

## Indonesian Court Performance in Fulfillment The Substantive Justice to The Victims of Human Trafficking Crimes

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### **Abstract**

*Indonesia is in a state of emergency for the crime of trafficking in persons. The need for employment has caused many Indonesian workers to become victims of human trafficking, which is one of human crimes. The district court as the executor of judicial power in the field of general crimes plays a role in enforcing the law and providing justice, one of which is by imposing restitution decisions for victims of human crimes. The technical rules for implementing restitution are important so that substantive justice for victims of trafficking in persons can be recovered materially. Based on the experiences, The court has issued a decision which contains the obligation of the criminal perpetrator to pay compensation to the victim. The restitution takes the form of compensation for material and immaterial losses arising as a result of suffering directly related to criminal acts. If the assets are insufficient, then the implementation of the decision of substitute confinement or substitute imprisonment for the perpetrator of the crime is carried out proportionally taking into account the amount of compensation that has been paid by the perpetrator and/or third parties.*

**Keywords:** *Trafficking in Persons; Human Right; District Court*

### **Abstrak**

*Indonesia berada dalam keadaan darurat atas tindak pidana perdagangan orang. Kebutuhan akan lapangan kerja menyebabkan banyak pekerja Indonesia menjadi korban perdagangan manusia yang merupakan kejahatan terhadap kemanusiaan. Pengadilan Negeri sebagai pelaksana kekuasaan kehakiman di bidang pidana umum berperan dalam menegakkan hukum dan memberikan keadilan, salah satunya dengan menjatuhkan putusan restitusi terhadap korban kejahatan kemanusiaan. Aturan teknis pelaksanaan restitusi penting agar keadilan substantif bagi korban perdagangan orang dapat pulih secara materiil. Dalam prakteknya, Pengadilan telah menjatuhkan putusan yang berisi kewajiban pelaku pidana untuk membayar restitusi bagi korban. Restitusi tersebut berupa ganti kerugian materiil maupun imateriil, yang ditimbulkan akibat penderitaan yang berkaitan langsung sebagai akibat tindak pidana. Apabila harta kekayaan tersebut tidak cukup, maka pelaksanaan putusan pidana kurungan pengganti atau pidana penjara pengganti terhadap pelaku tindak pidana dilakukan secara proporsional dengan memperhitungkan jumlah restitusi yang telah dibayarkan oleh pelaku dan/atau pihak ketiga.*

**Kata Kunci:** *Perdagangan Orang; Hak Asasi Manusia; Pengadilan Negeri*

### **A. Introduction**

Cases of human trafficking have existed since hundreds of years ago. This can be found in Hammurabi's Code of Laws from Mesopotamia, now Iraq in 3.200-1.595 BC (Reid, 2014). Slavery in ancient times can be compared today to human trafficking. The main element of slavery that similar to human trafficking is that humans become the property or ownership of

of other people that can be traded (Dottridge, 2002).

During the period of slavery in the United States of America, a slave family could be sold separately, namely father, mother and children depending on the needs of the buyer. The father's services are used to manage the garden, the mother is used for cooking and housework and other domestic work, while the children can be thrown away if they are not needed. The historical relationship between slavery and human trafficking can be watched from a Hollywood movie released in 2013 entitled "12 years a slave" that comes from the true story of Solomon Northup which tells of a black American citizen who is forced to become a slave as a result of being trapped by a job offer. This movie also focuses on a character named Patsey, a female slave who is used as a mean to satisfy her master's lust.

Along with time, the term of slavery has been changed to human trafficking which is something that rarely occurs in contemporary times. Slavery in the world itself was officially banned with the issuance of the United Nations General Assembly Declaration on December 10, 1948 which stated that the world must be free from slavery because it is not in accordance with human rights.

Conceptually, trafficking in persons (especially women and children) is in the form of transferring social support from their families through the process of being recruited, sent, transferred, accommodated, and received by certain individuals or groups using violence, kidnapping, fraud, protected rescue, or other positions. vulnerable person for the purposes of social exploitation, pornography, forced labor, prostitution, and other forms of slavery Hatta, 2012).

