

**Title: Forensic videotape interview of trafficked minors:
whose interest is best served?
A discussion paper**

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**PART I: AYOKO NA!
(I DON'T WANT TO ANYMORE!)
(THE PROBLEM STATEMENT)**

1.1 Introduction

***T**INA* was 17 years old when she left Isabela¹ to work as sales girl in Cebu City.² Without asking permission from her farm-tilling parents, she headed to Manila on board a non-aircon bus. At the port area of Manila, she jumped on a ship bound for Cebu City. After 20 hours of boat trip, she finally arrived in Cebu City. Wow! The glittering lights and tall buildings of the city left Tina dumbfounded. From the jeepney,³ she saw the department store where she was to report as a saleslady the next day. Tina was bursting with excitement. In the meantime, she needed to sleep in preparation for tomorrow. Tina alighted in front of a building with a neon sign that reads "Burning Darkness." She entered a room and met girls who were scantily dressed and fully-made up. Rather than sleeping that night, she spent the hours entertaining male patrons of the place. The word 'saleslady' found a new meaning in Tina's vocabulary. It meant selling ladies drinks to male customers. It also meant selling her body and soul to Kuya⁴ Enting, the recruiter who promised her a saleslady job, Kuya Ramon, the bar owner who held her and other girls captive after show time, and the nameless kuyas who frequented Burning Darkness for entertainment.*

* Not her real name. To protect her identity, the author also changed the names of the recruiter, bar owner, and the nightclub.

¹ The Philippines has three main regions: Luzon, Visayas, and Mindanao. **Isabela** is a province located in Luzon. This primarily agricultural province is the second largest in the Philippines and the largest in Northern Luzon.

² **Cebu City** is located in the Visayan region. Next to Metro Manila, it is the most developed city in the country. It is the main center of commerce, trade, education, and industry in the central and southern parts of the Philippine archipelago. It has five-star hotels, casinos, white sand beaches, world-class golf courses, convention centers, and shopping malls. The UK-based Condast Travellers Magazine named Cebu the 8th best Asian-Pacific island destination in 2005, and 7th in 2004.

³ Philippines' number one means of inexpensive public transportation.

⁴ In Filipino, it means older brother. Also use to address an older male person who may or may not be related by blood to the speaker.

The story of Tina caught Cebu City's public and media attention in the late 1990s. It exposed the experience of a trafficked minor whose motive in leaving home was to alleviate her family's poverty but found herself in a brothel. It also illustrated a trafficked minor's story of fleeing from her captors; filing a criminal complaint against her traffickers; and eventually losing interest in a protracted legal process.

Tina's case, however, was filed prior to the passage of the *Anti-Trafficking in Persons Act of 2003*.⁵ It happened prior to the formulation of the Supreme Court of the Philippines' *Rule on Examination of a Child-Witness*.⁶ Her lawyers filed a criminal case of child trafficking as defined under the *Special Protection of Children Against Abuse, Exploitation and Discrimination Act*.⁷ She testified at a time when forensic videotaped testimony – or video-based evidence – was not yet admissible in Philippine courts.

There is a glaring similarity between Tina and most of the trafficked minors that this author currently comes across in her development legal work and advocacy. They file a complaint and, eventually, they lose interest to pursue the case to its end.

This is what this discussion paper is all about. It attempts to see how forensic videotape interview can be used to protect trafficked minors.

On the other side of the coin, it attempts to view forensic videotape interview as a process that might – or can – encroach on the minors' right to exercise agency. If not done properly, it could compound the abuses suffered by the minors at the hands of the traffickers.

This paper is intended to open a discussion among key players who are involved in conducting forensic videotape interview of trafficked minors. It concentrates on the issue of internal trafficking of children. It focuses on girl-children since they are the subjects that the author often encounters.

1.2 Child trafficking: an increasing phenomenon?

Trafficking of Filipino children is becoming a global and local phenomenon. This is the observation of the Coalition Against Trafficking in Women-Asia Pacific (CATW) and Visayan Forum, two Philippine non-government organizations (NGOs) working on and against the issue of child trafficking.

⁵ Republic Act 9208 became effective on 19 June 2003.

⁶ A. M. NO. 004-07-SC 2000-11-21 became effective on 15 December 2000.

