a of PPMI Law. This indictment form is incorrect considering the variables in Article 85 letter A of PPMI Law, by law, have been absorbed by offenses under the TIP Law, hence, logically, the form of indictment that is used should have been the single form. The use of alternative indictment form otherwise opens the window for error in the implementation of law, considering there is no *concurus* in this case.

b. Public Legal Awareness

The success in handling TIP cases can not be solely depended on the performance of law enforcers. As a social phenomenon, public participation also plays a pivotal role in preventing and eradicating TIP. In this regard, the conditions of social underprivilege and patriarchal culture that let the violence tradition to prevail will certainly hinder efforts on prevention and eradication of TIP in Indonesia. Those conditions have basically been realized by the government in national planning documents mentioning the importance of increasing public knowledge on social and cultural values that protect children and women from various violence acts.³⁶⁵ Such measure means that the government has realized the importance in increasing public knowledge on the danger of TIP, therefore it is expected that every person has the awareness to take role and participate in preventing and eradicating TIP, at least within each community.

Nevertheless, facts show that the social and economic conditions of Indonesian public are still vulnerable to the existence of TIP practices. For instance, one of practices that is deemed to be the primary factor on the development of TIP is the tradition of child marriage.³⁶⁶ In actuality, the rate of child marriage in Indonesia does not show any improvement, even after the government has increased the marriage age for women. During the pandemic, the rate of marriage dispensation applications rose from 23,126 cases in 2019 to be at 34,000 in June 2020.³⁶⁷ Such rise is not only deemed as a social/cultural phenomenon, but also an economic phenomenon, since most parents lost their livelihoods during the pandemic which led them to take shortcut in marrying their children with the purpose of lessening family's burden.

Another matter that still becomes an issue relates to the restorative justice approach in TIP cases. The concept of restorative justice continues to develop in Indonesia, in line with the government's efforts

³⁶⁵ Regulation of the Coordinating Minister for Human Resources Development and Culture of the Republic of Indonesia Number 2 of 2016 on the National Action Plan for Eradication of Trafficking in Persons Offenses for 2015-2019, Appendix, p. 10

³⁶⁶ Performance Report of PP-TPPO Taskforce, <https://aseanactpartnershiphub.com/wp-content/uploads/2022/03/IN-NPA-Report-2015-2019-Bahasa.pdf>, p. 4. Accessed on 10 January 2023.

³⁶⁷ Tahira Fulazzaky, Meroketnya Kasus Perkawinan Anak di Masa Pandemi COVID-19, <https://rhknowledge.ui.ac.id/id/articles/detail/meroketnya-kasus-perkawinan-anak-di-masa-pandemi-covid-19-fb2199>, accessed on 10 January 2023

in encouraging the out-of-court case settlement. On the other hand, restorative justice is also deemed as a practice that is based on local wisdom, thus it matches with values that are living in the public.³⁶⁸ Unfortunately, the implementation of restorative justice has not been fully considered as an effort to restore victims' interests, meanwhile it just serves as an amicable measure between offenders and victims, as followed with the termination of the case.

Restorative justice approach that only aims to amicable settlement leaves issues where victims' rights in obtaining recovery to be not guaranteed because during the mediation process to reach a consensus, the non-levelled playing field between offenders and victims may affect the result.³⁶⁹ Moreover, the lacking supports from family and the surrounding environment may also affect the result of mediation.³⁷⁰ In this event, victims' interests are possible to be neglected due to the reaching of consensus as pushed by fear or urges from external parties to silence them.

Normatively, a progress step has basically been performed by the government through the enactment of Law No. 12 of 2022 on Sexual Violence Offenses (TPKS Law). In this regard, lawmakers prohibit the use of restorative justice approach that only aims to out-of-court case settlement.³⁷¹ Nonetheless, such prohibition only applies for sexual violence offense cases.

³⁶⁸ Donny Irawan, Herlyanty Bawole, dan Ronald Rorie, Tinjauan Hukum Atas Keadilan Restoratif Sebagai Perlindungan Hukum Bagi Korban Tindak Pidana Di Indonesia, *Jurnal Lex Administratum*, Vol. 10, No. 5, August 2022, p. 11

³⁶⁹ Sri Wiyanti Eddiyono, Restorative Justice for Victim's Rights on Sexual Violence: Tension in Law and Policy Reform in Indonesia, *Journal of South East Asian Human Rights*, Vol.5, Issue. 2, December 2021, p. 184

³⁷⁰ *Ibid*, p. 178

³⁷¹ Article 23 of TPKS Law

CHAPTER VI

CLOSING



1. CONCLUSIONS

a. TIP in Prostitution Practices

- 1) Firstly, characteristics that distinguish between prostitution cases and trafficking in persons cases may be inferred from the purpose of exploitation, the factor of intention or willingness of the persons involved, including sex workers, and the factor of the role of the offenders (brokers or human traffickers).
- 2) Secondly, articles that specifically address prohibition on prostitution are Article 296 of KUHP and Article 506 of KUHP, whereas, Article 296 of KUHP is imposed on anyone who acts as the “connector” that facilitates obscene acts by other person with another person, meanwhile Article 506 of KUHP is imposed on anyone who obtains benefits from such obscene acts (prostitution). Differs from prostitution, trafficking in persons is addressed under the TIP Law, for instance, articles that are analysed in this research are Article 2 and Article 12. In this event, Article 12 may only be used if trafficking in persons offenses have initially took place, for instance the offense in Article 2, and then such TIP victims are re-exploited or reutilized by different trafficking in persons offenders.
- 3) Thirdly, the defendant in the case number 61/Pid.Sus/2019/PN Bgl is incorrectly convicted with the verdict using articles under the TIP Law because sex workers (*Pekerja Seks Komersial – PSK*) in this case do not constitute as victims of trafficking in persons. It would be more accurate if the defendant is convicted using Article 296 of KUHP because the defendant has deliberately caused or facilitated obscene acts by other person with another person, and treats it as a living or habit.
- 4) In relation to Annotation of Decision No. 365/Pid.Sus/2018/PN Smn, Judges assess that the Defendant does not fulfil the element of acts in Article 12 of TIP Law as charged by the prosecutors because the Panel of Judges does not find the existence of victims of trafficking in persons or victims of exploitation from the act of the defendant. According to the considerations of Judges, the act of the Defendant is more accurate to be imposed using Article 296 of KUHP because the Defendant has deliberately caused or facilitated obscene acts by PD as the witness with another person (client), and treats it as a living of habit. Moreover, if observed from the purpose, the aspect of intention/willingness of involved parties and from the aspect of position of the Defendant as the offender, the act of the Defendant cannot be categorized as trafficking in persons act, meanwhile an offense within the prostitution practices.

b. TIP against Child Victims

- 1) Firstly, the scope of form of exploitation in trafficking in persons and exploitation shares similarities, namely the broad exploitation (prostitution, force labour or services, slavery or practices similar to slavery and others) and sexual exploitation
- 2) Secondly, the distinguishing factor between trafficking in persons offense in Article 2 paragraph (1) of TIP Law with child exploitation under the Child Protection Law is that in trafficking in persons cases, the exploitation element must always be connected with means and acts that harm victims and the exploitation itself should not need to happen to prove the existence of exploitation. Meanwhile, under the Child Protection Law, means are not proven because they are not addressed and exploitation is construed to have happened. Besides, in trafficking in persons, offenders work in organized and systematic manners (offenders are more than 1 person), meanwhile in child exploitation offenses, it is possible that the direct offender is only 1 (one) person
- 3) Thirdly, Public prosecutors tend to use Article 2 paragraph (1) of TIP Law in trafficking in persons cases involving child victims compared to Article 6 of TIP Law. This condition

happens because the form of acts in Article 6 of TIP Law that is limited to only the act of transferring and exploitation that must have happened, whereas, this condition is not in line with international standards where exploitation should not need to happen to prove the existence of exploitation in trafficking in persons cases.

- 4) Fourthly, decision of the Panel of Judges that deems the act of I Wayan Sujana as the defendant as an exploitation offense according to Article 88 of Child Protection Law is incorrect because the whole series of acts committed by the defendant with other defendants fulfil the elements of trafficking in persons offenses. Provisions under the Child Protection Law do not require any organized and systematic process in the commitment of offenses, which differs from trafficking in persons. Various witness testimonies and evidences presented by Public Prosecutors show that the defendant and other defendants have deliberately committed series of activities, such as recruitment, debt trap, abuse of position of vulnerability, and physical and sexual abuses, and abuse of energy of victims.
- 5) Fifthly, the choice made by Public Prosecutors that uses alternative indictment against I Wayan Sujana as the defendant is deemed to be incorrect because it may result in error in the implementation of law in terms of Article 88 of Child Protection Law and Article 2 paragraph (1) of TIP Law with both having the element of purpose of exploitation. There is a contention on the choice of such form of indictment. The first group deems that the choice of using alternative indictment is correct because both articles are not addressed in a single law and possess the same characteristic of acts, namely the purpose of exploitation. Another reason relates to easier inquisitorial process. Choosing this form of indictment is mostly adopted by prosecutors against cases that use those two articles. Meanwhile, the other group deems the use of subsidiarity indictment is more accurate. The vagueness of the element of acts and the element of means that are not addressed under the Child Protection Law, therefore in practice, law enforcers may experience difficulties in identifying the act that has the purpose of exploitation, whether it falls under TIP or general exploitation. Hence, by using the subsidiarity indictment that obliges prosecutors and judges to prove and consider all articles in indictment may be an effort to prevent any error in the implementation of law.
- 6) Sixthly, the step taken by Public Prosecutors of not filing for restitution against I Wayan Sujana as the defendant is deemed to be incorrect, considering that in the grounds for cassation and arguments presented by Public Prosecutors assessing that the act of I Wayan Sujana as the defendant constitutes trafficking in persons offense, that the TIP Law addresses restitution to victims. Besides from the TIP Law, Public Prosecutors may refer to Law No. 13 of 2006 on Protection of Witnesses and Victims (before being replaced with Law No. 31 of 2014) and Regulation of the Government No. 44 of 2008 on Grant of Compensation, Restitution, and Aid to Witnesses and Victims.
- 7) Seventhly, the lacking restitution applications in trafficking in persons cases caused by several factors, such as: 1) unavailability of a technical guideline relating to restitution applications, such as considerations in determining the ideal substitutable confinement sentence; 2) unavailability of regulation that is able to force the convicts to pay restitution and technical guideline for seizure and auction of assets of the convicts to pay restitution to victims. Nonetheless, all of those obstacles have been responded in Regulation of the Supreme Court 1/2022 on Procedures for Settlement of Applications for and Payment of Restitution and Compensation to Victims of Offenses. Another underlying obstacle is that most victims of trafficking in persons do not know their rights for payment of restitution.
- 8) Eighthly, in terms of restitution applications for child victims of trafficking in persons, besides from referring to the TIP Law, law enforcers may refer to Regulation of the Supreme Court 1/2022, Regulation of the Government on Payment of Restitution to Child Victims of Offenses and Guideline of the Prosecutor's Office Number 1 of 2021. Both legal frameworks address in

details on the mechanism for restitution applications for child victims of offenses.

c. TIP against Migrant Workers³⁷²

TIP Law and PPMI Law have fundamental differences. The TIP Law addresses offenses relating to exploitation committed against persons, meanwhile the PPMI Law is an administrative law addressing prerequisites relating to migrant workers, even if there are intersections, such intersections are only limited to modus of trafficking in persons and victims that are both located abroad.

To determine an act falls under Article 85 letter a of PPMI Law or Article 4 of TIP Law, it may be inferred from Article 4 of TIP Law that requires the existence of process and purpose, namely the process of bringing abroad and purpose of exploitation. To determine exploitation, it may be inferred from activities performed by victims whether they lead to slavery practices, force labour and others. In assessing such condition, indicators may be used to help, such as debt traps that lead to the existence of control of the offender over victims, poor work conditions, existence of force practices and others. In addition, such acts are designated to obtain benefits for the offenders. Differs from Article 85 letter a of PPMI Law with the scope that is only limited to differences between work agreements with the actual happening conditions to migrant workers.

The choice of indictment form must be formulated in more precise manner, in the relevant case, the act of the defendant is categorized as *vorgezette handling*, therefore the indictment form that is chosen should have been the single form. In Decision No. 22/Pid.Sus/2021/PN Tgl, the Panel of Judges incorrectly convicts the defendant to be guilty of committing an offense according to the second alternative indictment of Public Prosecutors. Such error occurs due to the neglect of several testimonies from victim witnesses explaining work conditions of victim witnesses, existence of control of the offender over victims and benefits obtained by the defendant from victims.

The consequence from the failure in identifying trafficking in persons may raise an issue in terms of sentencing proportionality, hindering restitution to victims and failure in identifying the root cause of trafficking in persons.

d. TIP and People Smuggling Offenses

- 1) There are underlying issues in the legal framework on people smuggling offenses that does not meet the standard formulation in the Protocol on People Smuggling, hence it is unable to address different regulation with Trafficking in Persons Offenses
- 2) Another issue on the regulatory aspect that the legal framework on people smuggling offenses does not cover people smuggling offenses committed with endangering conditions or offenses that become exploitative, including transforming into trafficking in persons offenses
- 3) APH do not have adequate knowledge on core Variables that become the distinguishing factors between people smuggling offenses with TIP, but this condition cannot be separated from the issues on legal provisions under the Immigration Law
- 4) Standards of proof for TIP and people smuggling cases that do not focus on victims, although the basic variables consist of vulnerability of victims/consents
- 5) Non-optimal standards of proof that should consider the characteristics of trans-organized crime, as proven with wanted list (*Daftar Pencarian Orang – DPO*) that is unable to be summoned and legal facts that are very lacking

³⁷² See appendix 5. Annotation of Decision No.

f. TIP with Other TIP

TIP Law does not provide any limitations that are able to explain how far the exploitation element in trafficking in persons offenses may be declared to be proven. This condition gets more difficult within the context of bride by order cases, that basically, the practice of marriage by contract does not constitute an unlawful act that is able to be imposed with criminal sentences. Nevertheless, the exploitation element may be inferred from several indicators showing the existence of the purpose of exploitation, although such condition has not happened yet. Within the context of bride by order, such condition may be inferred from the means used by the offenders where victims are placed in vulnerable position in such a way. For instance, victims are requested to move to the country of origin of the spouse although they cannot speak the local language. This condition may be connected with the purpose to make the victims cannot communicate with other parties during the exploitation in such country.

There are several overlapping articles under the TIP Law in relation to the place of crime (*locus delicti*) of a trafficking in persons offenses case. This condition relates to the accuracy of the use of articles, therefore it may result in inconsistency of articles that are declared to be proven in a trafficking in persons offenses cases.

