

Applying an Appropriate Standard of Evidence in Victim Identification Policies and Practice in Cambodia, Indonesia, Malaysia, Myanmar, Philippines, and Thailand

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ABSTRACT

Human trafficking remains to be a bane in our time undermining economic progress and perpetuating inequities by setting vulnerable communities who fall prey to it further back. This vicious cycle increases the risk of re-trafficking for victims who escape, and leaves layered trauma experiences unaddressed. To counter this, labor-receiving countries need to connect human trafficking victims to social services that utilize victim-centered and trauma-informed approaches geared toward victim restoration. Often the first step in accessing these services is victim identification. However, officers of government frontline agencies with the mandate to enforce the anti-human trafficking law apply very strict standards in their screening method. The perceived outcome of cases in trial plays a crucial role in victim determination. Thus, there is the tendency to apply evidentiary standards appropriate for a court trial in victim identification. Such practice tends to be adversarial where the burden of proof is placed on the victim's shoulders. Utilizing the standards of evidence as a conceptual framework has the potential of shifting rigid procedures and processes. The standards of evidence framework can calibrate and adjust current practices in victim identification to the appropriate threshold in favor of potential victims of trafficking accessing and receiving victim-centered services.

Keywords: Human trafficking, Modern slavery, Victim identification, Evidence, Victim-centered

Introduction

Victim Identification has been an ongoing challenge in Southeast Asia particularly in countries where International Justice Mission (IJM) is implementing a justice system strengthening program to improve the public justice system response to better protect people in poverty against violence, in this case human trafficking and modern slavery. The form of modern slavery contemplated here is forced labor including human trafficking for labor exploitation. The impetus for this study is the particular challenge on the lack of guidance on the quantum of evidence or standard of evidence required for public frontline officers mandated by law to make the determination of whether or not someone is a victim of trafficking. In criminal cases, we recognize the standard of evidence required to be proof beyond reasonable doubt. In civil cases, it is preponderance of evidence; and in administrative cases it is substantial evidence. But what is the correct standard of evidence when determining victim status?

This paper focused on countries where IJM is implementing a forced labor slavery program, namely: Thailand, Cambodia, Myanmar, Malaysia, and Indonesia. While IJM is currently implementing a different program in the Philippines, online sexual exploitation of children, it is included in this paper since the program still falls under human trafficking. These countries have been selected for this paper due to access to actual casework experiences from accompanying government frontliners mandated to implement human trafficking laws. This paper also looked into relevant literature to shed insights to answer this question. Anecdotal experiences of practitioners who support government response against forced labor and human trafficking were also integrated in the findings.

Review of Related Literature

Victim identification is seen as a process that consists of a series of interactions and involving different pathways that ultimately lead relevant authorities to the identification of victims of trafficking or presumed victims and referred for

assistance. Victim identification is usually not a single event or interaction. It can be complex and can happen at different stages. For example, screening of potential victims can be made by NGOs or by frontline law enforcement officials such as police, border guards, and embassy/consular officials, among other frontline officers with such a mandate. Identification of victims can also be made by specialized police (or police units) after a finding that the crime of human trafficking has been committed. Procedural identification can happen when there is an administrative mechanism in place to determine who is a victim of trafficking for purposes of assistance and support. And judicial identification (by a court) may be sought or required in order to grant victims the right to seek and receive compensation (Chiang, 2022).

According to the ACWC Regional Guidelines and Procedures to Address the Needs of Victims of TIP state that the accurate and timely identification of victims is critical to their safety and wellbeing. It calls for standardized mechanisms and procedures to be put in place to guide and facilitate victim identification across the ASEAN region. It also observes that the idea of an ‘ideal victim’ who is passive and blameless, has been popularized and has done more harm than good. It leads to the false conclusion that victims who have not been sexually exploited or suffered any physical abuse as not having the ‘right’ trafficking indicators (ASEAN Commission).

According to the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, the Trafficking in Persons (TIP) laws of ASEAN member states do not generally establish a formal identification or referral procedure, nor do they refer to victim identification. These are usually dealt with outside the law. That is, through procedures and guidelines (ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 2016).

In the literature cited above, there is no particular framework using standards of evidence as a tool to guide government frontliners in their determination of whether a person is a victim of trafficking or not.

