The Dual Criminality Principle in the Association of Southeast Asian Nations-Mutual Legal Assistance Treaty in Criminal Matters (ASEAN-MLAT): Prosecuting Transnational 'Cyber-Human Trafficking' in the Southeast Asian Region

Asia Pacific Journal of Multidisciplinary Research
Vol. 7 No.2, 88-95
May 2019
P-ISSN 2350-7756
E-ISSN 2350-8442
www.apjmr.com
CHED Recognized Journal
ASEAN Citation Index

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Date Received: August 2, 2018; Date Revised: April 5, 2019

Abstract *- This paper examines the applicability of the 'Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN member countries' (ASEAN-MLAT) in the prosecution of human trafficking committed in the cyberspace. This multilateral treaty ensures cooperation among Southeast Asian (SEA) states in the prosecution of crimes. ASEAN-MLAT, however, adheres to the principle of dual criminality which means that a crime cannot be subject of cooperation if it is not penalized under the jurisdictions of either the Requesting or the Requested Party. Although there are no specific laws which penalize cyber-human trafficking among SEA states and there is still a need for future development of a more cyber-responsive penal legislation on human trafficking, this crime when committed in the cyberspace can still be accommodated under the national penal laws existing in the ASEAN countries. A comparative reading of all penal laws among SEA states reveals that human trafficking includes the recruitment of persons for the purpose consonant with trafficking. This means that human trafficking as a crime can be committed in the cyberspace. Hence, despite the absence of a particular penal provision on cyber-human trafficking, this crime can be a proper subject of mutual legal assistance for investigation and prosecution among and between SEA states.*

Keywords:*cyber-human trafficking, dual criminality principle, mutual legal assistance treaty, prosecutorial framework, transnational crimes*

INTRODUCTION

"Cassie", not her real name, is a 12-year old girl who is a member of an indigenous community in Southern Philippines. Her family was lured by Jerrie to allow him to bring her to Manila with a promise of a good job and schooling. However, Jerrie's promise never happened for he has subjected "Cassie" to abuses, raping her in front of a web camera in return for payment by customers watching from other countries [i].

The story of "Cassie" is not an isolated one. There are other thousands of children exposed to the same abuse all over the Philippines. In fact, this assertion was confirmed when a headline posted on March 26, 2018 by a Singapore-based The Straits Times opened: "*Philippines urges tough global action on cyber sex trafficking of children*"[ii]. In this article, The Straits noted that there are about 3,000 reports received by the Philippine Justice Department concerning children-victims of sexual abuses in the cyberspace.

The prosecution of cyber-trafficking in person proves to be difficult. This may be attributed to the transnational character in the commission of the offense which means that there is interplay of two or more jurisdictions in the "planning, execution or impact of the crime" [iii]. This is further supported by an observation by the International Justice Mission that despite sufficient prosecution mechanisms in placed under Philippine laws, the crime of trafficking in persons (TIP) in the cyberspace remains to be significantly high [iv].

Fully aware of the difficulty in the prosecution of transnational crimes, many countries resort to the use of applicable legal devices. Most common of these is the utilization of an extradition treaty whereby state-parties agree to provide aid in cases the crime committed by a particular person involves their

respective jurisdictions. This is an ancient legal device, dating its existence way back in 1591 [v]. Owing to its antiquity, the applicability of extradition is merely confined within the metes and bounds of turning over the person of the fugitive by a requested state in favour of a requesting state.

Another legal tool which is more relevant on the discussion of this paper is the mutual legal assistance treaty (MLAT). This is a bilateral (involves two states) or a multilateral (involves more than two states) agreement in which state-parties bind themselves to cooperate with one another in the prosecution or investigation of a crime committed [3]. This involves the exercise by the requested state of its coercive power in the conduct of a criminal investigation or prosecution made upon the instance of a requesting state [vi]. In 2000, the United Nations sponsored the creation of the Convention against Transnational Organized Crime (UNTOC) [vii]. This multilateral treaty involves around 180 state-signatories and thereby binding themselves to create a bridge between and among their respective jurisdictions concerning a transnational criminal offense [viii].

A regional-specific treaty consonant with UNTOC was also crafted by the Association of the Southeast Asian Nations (ASEAN) to which it was termed as the Mutual Legal Assistance Treaty in Criminal Matters (MLAT). This multilateral treaty is binding among all ASEAN member-states and was created in order to aid them in the compliance of their obligations mandated under the UNTOC and other international agreements concerning transnational crimes [3].