Considering the difficulty in proving the element of purpose of exploitation, lawmakers need to provide parameters for APH to declare when such element is fulfilled. Within the context of bride by order, the element of purpose of exploitation may be deemed to be proven if means used by the offenders cause the victims to be vulnerable. In addition, the purpose of exploitation may also be inferred from the existence of the role of “matchmaker” that matches victims with offenders. In the event that there are persons acting as matchmakers and obtain benefits from such services, then it may be inferred that the purpose of exploitation is fulfilled. In this event, matchmakers are proven to utilize a person to obtain benefits.

Furthermore, the following are several conclusions relating to the annotation of Decision No. 19/Pid. Sus/2020/PN.Jkt.Tim (Best practiceBest Practice):

- 1) Fulfillment of the element of “bringing” in Article 4 of TIP Law is not only limited to be defined as the act of bringing a person altogether with the offenders. Meanwhile, the act of bringing may be performed using transportation means or through transferring means or departing without having the offenders to accompany as provided in considerations of judges in this case.
- 2) Judges should have broader perspectives on felonies, especially trafficking in persons offenses relating to cross-border offenses. Judges must consider the impacts beyond losses incurred on national scope, but also losses of another state (international)
- 3) Breakdown of considerations of judges in deciding the amount of restitution that must be incorporated in the decision by considering the proportionality between losses suffered by the victims with the ability of the defendant to pay restitution.

2. RECOMMENDATIONS

a. Policymakers (Government and House of Representatives)

- 1) Reviewing provisions relating to consents under the TIP Law that otherwise blur the TIP concept that originally demands the existence of unlawful means (force, threat, debt trap, etc)
- 2) Reviewing provisions on the element of “bringing” in Article 4 of TIP Law, is it only limited to the act of bringing? What about another act such as transferring, recruiting, and placing -> as addressed in article 2.

- c. **Law enforcers (Police, Prosecutor's Office, Supreme Court)**
 - 1) Formulating a guideline for the implementation of the TIP Law that is practical, and answers several matters, especially: 1) methods to interpret articles that have intersections, 2) modus and methods to identify TIP, 3) forms of indictments and choosing correct articles, 4) obligations of APH in fulfilling rights of victims.
 - 2) Organizing integrated trainings in order to ascertain levelled knowledge relating to TIP and other related offenses

- c. **Government (PP-TIP Taskforce)**
 - 1) Encouraging a more accurate registration of TIP cases by each APH for quantitative and qualitative evaluations may be performed
 - 2) Mapping vulnerable groups that become victims of TIP and performing socializations relating to rights of victims and preventive measures

- c. **Ministries/Agencies and Civil Society Organizations as counsel of victims**

Ascertaining rights of victims are fulfilled, from the investigation up to enforcement of decision stages (right to legal aid, right to restitution, right to rehabilitation)

- d. **Academics**

Encouraging the performance of multi-sector studies that may contribute to the improvement of public legal culture, thus they may avoid TIP practices and other related offenses.

APPENDIX 1

Kasus Posisi Putusan Nomor 61/Pid.Sus/2019/PN Bgl (Bad Practice)

Identitas Terdakwa

Nama lengkap	:	Hidayatuddin Alias Ayek Bin Daman Huli
Tempat lahir	:	Bengkulu
Umur/tanggal lahir	:	38 tahun / 22 Maret 1980
Jenis kelamin	:	Laki-laki
Kebangsaan	:	Indonesia
Tempat tinggal	:	Jln. Kali Progo, RT.009/RW.003, Kec. Gading Cempaka, Kota Bengkulu
Agama	:	Islam
Pekerjaan	:	Wiraswasta
Pendidikan	:	SMA (Tamat)

Kasus Posisi

Kasus ini bermula pada tanggal 13 Desember 2018 saat saksi ES dan saksi MOS dihubungi oleh Terdakwa untuk memberitahukan ada tamu yang ingin dilayani hubungan seks. Adapun bayarannya untuk saksi ES adalah sekitar Rp700.000,00 (tujuh ratus ribu rupiah) dan untuk saksi MOS adalah sekitar Rp800.000,00 (delapan ratus ribu rupiah). Pelayanan hubungan seks tersebut dilakukan di Hotel Rindu Alam kawasan Pantai Panjang Kota Bengkulu.

- Dalam hal ini, Terdakwa meminta uang pada saksi ES dan saksi MOS masing-masing sebesar Rp200.000,00 (dua ratus ribu rupiah) sebagai *fee* yang harus diberikan saksi apabila sudah melayani tamu hotel. Saksi ES dan saksi MOS pun setuju sehingga tak lama kemudian datang ke Hotel Rindu Alam kawasan Pantai Panjang kota Bengkulu tersebut.
- Setelah sampai di hotel, saksi ES langsung menuju kamar 07 dan saksi MOS langsung menuju kamar nomor 08 sebagaimana yang telah diberitahukan oleh Terdakwa sebelumnya dan di dalam kamar masing-masing sudah menunggu seorang laki-laki yang tidak saksi ES dan saksi MOS kenal lalu saksi mengobrol sebentar dan langsung berhubungan seks dengan laki-laki tersebut.
- Setelah selesai melayani seks, saksi ES diberi uang oleh tamunya sebesar Rp.700.000,00 (tujuh ratus ribu rupiah) dan saksi MOS diberi uang oleh tamunya sebesar Rp800.000,00 (delapan ratus ribu rupiah) sesuai tarif yang telah ditentukan sebelumnya.
- Setelah keluar hotel saksi ES dan saksi MOS langsung menelepon Terdakwa minta dijemput. Tidak lama kemudian datang Terdakwa menjemput, kemudian saksi ES dan saksi MOS memberikan uang masing-masing Rp200.000,00 (dua ratus ribu rupiah) pada terdakwa sesuai dengan perjanjian. Namun tiba-tiba datang tim dari Polda Bengkulu (sebelumnya telah mendapatkan informasi dari masyarakat akan adanya tindak pidana perdagangan orang di kawasan tersebut) yang langsung mengamankan terdakwa dan saksi ES dan saksi MOS.
- Bahwa terdakwa melakukan pekerjaan sebagaimana tersebut diatas sejak tahun 2016.

Dakwaan Jaksa Penuntut Umum

Penuntut Umum melimpahkan perkara Hidayatuddin Alias Ayek Bin Daman Huli ke Pengadilan Negeri Bengkulu dengan Nomor Perkara: 61/Pid.Sus/2019/PN Bgl dan mendakwa terdakwa Hidayatuddin Alias Ayek Bin Daman Huli secara alternatif yaitu: Pertama Pasal 12 Jo Pasal 2 UU No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang; Atau Kedua Pasal 296 Kitab Undang-undang Hukum

Pidana; Atau Ketiga Pasal 506 Kitab Undang-undang Hukum Pidana.

Tuntutan Jaksa Penuntut Umum

Jaksa Penuntut Umum berkesimpulan bahwa tindak pidana yang didakwakan kepada terdakwa telah terbukti secara sah dan meyakinkan yaitu melakukan tindak pidana perdagangan orang sebagaimana Pasal 12 Jo Pasal 2 UU No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang sesuai dengan dakwaan pertama penuntut umum. Jaksa penuntut umum dalam perkara ini menuntut supaya Majelis Hakim menjatuhkan pidana kepada Terdakwa Hidayatuddin Als ayek Bin Daman Huli dengan pidana penjara selama 5 (lima) tahun dan denda Rp.120.000.000 (seratus dua puluh juta rupiah) subsidair 6 (enam) bulan penjara.

Putusan Majelis Hakim

Dalam amar putusan, Majelis Hakim Pengadilan Negeri Bengkulu menyatakan Terdakwa Hidayatuddin Alias Ayek Bin Daman Huli telah terbukti bersalah melakukan tindak pidana "Perdagangan Orang" sebagaimana dalam dakwaan Pertama, dan menjatuhkan pidana kepada Terdakwa dengan pidana penjara selama 4 (empat) tahun dan pidana denda sebesar Rp. 120.000.000.000, - (Seratus dua puluh juta rupiah) subsider 3 (tiga) bulan penjara.

APPENDIX 2

Kasus Posisi Putusan Nomor 365/Pid.Sus/2018/PN Smn (Good Practice)

Kronologi kasus

Identitas Terdakwa

Nama lengkap	:	Dwi Sukma Erlangga Bin Sarjono
Tempat lahir	:	Cilacap
Umur/tanggal lahir	:	21 Tahun / 31 Maret 1997
Jenis kelamin	:	Laki-laki
Kebangsaan	:	Indonesia
Tempat tinggal	:	Jl. Pisang No.36 Rt.004 Rw.003, Tambakrejo, Cilacap Selatan, Cilacap, Jawa Tengah
Agama	:	Islam
Pekerjaan	:	Mahasiswa
Pendidikan	:	SMA

Kasus Posisi

- Pada awalnya Terdakwa kenal dengan saksi PD melalui media sosial, kemudian berlanjut dengan pertemuan di McDonald Yogyakarta. Setelah Terdakwa saling kenal dan bertatap muka dengan saksi PD, terjadi kesepakatan antara Terdakwa dengan PD yang isinya agar Terdakwa bersedia membantu menjadi perantara atau penghubung saksi PD dengan laki-laki yang membutuhkan layanan seksual / hubungan badan. Selanjutnya saksi PD memberikan akun twitter milik saksi yang bernama CASSEY JOGJA. Kemudian akun tersebut beralih menjadi akun milik Terdakwa dengan nomor milik terdakwa dan kemudian memasukkan foto dan identitas saksi PD ke Akun Twitter milik terdakwa yang diberi nama OPEN BO (NO DP);
- Kemudian pada hari Rabu tanggal 23 Mei 2018 sekitar pukul 19.00 WIB, ada seseorang yang menghubungi melalui Twiter Terdakwa, meminta agar dicarikan perempuan yang bisa memberikan layanan untuk diajak melakukan hubungan seksual. Setelah itu Terdakwa mengirim tarif dan foto perempuan kepada orang yang telah memesan kepada Terdakwa tersebut;
- Dalam menjadi perantara wanita panggilan tersebut, Terdakwa tidak memiliki tempat untuk menampung wanita yang menjadi PSK, dan setiap ada laki-laki yang membutuhkan layanan seksual, Terdakwa langsung menghubungi melalui WA wanita yang telah biasa memberikan layanan seksual;
- Pada hari Rabu tanggal 23 Mei 2018, Terdakwa telah menghubungi saksi PD untuk memberikan layanan seksual dengan tarif yang sudah ditentukan oleh Terdakwa sebesar Rp.1.200.000,- (satu juta dua ratus ribu rupiah);
- Terdakwa mendapatkan imbalan dari PD karena telah berhasil menghubungkan PD dengan laki-laki yang membutuhkan layanan seksual. Lalu, ketika Terdakwa akan pulang, tempat kostnya telah didatangi dan diamankan oleh petugas dari Polda DIY, kemudian terdakwa bersama PD serta barang buktinya dibawa menuju ke Polda DIY untuk dilakukan pemeriksaan lebih lanjut;
- Setiap berhasil menghubungkan saksi PD untuk memberikan jasa layanan seksual kepada tamu/pelanggan, Terdakwa mendapatkan uang imbalan/fee yang nilainya bervariasi antara Rp.150.000,- (seratus lima puluh ribu rupiah) dan untuk yang terakhir Terdakwa mendapatkan imbalan/fee sebesar Rp.400.000,- (empat ratus ribu rupiah) dari saksi PD sesuai dengan kesepakatan sebelum saksi PD memberikan layanan seksual kepada tamunya/pelanggannya;

- Bahwa yang membayar sewa Hotel adalah saksi PD dari uang yang saksi terima dipotong untuk membayar Hotel dan juga untuk *fee* atau bagi hasil kepada Terdakwa yang sudah membantu mencari pelanggan

Dakwaan Jaksa Penuntut Umum

Penuntut Umum melimpahkan perkara Dwi Sukma Erlangga Bin Sarjono ke Pengadilan Negeri Sleman dengan Nomor Perkara: 365/Pid.Sus/2018/PN.Smn dan mendakwa terdakwa Dwi Sukma Erlangga Bin Sarjono secara alternatif, yaitu: Pertama Pasal 2 ayat (1) UU No. 21 tahun 2007 tentang pemberantasan Tindak Pidana Perdagangan Orang; Atau Kedua Pasal 12 UU No. 21 tahun 2007 tentang pemberantasan Tindak Pidana Perdagangan Orang; Atau Ketiga Pasal 296 KUHP.

Tuntutan Jaksa Penuntut Umum

Jaksa Penuntut Umum berkesimpulan bahwa tindak pidana yang didakwakan kepada terdakwa telah terbukti secara sah dan meyakinkan yaitu melakukan tindak pidana perdagangan orang sebagaimana Pasal 12 UU No 21 tahun 2007 tentang pemberantasan Tindak Pidana Perdagangan Orang sesuai dengan dakwaan kedua penuntut umum. Jaksa Penuntut Umum dalam perkara ini menuntut supaya Majelis Hakim menjatuhkan pidana terhadap terdakwa Dwi Sukma Erlangga Bin Sarjono dengan pidana penjara selama 3 (tiga) tahun 6 (enam) bulan dan denda sebesar Rp.120.000.000,- (seratus dua puluh juta rupiah) subsidiair 6 (enam) bulan kurungan.

Putusan Majelis Hakim

Dalam amar putusan, Majelis Hakim Pengadilan Negeri menyatakan Terdakwa Dwi Sukma Erlangga Bin Sarjono telah terbukti bersalah melakukan tindak pidana “dengan sengaja menyebabkan atau memudahkan Perbuatan cabul oleh orang lain dengan orang lain dan menjadikannya sebagai Pencaharian“. Majelis Hakim pun menjatuhkan pidana terhadap terdakwa dengan pidana penjara selama 1 (satu) tahun.