Methodology

A systematic approach was used to review and analyze relevant literature for practitioners in anti-human trafficking work in select countries in Southeast Asia. The methodology involved the collection of relevant literature, the comparison of policies and practices in the selected countries on victim identification. The literature included legal frameworks, institutional mechanisms, and the effectiveness of implementation. A thematic analysis approach was applied in the review and analysis. Casework experience of practitioners was incorporated in the findings for a more accurate assessment of policy and practice.

Findings

Regional policies and practices on victim identification

Table 1 summarizes the policies and practices relevant to victim identification in a country based on literature from ASEAN, US Department of State, and other country documents. ASEAN Regional Review, summarized in the second column, has not been updated since 2016. The Trafficking in Persons (TIP) Report, and other documents and input from practitioners summarized under the third and fourth columns, respectively, are meant to update the information in the second column.

Table 1: Policies and practices on victim identification in Cambodia, Indonesia, Malaysia, Myanmar, Philippines, and Thailand

Country	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 2016	2022 US TIP Report (US Department of State, 2022)	Relevant Country Documents and Input from Practitioners
Cambodia	<ul style="list-style-type: none"> - No formal procedures operating for the identification of victims and no national referral mechanism. - The Ministry of Interior (MOI) and Ministry of Social Affairs, Veterans and Youth Rehabilitation (MOSAVY) both have the mandate to identify victims. - Typically, victims are only identified after they have 	<ul style="list-style-type: none"> - MOSAVY developed victim identification guidelines in 2017 - Law enforcement agencies’ victim identification, referral, and repatriation efforts remained disparate and underdeveloped. - Authorities penalized potential foreign victims for unlawful acts traffickers compelled them to commit, 	<ul style="list-style-type: none"> - National Committee for Counter Trafficking (NCCT) Guidelines state that the persons responsible for preliminary victim identification shall include the local authorities (commune, district, town, province/municipality), judicial police, Social Affairs officials, officials in charge of women and

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Indonesia	<p>escaped from their traffickers or been deported back to Cambodia by the country of destination.</p> <ul style="list-style-type: none"> - With respect to its nationals trafficked to other countries, Cambodia accepts the status determination of the destination country for purposes of providing returned victims with support and assistance. However, competent authorities in Cambodia are required to make a formal determination of victim status before taking further action, such as investigation or collecting evidence to file a complaint - Most victims are identified after reports to the national authorities (by the victim, by an NGO or even by the media). - The formal identification process for Indonesian victims of trafficking is done through interviews and observations. - State and non-state actors can all be involved in identification. - Detailed guidelines have been developed to assist in the identification process. 	<p>such as immigration violations.</p> <ul style="list-style-type: none"> - the government prevents NGOs from representing individuals seeking formal recognition as trafficking victims. - Victims were required to approach the Ministry of Interior (MOI) for the formal identification needed to access protection services. <p>- Several government agencies continued to utilize comprehensive or systematized standard operating procedures (SOP) for proactive victim identification or referral to protection services.</p> <ul style="list-style-type: none"> - Some observers expressed concern that the lack of SOP and the government's anti-trafficking infrastructure, which was under the purview of local-level police units and protection agencies who focused primarily on women and children, hindered the identification of victims overall and of rural and male victims specifically. - Due to lack of formal identification procedures, authorities may have arrested or deported some unidentified trafficking victims, particularly among vulnerable groups. - The Ministry of Foreign Affairs (MFA) maintains an online portal and mobile application to identify Indonesian trafficking victims exploited abroad. 	<p>children and staff of civil society organizations working on victim protection, or officials of the royal gendarmerie in charge of fighting against human trafficking, especially officials at all levels of the national mechanisms designed to combat human trafficking.</p> <p>Note: Italics supplied for emphasis. In practice, practitioners from civil organizations report that their victim identification is seldom upheld by government authorities.</p> <ul style="list-style-type: none"> - There is a National Anti-Trafficking in Persons Taskforce led by the Ministry of Women Empowerment and Children Protection (MOWECP). It consists of 12 other ministries and agencies and ad-hoc non-governmental organization (NGO) members. The Task Force has a National Action Plan (NAP) that is endorsed and implemented under Presidential Regulation. The new NAP is being finalized (after a 3-year delay) and is to be implemented from 2023. - At the subnational level, regional taskforces should be formed and operational. This is where there is delay. Very few at the subnational level are in compliance in forming regional task forces. - A regulation issued by the Ministry of Women Empowerment and Child Protection includes identification under its general case management function. Identification is carried out when receiving public complaints or victim outreach. Male victims do not seem to be covered by this regulation.