It is expected that by the creation of ASEAN-MLAT, transnational trafficking in the region will be at the very least mitigated [ix]. However, a 2017 data issued by US State Department [x] reflected the contrary. Said data showed that in the SEA region, only the Philippines had attained a Tier1 status, while the majority including Cambodia, Vietnam, Malaysia, Singapore, Indonesia, and Brunei were classified as Tier 2. On the other hand, Laos, Thailand and Myanmar were given a Tier 2 watchlist status.

This reveals a reality that the effectiveness of ASEAN-MLAT remains to be seen. What should be done, however, is to isolate any aspects of said treaty which would possibly present a challenge on its enforcement effectiveness. In this respect, it is worthy to look into the principle of dual criminality -- of which ASEAN-MLAT adheres -- particularly on its impact in addressing the issue of transnational cyber-trafficking in the region [xi].

The principle of dual criminality means that in order for ASEAN-MLAT to be applicable on a certain request, the subject crime must be considered punishable in the jurisdictions of both the requesting and the requested states [xii]. However, since cyber-trafficking in persons is not specifically considered a crime under the jurisdictions of all ASEAN countries, then this treaty would not be applicable, thereby posing a challenge on its effective prosecution within the region.

OBJECTIVES OF THE STUDY

Confronted with the previously stated legal loophole, then there is a need to re-examine whether ASEAN-MLAT would still take effect in addressing cyber-human trafficking. Thus, this paper offers a view that despite this present legal status, cyber-trafficking can still be a subject of ASEAN-MLAT by arguing that this offense is accommodated within the domestic penal laws of all ASEAN countries against TIP. This can be done by looking into the provisions of these domestic laws and examine whether these can be considered as analogous to cyber-trafficking using the two-tier substantially analogous test.

If proven that cyber-trafficking is indeed substantially analogous to TIP, then legal mechanisms under ASEAN-MLAT can be utilized in prosecuting and investigating transnational human trafficking committed in the cyberspace.

METHODS

In order to address the central question of whether cyber-human trafficking can be a subject of ASEAN-MLAT despite its adherence to the dual criminality principle, there is a need to look into relevant ASEAN-MLAT provisions itself as well as national penal laws punishing human trafficking which are in existence in the jurisdictions of all ASEAN member-states.

In conducting the above analysis, this paper employs a qualitative research as its methodology. Parker [xiii] defined this methodology as "the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made." However, considering the complications entailed in analysing these, a *black letter approach* is further utilized.

Black letter approach was defined by Salter and Mason [xiv] as "a detailed and highly technical

commentary upon, and systematic exposition of, the context of legal doctrine". This approach will be used to analyze the *black letter* provisions of ASEAN-MLAT and its adherence with the principle of dual criminality as well as the specific provisions of national penal laws concerning human trafficking to ascertain whether cyber-human trafficking can be specially accommodated within their respective provisions. In line with this doctrinal approach in the analyses of the dual criminality principle underpinning the ASEAN-MLAT, a comparative analysis of key findings in outside jurisdictions will also be made. In particular, the texts of TIP penal provisions will be viewed through the lens of substantially analogous test and investigate whether these two offenses (TIP *vis-a-vis* cyber-trafficking) can be considered as one and the same offense.

RESULTS AND DISCUSSION

Trafficking in persons (TIP)

Article 3(a) of the United Nations Trafficking Protocol [xv] defines trafficking in persons as "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."

From this definition, it may be argued that in order for trafficking to exist, the following requisites must be present: first, the offender must recruit, transport, transfer, harbour or receive another person; second, there must be an employment of threat, coercion, or force, fraud, deception, or abuse of power; and third, the same must be made for the purpose of exploiting the victim.

Considering the foregoing elements, the crime of trafficking in persons may be qualified as a transnational criminal offense. This means that elements necessary for its commission may be performed in different jurisdictions [6]. For an instance, the act by an offender of recruiting a victim may be done in the Philippines but the third element of exploitation may be committed in Thailand or in any place other than the Philippines. For this purpose, all national penal laws operating within Southeast Asian countries provide for an extraterritorial application. The following table summarizes national penal laws of various ASEAN member-states with respect to the applicability of their anti-trafficking laws outside of their jurisdictions.

Table 1. Extraterritorial application of anti-trafficking laws of Southeast Asian countries.