APPENDIX 3

Kasus Posisi Putusan No. 302/Pid.Sus/2015/PN.Cbi (Good Practice)

Kronologi Kasus

Identitas Terdakwa

Nama	:	GUNTUR SUPRATMAN Bin CECEP SUPRATMAN
Tempat lahir	:	Bogor
Umur/tanggal lahir	:	22 tahun/ 18 Februari 1993
Jenis kelamin	:	Laki-laki
Kewarganegaraan	:	Indonesia
Tempat tinggal	:	Apartemen Gading Mediterania Residence Lt. 19 No. 19/BK Kelapa Gading Jakarta Utara/Kp. Tanjakan Cinangneng No. 32 RT 01 RW 06 Desa Cibanten, Kec Ciampea, Kab Bogor
Agama	:	Islam
Pekerjaan	:	Karyawan Swasta

Kasus Posisi

- Bermula pada tanggal 8 Februari 2015, ketika saksi D diajak oleh saksi Ida Yustati untuk bertemu dengan keponakannya yang bernama Aldi di rumah saksi Y (Terdakwa lain yang penuntutannya terpisah). Ketika bertemu saksi Y, ia menawarkan kerja kepada saksi D dengan mengatakan “neng mau kerja gak?” lalu saksi D menjawab “kerja apa te?” lalu saksi Y menjawab “kerja di toko”. Awalnya saksi D menolak, namun saksi Y meminta no hp DA. Beberapa hari kemudian, saksi Y mengirim sms ke pada DA dan menanyakan perihal pekerjaan. Saksi Y kemudian datang ke rumah saksi D dan bertemu saksi D serta ibunya Ruminah. Saksi Y kembali menawarkan pekerjaan dan bertanya pada ibu Ruminah “ bu ada gak umur DA 15 tahun” lalu dijawab ibu Ruminah “emang 15 tahun” lalu saksi Y berkata “udah ketebak”.
- Saksi DA dan ibunya Ruminah kemudian diajak saksi Y bertemu saksi (Terdakwa lain yang penuntutannya terpisah). Saksi W kemudian menjelaskan pekerjaan saksi D nantinya sebagai pelayan melayani makanan dan minuman di rumah makan. Ibu Ruminah juga memastikan anaknya, saksi D, tidak dijadikan PSK. Lebih lanjut, saksi W menjanjikan bahwa gaji saksi D sebesar Rp. 12.000.000,-
- Selanjutnya, saksi W memberikan kasbon/pinjaman kepada Ibu Ruminah sebesar Rp. 700.000,- sebelum pulang, sedangkan saksi D tetap menginap selama 2 hari di rumah saksi W.
- Pada 14 Februari 2015, Saksi DA kemudian diajak oleh saksi W dan saksi Y ke Jakarta untuk menemui TERDAKWA di daerah Kelapa Gading. Namun sebelum bertemu dengan TERDAKWA dan Koko Awin, saksi D diajak ke salon oleh saksi W dan dipakaikan baju tanpa lengan dan celana jeans.
- Saksi DA bersama saksi W kemudian bertemu TERDAKWA dan Koko Awin di ruang kerja Koko Awin. Saat itu dilakukan pengecekan badan oleh Koko Awin dan Ragil, dimana saksi D disuruh mengangkat baju bagian atas untuk dilihat apakah perutnya ada selulit atau tidak. Saksi juga menyampaikan kepada TERDAKWA bahwa ia telah memberikan hutang kepada ibu DA dan menyampaikan bahwa uangnya akan diganti ketika DA ketika bekerja.
- Setelah selesai pengecekan badan, saksi D menginap di Apartemen Gading Mediterania bersama TERDAKWA dan diantar pulang keesokan harinya oleh TERDAKWA dan saksi Imam.

- TERDAKWA dan saksi Imam (belum tertangkap) menyuruh orang tua saksi membuat surat pernyataan yang isinya mengizinkan saksi bekerja dan ada kwitansi kosong yang diminta ditandatangani oleh orang tua saksi juga. TERDAKWA kemudian mencantumkan total kasbon/pinjaman saksi D di kwitansi kosong yang sudah ditandatangani ibu saksi, Ruminah, dengan total uang sebesar Rp. 2.200.000, serta tas 2 (dua) buah, sepatu 1 pasang, jeans 1 potong dan biaya ke salon berikut softlens sebesar Rp. 3.300.000,- jadi total cashbon di kwitansi sebesar Rp.5.500.000,-
- TERDAKWA juga mengambil foto saksi D Agustia untuk diserahkan ke Imam agar dibuat KTP dan diubah namanya menjadi DS dengan usia 19 tahun.
- Selanjutnya, saksi D dipekerjakan sebagai Dancer dan menemani tamu-tamu di King Cross untuk minum-minuman keras dari jam 19.00 sampai dengan subuh. Sebagai Dancer, saksi D wajib menggunakan kostum berupa Bra/BH dan celana dalam saja. Selama bekerja saksi D disuruh merokok, dan mengalami pelecehan seksual berupa dipegang-pegang payudaranya oleh tamu.
- TERDAKWA bertugas untuk mengantar jemput dan mengawasi saksi D selama bekerja. Setelah 3 hari bekerja, saksi D menggunakan kesempatan untuk melarikan diri karena tidak mau bekerja sebagai Dancer dan menemani tamu lagi.

Dakwaan Jaksa Penuntut Umum

Penuntut Umum mendakwa Guntur Supratman secara alternatif:

Pertama:

Pasal 2 ayat (1) Undang-Undang Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang

ATAU

Kedua:

Pasal 88 jo Pasal 76i Undang-Undang No. 35 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak

Tuntutan Penuntut Umum

Penuntut Umum pada Kejaksaan Negeri Cibinong menyatakan bahwa Terdakwa Guntur Supratman telah terbukti secara sah dan meyakinkan melakukan perbuatan sebagaimana dimaksud dalam Dakwaan Alternatif Kesatu yakni melanggar Pasal 2 ayat (1) Undang-Undang Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang. Jaksa penuntut umum dalam perkara ini menuntut supaya Majelis Hakim Pengadilan Negeri Cibinong yang memeriksa dan mengadili perkara ini memutuskan:

- a. Menyatakan terdakwa GUNTUR SUPRATMAN bin CECEP SUPRATMAN terbukti secara sah dan meyakinkan menurut hukum bersalah melakukan tindak pidana perdagangan orang melakukan penerimaan seseorang dengan penyekapan, penyalahgunaan posisi rentan, penjeratan utang walaupun memperoleh persetujuan dari orang yang memegang kendali atas orang lain, untuk tujuan mengeksploitasi orang tersebut di wilayah negara Republik Indonesia, sebagaimana diatur dan diancam dalam pasal dalam surat dakwaan alternatif kedua Pasal 2 ayat (1) Undang-Undang Republik Indonesia Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP dalam surat dakwaan
- b. Menjatuhkan pidana terhadap Terdakwa GUNTUR SUPRATMAN bin CECEP SUPRATMAN berupa pidana penjara selama 6 (enam) tahun dikurangkan dengan masa penahanan yang telah dijalani oleh Terdakwa dan denda Rp. 120.000.000,- (seratus dua puluh juta rupiah) subsidair 1 (satu) bulan kurungan;
- c. Membebaskan kepada Terdakwa GUNTUR bin CECEP SUPRATMAN, saksi Supratman dan Y untuk membayar Restitusi/Ganti Kerugian terhadap korban DA binti Saiful Hidayat sebesar Rp.

356.300.200,- (tiga ratus lima puluh enam tiga ratus ribu dua ratus rupiah) yang ditanggung secara renteng dengan Subsider 1 (satu) bulan kurungan;

Putusan Majelis Hakim

- a. Majelis Hakim Pengadilan Negeri Cibinong (Putusan Nomor 302/K/Pid.Sus/2015) memutus perkara ini dengan amar putusan sebagai berikut:
- b. Menyatakan Terdakwa GUNTUR SUPRATMAN bin CECEP SUPRATMAN terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana “Turut serta melakukan perekrutan untuk tujuan mengeksploitasikan orang di wilayah negara Republik Indonesia” sebagaimana dakwaan kesatu;
- c. Menjatuhkan pidana kepada Terdakwa oleh karena itu dengan pidana penjara 4 (empat) tahun dan denda sebesar Rp. 120.000.000,- (seratus dua puluh juta rupiah) dengan apabila denda tersebut tidak dibayar diganti dengan pidana kurungan selama 1 (satu) bulan;
- d. Membebaskan kepada terdakwa GUNTUR SUPRATMAN bin CECEP SUPRATMAN untuk membayar restitusi/ganti rugi terhadap korban DA binti Saiful Hidayat sebesar Rp. 15.000.000,- (lima belas juta rupiah) dengan ketentuan apabila tidak mampu maka diganti dengan pidana kurungan selama 1 (satu) bulan;

APPENDIX 4

Kasus Posisi Putusan No. 421 K/PID.SUS/2015 (*Bad Practice*)

Kronologi Kasus

Identitas Terdakwa

Nama : I Wayan Putu Sujana
Tempat lahir : Jenggala, Lombok Tengah
Umur/tanggal lahir : 33 tahun/ 5 Juni 1980
Jenis kelamin : Laki-laki
Kewarganegaraan : Indonesia
Tempat tinggal : BTN Sandik Indah, Jalan Alfa Raya Nomor 4 Dusun Sandik, Desa Sandik, Kecamatan Batulayar, Kabupaten Lombok Barat
Agama : Hindu
Pekerjaan : Karyawan Swasta

Kasus Posisi

- Terdakwa merupakan Manajer Cafe Mekar yang berwenang dan bertanggung jawab penuh dalam pengelolaan dan pengawasan operasional perusahaan berdasarkan kontrak kerja Nomor 096/MBCK/XI/2011. Pada tanggal 14 November 2011, Terdakwa menerima NS (SAKSI KORBAN) yang baru berusia 17 tahun berdasarkan Kutipan Akta Kelahiran Nomor 694/1995 tanggal 20 Maret 1995, sebagai Pemandu Lagu atau partner song atau PS untuk bekerja di Cafe Mekar.
- Sebelum diterima di Cafe Mekar, SAKSI KORBAN diberangkatkan dari daerah Cianjur untuk bekerja di Lombok, dengan diiming-imingi berbagai fasilitas gratis seperti tiket gratis, baju gratis, biaya kesehatan, makan, salon maupun fitness gratis. Tergiuur akan janji-janji tersebut, SAKSI KORBAN berangkat bersama kedua orang temannya dengan dibawa oleh koordinator PS Cafe Mekar, ROSWARI AL MAMI YOSI, yang mana koordinator tersebut berada di bawah tanggung jawab Terdakwa.
- Saat tiba pertama kali di Cafe Mekar, MAMI YOSI memperkenalkan SAKSI KORBAN sebagai PS baru yang hendak bekerja di Cafe Mekar. Terdakwa menerima SAKSI KORBAN untuk bekerja dan berpesan apabila ada yang menanyakan usia SAKSI KORBAN harus dijawab bahwa usianya sudah lebih tua dan nanti akan dibuatkan KTP baru.
- Meskipun Terdakwa mengetahui usia asli SAKSI KORBAN, tetapi Terdakwa tetap membiarkan SAKSI KORBAN bekerja di cafe Mekar sebagai pemandu lagu, dan ditugaskan untuk menemani para tamu, sekitar 3 hingga 4 tamu per/malam dari mulai pukul 19.00 sampai dengan 03.00 WITA dinihari, yang melebihi jam kerja perusahaan.
- Bahwa setelah 3 (tiga) hari bekerja sebagai pemandu lagu untuk menemani tamu, Terdakwa menyaksikan penandatanganan kontrak kerja SAKSI KORBAN serta saksi SI. Terdakwa juga ikut menandatangani kontrak dengan saksi HH alias F. Di dalam kontrak tersebut disebutkan bahwa apabila para pemandu lagu secara berturut-turut 3 (tiga) hari tidak masuk kerja maka hak para pemandu lagu atas calling charge dan jaminan 25% dari penghasilan yang harus diserahkan kepada koordinator pemandu lagu MAMI YOSI, akan dianggap hangus oleh perusahaan. Pemandu lagu tersebut juga diharuskan membayar ganti rugi sebesar Rp. 10.000.000,- (sepuluh juta rupiah). Selain itu, di dalam kontrak tersebut juga memuat klausul yang menyatakan bahwa pemandu lagu diberikan target jam kerja minimal 70 jam per bulan sehingga pemandu lagu harus bekerja kerja memenuhi target tersebut.
- Selama bekerja sebagai pemandu lagu, SAKSI KORBAN tidak hanya menemani tamu untuk

berkaraoke tetapi juga untuk minum-minuman keras dan berjoget dengan mengenakan seragam kerja yang minim. Selain itu, SAKSI KORBAN juga sering mendapatkan pelecehan seksual dari para tamu berupa dipegang-pegang payudaranya, dicium pipi dan bibirnya. Namun Terdakwa yang merupakan manajer yang seharusnya bertanggung jawab penuh untuk memajemen dan mengawasi jalannya perusahaan tidak berusaha melakukan tindakan-tindakan seperti memastikan usia pegawai atau staf yang ada di bawah manajemennya atau berupaya mengatur suasana kerja yang aman bagi para pemandu lagu yang ada di bawah manajemennya dari para lelaki hidung belang yang bertindak lebih dari sekedar ditemani karaoke dan minum-minuman keras. Bahkan beberapa pemandu lagu termasuk SAKSI KORBAN yang masih di bawah umur juga harus menemani tamu sampai jam 03.00 dinihari. Hal ini telah menempatkan SAKSI KORBAN yang masih di bawah umur berada dalam posisi yang rentan untuk mudah dimanfaatkan baik secara fisik, seksual maupun secara ekonomi.

- Manajemen Cafe Mekar menetapkan bahwa semakin banyak tamu yang minta untuk didampingi SAKSI KORBAN maka semakin banyak pula pemasukan yang dihasilkan SAKSI KORBAN. Tarif yang ditetapkan cafe Mekar untuk setiap pemandu lagu adalah Rp. 60.000,- (enam puluh ribu) per jamnya, yang mana Cafe Mekar menerima pemasukan Rp. 20.000,- (dua puluh ribu) dari tarif yang dibayarkan. Lebih lanjut, berdasarkan kontrak kerja nomor 0125/MBCKH/III/2012 tanggal 24 Maret 2012, Terdakwa memberikan imbalan kepada koordinator PS sebesar Rp. 3000,- (tiga ribu rupiah) setiap jam dari calling charge pemandu lagu termasuk dari SAKSI KORBAN maupun ketika tamu-tamu membeli makanan dan minuman yang ditawarkan pada saat berkaraoke dengan ditemani oleh pemandu lagu.
- Selain itu untuk setiap pemandu lagu yang baru datang harus dipotong gaji untuk membayar tiket pesawat keberangkatannya dari daerah asal mereka sampai ke Lombok, baju seragam yang dipergunakan untuk menemani para tamu, biaya makan setelah habis kontrak pertama serta biaya salon maupun fitness.
- Berdasarkan catatan taking order tanggal 26 Januari 2013 sampai dengan 2 Februari 2013, mencatat bahwa selama SAKSI KORBAN bekerja sebagai pemandu lagu Cafe Mekar, Cafe Mekar telah memperoleh pemasukan sebesar kurang lebih Rp. 10.662.500,- (sepuluh juta enam ratus enam puluh dua ribu lima ratus rupiah).
- Selama 12 hari bekerja di Cafe Mekar, SAKSI KORBAN tidak dibayar, karena MAMI YOSI selaku koordinator PS sengaja menghilangkan nama SAKSI KORBAN dari Bill/Calling Charge kasir.