Indonesia as a part of civilized countries in the world is inseparable from the threat of the crime of trafficking in persons. During the Dutch colonial period, the Indonesian people had experienced what was called slavery because of forced labor (*rodi*) and during the Japanese colonial era, the Indonesian people had also experienced what was called forced labor (*romusha*). Even in modern times, the criminal act of trafficking in persons is a serious threat to people's independence over themselves. Human trafficking is closely related to the job offer that is needed by every human being in the workforce to fulfill their own life necessities and for their families as well.

During the last five years the Indonesian government received reports of 2,356 victims of the crime of trafficking in persons (TPPO) and half of them were children at 50.97%. Girls were the most victims, namely 46.14%, while boys were 2.89%. This data was obtained from PPA SYMPHONY data for the 2017-2022 period as reported at the Ministerial Level Coordination Meeting of the Task Force for the Prevention and Handling of the Crime of Trafficking in Persons (GT PP TPPO) (Shabrina, 2022).

According to the report on Challenges and Problems in Law Enforcement of the Crime of

Trafficking in Persons in 2018, it is said that the challenges and problems related to the role of the court in enforcing the law on the crime of trafficking in persons are: 1. In human trafficking court decisions, it is rare to find payments restitution to victims of TPPO; 2. In human trafficking court decision, there was still no attempt to confiscate assets proceeds of crime as a basis for asset recovery (Sekretariat GT TPPO, 2019).

Substantive justice is justice related to the content of a judge's decision in examining, adjudicating and deciding a case which must be carried out based on considerations of rationality, honesty, objectivity, impartiality, without discrimination and based on conscience (the judge's beliefs).

Substantive justice is a new form of justice. Substantive justice is developed by Jeremy Bentham in 1843. Substantive justice focuses on how the legal system uses laws to constrain and direct human behaviour, specifically focusing on the function and the structure of a law. Substantive law discusses about right and obligation of individual. Substantive criminal justice deals with criminal offence and liability in the form of punishment in many cases but in some case also include compensation in the form of money. Illustration: - person A has intentionally killed B through a car and after that A is defending in court that it is not a rash driving, then court will apply their analytical view and give the judgement. (Raj, 2023).

Based on the introduction above, this essay will describe the author's perspective regarding is the crime of trafficking in persons a violation of human rights? and what is the role of the courts in enforcing the law and providing the substantive justice for victims of human trafficking crimes?

## **B. Discussion**

### **1. Human Trafficking is a Violation of Human Rights**

After the end of the second world war, the war-winning countries had a tendency to promote a broader approach by agreeing on minimum rights that should be enjoyed by everyone, whether he is a native, migrant or foreigner. The founding countries and members of the United Nations then collect, record, and determine these fundamental rights and freedoms in the form of an international bill of rights. The first and most important element of this international bill of rights is the legally binding of the Universal Declaration of Human Rights and the supplementary protocol to the International Covenant on Civil and Political Rights. All countries that later become members of the United Nations are obliged to respect these international human rights regulations and have the obligation to promulgate and adopt them in their respective domestic laws.

There are 30 rights and freedoms set out in the Universal Declaration of Human Rights which were accepted and announced on December 10, 1948 through United Nations General Assembly Resolution Number 217 A (III).

The 30 provisions of the Universal Declaration of Human Rights, as follows (Mitchell, 2020):

- 1) All humans are born free and equal;
- 2) Everybody is entitled to rights without discrimination;
- 3) All people have the right to life, liberty, and safety;
- 4) No one should be kept as a slave or in servitude;
- 5) There should be no torture or other inhuman treatment;
- 6) Everyone has the right to be recognized as a person in law;
- 7) The law should be the same for everybody;
- 8) Everyone may access legal help to protect their rights;
- 9) No one can arrest or exile anyone without good reason;
- 10) People have the right to a fair, impartial public trial;
- 11) Everyone is innocent until they are proved guilty;
- 12) No one should attack a person's privacy or reputation;
- 13) People have freedom of movement in their own country;
- 14) Everyone has the right to seek asylum abroad;
- 15) We all have the right to a nationality;
- 16) Men and women can marry and have children;
- 17) All people have the right to own property;
- 18) Freedom of thought is everybody's right;
- 19) People should have freedom of opinion and expression;
- 20) Everyone has the right to freedom of peaceful assembly;
- 21) Government authority should be based on free elections;
- 22) State social security should be provided when needed;
- 23) All people have a right to work and to fair pay;
- 24) Everyone should get leisure time, including paid holidays;
- 25) Adequate food and shelter are a basic human right;
- 26) Access to education is everyone's right;
- 27) We should be able to protect our artistic creations;
- 28) All these freedoms should be available worldwide;
- 29) We have a duty to protect other people's rights;
- 30) No state or persons can take away these rights.