Country	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 2016	2022 US TIP Report (US Department of State, 2022)	Relevant Country Documents and Input from Practitioners
Malaysia	<p>- The Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) has developed a small, portable checklist of indicators of trafficking that frontline officials can carry with them while on duty.</p>	<p>- The government had victim identification SOP formally adopted in April 2020—to guide law enforcement officers to identify victims during official duties.</p> <p>- These SOPs are not systematically implemented nationwide, especially in rural areas and in the eastern states of Sabah and Sarawak.</p> <p>- The government continued to focus most of its identification efforts on the use of large-scale police raids of suspected commercial sex establishments and factories suspected of forced labor.</p> <p>- Officials often relied on reports of abuse from embassies representing foreign workers, victims to “self-identify,” or workers’ complaints of non-payment of wages and other violations.</p> <p>- Police and immigration officers inconsistently applied victim identification procedures or were slow to identify victims, ultimately preventing some foreign victims from receiving protection services.</p> <p>- The government also did not adequately screen asylum-</p>	<p>- Other ministries also have SOP for victim identification as a derivative of the Regulation relevant to the National Anti-Trafficking Taskforce and consistent with the NAP. This would further be adapted to SOP at subnational level. The process of adaptation from national to subnational SOP is where there could be misalignment in the process of victim identification. The victim identification may also differ from one ministry to the other and between national and subnational. There is a recent amendment of the ATIPSOM law and the National Referral Mechanism has been updated to improve victim identification, among other things.</p>

Country	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 2016	2022 US TIP Report (US Department of State, 2022)	Relevant Country Documents and Input from Practitioners
Myanmar	<ul style="list-style-type: none"> - Victim identification is generally the responsibility of the specialist trafficking unit within the National Police. - There is a need to develop systematic procedures for victim identification (both for national and foreign victims). - There is a need for more systematic coordination between countries. 	<p>seekers and refugees for indicators of trafficking.</p> <ul style="list-style-type: none"> - NGOs continued to report authorities treated potential victims identified during police or immigration raids like criminals. - Anti-Trafficking in Persons and Smuggling of Migrants (ATIPSOM) required the government place victims who were granted a court-ordered 21-day interim protection order (for potential trafficking victims) or a subsequent 90-day protection order (for certified trafficking victims) at a “place of refuge,” designated by the Minister of Home Affairs. - Undocumented foreign trafficking victims had a considerably lower chance of obtaining protection orders compared with foreign victims who had valid immigration papers. - Moreover, officials’ interpretation that ATIPSOM required a trafficking victim to be subjected to physical restraint prevented the government from identifying some victims and issuing protection orders to many potential victims - Regime law enforcement authorities did not report if they screened for trafficking among vulnerable populations, including Rohingya, persons in commercial sex, and internally displaced persons (IDPs) and returning migrant workers. -The regime did not implement or utilize the National SOP on the Return, Reintegration, and Rehabilitation of Victims of Trafficking, which were formally adopted under the civilian government. - The regime reversed the deposed civilian government’s policy not to charge Rohingya with immigration violations; 	<ul style="list-style-type: none"> -The 2005 Anti-Trafficking in Persons Law has been amended on 16 June 2022. There is lack of clarity in some parts of this law. - The implementing guidelines and regulations are needed to clarify the implementation of the new TIP law. -The new law has a provision for the formation of community-based human trafficking identification teams. This is to improve the detection of human trafficking cases and assist in victim identification. - the Department of Social Welfare is tasked to propose guidelines relevant to TIP