Dakwaan Jaksa Penuntut Umum

Penuntut Umum melimpahkan perkara I Wayan Sujana Hermansyah ke Pengadilan Negeri Mataram dengan Nomor Perkara 413/Pid.Sus/2013 dan mendakwa I Wayan Sujana secara alternatif:

Pertama:

“mengeksplorasi ekonomi atau seksual anak dengan maksud untuk menguntungkan diri sendiri atau orang lain”

Pasal 88 Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak

ATAU

Kedua:

“melakukan perekrutan, pengangkutan, penampungan, pengiriman, pemindahan atau penerimaan seseorang dengan ancaman kekerasan, penggunaan kekerasan, penculikan, penyekapan, pemalsuan, penipuan, penyalahgunaan kekuasaan atau posisi rentan, penjeratan utang atau memberi bayaran atau manfaat walaupun memperoleh persetujuan dari orang yang memegang kendali atas orang lain, untuk tujuan mengeksplorasi orang tersebut di wilayah negara Republik Indonesia”

Pasal 2 ayat (1) Undang-Undang Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang

ATAU

Ketiga:

“melanggar ketentuan pekerja/buruh perempuan yang berumur kurang dari 18 tahun dilarang dipekerjakan antara pukul 23.00 sampai dengan pukul 07.00”

Pasal 76 ayat (1) jo 187 ayat (1) Undang-Undang Nomor 13 Tahun 2003 tentang Ketenagakerjaan

Tuntutan Penuntut Umum

Penuntut Umum pada Kejaksaan Negeri Mataram menyatakan bahwa Terdakwa I Wayan Sujana telah terbukti secara sah dan meyakinkan melakukan perbuatan sebagaimana dimaksud dalam Dakwaan Alternatif Kedua yakni melanggar Pasal 2 ayat (1) Undang-Undang Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang. Jaksa penuntut umum dalam perkara ini menuntut supaya Majelis Hakim Pengadilan Negeri Mataram yang memeriksa dan mengadili perkara ini memutuskan:

Menyatakan terdakwa I WAYAN SUJANA terbukti secara sah dan meyakinkan menurut hukum bersalah melakukan tindak pidana perdagangan orang melakukan penerimaan seseorang dengan penyekapan, penyalahgunaan posisi rentan, penjeratan utang walaupun memperoleh persetujuan dari orang yang memegang kendali atas orang lain, untuk tujuan mengeksploitasi orang tersebut di wilayah negara Republik Indonesia, sebagaimana diatur dan diancam dalam pasal dalam surat dakwaan alternatif kedua Pasal 2 ayat (1) Undang-Undang Republik Indonesia Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang

Menjatuhkan pidana terhadap Terdakwa berupa pidana penjara selama 5 (lima) tahun dikurangkan selama Terdakwa dalam tahanan sementara dan denda Rp. 200.000.000,- (dua ratus juta rupiah) subsidair 4 (empat) bulan kurungan;

Putusan Majelis Hakim

Majelis Hakim Mahkamah Agung (Putusan Nomor 421/K/Pid.Sus/2015) memutus perkara ini dengan amar putusan sebagai berikut:

MENGADILI

Mengabulkan permohonan kasasi dari Pemohon Kasasi/Penuntut Umum pada Kejaksaan Negeri Mataram tersebut;

Membatalkan putusan Pengadilan Negeri Mataram Nomor 413/Pid.Sus/2013/PN.Mtr tanggal 14 Juli 2014

MENGADILI SENDIRI

Menyatakan Terdakwa I WAYAN PUTU SUJANA terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana “Mengeksploitasi ekonomi dan seksual anak dengan maksud untuk menguntungkan diri sendiri atau orang lain;

Menjatuhkan pidana kepada Terdakwa tersebut dengan pidana penjara 2 (dua) tahun dan denda sebesar Rp. 60.000.000,- (enam puluh juta rupiah) dengan apabila denda tersebut tidak dibayar diganti dengan pidana kurungan selama 3 (tiga) bulan;

APPENDIX 5

Kasus Posisi Putusan Nomor. 22/Pid.Sus/2021/PN Tgl (Bad Practice)

Kronologis Kasus³⁷³

Terdakwa merupakan Direktur Utama di PT Lakemba Perkasa Bahari yang bergerak di bidang Perekrutan, penempatan dan Pengiriman ABK (Anak Buah Kapal) untuk bekerja di kapal Luar Negeri;

- Bahwa PT Lakemba Bahari memiliki izin dan terdaftar di Kementerian Perhubungan sebagai badan hukum yang memiliki Surat Izin Usaha Perekrutan dan Penempatan Awak Kapal (SIUPPAK) namun tidak memiliki Surat Ijin Penempatan Perusahaan Pekerja Migran Indonesia (SIP3MI);
- Pada tanggal 14 Februari 2019 PT Lakemba Perkasa Bahari mengirimkan Cerre Dorromeus Solum, Don Bosco Resa Lohonauman, Gunawan Ahyan, saksi RF, alm Efendi Pasaribu untuk bekerja di kapal Long Xing 629;
- Bahwa DELIAN selaku pihak pemilik kapal Long Xing 629 tidak memiliki hubungan kerjasama ataupun kontrak dengan PT Lakemba Perkasa Bahari;
- Sebelum diberangkatkan para ABK tersebut dikumpulkan oleh HRD PT. Lakemba di ruang meeting untuk diberikan penjelasan isi perjanjian kerja laut/PKL dan meminta mereka menandatangani isi perjanjian;
- Bahwa isi dari PKL adalah hak dan kewajiban para calon ABK Kapal seperti gaji, asuransi, kontrak 2 (dua) tahun di kapal Long Xin 629, tidak mengatur jam kerja dan makanan-minuman bagi para ABK;
- Adapun PKL tersebut tidak pernah disahkan oleh Kementerian Perhubungan Laut;
- Bahwa berdasarkan informasi yang terdakwa terima kalau para ABK pada saat bertugas sebagai ABK kapal Long Xing 629 diberikan makanan dan minuman yang tidak layak, serta jam kerja yang tidak tetap;
- Bahwa ABK EP meninggal dunia di Rumah Sakit Busan Korea Selatan karena sakit sesak napas dan muntah darat dan pada tanggal 8 Mei 2020 dan dengan difasilitasi KBRI, para ABK yang diberangkatkan PT Lakemba Bahari beserta jenazah dari (alm) EP dipulangkan ke Indonesia dan atas hal tersebut asuransi EP telah dibayarkan BNI Life sebesar Rp 200.000.000,- (dua ratus juta rupiah);
- Bahwa terdakwa tidak pernah menghubungi kondisi para ABK kapal menggunakan telepon satelit karena sebelumnya tidak ada laporan dari pihak agency tentang kondisi para ABK.

Dakwaan serta Tuntutan Jaksa Penuntut Umum

Terdakwa dalam perkara ini didakwakan oleh Penuntut Umum dengan dakwaan alternatif, yakni:

- Pertama** : Pasal 4 Jo. Pasal 48 ayat (1) Undang-Undang Republik Indonesia Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang Jo. Pasal 55 ayat 1 ke (1) KUHP.
- Kedua** : Pasal 85 huruf A UU Nomor 18 Tahun 2017 tentang Perlindungan Pekerja Migran Indonesia Jo. Pasal 55 ayat (1) ke-(1) KUHP.

Penuntut Umum dalam perkara ini menuntut Terdakwa dengan tuntutan pidana penjara selama 1 (satu) tahun dan 6 (enam) bulan dan denda sebesar Rp. 800.000.000,-(delapan ratus juta rupiah) dengan ketentuan apabila denda tersebut tidak dibayar maka diganti dengan pidana kurungan selama 3 (tiga) bulan sebagaimana dimaksud dalam dakwaan kedua.

Putusan Majelis Hakim

³⁷³ Kronologi kasus dirangkum dari fakta hukum pada putusan.

Dalam putusannya Majelis Hakim Pengadilan Negeri Tegal menyatakan Terdakwa terbukti secara sah dan meyakinkan bersalah dalam dakwaan kedua dengan pidana penjara selama 1 (satu) tahun dan 3 (tiga) bulan dan denda sejumlah Rp 800.000.000,- (delapan ratus juta rupiah) dengan ketentuan apabila denda tersebut tidak dibayar maka diganti dengan pidana kurungan 1 (satu) bulan;

APPENDIX 6

Kasus Posisi Putusan PN Pemalang No. 168/Pid.Sus/2020/ PN Pml (Good Practice)

Identitas Terdakwa

Nama lengkap	: Muhamad Zakaria Alias Zakaria Bin Slamet
Tempat lahir	: Pemalang
Umur/Tanggal lahir	: 33 Tahun / 09 Juni 1987
Jenis kelamin	: Laki-laki
Kebangsaan	: Indonesia
Tempat tinggal	: Desa Bojongbata Rt.001 Rw.003, Kelurahan Bojongbata, Kecamatan Pemalang, Kabupaten Pemalang, Provinsi Jawa Tengah
Agama	: Islam
Pekerjaan	: Karyawan Swasta (ktp), Direktur PT. Sinar Muara Gemilang Sejak 12 November 2018 S/d 03 Maret 2020

Kronologis Kasus³⁷⁴

Latar Belakang Terdakwa dan Perusahaannya

- Pada bulan November 2018 Muhamad Zakaria Alias Zakaria Bin Slamet (selanjutnya disebut terdakwa) bersama dengan saksi JONI KASIYANTO Als JONI, mendirikan perusahaan PT. Sinar Muara Gemilang untuk merekrut, mengumpulkan, mengirimkan dan menempatkan pekerja anak buah kapal (ABK) baik dalam negeri maupun luar negeri. Di dalam perusahaan tersebut, Terdakwa bertindak selaku Direktur dan saksi JONI KASIYANTO Als JONI sebagai Komisaris.
- Pendirian PT. Sinar Muara Gemilang agar untuk lebih meyakinkan bahwa seolah-olah perusahaan tersebut adalah perusahaan resmi untuk merekrut, mengirimkan, dan menempatkan ABK. Padahal, PT. Sinar Muara Gemilang tidak memiliki Surat Izin Penempatan Pekerja Migran Indonesia (SIP3MI), serta tidak memiliki Surat Izin Usaha Perekrutan Dan Penempatan Awak Kapal (SIUPPAK)
- Selain PT. Sinar Muara Gemilang, saksi JONI KASIYANTO Als JONI dan saksi FERRY SETIAWAN HARSONO mendirikan PT. Lovy Permata Samudera untuk jasa pembuatan dokumen persyaratan calon ABK berupa: paspor, buku pelaut, dan sertifikat basic safety training (BST). Saksi JONI KASIYANTO Als JONI berperan sebagai Direktur.

Proses Perekrutan, Transit/Pelatihan, dan Keberangkatan Saksi Korban

- Pada bulan September 2018, salah seorang sponsor bernama Herman menemui dan menawarkan kepada saksi korban Muhammad Yusup untuk bekerja sebagai ABK Kapal di luar negeri dengan janji-janji: gaji sebesar 300 USD sampai 400 USD per-bulan, setiap kapal bersandar akan mendapatkan bonus uang, pekerjaan tidak terlalu melelahkan karena sudah menggunakan mesin/tidak manual, jam kerja hanya 10 jam per-hari/tidak sampai 18 jam, dan setiap 6 bulan kapal akan bersandar ke

³⁷⁴ Kronologi kasus dirangkum dari fakta hukum pada putusan.

Pelabuhan.

- Herman meminta Muhammad Yusup untuk mencari orang lain untuk dijadikan ABK di luar negeri dengan gaji, fasilitas, dan syarat yang sama. Muhammad Yusup kemudian mengajak saksi korban lain yaitu Muhammad Yani dan Azuar untuk ikut bekerja sebagai ABK Kapal di luar negeri dan saksi korban tersebut menyetujuinya.
- Pada bulan Agustus 2018, Herman bertemu dengan Muhammad Yani dan Azuar dengan memberikan janji-janji yang sama dengan saksi korban Muhammad Yusup lalu Herman meminta persyaratan berupa dokumen dan uang pendaftaran sebesar Rp. 1.000.000,- (satu juta rupiah).
- Selanjutnya, Muhammad Yusup, Muhammad Yani dan Azuar dibawa ke Politeknik Ilmu Pelayaran (PIP) Semarang untuk mengikuti pelatihan BST dan setelah selesai mereka mendapatkan buku pelaut oleh JONI KASIYANTO Als JONI meskipun ketiganya tidak pernah ke syahbandar untuk membuat buku pelaut.
- Pada tanggal 10 Februari 2019 JONI KASIYANTO Als JONI membawa Muhammad Yusup, Muhammad Yani dan Azuar ke kantor PT. Sinar Muara Gemilang untuk bertemu dengan Terdakwa untuk menyerahkan dokumen-dokumen pribadi milik ketiganya serta ketiganya diminta untuk menandatangani 4 (empat) dokumen, di antaranya: 1) Individual working contract for fishing vessel 2) Surat pernyataan hutang ABK 3) Surat pernyataan ganti kerugian 4) Tabel gaji non-pengalaman. Semua dokumen kemudian ditandatangani oleh Muhammad Yusup, Muhammad Yani dan Azuar.
- Untuk saksi korban Riski Panggareza direkrut langsung oleh saksi JONI KASIYANTO Als JONI pada bulan November 2018 dengan pola yang sama;
- Untuk saksi korban Benardus Maturbongs kurang lebih tahap perekrutannya sama akan tetapi berbeda sponsor, yang merekrutnya adalah Anton yang juga terhubung dengan PT.Sinar Muara Gemilang.
- Untuk pengiriman ke luar negeri, Saksi JONI KASIYANTO Als JONI menghubungi pihak agency ORIENT COMMERCIAL AND TRADE CO LTD untuk pembelian dan pengiriman tiket elektronik.
- Pada tanggal 13 Februari 2019, Terdakwa membawa Muhammad Yusup, Muhammad Yani, Azuar, dan Riski Panggareza ke IFF Jakarta Timur dari Pemalang. Sampai di IFF keempat saksi korban juga bertemu dengan saksi korban Benardus Maturbongs. Terdakwa menyerahkan buku pelaut, paspor, sertifikat BST, tiket pesawat, dan dokumen lainnya atas nama kelima saksi korban kepada ABUR untuk nantinya kelimanya diantarkan ke Bandara Soekarno-Hatta dan seluruh dokumen tersebut diserahkan kepada kelima saksi korban.
- Pada tanggal 14 Februari 2019, ABUR membawa Muhammad Yusup, Muhammad Yani, Azuar, Riski Panggareza, dan Benardus Maturbongs dari IFF ke Bandara Soekarno-Hatta untuk keberangkatan tujuan akhir ke Busan, Korea Selatan.
- Sampai di Busan, Korea Selatan pihak agency ORIENT COMMERCIAL AND TRADE CO LTD menjemput keenam saksi korban beserta ABK lainnya untuk bekerja di Kapal Longxing 629 dengan beberapa ABK lain termasuk 8 orang dari China.
- Pada tanggal 15 Februari 2019, Kapal Longxing 629 mulai berangkat dari Busan, Korea Selatan dengan jalur Samudera Pasifik untuk menangkap ikan tuna dan ikan hiu.
- Kondisi Selama Bekerja Sebagai ABK di Kapal LONG XING 629
- Berdasarkan rencana, Kapal Longxing 629 akan berlabuh ketika sudah berlayar selama 8 bulan akan tetapi tidak berlabuh. Sekitar bulan Maret 2019 ada dua ABK atas nama EDO dan MUH IDRIS dipindahkan dari Kapal Longxing 629 ke Kapal Longxing 630.
- Selama berada di Kapal Longxing 629 semua ABK asal Indonesia termasuk keenam saksi korban mengalami kondisi perlakuan yang berbeda dengan ABK asal China. Seluruh ABK asal Indonesia setiap harinya bekerja selama antara 18 jam sampai dengan 30 jam. Untuk kondisi makan dan minum ABK asal Indonesia diberikan ikan umpan yang sudah lama berada di pendingin selama bulanan atau

tahunan. Selain itu lauk yang diberikan berupa daging ayam yang berwarna biru/hampir busuk. Untuk minum, mereka diberikan air laut yang sudah disuling sebelumnya.

