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RESPONDING TO PROTECTION GAPS IN MALAYSIA'S ANTI-HUMAN TRAFFICKING POLICIES

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This NTS Alert discusses the protection gaps in national anti-human trafficking policies perpetuated by the dominant influence of the *US Trafficking in Persons (TIP) Reports*. Using Malaysia as a case study, this NTS Alert discusses how over-reliance on the *US TIP Reports* has led certain states to focus their national policies on prosecuting traffickers. Without a more balanced approach, trafficked persons remain inadequately protected. The experiences of local communities in Malaysia can be tapped upon to inform more holistic anti-human trafficking policies; they currently collaborate with the non-government sector to assist with these protection needs. However, the non-government sector experiences restrictions in influencing policy changes. Thus, it is suggested that a rebalancing of the US Department of State's skewed focus on prosecuting traffickers is needed to promote internal policy changes in Malaysia.



Audience at a concert organised by MTV for its anti-human trafficking campaign in Asia.

Credit: UN Photo.

This NTS Alert is the second issue of a two-part series on the *US Trafficking in Persons (TIP) Reports* and its influences on national anti-human trafficking policies. The series also critically analyses the prioritisation of prosecution of traffickers over protection of trafficked persons.

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Introduction

Malaysia, like many other Southeast Asian states, relies heavily on what it perceives to be the expectations of the *US Trafficking in Persons (TIP) Report* to develop its national anti-human trafficking policies (Chuang, 2006:490). Consequently, the *US TIP Reports* – representing the extra-jurisdictional enforcement of the US Trafficking Victims Protection Act 2000 (TVPA) – have become the primary international enforcement mechanism against human trafficking (Kaur, 2011). States are responsive to the US TIP enforcement strategy as it is the only assessment tool that ties states' compliance with the TVPA to the threat of economic sanctions. However, a shortcoming of the US TIP enforcement strategy is that it perpetuates a human security deficit because it prioritises prosecution rates of traffickers over the rights protection of those trafficked (Kaur, 2011). The *US TIP Reports* offer little support for the development of a comprehensive anti-human trafficking agenda encompassing the protection of the human rights of trafficked

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persons. This is because the Reports place a low priority on assessing countries' measures for the protection of these rights. This practice is a reflection of the absence within the TVPA of an independent list of standards for the protection of the human rights of trafficked persons (Chuang, 2006:471). Subsequently, states downgrade the need to conduct an internal assessment of protection needs of trafficked persons, compromising their ability to implement holistic anti-human trafficking measures.

This NTS Alert evaluates the Malaysian government's anti-human trafficking policies and investigates the limitations of its over-reliance on the *US TIP Reports*. The themes discussed in this Alert are derived from a recent research trip to Kuala Lumpur to investigate protection concerns of trafficked persons,¹ as well as reports and broader academic discourse. The prevalent characteristics of the human trafficking process in Malaysia include debt bondage as a pressing concern experienced by trafficked persons and the similarity of the workings of the human trafficking industry to those of 'cottage industries'. This tightens the control of traffickers over trafficked persons and undermines access and assistance to trafficked persons.

The Alert will then proceed to highlight that the Malaysian government's dominant policy of intercepting, detaining and deporting trafficked persons is not sensitised to the characteristics of the trafficking process. Furthermore, this approach is not adequately assessed by the *US TIP Reports* for its effectiveness in protecting the rights of trafficked persons.

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Unaddressed Protection Concerns of Trafficked Persons

An array of debilitating socioeconomic conditions can make persons vulnerable to being trafficked. Inequitable access to education and employment, and discrimination on the basis of gender, ethnicity or through the imposition of restrictive cultural norms, coupled with the marketability of cheap labour, are some factors that sustain the human trafficking trade (Joshi, 2002:32–6). Given these circumstances, it is not surprising that debt bondage was indicated as a pertinent pressure on trafficked persons in Malaysia by human rights advocates and non-governmental organisations (NGOs).² In the following, the debt bondage of trafficked persons, and the resulting economic and physical pressures from human trafficking networks, will be discussed. The exercise of control by human trafficking networks on trafficked persons is made worse by the operation of these networks in a manner similar to 'cottage industries' (Piper, 2005:212). This means the human traffickers are familiar and proximate to the families of trafficked persons, trusted and considered to be providing a service to their local communities³ (Piper, 2005:212). Collectively, these characteristics discourage trafficked persons from interacting with the wider public sphere and accessibility to trafficked persons is thus compromised. Finally, it will be shown that government policies based on detention and deportation are disconnected from these conditions and serve to further marginalise trafficked persons.