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Philippines	<ul style="list-style-type: none"> - Victims of trafficking are commonly identified through rescue operations, interview screening at ports and borders, reports from embassies and consulates abroad, referral cases, and reports via calls to government and NGO hotlines/help lines. - In some instances, cases of trafficking are detected during case build-up of similar cases, discussion during meetings or case conferences and other similar circumstances. 	<p>the regime also issued a directive for authorities to resume detention and legal actions against the Rohingya, including imprisonment of up to two years with hard labor, on immigration-related charges.</p> <ul style="list-style-type: none"> - The government lacked a reliable mechanism to consolidate statistics on the total number of victims identified and assisted because of the different pathways of victim identification. 	<p>victim identification and care.</p> <ul style="list-style-type: none"> - According to the Referral System developed by Department of Social Welfare and Development (DSWD), entry to the referral system is through various means to seek assistance and protection. Upon entry, however, their status as victims of trafficking has to be confirmed by the appropriate authorities. The identification of trafficked persons may also be undertaken by the designated Focal Person of the referral system. In this way, services to the victims-survivors are made more accessible.
Thailand	<ul style="list-style-type: none"> - Division of Anti-Trafficking in Persons (DATIP) under the Ministry of Social Development and Human Security (MSDHS) developed a pamphlet to assist frontline officials in victim identification. - To further assist frontline officials, there is a preliminary interview form for multidisciplinary teams (MDT), which include interpreters) to use during initial interviews with potential victims. <p>The form has been revised and the new version has been in use since early 2016.</p>	<ul style="list-style-type: none"> - Finalized a national referral mechanism (NRM) in March 2022 that authorized a 45-day reflection period allowing for the provision of services to potential victims prior to formal identification. - Finalizing implementing guidelines for the forced labor provision of the anti-trafficking law - Established a new trafficking victim identification center - Developed guidelines for labor officials to refer suspected trafficking victims to MDTs - Inconsistent and ineffective interviewing practices during labor inspections left many labor trafficking victims unidentified. - NGOs raised concerns that officials did not screen undocumented migrants for trafficking, particularly those fleeing political instability in Burma, 	<ul style="list-style-type: none"> -A new law on forced labor is in effect. Implementing guidelines and SOP are in place for its implementation.

Country	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 2016	2022 US TIP Report (US Department of State, 2022)	Relevant Country Documents and Input from Practitioners
		<p>and often detained and deported migrants without screening.</p> <ul style="list-style-type: none"> - Some practices hindered the ability of victims to recount their exploitation, such as allowing employers of potential victims to be present during victim interviews. - Formal identification by MDTs was necessary for victims to obtain a legal right to services, including access to the government's trafficking shelters. - In December 2021, the Department of Special Investigations (DSI) established a human trafficking victim identification center to accommodate potential victims and prepare them for identification interviews. 	

International And Regional Standards

UN Principles and Guidelines on Human Rights and Human Trafficking has underscored the primacy of human rights and stated that, "failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights" (United Nations Office of the High Commissioner for Human Rights (OHCHR), 2003). In light of this, it would appear that one would be in better standing consistent with international standards to err in favor of identifying someone as a victim of trafficking in ambiguous situations instead of denying a person's rights.

According to a UNODC training module, persons may also be termed as "potential" or "presumed" victims of trafficking. Potential victims are people who have not yet been trafficked, but due to their vulnerability or other circumstances, are at risk of being trafficked. A presumed victim is a person whose circumstances indicate that they may have been trafficked, but no final determination has yet been made, perhaps pending further inquiries. In the interim they should be treated as a victim and immediately provided with protection and assistance (UNODC, 2019).

Relevant provisions of ASEAN Convention against Trafficking in Persons Especially Women and Children Provision (ACTIP) (ASEAN, 2015): (a) Article 14(1) Each Party shall establish national guidelines or procedures for the proper identification of victims of trafficking in persons and where appropriate, may collaborate with relevant non-governmental assistance organizations, and (b) Article 14(2) In a case where trafficking takes place in more than one country, each Party shall respect and recognize the identification of victims of trafficking in persons made by the competent authorities of the receiving Party.

These international and regional standards, support making survivor services accessible for victims of trafficking with the least friction through the public justice system. In case of doubt, persons should be presumed victims and given access to protection and aftercare services. However, in practice victims often bear the burden of proving that they are in fact victims using a standard of evidence that is more appropriate in full blown trial of the case.