One of the human rights regulated in the United Nations convention is the right to personal freedom. The right to personal freedom is one of the most fundamental rights for everyone because it also involves the right to self-determination. One form of the right to personal freedom that concerns human trafficking is the right not to be enslaved. This right is protected by various international, regional, and national legal instruments. The Universal Declaration of Human Rights regulates it in Article 1, All humans are born free and equal in dignity and rights and in Article 4, No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms (United Nations, 2023). In the International Covenant on Civil and Political Rights, this right is regulated in Article 17 while in Law Number 39 of 1999 concerning Human Rights, the protection of the right to personal freedom is regulated in Article 20, namely the right not to be enslaved (Oktavionita, 2022). Article 2 until article 12 Law Number 39 of 1999 concerning Human Rights also regulate the principle that human being cannot be traded (Anggraeni, 2022).

The slavery referred to in Law Number 30 of 1999 regarding Human Rights includes servitude, trade in slaves and women, and all similar acts. Slavery is a person's status under other people as private property in which he must obey and do everything ordered by the "owner". H. Victor Conde called slavery a form of violation of human rights (Asplund, 2015).

Although the slavery has been abolished in Indonesia since 1890 with the abolition of the forced cultivation system by the Dutch East Indies Government (Zulkarnain, 2010), in practice

slavery still occurs today by changing the name to human trafficking. Among them is the treatment of employers towards domestic helpers, unskilled workers, and even their employees. Employers treat their workers arbitrarily and even inhumanely as if they have full power over their workers, and workers cannot and must not resist because if they do, they will receive severe threats, even psychological and physical violence by the employers. Not only for unskilled workers, even slavery also occurs among middle-level employees, including by giving excessive workloads that are not in accordance with their duties and functions, this is usually done for the benefit of the company or institution (Crane, 2013).

According to United Nations Children's Fund (UNICEF), Indonesia is a country of origin, a transit area, and at the same time a destination country for human trafficking. International organizations such as Human Rights Watch produce reports that consistently show the relevance of the issues of female migrant workers, domestic workers, and trafficking in women (Nofrianti, 2011).

## **2. Human Trafficking is Criminal Act**

Moeljatno briefly defined criminal act as "an act that is prohibited by law and threatened with criminal sanction for those who violates such prohibition" (Moeljatno, 1955). Vos states that criminal act is human behaviour that is punishable by criminal law. Hazewinkel Suringa states that criminal act is a term, in which after considerations, refers to every punishable act, or it can also be acts or omission, or crimes and violations (Hiariej, 2016).

Initially, in Indonesia the law regarding the criminal act of trafficking in persons was regulated in the Criminal Code, specifically Articles 324 to 337 of the Criminal Code which stipulate that slavery and servitude are crimes against people's freedom. The provisions in the Criminal Code have been revoked and replaced by Law Number 21 of 2007 concerning the Eradication of Human Trafficking Crimes which was added and amended by Law Number 1 of 2023 concerning the Criminal Code and Law Number 14 of 2009 concerning the Ratification of Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

As technology, information, and transportation advances, criminals wrap up slavery or human trafficking to escape legal scrutiny through cross-border relations using international syndicates.

The definition of trafficking in persons has also developed since the creation of the Protocol to Prevent Suppress and Punishment Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention Against Transnational Organized Crime in 2000. In this protocol, what is meant of human trafficking is "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other power or coercion

abduction, of fraud, or of deception of the abuse of power or position vulnerability or of the giving or receiving of payment of benefits to achieve the cost or person having control over another person, for the purpose of exploitation. Exploitation shall include at a minimum the exploitation of prostitution of other forms of sexual exploitation, forced labor of service salaries or the removal of organs.”

From the description above, it can be concluded that the elements of human trafficking are (Hatta, 2012): 1) Acts of: recruiting, transporting, transferring, harboring or receiving; 2) Means to control the victim, threats, use of force abduction, fraud, abuse or a position of vulnerability or the giving or receiving of payments or benefits to obtain the consent of the person who has control over the victim; 3) The purpose of exploitation is at least for prostitution or other forms, forced labor, slavery, servitude, and removing of human organs.