Country	Extraterritorial application	Legal basis
Brunei	Yes	Section 3, No. S 82, Trafficking and Smuggling of Persons Order, 2004
Cambodia	Yes	Section 3, The Law on Suppression of Human Trafficking and Sexual Exploitation
Indonesia	Yes	Article 4, Law on the Eradication of the Criminal Act of Trafficking in Persons
Lao PDR	Yes	Article 7, The Law on Anti-Trafficking in Persons
Malaysia	Yes	Part I (3), Anti-trafficking in Persons and Anti-smuggling of Migrants Act of 2007
Myanmar	Yes	Chapter I (2), The Anti Trafficking in Persons Law
Philippines	Yes	Section 26-A, The Expanded Anti-Trafficking in Persons Act of 2012
Singapore	Yes	Part 2 (3 and 4), Prevention of Human Trafficking Act of 2014.
Thailand	Yes	Section 11, The Anti-Trafficking in Persons Act B.E 2551 (2008)
VietNam	Yes	Article 4, Law No. 66/2011/QH12 on human trafficking prevention and combat

Status of trafficking in persons in the Southeast Asian Region

Despite the extraterritorial application of anti-trafficking statutes being enforced on all SEA states, this crime remains to be prevalent within the region. A report by the US State Department [10] bears the fact that the prevalence of human trafficking in the Southeast Asia remains at around 2,000 cases. Further, the same report noted that majority of SEA

states are categorized as tier 2. This means that they do not fully meet the United States' Victims of Trafficking and Violence Protection Act's (TVPA) "minimum standards, but are making significant efforts to bring themselves into compliance with those standards" [10]. Moreover, a handful of these states including Thailand, Laos, and Myanmar remained at a Tier 2 Watchlist category. This means that there is significant number of severe forms of trafficking, or there is a failure on the part of these states to combat these forms of trafficking.

The core of this problem lies in the fact that there is a challenge in the investigation and prosecution of this criminal offense [6]. When a criminal offense constituting human trafficking involves two or more jurisdictions of different countries, there is a need for cooperation in the government-to-government level. However, the differences in the legal systems in the jurisdictions involved pose a hindrance for an effective prosecution and investigation of the same [xvi]. Further, differences on these legal systems are deeply rooted in the varying social and economic orientations of countries involved [xvii]. As such, creating an atmosphere of cooperation among countries, even within the confines of a particular geographical location, would be a challenge in itself.

These same challenges were recognized by the ASEAN Secretary-General Dr. Surin Pitsuwan [9] when he emphasized that the difficulty in prosecuting transnational trafficking in persons (TIP) can be greatly attributed to the "differences in laws, standards and priorities between countries". However, despite this, the ASEAN had risen up to the challenge and crafted an international legal instrument which would promote cooperation in the prosecution of criminal offenses. As a testament to this, eight of the ASEAN member-states signed the Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN Member Countries (ASEAN-MLAT), while two other member-states (Myanmar and Thailand) became signatories two years later. This elevated ASEAN-MLAT to the level of a binding international legal instrument operating within the SEA region.

ASEAN-MLAT and the principle of dual criminality

ASEAN-MLAT was brought into existence through the collective efforts of the member-states of the Association of Southeast Asian Nations (ASEAN). This was made in consonance with the unifying goal of addressing the prevalence of transnational organized crimes, including trafficking in persons through the enhancement of "the existing cordial working relationships among the security and law enforcement agencies in the region (and) by providing them with an additional and effective tool to combat" said crimes [xviii].

Through this treaty, ASEAN-MLAT state-parties bind themselves to provide the following legal assistance as provided in the texts of Article 1 (2) of the same: "taking of evidence or obtaining voluntary statements from persons; making arrangements for persons to give evidence or to assist in criminal matters; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing original or certified copies of relevant documents, records, and items of evidence; identifying or tracing property derived from the commission of an offence and instrumentalities of crime; the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated; the recovery, forfeiture or confiscation of property derived from the commission of an offence; and locating and identifying witness and suspects".