General Observations on regional practices on victim identification

In most ASEAN member states, victim identification and referral procedures are dealt with outside the law, often through procedures and guidelines aimed at ensuring those on the frontline are able to recognize victims of trafficking and provide an adequate first response (ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 2016). This is not an issue in and of itself. However, if victim identification is not anchored on international and regional standards, there would be a lot of inconsistency especially in the case of trafficked migrant workers where one country, usually the source country, identifies a person as a trafficking victim and another country, usually the destination country, identifies that same person as an immigration law violator.

Throughout the ASEAN region, the practice of victim identification is principally reactive: victims are not “found” by frontline responders such as police, labor inspectors, immigration officers, among others, but will generally self-identify to police or support organizations while still in their situation of exploitation or once they have escaped their traffickers (ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 2016). The present stringent process in victim identification further discourages those who would self-identify as victims of trafficking.

Based on country assessments, most ASEAN countries experience difficulties in identifying victims trafficked for forced labor (ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 2016). This implies that the number of victims actually identified does not reflect the scale of the problem. Governments need to improve victim identification mechanisms. This is where victim-centered approaches come in. When governments apply victim-centered approaches, victims would be encouraged to report.

Conclusion and Recommendations

From the foregoing review of literature, there is no reference to a conceptual framework on evidence that frontliners, whether working individually or as part of a team mandated with the authority to identify victims of trafficking, can use to base their determination. Non-government Organizations advocating for the rights of victims of trafficking understand how important victim identification is because it opens access to government-funded services and protects the survivors from being criminalized. Anecdotal reports received disclose that frontliners often apply a very high standard of evidence in making their determination. Observers have noted that it appeared victim identification is being made dependent on the outcome of the case or the likelihood of success should it go to trial. Following this logic, it would appear that the standard of evidence used in victim identification in practice is one that approximates the standard of evidence applied by the courts in criminal cases which is beyond reasonable doubt.

It is likely that frontline authorities do this without awareness on the standard of evidence utilized as articulated here. It is more likely that due to the lack of practical guidance on what standard of evidence to use in victim identification, they default to that standard which they are most familiar with. While done without malice, this practice is not victim-centered and has the effect of putting an unreasonable burden on the victims’ shoulders.

Standards of evidence can be used as a conceptual framework to help people in authority to do victim identification move away from a singular standard of evidence that is rigid and unreasonably high. Figure 1 explains the different burdens of proof standards for legal matters. Under this framework, the more serious the consequences, the higher the burden of proof standards are.