Debt Bondage

'Debt bondage' can be defined as the pledging of personal services or labour of persons indefinitely as security for debt, where the length and nature of the service is not clearly stipulated (Inglis, 2001:70). Debt can be accrued from the early stages of the trafficking process, even at the point of origin (Salt and Stein, 1997:472). Debt bondage occurs in various ways. Those trafficked could have been kidnapped or handed over in payment of family debt, while some may have been lured by promises of well-paying jobs and opportunities abroad. Thereafter, debt is imposed through exorbitant fees for the provision of transportation or travel documents for overseas employment. While in the destination country, debt is accumulated through payment for the maintenance of those trafficked, and funds to eventually return them home (Joshi, 2002:47).

In Malaysia, debt bondage affects men, women and children who have been trafficked.⁴ A Malaysian government official noted that there are rampant exploitative conditions in labour-intensive industries which contribute to the problem of debt bondage for trafficked persons.⁵ These industries include the manufacturing, fisheries and agricultural industries, and exploitative conditions take the form of the withholding of wages or the imposition of arbitrary subsistence costs for rent, food and utilities.⁶

Human Trafficking as a Form of Cottage Industry

The human trafficking process is an elaborate system, utilising legitimate and illegitimate migration processes. It undoubtedly poses a great risk to all involved and so is ordered around a system of closely-knit social networks and institutions (Salt and Stein, 1997:479–83). In Malaysia, legal practitioners and NGOs do not deny the presence of organised human trafficking syndicates, but also characterise the operation of human trafficking networks as similar to the workings of cottage industries.⁷ Human traffickers are characterised as more likely comprised of small groups and individuals, with weak organisational structures and absence of clear leadership; membership in these networks is fluid.⁸ Trafficked persons may be recruited on a one-off basis or in regular recruitment drives (Marshall, 2001:9). NGOs observed that in the majority of cases, networks of traffickers, on both ends of the trafficking journey (the country of origin and destination), comprises persons linked to the families of those trafficked, such as distant relatives, members of the local community, or even those who lure victims by striking up romantic relationships.⁹ The familiarity and proximity of these traffickers strengthens their control over those trafficked (Srikantiah, 2007:163–4). Tightly controlled trafficked persons with no freedom of movement become significantly dependant on their traffickers (Laczko and Gozdzia, 2005:64).



Irregular migrants, suspected to be trafficked, being detained by government authorities.

Credit: I4 I.R.

Difficulties in Accessing and Assisting Trafficked Persons

With migrant trafficked persons being highly dependent on their traffickers, they find it difficult interacting with anyone outside the traffickers' networks. If they manage to make contact with public authorities either through escaping or being intercepted in raids, the Malaysian government's first course of action is detention, followed by deportation subject to those trafficked assisting in prosecuting the traffickers. However, according to a government official, most of those detained do not want to stay any longer in Malaysia to assist in prosecutions but want to return home.¹⁰ For some trafficked persons, returning home is not an option, mainly due to economic reasons such as a lack of alternative employment opportunities, fear of reprisal from traffickers and societal stigmatisation (Motus, 2004:40; Vijayarasa, 2010:91–2). NGOs have analysed that the fear of being detained by public authorities, with 'deportation as the necessary eventuality', often leads to trafficked persons evading contact with the public sector. If detained, trafficked persons try to escape detention to avoid being sent to their countries of origin.¹¹

Trafficked women in Malaysia are comparatively more difficult to access because they are reluctant to interact with public authorities. A government official noted that women who are detained display depression and suicidal tendencies.¹² They feel more vulnerable to being criminalised by national anti-human trafficking policies.¹³ Also, women are more likely to become dependent on their controllers (Jones et al., 2007:115–6). Legal practitioners point out that some of these women when intercepted by Malaysian authorities, described their controllers as their source of protection from legal problems such as providing bail for their release from police detention.¹⁴

It is important to note that national anti-human trafficking policies are not applied to women internally trafficked for sex. Although, both transnational and internal human trafficking are notable in Malaysia, human trafficking remains framed as an issue that originates outside of Malaysia.¹⁵ As a result, national anti-human trafficking policies tend to be applied to migrant trafficked persons and internally trafficked persons are generally dealt with under domestic laws. Legal practitioners observed that there has yet to be a local Malaysian identified as a victim of sex trafficking.¹⁶ These domestic laws such as prostitution laws in the case of women internally trafficked for sex are comparatively harsher than the anti-human trafficking policies applied to migrant women trafficked for sex. Although the illegality of the sex industry in Malaysia restricts the activities of the non-government sector to assist women internally trafficked for sex, the Malaysian government's financial support for the non-government sector to secure health intervention to assist Malaysian women involved in the sex industries encourages the sector to focus more attention on the needs of internally trafficked women and the problems they face.¹⁷ However, the extension of this to migrants is controversial due to the sensitivity linked to utilising state funds for migrants in the sex industry.¹⁸ In addition, once migrant trafficked persons are intercepted, they are deemed to come under the jurisdiction of immigration authorities, thus becoming inaccessible to the non-government sector.¹⁹

In sum, the Malaysian government's policy solutions for trafficked persons that are primarily focused on their detention (while arrangements are made for their deportation) hinder the ability of public authorities to access and assist trafficked persons. This approach imperils trafficked persons and marginalises them in the area of public assistance. To address this gap, the non-government sector has intervened to assist trafficked persons in overcoming their circumstances.