- ABK asal Indonesia juga mengalami kekerasan fisik, Muhammad Yusup, Azuar, A Faisal, Ari, dan Sepri dipukul beberapa kali di beberapa bagian tubuh oleh wakil mandor bernama (ARFU) SHAU XI LONG.
- Muhammad Yusup, Muhammad Yani, Azuar, Riski Panggareza, dan Bernadus Maturbongs bekerja sebagai ABK Kapal Ikan Longxing 629 selama 14 bulan dari 15 Februari 2019 hingga April 2020 tidak menerima gaji sebagaimana mestinya termasuk tidak menerima bonus sebesar apapun. Rinciannya sebagai berikut
 - a) Muhammad Yusup. Hanya menerima gaji yang ditransfer ke rekening ibu saksi korban sejumlah sebesar USD 300. Padahal berdasarkan besaran gaji yang diterima dari USD 300 dikalikan 14 bulan maka total yang diterima seharusnya USD 4.200.
 - b) Muhammad Yani. Hanya menerima gaji yang dikirim selama 7 bulan dengan total USD 1.750. Padahal berdasarkan besaran gaji yang harus diterima jika USD 300 dikalikan waktu kerja 14 bulan adalah USD 4.200. 3) Azuar. Hanya menerima gaji yang dikirim selama 7 bulan dengan total USD 1.750. Padahal berdasarkan besaran gaji yang harus diterima jika USD 300 dikalikan waktu kerja 14 bulan adalah USD 4.200.
 - c) Rizki Panggareza. Hanya menerima gaji yang ditransfer ke rekening istrinya dengan jumlah USD 150 pada bulan Maret 2019 dan USD 150 pada bulan April 2019 dengan total USD 300. Padahal berdasarkan besaran gaji yang harusnya diterima USD 450 dikalikan waktu kerja selama 14 bulan harusnya yang diterima sebesar USD 6.300.
 - d) Benardus Maturbongs. Hanya menerima gaji yang ditransfer sebesar Rp. 8.000.000,-. Padahal berdasarkan besaran gaji per-bulan USD 300 dikalikan 14 bulan kerja maka seharusnya menerima USD 4.200.
- Hasil dari perekrutan dan pengiriman kelima saksi korban tersebut, Terdakwa dan saksi JONI KASIYANTO Als JONI mendapatkan keuntungan total sebesar Rp. 15.000.000,- (lima belas juta rupiah). Selain itu, terdapat keuntungan lain setiap bulannya yakni sebesar USD 30 per-ABK yang dikirimkan

Dakwaan serta Tuntutan Jaksa Penuntut Umum

Terdakwa dalam perkara ini didakwakan oleh Penuntut Umum dengan dakwaan alternatif, yakni:

- Pertama : Pasal 4 Jo. Pasal 48 ayat (1) Undang-Undang Republik Indonesia Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang Jo. Pasal 55 ayat 1 ke (1) KUHP.
- Kedua : Pasal 81 UU Nomor 18 Tahun 2017 tentang Perlindungan Pekerja Migran Indonesia Jo. Pasal 55 ayat (1) ke-(1) KUHP.

Penuntut Umum dalam perkara ini menuntut Terdakwa menggunakan dakwaan pertama dengan tuntutan pidana penjara selama 6 (enam) tahun dan denda sebesar Rp.120.000.000 (seratus dua puluh juta rupiah) subsidi 3 (tiga) bulan kurungan penjara. Selain itu Penuntut Umum mengajukan restitusi dalam perkara Joni Kasiyanto als Joni yang penuntutannya dilakukan terpisah.

Putusan Majelis Hakim

Dalam putusannya Majelis Hakim memutuskan terdakwa bersalah dalam dakwaan pertama Pasal 4 jo. 48 ayat (1) Undang-Undang Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang Jo Pasal 55 ayat (1) Ke 1 KUHP. Terdakwa dipidana penjara selama 4 (empat) tahun dan 6 (enam) bulan dan denda sebesar Rp120.000.000,- (seratus dua puluh juta rupiah) dengan ketentuan apabila denda tersebut tidak dibayar maka diganti dengan pidana kurungan pengganti denda selama 4 (empat) bulan.

Tidak hanya itu, terdakwa juga diperintahkan oleh Majelis Hakim untuk membayar restitusi kepada para korban sebesar Rp. 557.985.196,-(lima ratus lima puluh juta sembilan ratus delapan puluh lima seratus sembilah puluh

APPENDIX 7

a. Putusan No. 3/Pid.Sus/2021/PN Lsm dengan terdakwa Basri Sihombing/BS (Bad Practice)

Kasus Posisi:

Kasus ini bermula saat terdakwa ditangkap pada hari Jumat tanggal 20 November 2020 sekitar Pukul 16:30 WIB oleh petugas pengungsi di Pengungsian Rohingya di Lhoseumawe, dikarenakan terdakwa berputar-putar di luar areal pengungsian tersebut, dan petugas menyatakan hal tersebut mencurigakan, kemudian terdakwa diberhentikan dan dilakukan pemeriksaan HP diketahui terdakwa berhubungan dengan M (yang diketahui berada di Malaysia). Terdakwa mengaku disuruh M untuk menjemput seorang pengungsi. M menjanjikan akan memberikan Rp 6.000.000 setelah penjemputan dilakukan, dan Rp 6.000.000 untuk biaya perjalanan.

Dakwaan:

BS didakwa dengan dakwaan alternatif kesatu Pasal 120 ayat (1) dan ayat (2) UU No. 6 Tahun 2011 tentang Keimigrasian yang dikenal dengan nama tindak pidana penyeludupan manusia³⁷⁵ dan alternatif kedua Pasal 10 UU No. 21 tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang (PTPPO).

Proses Persidangan:

Terhadap dakwaan tersebut, terdakwa tidak mengajukan eksepsi. Sebagai proses pemeriksaan, Penuntut Umum menghadirkan saksi pertama, yaitu yang melakukan penangkapan, yaitu Saksi Mulyadi yang menyatakan curiga dengan terdakwa dan langsung memeriksa HP terdakwa dan mendapati adanya nomor Malaysia berkontak dengan terdakwa dan kemudian terdakwa mengaku akan menjemput 2 orang pengungsi yang akan dibawa ke penginapan di Lhokseuwame, yang terdakwa tidak tahu siapa nama 2 orang tersebut. Saksi kedua yang dihadirkan oleh Penuntut Umum adalah Saksi Suhendri yang juga melakukan penangkapan, keterangan yang diberikan oleh Saksi Suhendri ini sama dengan Saksi Mulyadi.

Setelah 2 saksi tersebut, Penuntut Umum langsung memeriksa terdakwa. Dalam pemeriksaan terdakwa, ia mengaku bahwa ia akan membawa 2 orang pengungsi Rohingya atas suruhan dari M, yang dimana ia memerintahkan untuk membawa 2 orang tersebut ke penginapan di Lhokseuwame, nantinya setelah tiba di penginapan tersebut, akan dilakukan video call, dan kemudian terdakwa akan mendapatkan Rp 6.000.000. M menyatakan pada terdakwa bahwa 2 orang tersebut adalah adiknya beserta anak dari adiknya. Terdakwa menyatakan tidak tahu akan diapakan 2 orang tersebut. Terdakwa juga sama sekali tidak mengajukan saksi yang meringankan.

Barang Bukti:

Disebutkan dalam putusan, bahwa Penuntut Umum mengajukan “barang bukti” berupa -1 (satu) unit handphone merek Realme, warna Biru beserta sim card telkomsel dengan nomor : 081282854440; dan 3 (tiga) Lembar E-ticket traveloka, dari Jakarta ke Banda Aceh, dengan Pesawat Lion Air, atas nama penumpang BASRI SIHOMBING (terdakwa).

Tuntutan:

Penuntut Umum kemudian menuntut dengan Pasal 10 UU No. 21 tahun 2007 tentang PTPPO dengan tuntutan pidana penjara selama 5 (lima) dan pidana denda sebesar Rp120.000.000.000 (seratus dua puluh juta rupiah) subsidair 1 (satu) bulan penjara.

³⁷⁵ Pasal 120 ayat (2) UU No. 6 Tahun 2011 tentang Keimigrasian menjelaskan bahwa perbuatan yang diatur dalam ayat (1) merupakan tindak pidana penyeludupan manusia

Fakta Hukum yang disepakati oleh Hakim:

- Yang melakukan penangkapan adalah Anggota TNI yang menjadi petugas di pengungsian
- Hakim menyatakan cara terdakwa membawa lari 2 orang pengungsi adalah dengan menjemput pengungsi tersebut yang tidak diketahui namanya oleh terdakwa
- Namun sebelum menjemput tersebut, terdakwa terlebih dahulu ditangkap oleh anggota TNI yang bertugas melakukan pengamanan di pengungsian
- Tidak dijelaskan apakah M menyuruh, disebutkan dalam putusan “Bahwa terdakwa membawa 2 (dua) orang pengungsi rohingya tersebut adalah Sdr. MUHAMMAD (Mengaku di Malaysia), yang dimana ia memerintahkan terdakwa untuk membawa 2 (dua) orang tersebut ke penginapan atau hotel yang ada di Lhokseumawe dan nantinya setelah 2 (dua) orang tersebut tiba di hotel dan pengungsi tersebut akan video call Sdr. MUHAMMAD dan kemudian Sdr. MUHAMMAD akan mengirimkan uang kepada terdakwa sejumlah Rp6.000.000.00 (enam juta rupiah).
- Tidak ada kata-kata “menyuruh”
- Hakim menjelaskan bahwa terdakwa tidak tahu akan diapakan 2 orang tersebut

Pertimbangan Hakim

- Hakim langsung memilih dakwaan alternatif Pasal 10 Undang-Undang Republik Indonesia Nomor 21 Tahun 2007 tentang PTPPO dengan berdasarkan fakta hukum yang disebutkan di atas, padahal fakta hukum tersebut tidak ada yang menguraikan tentang proses, cara dan tujuan yang merupakan indikator terjadinya TPPO
- Untuk membuktikan unsur “Membantu Atau Melakukan Percobaan Untuk Melakukan Tindak Pidana Perdagangan Orang” dalam Pasal 10 UU PTPPO, hakim tidak menguraikan terpenuhi tindak pidana perdagangan orang yang mana dalam UU PTPPO, lalu tidak menguraikan proses, cara dan tujuan TPPO, hanya dengan menguraikan fakta hukum, yang mana juga fakta hukum tersebut tidak menguraikan proses, cara dan tujuan TPPO, yang mana justru hakim menarasikan perbuatan tersebut dengan “membawa lari pengungsi Rohingya” yang tidak serta merta menjadi TPPO

Putusan Pengadilan

Majelis hakim kemudian menyatakan terdakwa BS terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana “membantu atau melakukan percobaan untuk melakukan tindak pidana perdagangan orang” sebagaimana dalam dakwaan alternatif kedua yaitu Pasal 10 UU No. 21 tahun 2007 tentang PTPPO dengan pidana penjara 3 tahun dan denda Rp120.000.000.000 (seratus dua puluh juta rupiah) subsidair 1 (satu) bulan penjara.

Temuan menarik

Dalam dokumen putusan ditemukan perbedaan cara ketik dalam amar putusan yang memuat nama terdakwa

MENGADILI:

1. Menyatakan Terdakwa Basri Sihombing terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana “membantu atau melakukan percobaan untuk melakukan tindak pidana perdagangan orang” sebagaimana dalam Dakwaan Alternatif Kedua Penuntut Umum tersebut;
2. Menjatuhkan pidana terhadap Terdakwa Basri Sihombing oleh karena itu dengan pidana penjara selama 3 (tiga) Tahun;
3. Menjatuhkan pidana denda kepada Terdakwa Basri Sihombing sejumlah Rp120.000.000.00 (seratus dua puluh juta rupiah) dengan ketentuan apabila denda tersebut tidak dibayar maka harus diganti dengan pidana penjara selama 1 (satu) bulan;

b. **Putusan No. 6/Pid.Sus/2021/PN Lsm dengan Terdakwa I Nunung Fauziah Binti Sumarno (NF) dan Terdakwa II James Maarseven Pasaribu/JMP (Bad Practice)**

Kasus Posisi:

Terdakwa dalam perkara ini berjumlah 2 orang yaitu NF dan JMP. Keduanya didampingi oleh penasihat hukum yang disediakan oleh pengadilan negeri. NF dan JMP dalam dakwaan disebutkan disuruh oleh A³⁷⁶ untuk menjemput Dilkayas di Pengungsian Rohingya pada tahun 2020. Sepanjang 2020, NF dan JMP telah beberapa mengunjungi tempat pengungsian tersebut untuk menjemput Dilkayas, yaitu pada 17 Oktober 2020 dan 18 Oktober 2020. Pada kunjungannya 18 Oktober 2020, NF dan JMP dinyatakan oleh petugas UN bahwa mereka tidak dapat membawa Dilkayas dikarenakan tidak adanya dokumen yang harus dilengkapi, namun terhadap NF dan JMP tidak dilakukan penangkapan. Lalu kemudian NF dan JMP mengajak saksi S untuk melakukan kembali penjemputan terhadap Dilkayas, yaitu pada 5 November 2020. Pada waktu ini kemudian, NF didatangi oleh Anggota TNI dan kemudian NF dan JMP dibawa untuk mendapatkan keterangan lebih lanjut, padahal tidak ada bukti yang dinarasikan sebelumnya pada dakwaan bahwa NF dan JMP dapat dilakukan penangkapan.