### **3. The Actualization of the Role of the Court in Providing Justice for Victims of Human Trafficking**

Based on the report of the Directorate of General Judicial Administration Development, Supreme Court at the level of the High Court and District Court, TPPO case on in 2018 there were 316 cases, consisting of the remaining 68 (21.5%) last year new cases and cases of 248 (78.5%) cases. Of these, case 262 cases that broke up and as many as 54 cases that have not been decided completed the following year. Of the 262 cases that broke up, there were 29 and 23 cases submitted to the process of appeal and cassation. Then, in 2019 totaling 247 cases, consisting of last year's remainder of 57 cases and 190 new cases. Of these, cases were decided as many as 223 cases (ATTF, 2019).

The process of prosecuting and examining TPPO cases in court is part from TPPO law enforcement. Some notes in the submission administration process legal efforts and the process of handling TPPO cases at all levels throughout the year 2018-2019, carried out by applying the policies of the Supreme Court, including: 1) Supreme Court Regulation Number 3 of 2017 concerning Guidelines Judging Women's Cases Against the Law; 2) Request for cassation that meets the formal requirements at the latest within 14 days after the deadline for submitting a cassation memorandum ends, the cassation file must have been sent to the Supreme Court (Art.249 paragraph (3) of the Criminal Procedure Code). This is reinforced by SEMA Number 1 Year 2014, changes to SEMA Number 14 of 2010 concerning Documents Electronic as Complementary Requests for Cassation and Review Return; 3) Circular of the Supreme Court (SEMA) Number 4 of 2011 concerning Treatment for Whistleblowers and Witnesses who cooperate (Justice Collaborator) in Criminal Cases certain basis for judges and internal courts process TPPO cases. The intended crime is a crime that serious and/or organized, such as corruption, gross violations of human rights, drugs, terrorism, human trafficking, and forestry;

4) SEMA Number 1 of 2000 concerning Punishment to Comply with The Gross and Nature of the Crime.

Penal sanctions that are often imposed by judges against the accused who are proven guilty of committing the crime of trafficking in persons are imprisonment and fines. If the fine is not paid, it will be replaced by imprisonment.

At the beginning of the enactment of the 2007 Law on Eradication of Human Trafficking Crimes, the Public Prosecutor had filed a claim for restitution in a trafficking case, but the judge had not yet issued a restitution decision because there were no technical instructions regarding the procedures for implementing restitution decisions.

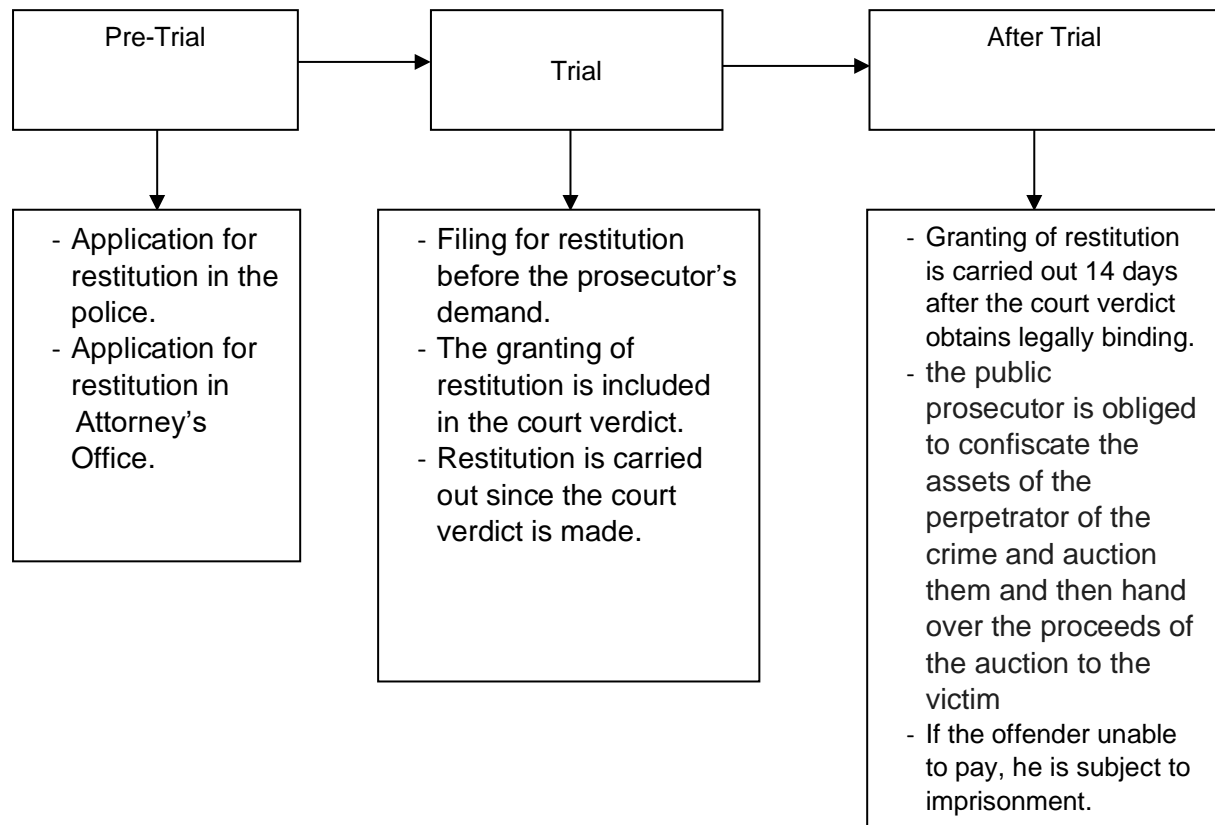
The development of the criminal justice system is not only oriented towards the accused, but is also offered to protect victims, so that each victim of a particular crime, in addition to obtaining the right to protection, also the right to restitution. This has been accommodated in various government laws and regulations, but does not touch on the technical aspects of resolving requests for rights to the Supreme Court which issued the Supreme Court Regulation Number 1 of 2022 concerning Procedures for Completing Applications and Granting Restitution and Compensation to Victims of Crime (Supreme Court, 2023).