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The Role of the Non-government Sector in the Protection of Trafficked Persons

As has been discussed, government policies lack an understanding of the circumstances of the trafficking process. This has inevitably led to a range of actors from the non-government sector intervening to assist trafficked persons. In contrast to the government's approach of

prioritising prosecutions, the non-government sector intervenes to assist trafficked persons with priority placed on their protection concerns. In addition, the non-government sector in Malaysia has better accessibility to trafficked persons through its networking with local community members who were previously trafficked or with aid workers directly working in the industries prone to trafficking such as the sex industry or the fishing industries. This also leads to the sector being more responsive to the circumstances surrounding the migration of those trafficked. Thus, their approaches are reflective of bottom-up perspectives on the issues affecting trafficked persons (Tzvetkova, 2002). Also, organisations with a focus on health issues such as HIV/AIDS are more successful in accessing trafficked persons because they take on a neutral position, and are not associated with criminal and immigration prosecution. Consequently, at present, non-government shelters in Malaysia are hosting about 10 times more trafficked women as compared to government shelters.²⁰ However, a government official noted that NGO shelters have existed longer while government shelters under the Ministry of Women, Family and Community Development began operations only in 2009 after their establishment in 2008.²¹

Responsive Practices of the Non-Government Sector

The non-government sector in Malaysia has adopted several responsive practices that reflect an appreciation of the difficulties involved in the trafficking process. Bearing in mind the debt bondage and cottage-industry characteristics of the trafficking process, most non-government shelters refuse to be gazetted by the government. They basically disagree with the lack of confidentiality of government-run shelters, as confidentiality would curb the ability of traffickers to track trafficked persons (Brunovskis and Surtees, 2008:64).²² Members of the non-government sector also disagree with the way government shelters are being operated and guarded using barbed fencing, and liken them to detention camps for illegal migrants. They prefer a more rehabilitative atmosphere by offering counselling and skills training to victims in recognition of the difficulties they could face when returned to their countries of origin. They consequently forego becoming official places of refuge for trafficked persons and thus the possibility of financial assistance or support from the government in running their facilities.

In contrast to the government's approach of deportation, the non-government sector approaches the issue of the return of trafficked persons by assisting their voluntary repatriation. The Malaysian government's policy of deportation categorises trafficked persons as violators of immigration laws. Voluntary repatriation, on the other hand, is the right of irregular migrants, such as trafficked persons, to return to their country of origin. This right is enshrined in international human rights law and protects them from compulsory expulsion from the destination country (Obokata, 2005:411; Haynes, 2003:25–6). NGOs in Malaysia with overseas networks would facilitate repatriation through cooperation with trafficked persons' country embassies and these overseas networks to support and protect victims from re-exploitation in countries of origin, bearing in mind the cottage-industry characteristics of traffickers.²³ Underlying these contrasting approaches is the inadequate level of enforcement and accountability for the rescue, rehabilitation and reintegration of trafficked persons within the US TIP strategy (Hendrix, 2010:182, 185; Chacon, 2006:333, 375, 378).

Restrictive Space for Interaction between Government and Non-Government Sectors

Undoubtedly, the non-government sector is a vital resource for the government to enhance their protection policies for trafficked persons. However, the space for interaction between these two spheres towards formulating anti-human trafficking policies is restricted by internal political conditions. This is because the Malaysian government's primary agenda is to respond to the *US TIP Reports*. Since holistic anti-human trafficking approaches (giving equal priority to the protection needs of those trafficked) are not demanded by the *US TIP Reports*, the opportunity to discuss and implement these is restricted. As the non-government sector places an emphasis on the protection needs of trafficked persons, their priorities often clash with the government's anti-human trafficking objectives targeted on the arrest and prosecution of traffickers.²⁴ In addition to this clash of objectives delimiting the access of the non-government sector to funding from the government, interviewees from the non-government sectors are also sceptical about cooperating with government officials, for fear of being 'used as bait to penetrate trafficking networks'. For example, non-government agencies with better access to trafficked persons have been used by government agencies such as Malaysia's Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants, to obtain information, and secure raids on and arrests of suspected trafficking networks.²⁵

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Conclusion

In conclusion, this NTS Alert has highlighted the circumstances and conditions of the trafficking process in Malaysia. The *US TIP Reports* prioritise prosecution rates of traffickers over the rights protection of trafficked persons. This policy focus has discouraged the Malaysian government from developing holistic anti-human trafficking policies, stymying efforts to protect trafficked persons.