Dakwaan:

Dakwaan yang diberikan oleh pentuntut umum berupa dakwaan alternatif kepada yaitu NF dan JMP didakwa, dengan dakwaan alternatif kesatu Pasal 120 ayat (1) dan ayat (1) UU No. 6 Tahun 2011 tentang Keimigrasian jo Pasal 55 ayat (1) KUHP dan alternatif kedua Pasal 10 UU No. 21 tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang (UU PTPPO).

Proses Persidangan:

Saksi pertama yang dihadirkan dalam prose pemeriksaan adalah saksi Anggota TNI yang melakukan penangkapan/ pengamanan kepada NF dan JMP yang kemudian menyerahkan kepada Anggota Piket Reskrim. Dinarasikan dalam putusan bahwa NF dan JMP berusaha “mengambil dan membawa lari” pengungsi Rohingya. Saksi kedua yang dihadirkan adalah IP yang merupakan petugas yang melakukan pengamanan kepada NF dan JMP, yang terlebih dahulu melakukan pengeledahan terhadap HP milik NF yang kemudian ditemukan foto pengungsi Dilkayas, yang kemudian NF mengaku akan membawa pengungsi tersebut ke Medan atas suruhan dari A. Dalam persidangan juga dijelaskan terdapat keterangan dari Saksi SY, SY adalah ada petugas yang melakukan pengamanan kepada mereka sebelum SY memanggil IP yang melakukan pengeledahan HP. Kedua terdakwa sama sekali tidak mengajukan saksi yang meringankan.

Barang Bukti:

Penuntut umum mengajukan barang bukti berupa 1 (satu) unit mobil Avanza warna putih dengan Nopol BK 1511 ZD, 1 (satu) buah Kartu ATM Mandiri, 1 (satu) unit HP OPPO warna merah casing hitam, 1 (satu) buah buku rekening BRI a.n NUNUNG FAUZIAH dan 1 (satu) buah kartu ATM BRI.

Fakta Hukum yang disepakati oleh Hakim:

- Majelis Hakim menyepakati bahwa
- Bahwa Pada tanggal 15 Oktober 2020 terdakwa dihubungi oleh A (belum tertangkap/DPO) untuk dapat mengeluarkan dan membawa sdr. Dilkayas Binti Jofar Hissain tanpa izin dari camp untuk dibawa kerumah terdakwa dengan dijanjikan sejumlah uang
- A disebutkan telah mengirimkan uang sebesar RM 1500 untuk uang akomodasi/perjalanan. Selanjutnya terdakwa berangkat ke Lhokseumawe dengan menggunakan 1 (satu) unit mobil
- Tanggal 16 Oktober 2020, Terdakwa kembali ke Pengungsian, dan diberikan uang kembali oleh A sebesar RM 2000 sebagai biaya akomodasi tambahan

³⁷⁶ A berstatuskan DPO, belum tertangkap

- Tanggal 17 dan 18 Oktober 2020, Terdakwa kembali ke pengungsian tersebut namun tidak dapat bertemu dengan Dilkayas
- Tanggal 2 November 2020, A kembali menelpon para terdakwa untuk meminta menjemput Dilkayas, yang kemudian para terdakwa membawa Saksi A, dan pergi ke pengungsian Rohingya tersebut pada 2 November 2020 dari Sumatera Utara dan tiba di Lhokseumawe pada 5 November 2020, namun pada sore harinya terdakwa NF diamankan oleh petugas kemudian dipertemukan oleh JMP dan diminta keterangan.
- Fakta hukum yang diakui oleh majelis hakim hanya sebatas fakta tersebut, perihal penggeledahan HP yang menyertakan foto Dilkayas tidak dijelaskan

Tuntutan:

Para terdakwa kemudian dituntut oleh Penuntut Umum melanggar pasal 10 UU PTPPO dengan tuntutan pidana penjara selama 4 (empat) dan pidana denda sebesar Rp.120.000.000.000, - (seratus dua puluh juta rupiah) subsidair 1 (satu) bulan penjara.

Pertimbangan Hakim:

Hakim langsung memilih dakwaan alternatif Pasal 10 Undang-Undang Republik Indonesia Nomor 21 Tahun 2007 tentang PTPPO dengan berdasarkan fakta hukum yang disebutkan di atas, padahal fakta hukum tersebut tidak ada yang menguraikan tentang proses, cara dan tujuan yang merupakan indikator terjadinya TPPO

Untuk membuktikan unsur “Membantu Atau Melakukan Percobaan Untuk Melakukan Tindak Pidana Perdagangan Orang” dalam Pasal 10 UU PTPPO, hakim tidak menguraikan terpenuhi tindak pidana perdagangan orang yang mana dalam UU PTPPO, lalu tidak menguraikan proses, cara dan tujuan TPPO, hanya dengan menguraikan fakta hukum, yang mana juga fakta hukum tersebut tidak menguraikan proses, cara dan tujuan TPPO, yang mana justru hakim menarasikan perbuatan tersebut dengan “mengeluarkan dan membawa tanpa izin dari camp untuk dibawa ke rumah terdakwa dengan dijanjikan sejumlah uang” yang tidak serta merta menjadi TPPO

Putusan Pengadilan:

Majelis hakim menyatakan para terdakwa terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana “membantu atau melakukan percobaan untuk melakukan tindak pidana perdagangan orang” sebagaimana dalam dakwaan alternatif kedua yaitu Pasal 10 UU PTPPO dengan pidana penjara 3 tahun dan denda Rp120.000.000.000 (seratus dua puluh juta rupiah) subsidair 1 (satu) bulan penjara.

APPENDIX 8

Kasus Posisi Putusan No. 647/Pid.Sus/2021/PN Kis dengan terdakwa Deni Franciska Alias Deni/DF (Good Practice)

Kasus Posisi:

Terdakwa tidak didampingi oleh penasihat hukum. Keterlibatan Terdakwa dalam kasus ini berdasarkan pengembangan perkara dimana yang ditangkap terlebih dahulu adalah Saksi Haidir yang menampung 17 orang TKI ilegal yang hendak berangkat ke Malaysia tanpa adanya dokumen legal. Disebutkan dalam dakwaan bahwa berdasarkan keterangan Saksi Haidir dan ke-17 orang TKI tersebut, mereka dititipkan di rumah Saksi Haidir oleh Terdakwa, kemudian mereka akan berangkat dengan kapal dengan nahkoda Terdakwa dan Rembes (seorang DPO). Dalam dakwaan disebutkan bahwa pada 4 Januari 2021, Terdakwa pernah melakukan upaya untuk mengirimkan TKI, namun tidak jadi dilanjutkan karena mereka dirampok (namun tidak dijelaskan apakah orang yang diberangkatkan pada 4 Januari 2021 tersebut adalah ke-17 orang TKI tersebut). Dalam dakwaan disebutkan, untuk perbuatan tersebut, terdakwa mendapatkan upah sejumlah Rp 2.500.000.

Dakwaan:

Terdakwa didakwa dengan dakwaan alternatif kesatu Pasal 120 ayat (1) dan ayat (2) UU No. 6 Tahun 2011 tentang Keimigrasian jo Pasal 55 ayat (1) ke-1 KUHP atau alternatif kedua Pasal 2 jo. 10 UU No. 21 tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang (UU PTPPO). Atas dakwaan tersebut, Terdakwa juga tidak mengajukan eksepsi.

Proses Persidangan:

Saksi pertama yang dihadirkan adalah saksi Haidir yang disebutkan membenerakan berita acara pemeriksaan, bahwa ia menampung 17 orang dari seluruh Indonesia (10 laki-laki, 7 orang perempuan dewasa), hal tersebut sudah 2 kali dilakukan, yang pertama dengan 7 orang (6 orang laki-laki, 1 orang perempuan). Saksi hanya menyediakan jasa sewa tempat dan makan ke-17 orang tersebut, yaitu sewa tempat Rp 300.000, makan Rp 20.000 per orang per hari, yang dibayarkan oleh orang bernama Ucok, namun Saksi Haidir menyatakan pernah mendapatkan tambahan uang Rp 500.000.

Saksi kedua dan ketiga yang dihadirkan adalah penyidik yang melakukan penangkapan, saksi ini memberikan keterangan bahwa tujuan penampungan yang dilakukan saksi Haidir untuk mengirimkan 17 orang tersebut ke Malaysia dengan kapal but berukuran 3x8m

Lalu kemudian yang diperiksa selanjutnya langsung kepada Terdakwa, tidak ada saksi lainnya, termasuk tidak ada saksi yang meringankan. Keterangan Terdakwa menjelaskan bahwa pada 4 Januari 2021, Terdakwa pernah melakukan upaya membawa dengan kapal 35 orang TKI ke Malaysia, namun tidak jadi dilanjutkan dikarenakan kapal yang ia bawa dirampok. Dalam keterangan terdakwa, Terdakwa hanya sekali melakukan perjalanan tersebut. Terdakwa menyatakan bahwa yang menyuruh melakukan perjalanan TKI tersebut adalah Rembes, dengan upah yang diberikan sejumlah Rp 2.500.000. Namun dalam keterangan Terdakwa bagian lain, Terdakwa menyatakan sudah 2 kali memberangkatkan TKI ke Malaysia, yang sebelumnya pada sebelum 2021 dengan upah Rp 2.000.000

Barang Bukti:

Penuntut Umum tidak ada mengajukan barang bukti dalam perkara ini

Fakta Hukum yang disepakati oleh Hakim:

- Hakim menjelaskan berdasarkan alat bukti dan barang bukti diperoleh fakta hukum yang dideskripsikan, padahal tidak ada barang bukti yang diajukan.
- Fakta hukum yang disepakati oleh hakim:
- Terdakwa pernah melakukan upaya mengantarkan TKI ke Malaysia, namun tidak jadi dilakukan karena kapal tersebut mau dirampok, yang menyebabkan Terdakwa kembali ke tepi
- Disebutkan Hakim Terdakwa hanya 1 kali kali melakukan pemberangkatan para TKI ke Malaysia, untuk sebanyak 35 orang TKI atas suruhan Rembes
- Hubungan Terdakwa dengan Rembes diawali oleh Terdakwa meminta pekerjaan kepada Rembes, Rembes menyuruh membahwa kapal but, yang disepakati oleh Terdakwa karena Terdakwa membutuhkan uang sehingga menerimanya, yaitu dengan bayaran Rp 2.500.000
- Dalam fakta hukum tersebut, hakim juga menjelaskan peran Rembes, padahal ia tidak pernah dihadirkan dalam persidangan, bahwa Rembes yang membawa TKI ke Malaysia. Lalu kemudian disebutkan nama “Heri” yang dijelaskan sebagai rekan kerja Rembes, namun tidak jelas apa peran yang dilakukan
- Namun dalam fakta hukum lainnya, Hakim menyatakan Bahwa Terdakwa sudah 2 (dua) kali memberangkatkan TKI ke Negara Malaysia, yaitu yang pertama kali yaitu sebelum tahun baru 2021, dengan upah Rp 2.000.000

Dalam hal ini, fakta hukum dapat dikatakan hanya salin-tempel dari keterangan terdakwa, termasuk pada aspek ketidakjelasan informasinya. Namun, dalam fakta hukum tersebut, berusaha dijelaskan bahwa aspek tindakan yang dilakukan hanya pada pemberangkatan, yang berhubungan erat dengan pasal putusan yang digunakan.

Tuntutan:

Terdakwa Deni Franciska Alias Deni (DF), DF DF kemudian dituntut oleh Penuntut Umum melakukan tindak pidana turut serta melakukan penyeludupan manusia sebagaimana dimaksud dalam pasal 120 UU ayat (1) dan ayat (2) UU RI nomor 6 tahun 2011 tentang Keimigrasian jo pasal 55 ayat (1) ke-1 KUHP dalam dakwaan pertama dan menuntut hakim menjatuhkan pidana kepada terdakwa dengan pidana penjara selama 6 (enam) tahun dan denda Rp.1.000.000.000,00 (satu milyar rupiah) subsidiair 4 (empat) bulan.

Pertimbangan Hakim:

- Hakim langsung memilih dakwaan alternatif pertama Pasal 120 UU ayat (1) dan ayat (2) Undang-Undang Republik Indonesia nomor 6 tahun 2011 tentang Keimigrasian jo Pasal 55 ayat (1) ke-1 KUHP
- Pusat pembuktian yang dilakukan oleh Hakim adalah pada aspek bahwa terdakwa pernah mengirimkan TKI dengan kapal but namun tidak jadi dikarenakan kapal tersebut mau dirampok yang membuat terdakwa kembali lagi, namun atas hal ini Hakim menyatakan unsur “melakukan perbuatan yang bertujuan mencari keuntungan, baik secara langsung maupun tidak langsung, untuk diri sendiri atau untuk orang lain” terpenuhi
- Unsur “membawa seseorang atau kelompok orang, baik secara terorganisasi maupun tidak terorganisasi” dibuktikan oleh hakim dengan menjelaskan bahwa yang Terdakwa berangkatkan para TKI tersebut sebanyak 35 (tiga puluh lima) orang. Padahal fakta ini tidak dijelaskan dalam dakwaan, bahkan berbeda dari dakwaan yang menyebutkan 17 orang, dan untuk 35 orang ini tidak jadi dilakukan pemberangkatan
- Sekalipun maksud hakim adalah percobaan, Pasal 53 KUHP tentang percobaan tidak didakwaan, juga tidak menjadi bagian dari pertimbangan hakim yang diberlakukan

Putusan Pengadilan:

Majelis hakim kemudian menyatakan terdakwa DF telah terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana turut serta melakukan penyelundupan manusia sebagaimana dalam dakwaan alternatif pertama dan menjatuhkan pidana terhadap terdakwa pidana penjara selama 5 (lima) tahun dan denda sebesar Rp1.000.000.000,00 (satu milyar rupiah) subsidi 2 bulan penjara.