From the foregoing scope of assistance, it may be inferred that the legal assistance required of a state-party covers not only the prosecution of a transnational criminal offence, but also in its investigation and apprehension of the perpetrator. However, it is also textualized in the said treaty that a Requested Party may deny any request for the covered assistance under the following instances enumerated under Article 3(1):

(a) "The request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political nature;

(b) "The request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would have constituted a military offence under the laws of the Requested Party which is not also an offence under the ordinary criminal law of the Requested Party;

(c) "There are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions;

(d) "The request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person-

(i) has been convicted, acquitted or pardoned by a competent court or other authority in the Requesting or Requested Party; or

(ii) has undergone the punishment provided by the law of that Requesting or Requested Party, in respect of that offence or of another offence constituted by the same act as the first-mentioned offence;

(e) "The request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would not have constituted an offence against the laws of the Requested Party except that the Requested Party may provide assistance in the absence of dual criminality if permitted by its domestic laws;

(f) "The provision of the assistance would affect the sovereignty, security, public order, public interest, or essential interests of the Requested Party;

(g) "The Requesting Party fails to undertake that it will be able to comply with a future request of a similar nature by the Requested Party for assistance in a criminal matter;

(h) "The Requesting party fails to undertake that the item requested for will not be used for a matter other than the criminal matter in respect of which the request was made and the Requested Party has not consented to waive such undertaking;

(i) "The Requesting Party fails to undertake to return to the Requested Party, upon its request, any item obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made;

(j) "The provision of the assistance could prejudice a criminal matter in the Requested Party; or

(k) "The provision of the assistance would require steps to be taken that would be contrary to the laws of the Requested Party."

From the list provided by ASEAN-MLAT, it can be inferred that these are governed by the basic international legal principles of reciprocity, respect for sovereignty or non-interference, and respect for human rights [xix]. However, it is most worthy to note that a Requested Party may refuse to provide legal assistance in favour of the Requesting Party when it violates the principle of dual criminality [3].

Table 2. National laws on mutual legal assistance of ASEAN-MLAT state-parties and their dual criminality provisions.

State-Party	Adherence to dual criminality principle	Statutory source
Brunei	Yes	***Sec. 24(2)(c)***, Mutual Assistance in Criminal Matters Order of 2005
Cambodia	No*	
Indonesia	Yes	**Art. 7(a)**, The Law Concerning Mutual Legal Assistance in Criminal Matters (Law No. 1 of 2006
Laos	No*	
Malaysia	Yes	**Sec. 20(1)(f)**, Mutual Assistance in Criminal Matters Act (Act. 621 of 2002)
Myanmar	Yes	**Sec. 3(a)**, Mutual Assistance in Criminal Matters Law (Law No. 4/2004).
Philippines	No*	
Thailand	Yes	**Sec. 20(1)(f),** Mutual Assistance in Criminal Matters Act (Chapter 190A)
Vietnam	Yes	**Art. 21(1)(e),** Law on Mutual Legal Assistance (Law No. 08/2007/QH12)

**No specific national law on mutual legal assistance*

The principle of dual criminality is one which guarantees that in order for a crime to be subject of a mutual legal assistance; the same must be considered an offence both in the jurisdictions of the Requesting and the Requested State [6]. Otherwise, if the subject offence is not considered criminal in either jurisdiction, then the refusal is in order.

Nevertheless, a reading of the same proviso of ASEAN-MLAT on dual criminality would yield a conclusion that this can be overturned when despite the absence of this requirement, the domestic laws on mutual legal assistance of the Requested Party allows the rendition of assistance. In such a case, there is a need to look further into the respective domestic laws of all state parties covering the matter.

From the foregoing, it is clear that majority of the State-parties to ASEAN-MLAT adhere to the principle of dual criminality. Other state-parties such as Cambodia, Laos, and the Philippines do not have specific domestic laws on mutual legal assistance. In such a case, ASEAN-MLAT's proviso on dual criminality requirement takes effect considering the fact that they are signatory to such treaty. Thus, it can be concluded that the dual criminality principle operates in all fours on all state-parties to the ASEAN-MLAT.

Hurdling the dual criminality principle of ASEAN-MLAT in prosecuting transnational cyber-trafficking in person in the SEA region

The principle of dual criminality poses a hindrance in the prosecution of transnational cyber-human trafficking. Problems in its prosecution are attributable to the fact that cyber-human trafficking is not particularly considered a criminal offense in all jurisdictions in all SEA countries concerned. It is since there is still a need for these states to legislate a cyber-specific law on human trafficking [xx]. In the absence of this law, trafficking in persons committed in the cyberspace cannot be qualified as a subject of ASEAN-MLAT owing to the required dual criminality. However, specific national laws of SEA states on anti-trafficking in persons would draw a conclusion that although these are not cyber-specific, the crime of cyber-human trafficking can be accommodated within its provisions. The following provides for a review of the anti-human trafficking provisions on domestic laws of all SEA countries.