Some of the contents regulated in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 Year 2022 are as follows: 1) Restitution is compensation given to victims or their families by perpetrators of criminal acts or third party; 2) Criminal acts that can be requested for restitution are: criminal act of the gross violation of human rights, terrorism, human trafficking, surveillance race and ethnicity, crimes related to children, and acts other crimes determined by the decision of the Witness and Victim Protection Agency (LPSK) as referred to in the provisions of the legislation invitation regulations; 3) Requests for restitution must be made in writing in Indonesian and submitted to the chairman/ the head of the court, whether done directly or through LPSK, investigators, or public prosecutors. The competent court hears the application restitution is a court that tries the perpetrator of criminal act, namely district court, human rights court, military courts, high military courts, and/or *syar'iyah* court (Susilowardani, 2024); 4) The procedure for filing for restitution, except for a few things that are regulated in Article 18 of the Supreme Court of the Republic of Indonesia Regulation Number 1 of 2022, among others the application does not need to contain the identity of the perpetrator criminal act in terms of the identity of the accused has not or unknown; 5) Application for restitution must be submitted through the LPSK and filed before or during the trial stage against criminal offenders.

According to Article 48 (1) of Law Number 21 of 2007 regarding Eradication of Human Trafficking Crimes, "every victim of a Trafficking in Persons Crime or Their Heirs are Entitled to Restitution." Article 48 (2) of Law Number 21 of 2007 regarding the Eradication of the Human Trafficking Crimes, states that Restitution as referred to in paragraph (1) is in the form of

compensation for: a. Loss of wealth or income; b. Suffering; c. Costs for medical and/or psychological treatment measures; and/or Another loss suffered by Victims of Trafficking in Persons.

From the interests of the victim in the concept of compensation contained two benefits, namely to meet substantial losses and all costs incurred and victim's emotional satisfaction. The following is the mechanism for submitting restitution based on Law on Eradication of Human Trafficking Crimes:



**Picture 1.** Mechanism for Restitution

The ability of the courts to provide justice for victims of the criminal act of trafficking in persons is not only punishment but also restitution. Technical regulation owned by the Supreme Court should make judges no longer hesitate to impose restitution in every verdict or decision on human trafficking case.