APPENDIX 9

Kasus Posisi Putusan No. 924/Pid.Sus/2019/PN Ptk & No. 919/Pid. Sus/2019 PN Ptk (*Bad Practice*)

Identitas Terdakwa

Nama Lengkap : Agus Matius Wiranata Wen Als Ashang bin Bun Koi Kui
Tempat Lahir : Sui Pinyuh
Umur/Tanggal Lahir : 55 Tahun/7 Maret 1965
Jenis Kelamin : Laki-laki
Kebangsaan : Indonesia
Tempat Tinggal : Jl. Surya Purnama No. 16 RT. 03 RW. 010 Kel. Akcaya Kec. Pontianak Selatan,
Kota Pontianak
Agama : Kristen Protestan
Pekerjaan : Wiraswasta

Kasus Posisi

- Pada Maret 2019, terdakwa Agus Matius Wiranata Wen Als Ashang bin Bun Koi Ku (selanjutnya disebut terdakwa) menginap di Hotel 360 di Jalan Mangga Besar, Jakarta Barat. Ketika itu, terdakwa melihat kertas di atas meja rias kamar hotel yang ditempati terdakwa, yang bertuliskan “Bagi yang bisa mencarikan wanita untuk dijodohkan boleh menghubungi nomor telepon di bawah ini (nomor telepon dengan nama kontak Mei Cen)”. Selanjutnya terdakwa menyimpan nomor telepon yang tertulis di kertas tersebut agar nantinya dapat dihubungi.
- Sekitar akhir Maret 2019, terdakwa menghubungi Wati Sarimin als Radhiah als Mei Cen als Mei Fen (selanjutnya disebut Wati Sarimin) untuk menanyakan informasi tentang perjodohan sebagaimana yang terdakwa ketahui melalui tulisan di kertas yang ada di kamar hotel yang terdakwa tempati. Setelah mendapatkan penjelasan dari Wati Sarimin, terdakwa menyatakan kesediaannya untuk mencarikan perempuan warga negara Indonesia untuk dinikahkan dengan laki-laki warga negara asing asal RRC/Tiongkok.
- Pada pertengahan April 2019, terdakwa menemui Wati Sarimin di Hotel 360 dan dijelaskan bahwa Wati Sarimin merupakan pengelola biro jodoh di Jakarta yang bekerjasama dengan Sdr. Wu Ai Hu selaku pengelola biro jodoh di Tiongkok, untuk mencari perempuan warga negara Indonesia yang bersedia dinikahkan dengan laki-laki warga negara Tiongkok.
- Kemudian Wati Sarimin menyampaikan pada terdakwa bahwa apabila terdakwa mendapatkan perempuan yang siap menikah dengan WNA Tiongkok maka terdakwa akan mendapat imbalan berupa uang sebesar Rp10.000.000 (sepuluh juta rupiah) per perempuan. Uang tersebut akan diberikan setelah perempuan WNI yang dicarikan terdakwa sudah diberangkatkan ke Tiongkok serta Wati Sarimin juga akan memberikan biaya lainnya yang berkaitan dengan pernikahan tersebut. Atas penawaran tersebut terdakwa menyatakan kesediaannya serta menyanggupi untuk mengurus pernikahan antara perempuan WNI dengan laki-laki WNA asal Tiongkok.
- Pada awal Mei 2019, terdakwa kembali menemui Wati Sarimin di Hotel 360 dan mengatakan bahwa terdakwa dapat menyediakan perempuan yang berasal dari Kalimantan Barat, dan siap untuk mengurus pernikahan perempuan tersebut dengan WNA asal Tiongkok sesuai dengan permintaan Wati Sarimin. Selanjutnya, terdakwa mengajak Wati Sarimin ke Kalimantan Barat untuk melihat langsung situasi di tempat.
- Pada 15 Mei 2019, Wati Sarimin berangkat ke Pontianak dengan membawa 6 (enam) orang laki-laki WNA asal Tiongkok. Setibanya di Pontianak, Wati Sarimin bertemu dengan saudara Aphen serta 3

(tiga) orang perempuan WNI asal Kalimantan Barat yang akan dinikahkan dengan 3 orang laki-laki WNA asal Tiongkok. Di hari yang sama, dilakukan pernikahan antara 3 orang WNI asal Kalimantan Barat dengan 3 orang laki-laki WNA asal Tiongkok di rumah terdakwa. Keesokan harinya, tanggal 16 Mei 2019, terdakwa dan Wati Sarimin kembali menikahkan 3 orang laki-laki WNA asal Tiongkok dengan 3 orang perempuan WNI asal Kalimantan Barat yang sudah disiapkan oleh terdakwa dan Aphen di rumah terdakwa.

- Pernikahan tersebut diawali dengan perkenalan keenam perempuan WNI asal Kalimantan Barat dengan terdakwa di rumah terdakwa melalui 'mak comblang' bernama Mama Lusi yang menyuruh mereka untuk bertemu dengan terdakwa yang akan menikahkan mereka dengan laki-laki WNA asal Tiongkok.
- Salah satu dari enam perempuan WNI asal Kalimantan Barat adalah Ratika Mungha yang dinikahkan dengan WNA asal Tiongkok bernama Xiao Huan. Sebelumnya, terdakwa mengatakan pada Ratika bahwa "Mong, ini orang dari Cina tinggal di daerah Hebei umurnya 28. Dia ini punya usaha pabrik mie. Kalau kau mau dengan dia, bisa jamin hidup kau lah, nanti kita masukkan dia ke agama kita biar nanti kita yang bimbing dia."
- Selain itu, perempuan WNI asal Kalimantan Barat lainnya adalah Annisa dan Siao San als Sherly. Mereka dinikahkan oleh terdakwa dengan laki-laki WNA asal Tiongkok di rumah terdakwa dengan cara dibaptis di GOR Oevang Oeray, tepatnya di kolam renang, lalu dilakukan pemberkatan di Gereja Bethel Indonesia di Jl. Beringin, Pontianak oleh Pendeta Marbun yang dibayar oleh terdakwa sebesar Rp250.000 (dua ratus lima puluh ribu) untuk satu pasangan yang melakukan pernikahan.
- Pada awalnya Ratika menolak untuk dilakukan pembaptisan dan pernikahan dan pembaptisan sehingga berniat untuk membatalkan pernikahan tersebut dengan mengatakan kepada terdakwa "Gak bisa, nanti saja saya belum siap" namun terdakwa mengatakan kepada Ratika dengan berbisik-bisik agar tidak didengar oleh Pendeta Marbun, "Ya sudah, gak apa-apa sekali ini saja nanti yang bimbing kita kamu ikut saja".
- Annisa dan Siao San juga keberatan untuk dibaptis dan dilakukan pemberkatan dalam pernikahan mereka, karena Annisa beragama Islam dan Siao San beragama Budha. Namun, karena terdakwa memaksa dengan alasan "hanya kali ini", Annisa dan Siao San kemudian mau menuruti kemauan terdakwa. Dari pernikahan tersebut, Ratika, Annisa, dan Siao San mendapat uang mahar dari terdakwa masing-masing sebesar Rp20.000.000 (dua puluh juta rupiah).
- Selanjutnya terdakwa meminta uang biaya pernikahan untuk 6 (enam) orang perempuan WNI asal Kalimantan Barat kepada Wati Sarimin sebesar Rp180.000.000 (seratus delapan puluh juta rupiah) dengan rincian uang mak comblang sebesar Rp 10.000.000 (sepuluh juta rupiah) per orang dan uang mahar sebesar Rp20.000.000 (dua puluh juta rupiah) per orang. Namun Wati Sarimin hanya memberikan sejumlah Rp90.000.000 (sembilan puluh juta rupiah) kepada terdakwa. Uang tersebut berasal dari Wu Ai Hu yang diperuntukkan untuk biaya pernikahan 6 (enam) orang laki-laki WNA asal Tiongkok. Setelah itu Wati Sarimin kembali ke Jakarta.
- Pada 2 Juni 2019 sekitar pukul 11.00 WIB, Wati Sarimin menghubungi terdakwa melalui telepon untuk meminta terdakwa menjemput 7 (tujuh) orang WNA asal Tiongkok di Hotel 360. Pada 5 Juni 2019, terdakwa dan 7 (tujuh) orang WNA asal Tiongkok serta Wu Ai Hu berangkat ke Bandara Soekarno-Hatta dengan diantar oleh Wati Sarimin. Setibanya di Pontianak, terdakwa langsung membawa 7 (tujuh) orang WNA asal Tiongkok ke rumah terdakwa untuk selanjutnya 6 (enam) orang dari mereka akan dinikahkan terdakwa dengan perempuan WNI asal Kalimantan Barat.
- Pada 8 Juni 2019, sekitar pukul 10.00 WIB, Heliana als Sherly (mak comblang) yang sebelumnya diminta oleh terdakwa mencari perempuan yang mau menikah dengan laki-laki WNA asal Tiongkok, datang ke rumah terdakwa bersama SE dengan tujuan memperkenalkan SE kepada terdakwa. Kemudian terdakwa mengenalkan SE dengan WNA asal Tiongkok yaitu Qu Baiyun.
- Setelah perkenalan tersebut, terdakwa menanyakan kepada SE, "Kau mau gak dijodohkan dengan

laki-laki itu? Die tu orang kaya banyak duit e. Nanti kalau kau dah dinikahkan dengan die, kau ikut ke Cine”. Kemudian SE menjawab “Saye ndak mau bang, karena saye takut pegi ke Cine”. Selanjutnya terdakwa membujuk SE dengan mengatakan “Kau sah takut nanti disana kau bakal banyak duit, hidup terjamin dan kau bisa bahagiakan orang tua kamu”. Ketika itu Heliana juga turut membujuk SE untuk menyetujui tawaran terdakwa. SE mengatakan untuk bertanya kepada orang tuanya terlebih dahulu. Kemudian terdakwa menyuruh SE untuk membawa dokumen-dokumen seperti KTP, Kartu Keluarga, dan Akta Kelahiran ke rumah terdakwa esok hari.

- 9 Juni 2019, Heliana dan SE kembali datang ke rumah terdakwa dengan membawa dokumen yang dimintakan terdakwa sebelumnya. Setelah memberikan dokumen-dokumen tersebut, terdakwa, Heliani, dan SE menuju ke dapur. Setibanya di dapur, ada 7 orang WNA yang tidak saksi SE kenal. Lalu terdakwa mengatakan kepada SE “nanti setelah nikah ni, kau tak boleh batalkan pernikahan. Kalau kau batalkan uang mahar kau balekkan. Kalau tak kau balekkan, kite tak dapat ape-ape jangan sampai kau lari ya, ku cari kau sampai dapat”.
- Mendengar hal tersebut, SE merasa takut dan berencana akan membatalkan pernikahan tersebut. Namun karena di dalam dapur tersebut ramai orang yang tidak SE kenal, dan SE takut terjadi apa-apa jika SE membatalkan pernikahan tersebut, akhirnya SE bersedia melakukan pernikahan dengan laki-laki WNA asal Tiongkok yaitu Qu Baiyun.
- Kemudian SE diberikan pemahaman pernikahan dengan tata cara pernikahan Katolik, yang mana SE sama sekali tidak mengerti tata cara pernikahan tersebut. Selanjutnya dilakukan prosesi upacara pernikahan di rumah terdakwa antara SE dengan Qu Baiyun dengan cara pemberkatan yang dilakukan oleh Pendeta Andreas.
- Pada 10 Juni 2019, sekitar pukul 10.00 WIB, SE diajak Heliya untuk ke rumah terdakwa. Setibanya di rumah terdakwa, SE diberikan uang sebesar Rp10.000.000 oleh terdakwa dengan mengatakan “ini uang mahar untuk kau 10 juta, uang ini dari agen besar yang ade di Jakarta. Nanti kau berangkat dulu ke Jakarta selama 3 hari, abis tu kau pulang lah ke Pontianak. Sampai kau di pontianak, sisanya yang 10 juta aku kasihkan.” Selanjutnya terdakwa mengatakan kepada SE bahwa terkait pesawat ke Jakarta sudah ada yang menanggung, dan SE tidak akan berangkat sendiri melainkan dengan pengantin perempuan lainnya yang sudah menikah dengan WNA asal Tiongkok sebelumnya.
- Sekitar pukul 17.00 WIB, di rumah Heliana, Heliana meminta uang sebesar Rp5.000.000 (lima juta rupiah) dari uang mahar yang diberikan oleh terdakwa kepada SE dengan alasan uang tersebut harus dibagi dua karena Heliana telah mencarikan laki-laki WNA asal Tiongkok yang bersedia menikah dengan SE. Selanjutnya SE memberikan uang sebesar Rp5.000.000 (lima juta rupiah) kepada Heliana.
- Selain SE yang dinikahkan dengan Qu Baiyun, pada waktu yang bersamaan yaitu 19 Juni 2019, terdakwa yang bertempat di rumah terdakwa juga menikahkan 5 (lima) orang perempuan WNI dengan 5 (lima) orang laki-laki WNA asal Tiongkok dengan cara-cara yang serupa dengan cara terdakwa menikahkan SE dengan Qu Baiyun.
- Untuk segala biaya terkait pernikahan tersebut, terdakwa memperoleh uang sebesar Rp146.000.000 dari Wati Sarimin untuk biaya uang mak comblang, uang mahar pernikahan, uang mas kawin, uang resepsi pesta, biaya administrasi perkawinan, uang tiket transportasi pesawat dari Jakarta-Pontianak dan Pontianak-Jakarta untuk para WNA asal Tiongkok, dan uang tersebut berasal dari Wu Ai Hu.

Dakwaan Jaksa Penuntut Umum

Penuntut Umum dalam perkara nomor No. 924/Pid.Sus/2019/PN Ptk atas nama terdakwa Agus Matius Wiranata Wen Als Ashang Bin Bun Koi Ku, mendakwakan terdakwa secara alternatif dengan pasal dakwaan sebagai berikut:

Pertama: Pasal 2 ayat (1) UU RI No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP.

Atau

Kedua: Pasal 4 UU RI No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP.

Atau

Ketiga: Pasal 10 UU RI No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP.