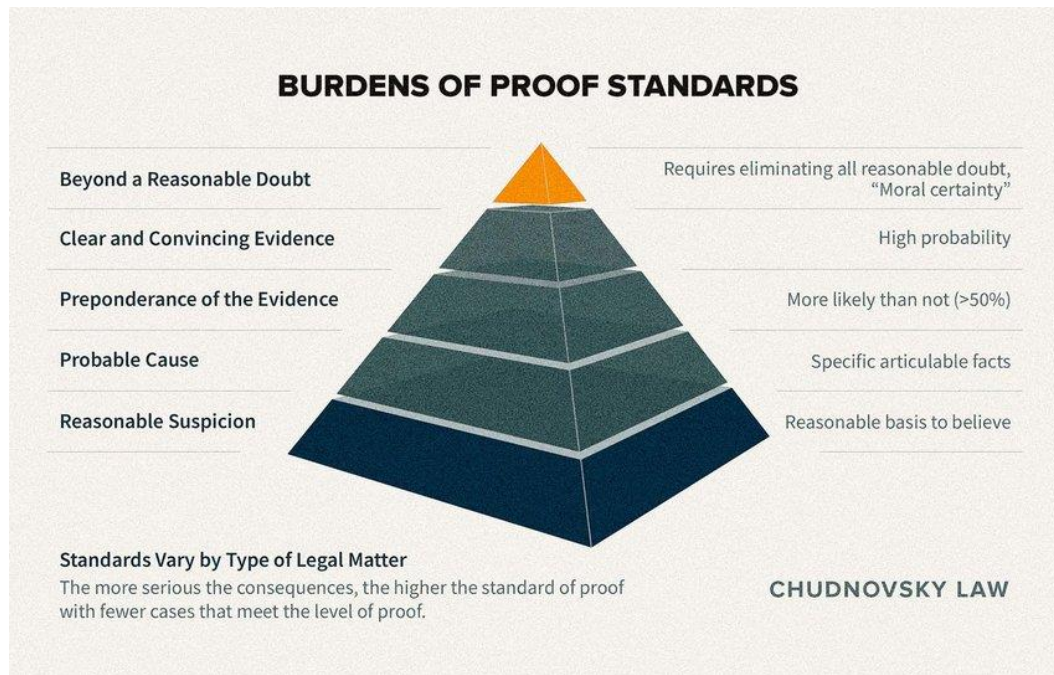


Figure 1: Burdens of proof standards (Chudnovsky, 2019)

Using this conceptual framework makes it possible to move to a different level of the pyramid, one that is more accepting of other means of verifying information other than that set forth in the formal rules of court.

Figure 2 is another illustration of the same concept. The smaller the ring or the hoop the stricter standard of evidence. Applied to victim identification, this means there would be fewer who would get through the hoop and pass as victims. Say for the Beyond a Reasonable Doubt standard, for every person who passes as a victim of trafficking, there would be so much more who would fail to meet the standard. But the same persons who failed to meet that standard would pass and be identified as victims of trafficking if another standard of evidence is applied.

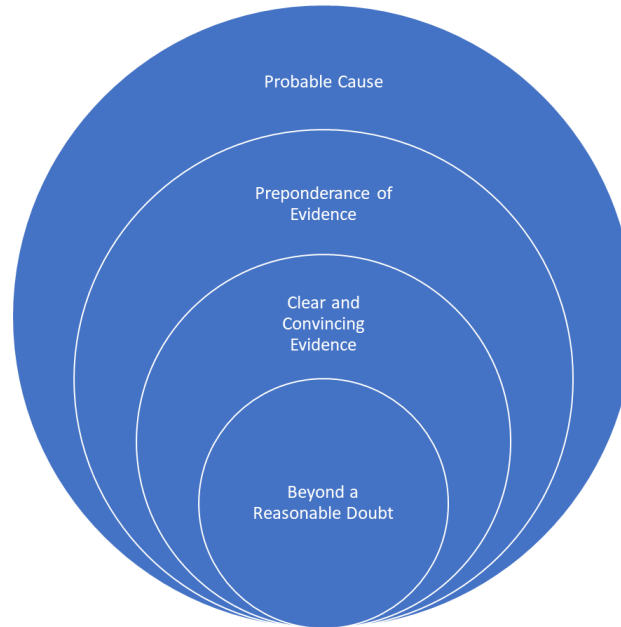


Figure 2: Standards of evidence

Here are practical recommendations:

1. In law enforcement trainings on trafficking in persons, include a module on standards of evidence that is specifically oriented towards victim identification. The goal is to first separate the standard of evidence used by courts in criminal cases from the victim identification process. Some practitioners assert that evidence should not even be an issue during victim identification. Certainly, evidence collection should be separate from victim identification in theory, but in practice these usually overlap if not considered simultaneously. A discussion of the standards of evidence in these two overlapping processes would clarify that victim identification should not be made dependent on the outcome of a case during trial such that only cases that are expected to succeed will victims be identified.
2. In many cases of human trafficking, victims who have escaped and are in a position to report to authorities are more concerned about physical safety than evidence collection. It is recommended that frontliners are trained to make a determination of whether someone is a victim of trafficking or not based on that person's statement if all they had was that statement. This would not preclude efforts to corroborate a statement if the means to do so are available to authorities. However, the burden to corroborate the statement should not be placed on the person who self-identified as a victim of trafficking.
3. Calibrate law enforcement response to reports and calls-for-help in situations of ongoing exploitation in the context of human trafficking or forced labor to be on the same as the response in any major crime requiring a speedy response.
4. It is recommended that agencies enforcing the TIP and forced labor laws reinforce this framework in their policies and standard operating procedures or SOPs.
5. Further study based on the findings of this paper is recommended to contribute to the strengthening of victim identification policies and practices.

Contributions of Authors

The authors confirm the equal contribution in each part of this work. All authors reviewed and approved the final version of this work.

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Conflict of Interests

All authors declare that they have no conflicts of interest

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