It is empirical from statutory definitions of SEA national laws that human trafficking may be committed under domestic laws of SEA countries when the offender performs the act of recruiting, or transporting the victim against or by vitiating his will for the purpose of exploitation. Hinging from these elements, then it is of most possibility that this may also be committed in the cyberspace.

Cyber-trafficking does not have a particular legal definition [xxi]. An approximation of its definition only appears in the 2001 Council of Europe Convention on Cybercrime [xxii]. However, this only refers to the commission of child pornography as a cybercrime. Notwithstanding this, Sykiotou [20] defined the term either as the "space" where trafficking was committed or as means in the commission of the same [20]. In respect with the cyberspace as place of commission of TIP, the element of exploitation is consummated in the internet that is when for an instance, a child is made to commit cybersex in front of a web camera. On the other hand, with regard to the internet as means of committing the crime, here, the first element of recruitment is done by using the internet.

Proceeding from the above presupposition, then it may be counter-argued that cyber-trafficking may well be considered as a cybercrime. However, this argument is defective especially when the end-goal is to promote an effective regional cooperation in its investigation and prosecution within the SEA region by utilizing ASEAN-MLAT as legal vehicle.

There is no cyber-specific legislation covering trafficking in persons among SEA countries. Moreover, domestic penal laws on cybercrime of these states are limited rather than exhaustive in application. To date, the intersection of anti-cybercrime and anti-trafficking laws in the SEA region deals more on the aspect of child pornography. Then, the inescapable conclusion is that existing anti-cybercrime regimes in the region is narrow. This is considering that other than child pornography, human trafficking in the cyberspace may also be in the form of labour exploitation and mail order brides [20].

Thus, from the foregoing, it is argued that cyber-trafficking can be accommodated within the provisions of human trafficking laws among SEA countries. The mere fact that the crime may be committed in cyberspace either as a place or a mode of its commission is immaterial. It is since that existing domestic anti-human trafficking laws among the countries concerned do not provide for a specific platform on how it should be committed [xxiii].

However, the crime can still be subjected to the operation of ASEAN-MLAT under the premise that the requirement of dual criminality principle was already satisfied. It is even if assuming that indeed cyber-human trafficking is of a different genus from that of trafficking in persons, and that the former crime is indeed not specifically punished under any national penal laws of any SEA country concerned. The test in determining whether the dual criminality principle of ASEAN-MLAT was satisfied is to examine whether the crimes subject of mutual legal assistance are analogous to one another [xxiv].

The analogous test considers the following matters: first, whether the "acts performed which support the charge could sustain a charge under the laws of the requested state" [xxv]; and second, whether the evils sought to be suppressed is substantially similar [19].

Finally, scrutinizing both the criminal acts of cyber-trafficking and trafficking in persons through the lens of the above substantially analogous test would reveal that the principle of dual criminality was already satisfied. The following table bears out this conclusion.

Table 3.Two-tier substantially analogous test on cyber-trafficking and trafficking in persons.

Parameter		Trafficking in persons	Cyber-trafficking
1st tier: are the acts performed which support the charge could sustain a charge under the laws of the requested state	Yes	a. Common element of recruiting b. Common element of exploitation	a. Can be committed in the cyberspace b. Can take place in the cyberspace.
2nd tier: are the evils sought to be suppressed substantially similar	Yes	To suppress illegal recruitment for the purpose of exploitation	To suppress illegal recruitment for the purpose of exploitation.

From the analysis, then it is concluded that even if cyber-trafficking and trafficking in persons will be treated as different criminal offenses, the former can still be considered as subject of ASEAN-MLAT due to the fact that both offenses are substantially analogous to one another.

CONCLUSION AND RECOMMENDATION

This paper had established that ASEAN-MLAT adheres to the principle of dual criminality. This adherence, however, poses a challenge in the prosecution and investigation of transnational trafficking in persons committed in the cyberspace. This is deeply rooted in the fact that cyber-human trafficking is not specifically punished as a crime among all SEA countries. As such, the dual criminality requisite is not satisfied.

However, a further reading of the penal provisions of each SEA country concerning the crime of anti-trafficking in person would reveal a conclusion that cyber-human trafficking can be accommodated within said penal provisions. A further analysis of cyber-human trafficking *vis-a-vis* trafficking in person utilizing the two-tier substantially analogous test would yield a result that these two crimes are analogous to one another. Hence, considering the above, the dual criminality requisite of ASEAN-MLAT was satisfied.

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