Tuntutan Jaksa Penuntut Umum

Jaksa Penuntut Umum membuat surat tuntutan yang pada pokoknya menuntut terdakwa terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana Pasal 2 ayat (2) UU No. 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP yaitu “Melakukan atau turut serta melakukan perekrutan, penerimaan seseorang dengan penyalahgunaan posisi rentan, atau memberi bayaran untuk tujuan mengeksploitasi orang tersebut di wilayah negara Republik Indonesia” dan menjatuhkan pidana terhadap terdakwa dengan pidana penjara selama 9 (sembilan) tahun dikurangi masa penahanan yang telah terdakwa jalani dengan perintah agar terdakwa tetap ditahan dan membayar denda sebesar Rp200.000.000,- (dua ratus juta rupiah), subsidair 3 (tiga) bulan kurungan.

Amar Putusan

Majelis Hakim dalam amar putusan No. 924/Pid.Sus/2019/PN Ptk menyatakan terdakwa Agus Matius Wiranata terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana melakukan perekrutan seseorang dengan posisi rentan untuk tujuan mengeksploitasi orang tersebut di wilayah Republik Indonesia, sebagaimana dalam dakwaan Kesatu. Dengan demikian Majelis Hakim menjatuhkan pidana kepada terdakwa dengan pidana penjara selama 3 (tiga) tahun dan pidana denda sebesar Rp200.000.000 (dua ratus juta rupiah) dengan ketentuan pidana kurungan pengganti selama 1 (satu) bulan.

Putusan Nomor 919/Pid.Sus/2019/PN.Ptk

Identitas Terdakwa

Nama lengkap : Wati Sarimin Als. Radhiah Als. Mei Cen Als. Mei Fen
Tempat lahir : Medan
Umur/tanggal lahir : 41 Tahun/3 April 1978
Jenis kelamin : Perempuan
Kebangsaan : Indonesia
Tempat tinggal : Jalan Utama Sakti V RT.001/RW.007 Desa Wijaya Kusuma, Kecamatan Grogol, Petamburan, Jakarta Barat
Agama : Islam
Pekerjaan : Mengurus rumah tangga

Dakwaan

Penuntut Umum mendakwakan terdakwa secara alternatif dengan pasal dakwaan sebagai berikut:

Kesatu: Pasal 2 ayat (1) UU RI No. 21 tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP.

Atau

Kedua: Pasal 4 UU RI No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP.

Atau

Ketiga: Pasal 10 UU RI No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP.

Tuntutan Penuntut Umum

Jaksa Penuntut Umum membuat surat tuntutan yang pada pokoknya menuntut terdakwa terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana Pasal 2 ayat (1) UU No. 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP yaitu “Melakukan atau turut serta melakukan perekrutan, penerimaan seseorang dengan penyalahgunaan posisi rentan, atau memberi bayaran untuk tujuan mengeksploitasi orang tersebut di wilayah negara Republik Indonesia” dan menjatuhkan pidana terhadap terdakwa dengan pidana penjara selama 10 (sepuluh) tahun dikurangi masa penahanan yang telah terdakwa jalani dengan perintah agar terdakwa tetap ditahan dan membayar denda sebesar Rp200.000.000,- (dua ratus juta rupiah), subsidair 2 (dua) bulan kurungan.

APPENDIX 10

Kasus Posisi Putusan Perkara No. 19/Pid.Sus/2020/PN Jkt.Tim (Good Practice)

Identitas Terdakwa

Nama Lengkap : Mujiono
Tempat Lahir : Cilacap
Umur/Tanggal Lahir : 49 Tahun/12 Juli 1970
Jenis Kelamin : Laki-laki
Kebangsaan : Indonesia
Tempat Tinggal : Komplek DKI Blok G2 No 01 RT 018/RW 002 Kelurahan Pondok Kelapa, Kecamatan Duren Sawit, Jakarta Timur
Agama : Islam
Pekerjaan : Wiraswasta
Pendidikan : SMP

Kasus Posisi

- Pada September 2018, Rudi (DPO) menawarkan AMUprogram kuliah sambil bekerja di Taiwan dengan gaji pokok sebesar NT 26.000 (±Rp12.000.000) dan ijazah S1 dari Taiwan. Untuk mendapatkan penawaran tersebut, AMUdiharuskan membayar biaya sejumlah Rp35.000.000 (tiga puluh lima juta rupiah).
- AMUtertarik dengan penawaran tersebut, sehingga kemudian orang tuanya menyerahkan uang sejumlah Rp35.000.000 kepada Rudi, dan menyiapkan dokumen yang diperlukan (Ijazah SMA, KTP, Kartu Keluarga, Akta Kelahiran, Rapor SMA, Surat Izin dari Orang Tua, dan SKCK dari Kepolisian).
- Tiga hari kemudian, Rudi membawa AMUdan tiga orang lainnya berangkat ke Jakarta menuju rumah terdakwa Mujiono (selanjutnya disebut terdakwa). Pada saat itu, terdakwa menerima uang sebesar Rp30.000.000 (tiga puluh juta rupiah) dari Rudi. Dari uang tersebut, terdakwa menyerahkan sejumlah Rp25.000.000 (dua puluh lima juta rupiah) kepada Lukas dengan potongan cash back Rp3.000.000 (tiga juta rupiah). Sehingga Lukas menerima sejumlah Rp22.000.000 (dua puluh dua juta rupiah) per orang.
- Rincian penerimaan uang dari 40 orang yang akan diberangkatkan ke Taiwan adalah, 10 orang membayar Rp20.000.000 (dua puluh juta rupiah), dan 30 orang membayar Rp22.000.000 (dua puluh dua juta rupiah). Sehingga total penerimaan tersebut sejumlah Rp860.000.000 (delapan ratus enam puluh juta rupiah) yang dipergunakan Lukas untuk membayarkan seluruh biaya keberangkatan 40 orang ke Taiwan yang meliputi:
 - Biaya Tiket (Rp4.000.000/orang)
 - Fee untuk PT Assalam Karya Manunggal (Rp3.000.000/orang)
 - Biaya visa (Rp1.000.000/orang)
 - Biaya penerjemahan dokumen leges (Rp1.500.000/orang)
 - Gaji penerjemah (Rp1.000.000/orang)
 - Sewa hotel (Rp3.700.000/orang)Sehingga total untuk biaya keberangkatan 40 orang sebesar Rp690.000.000 (enam ratus sembilan puluh juta rupiah), sementara sisa dari penerimaan uang sejumlah Rp170.000.000 merupakan keuntungan Lukas.
- Pada 11 September 2018, AMUbersama dengan 6 orang lainnya berangkat ke Hotel Aston Cengkareng dari rumah terdakwa, untuk pertemuan yang disiapkan oleh Lukas. Pertemuan tersebut dihadiri oleh calon mahasiswa, Lukas, Direktur Utama PT Assalam H. Sulaeman Sultoni, perwakilan dari Chienkuo Technology University, wakil agensi dari Taiwan, dan terdakwa.

- Pertemuan tersebut dilakukan untuk menjelaskan program dari PT Assalam Karya Manunggal yang meliputi bekerja di Taiwan dengan gaji NT 26.000, asuransi tenaga kerja dan asuransi kesehatan, dijanjikan lulus kuliah di Taiwan dengan gelar S1, dan fasilitas hidup di Taiwan yang terjamin. Selanjutnya dilanjutkan dengan wawancara dan melengkapi berkas administratif, serta penandatanganan kerja sama antara Direktur Utama PT Assalam Karya Manunggal dengan pihak Chienkuo University.
- Kemudian terdakwa mengantar AMU dan teman-temannya untuk pembuatan paspor di Kantor Imigrasi Jakarta Timur. Namun, pembuatan paspor AMU sempat ditolak 5 (lima) kali oleh petugas Kantor Imigrasi Jakarta Timur karena pada saat wawancara AMU mengatakan bahwa tujuan pembuatan paspornya adalah untuk kuliah sambil bekerja di Taiwan. Setelah Lukas mengarahkan AMU untuk mengatakan peruntukan paspor tersebut adalah untuk kuliah di Taiwan, pada Oktober 2019 paspor AMU diterbitkan oleh Kantor Imigrasi Jakarta Timur. Selanjutnya terdakwa diminta oleh Lukas untuk membawa AMU dan peserta lainnya untuk melakukan pemeriksaan kesehatan dan hasilnya dinyatakan sehat.
- Pada 21 September 2018, di kantor PT Assalam Karya Manunggal, Lukas memberikan pengarahan kepada Asep Muhtar, AMA, dan peserta lainnya. Kemudian terdakwa menjelaskan bahwa untuk mengambil penawaran sebagaimana telah dijanjikan sebelumnya, para peserta diminta terdakwa untuk menyiapkan uang sebesar Rp50.000.000 (lima puluh juta rupiah) sebelum keberangkatan. Oleh karena para peserta tidak memiliki uang sejumlah yang diminta tersebut, karena sebelumnya telah menyerahkan uang sebesar Rp35.000.000 (tiga puluh lima juta rupiah), terdakwa kemudian berkonsultasi dengan Direktur Utama PT Assalam Karya Manunggal.
- Berdasarkan hasil konsultasi tersebut, Direktur Utama PT Assalam Karya Manunggal yang sekaligus juga merupakan pimpinan Koperasi Simpan Pinjam Assalam Karya Manunggal, menyetujui para peserta untuk menjadi anggota koperasi sehingga bisa mendapatkan pinjaman sejumlah uang dari koperasi Assalam Karya Manunggal yang dilanjutkan dengan penandatanganan akad kredit antara para peserta dengan koperasi Assalam Karya Manunggal.
- Bahwa antara Lukas dengan Koperasi Assalam Karya Manunggal telah memiliki perjanjian kerja sama. Sehingga Lukas merekomendasikan pengajuan pinjaman dari seluruh peserta dan pinjaman kepada masing-masing peserta tidak sama besaran pinjamannya. AMU mengajukan pinjaman sebesar Rp50.000.000 (lima puluh juta rupiah), namun setelah dana pinjaman koperasi cair, Lukas memerintahkan petugas koperasi Assalam Karya Manunggal untuk hanya memasukkan Rp40.000.000 (empat puluh juta rupiah) ke rekening Asep Muhtar. Sedangkan AMA sebesar Rp70.000.000 (tujuh puluh juta rupiah). Sehingga total pinjaman 40 orang peserta berjumlah Rp2.182.000.000 (dua milyar seratus delapan puluh dua juta rupiah).
- Sebelum berangkat ke Taipei, AMU dan peserta lainnya ditampung di rumah terdakwa selama kurang lebih dua minggu. Terdakwa mendapatkan uang sebesar Rp17.000.000 (tujuh belas juta rupiah) untuk biaya para peserta.
- Setibanya di Taiwan, agensi membawa para peserta ke asrama universitas dan keesokan harinya paspor seluruh peserta diambil oleh agensi. Perkuliahan dilaksanakan dari hari Senin hingga Jumat tanpa ada pendaftaran. Selanjutnya setelah satu bulan berada di Taiwan, kemudian para peserta mulai bekerja di pabrik besi (pembuatan rak besi) dengan hari kerja Senin sampai dengan Jumat selama 8 jam kerja, juga di hari Sabtu selama 8 jam kerja dan pada hari Minggu libur. Sehingga, total jam kerja dalam 1 minggu adalah 48 jam, dan jika hari minggu masuk maka bisa sampai 56 jam kerja.
- Bahwa gaji yang diterima para peserta adalah sebesar NT 27.000, dimana uang gaji tersebut beserta ATM gaji dari pabrik dipegang oleh Agensi Taiwan dengan alasan untuk membayar utang kredit sebesar Rp50.000.000 kepada Koperasi Assalam Karya Manunggal. Sehingga para peserta hanya menerima uang gaji sebesar NT 5000 atau sekitar Rp2.000.000. Setelah memasuki bulan keempat, AMU hanya menerima gaji dengan jumlah minus NT 5000.
- Terkait pemotongan tersebut AMU merasa keberatan dan melaporkan hal tersebut ke Departemen

Tenaga Kerja Taiwan dan meneruskan laporan tersebut kepada pihak Kepolisian Taiwan. Sehingga paspor AMU dikembalikan oleh agensi Taiwan, Ensunny Spring Co. Ltd.

- Pada 20 Juni 2019, AMU ditampung di Shelter Nantau selama tiga bulan untuk dimintai keterangan dari Kepolisian Taiwan dan mengikuti sidang sebanyak dua kali. Pada 3 September 2019, AMU dan AMA dipulangkan ke Indonesia dibantu oleh Kantor Dagang dan Ekonomi Indonesia (KDEI).
- Akibat perbuatan terdakwa, AMU dan AMA merasa telah dirugikan sehingga mengajukan restitusi sebesar Rp150.000.000 (seratus lima puluh juta rupiah).

Dakwaan Jaksa Penuntut Umum

Penuntut Umum dalam perkara nomor No. 19/Pid.Sus/2020/PN Jkt.Tim atas nama terdakwa Mujiono, mendakwakan terdakwa secara alternatif dengan pasal dakwaan sebagai berikut:

Pertama: Pasal 4 ayat jo. Pasal 48 UU RI No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP.

Atau

Kedua: Pasal 83 jo. Pasal 68 jo. Pasal 5 huruf b s.d e Undang-Undang Nomor 18 Tahun 2017 tentang Perlindungan Pekerja Migran Indonesia jo. Pasal 55 ayat (1) ke-1 KUHP.

Atau

Ketiga: Pasal 86 huruf a Undang-Undang Nomor 18 Tahun 2017 tentang Perlindungan Pekerja Migran Indonesia jo. Pasal 55 ayat (1) ke-1 KUHP.

Tuntutan Jaksa Penuntut Umum

Jaksa Penuntut Umum membuat surat tuntutan yang pada pokoknya menuntut terdakwa terbukti secara sah dan meyakinkan bersalah melakukan tindak pidana perdagangan orang sebagaimana diatur dan diancam pidana dalam Pasal 4 jo. Pasal 48 ayat (1) Undang-Undang RI No. 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang jo. Pasal 55 ayat (1) ke-1 KUHP; dan menjatuhkan pidana terhadap terdakwa dengan pidana penjara selama 7 (tujuh) tahun dikurangi masa penahanan yang telah terdakwa jalani dengan perintah agar terdakwa tetap ditahan dan membayar denda sebesar Rp300.000.000,- (tiga ratus juta rupiah), subsidair 6 (enam) bulan kurungan.

Berdasarkan pasal 48 s.d Pasal 50 Undang-Undang Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang, maka tuntutan restitusi dari korban sebesar Rp150.000.000 (seratus lima puluh juta rupiah) ditanggung renteng terdakwa Mujiono dan Lukas, jika tidak mampu membayar restitusi maka pelaku dikenai pidana kurungan pengganti selama 6 (enam) bulan kurungan.