There have been attempts to engage the government towards enhancing protection measures for trafficked persons in Malaysia. SUHAKAM (Malaysia's human rights commission), the Malaysian AIDS Council (representing a conglomerate of domestic health NGOs) and the Kuala Lumpur Legal Aid Centre have successfully engaged in dialogue with the public authorities, including religious representatives, to deregulate the criminal and immigration enforcement policies attached to anti-human trafficking measures. The problem is that discussions do not translate into formal internal policy changes.

As a result of the lack of agreement on how to address this human security deficit, the non-government sector has intervened to assist and protect those trafficked but experiences significant operational constraints due to the focus of government agencies on prosecution. Although cooperation between the government and non-government sector is important and has been encouraged by the *US TIP Reports*, the non-government sector has achieved minimal success in influencing anti-human trafficking policy changes (US Department of State, 2011). It is suggested that in order to facilitate a more holistic policy environment encouraging collaboration between the Malaysian government, the non-government sector and the international community, the US State Department needs to adopt a more balanced approach to human trafficking and shift the main focus of its TIP enforcement strategy from prosecution to encouraging states to give equal weight to the protection of trafficked persons, and ensuring this is independent of prosecution efforts.

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Notes

1. This NTS Alert relies on research conducted in Kuala Lumpur, Malaysia, between 13 and 17 June 2011. The material is used as contextual evidence alongside scholarly writing on the themes discussed in the NTS Alert. Qualitative research on the dynamics of human trafficking in Malaysia was conducted through open-ended interviews and observational interaction. A cross-section of views was solicited, from non-partisan organisations, and government and non-government agencies. All interviews were conducted in confidentiality, and the names of interviewees are withheld by mutual agreement.
2. Personal interviews with (1) expert on Malaysian national human rights issues; and (2) NGO practitioners, Kuala Lumpur, 13 and 14 June 2011.
3. Personal interviews with NGO practitioners, Kuala Lumpur, 13 and 14 June 2011.
4. Personal interview with expert on Malaysian national human rights issues, Kuala Lumpur, 14 June 2011.
5. Personal interview with expert on Malaysian national human rights issues, Kuala Lumpur, 14 June 2011.
6. Personal interview with expert on Malaysian national human rights issues, Kuala Lumpur, 14 June 2011.
7. Personal interviews with (1) NGO practitioners; and (2) legal specialist, Kuala Lumpur, 13 and 14 June 2011.
8. Personal interviews with (1) legal specialist; and (2) NGO practitioner, Kuala Lumpur, 14 June 2011.
9. Personal interviews with NGO representatives, Kuala Lumpur, 13 and 14 June 2011.
10. Personal interviews with a government official with work experience at shelters for trafficked victims, 16 June 2011.
11. Personal interviews with (1) NGO practitioner; (2) expert on Malaysian national human rights issues, Kuala Lumpur, 13–14 June 2011.
12. Personal interview with a government official with work experience at shelters for trafficked victims, Kuala Lumpur, 16 June 2011.
13. Personal interviews with (1) NGO practitioner; (2) expert on Malaysian national human rights issues; and (3) government official with work experience at shelters for trafficked victims, Kuala Lumpur, 13–14, and 16 June 2011, respectively.
14. Personal interviews with legal specialist, Kuala Lumpur, 14 June 2011.
15. Personal interviews with (1) legal specialists; (2) NGO practitioners; and (3) expert on Malaysian national human rights issues, Kuala Lumpur, 13–15 June 2011.
16. Personal interview with legal specialists, Kuala Lumpur, 13 and 14 June 2011.
17. Personal interview with NGO practitioner, Kuala Lumpur, 15 June 2011.
18. Personal interview with NGO practitioner, Kuala Lumpur, 15 June 2011.
19. Personal interviews with NGO practitioners, Kuala Lumpur, 13 and 14 June 2011.
20. Personal interviews with (1) NGO practitioners; and (2) government official with work experience at shelters for trafficked victims, Kuala Lumpur, 13, and 15–16 June 2011 respectively.
21. Personal interview with a government official with work experience at shelters for trafficked victims, Kuala Lumpur, 16 June 2011.
22. Personal interview with NGO practitioner, Kuala Lumpur, 13 June 2011.
23. Personal interview with NGO practitioner, Kuala Lumpur, 13 June 2011.
24. Personal interview with NGO practitioner, Kuala Lumpur, 15 June 2011.
25. Personal interviews with NGO practitioners, Kuala Lumpur, 14 and 15 June 2011.

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