The judge's courage to issue a restitution decision is proven in 2014, the East Jakarta District Court passed a verdict on restitution in a case of trafficking in persons through Verdict Number 55/Pid.Sus/2014/PN.Jkt.Tim by way of a judgment (Sekretariat GT TPPO, 2019): 1) Declare that the accused Rudi Yulianta bin Suparman has been legally and convincingly proven guilty of committing the crime of "Joint Trafficking in Persons"; 2) Sentence the accused Rudi Yulianta bin Suparman to imprisonment for 4 (four) years and a fine of Rp120,000,000 (one hundred and twenty million rupiahs) provided that if the fine is not paid, it will be replaced with imprisonment for 3 (three) months and charged with paying "restitution" to witness victims



Sugianto, Sumarudin bin Gimam, Yosep Anwar bin Karsiwan, Prajitno bin Senen, Wagiman, and Abdul Muin each in the amount of Rp. 20,000,000 (twenty million rupiahs), so that a total of Rp120,000,000.- (one hundred and twenty million rupiah) with the provision that if within 14 (fourteen) days after this decision has legally binding it turns out that the accused does not pay the restitution, then it is replaced with imprisonment for 3 (three) months.

In the practice of the criminal justice system in Indonesia, sentences that require payment of restitution can be changed to prison sentences. For example, Tual District Court Decision Number 109/PID. SUS/2015/PN Tul states the obligation to pay restitution of Rp. 239,900,000,- can be replaced by serving a prison sentence of 1 (one) year (Damayanti, 2024). Practices like this cause losses for victims because the defendant deliberately does not pay compensation and chooses to serve a substitute prison sentence.

The role of the Witness and Victim Protection Agency (LPSK) in calculating requests for restitution is very necessary so that the Public Prosecutor can request a restitution in the Public Prosecutor's lawsuit and the Judge can consider and decide on the imposition of restitution in a court decision.

During the trial, the judge and public prosecutor are obliged to provide information about the victim's right to obtain restitution for the criminal act of human trafficking that occurred (Angelina, 2020), so that the victim can know their right to restitution, so they can fight for their rights in accordance with applicable regulations. with applicable laws and regulations regarding restitution for criminal acts of human trafficking.

The question that arises now is if the convicted does not want to pay restitution, what can the Court do? Article 50 (2) of the Law on the Eradication of the Human Trafficking Crimes answers in principle in the event that the notice of fulfillment of the obligation to pay restitution is not carried out by the restitution provider within 14 (fourteen) days, the court ordered the public prosecutor to confiscate the convict's assets and auctioning off the assets for refund payment. If the perpetrator is unable to pay restitution, then the perpetrator subject to imprisonment for a maximum of 1 (one) year.

The Regulation of the Supreme Court of the Republic of Indonesia Number 1 Year 2022 does not yet regulate how the public prosecutor technically confiscates the assets of the restitution giver who does not want to pay restitution. This makes law enforcement in order to recover the loss of victims of trafficking in persons still leaves a homework for law enforcers.

The district court's decision seeks to realize substantive justice for victims of criminal acts of human trafficking because material losses from victims of criminal acts of human trafficking have been paid in the form of restitution by the perpetrator or a responsible third party. Substantive justice for victims to obtain recovery for substantive losses suffered as a result of human trafficking crimes is protected by a restitution decision handed down through a court decision. The role of the Public Prosecutor as implementer of court decisions in confiscating and auctioning off the

assets of perpetrators or third parties to fulfill restitution payments that have not been paid by perpetrators or third parties is very crucial in fulfilling substantive justice for victims of crimes of human trafficking.

### **C. Conclusion**

Indonesian Court performance in providing justice for the victims of Human Trafficking is still limited to the ability to impose prison sentences, fine, and restitution but it is not yet certain whether the perpetrator can pay the restitution or not or how to guarantee that the perpetrator's assets can be confiscated, sold, and handed over to victims of the crime of trafficking in persons. In the TPPO verdict, there was still no attempt of expropriation assets proceeds of crime as a basis for asset recovery. Law enforcement officer especially judges need to be equipped with progressive knowledge about law on human trafficking in an integrated manner and their understanding regarding money laundering to seize assets the proceeds of crime from the predicate crime of trafficking in persons, both domestically as well as abroad. Endeavor to include in every verdict the existence of 'restitution' and 'asset confiscation' as the basis for the executing prosecutor to deter/impoverish the perpetrators of crimes as well as mechanism efforts recovery of assets if the proceeds of the crime are abroad through mutual legal agreement request. Incomplete recovery for victims of human trafficking crimes will make them receive neither justice, legal certainty nor benefits.

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