⁷ Republic Act 7610 was passed by Philippine Congress on 17 July 1992. Its passage was in compliance with the State's obligation as signatory to the United Nation's Convention on the Rights of the Child.

Although the rate of child trafficking continues to increase, the country lacks national baseline information on its incidence.

CATW identified some of the factors that contribute to the lack of data or low rate of reporting. Among these are the underground nature of trafficking; the stigma placed on the victims; the lack of a name for the problem in the community level; the community's lack of awareness of acts of trafficking as violations of human rights; and the same lack of awareness among many government agencies and NGOs.

Beyond national borders, one could sense the gravity of the problem. From sporadic reports by the media and some victims to qualitative studies on the issue, there are reports of children getting trafficked to Hong Kong, Malaysia, Japan, Korea, Nigeria, Cyprus, Greece, Germany, Italy, USA, and Commonwealth of the Northern Marianas Islands (CATW, 2005). Most of these cases were documented after victims escaped and ran for assistance either to the local police, to the church ministry, or to the partner-NGOs based in the receiving countries.

At the local level, exact figure is also unavailing. Even estimates are very rough. According to UNICEF, a "good proportion" of the estimated 60,000 to 100,000 exploited children in the Philippines have been trafficked.

Lack of clear statistical and gender-disaggregated statistics is just one of the problems. Another problem is the low rate of reporting. There is even a lower percentage of conviction. In 2006, or three (3) years after the passage of Republic Act 9208, there were only 10 convictions of child trafficking.

There are several factors that contribute to the low rate of conviction of child traffickers. These will be tackled at the last section of Part 1.

1.3 Profiles of victims and traffickers

Tina illustrates the typical profile of trafficked minors. They are as young as 14 years old. They have not finished high school. They come from poor families where they are expected to contribute to the family's upkeep. Many are also victims of abuse early in their lives. From rural areas they are brought to the cities of the county (CATW, 2005).

The recruiters are often women. They operate through word of mouth by intermediaries. Often the intermediaries are family members, friends, and/or acquaintances known to the victim or the latter's family. They recruit the victims at home or within the vicinity of the neighborhood (UNODC, 2003). If

family members are involved in the recruitment process, the recruiters usually 'advance' the minor's wage to the latter's parents.

The recruiters often promise jobs as domestic helpers or salesladies. Others also recruit minors to be "entertainers" or *silbidoras*⁸ in *videoke* bars.⁹ But the latter do not often divulge the sexual services that the minors were expected to provide to their customers.

1.4 Existing legal remedies

The Philippines is the first country in Southeast Asia to enact a law addressing trafficking in persons. It took more than eight (8) years of lobbying by various women's groups before Philippine Congress finally enacted Republic Act 9208. Under Section 3 (a), the law defines trafficking in persons as:

"...the recruitment, transportation, transfer or harboring, or receipt of persons **with or without the victim's consent or knowledge**, within or across national borders by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person.

It also means giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the **purpose of exploitation** which includes, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs.

The recruitment, transportation, transfer, **harboring or receipt of a child for the purpose of exploitation** shall also be considered as "trafficking in persons" even if it does not involve any means set forth in the preceding paragraph." (emphasis supplied)

RA 9208 penalizes and provides the penalties for trafficking in persons. It seeks the establishment of necessary institutional mechanisms for the protection and support of trafficked persons.

RA 9208 reinforces the child trafficking provision of Republic Act 7610.¹⁰ It also strengthens related laws such as Republic Act 7658 (*An Act Prohibiting the Employment of Children Under Fifteen Years Old*), Republic Act 7877 (*Anti-Sexual Harassment*), Republic Act 8042 (*Migrant Workers and Overseas*

⁸ Filipino term for waitress.

⁹ Refers to sing-along clubs. *Videoke* is one of Filipinos' favorite pastimes and source of entertainment.

¹⁰ *Supra*, see 7

Filipinos), Republic Act 8043 (*Inter-Country Adoption Law*), Republic Act 8353 (*Anti-Rape Law*), and Republic Act 8505 (*Rape Victim Assistance and Protection Act*).

In cases of minor trafficked victims, RA 9208 is bolstered by the Child Witness Rule.¹¹ On account of the increased number of children coming into the realm of the judicial system, the Supreme Court adapted this Rule to govern the examination of child witnesses who may be victims, accused, or witnesses to a crime.¹²

Despite existing and available legal remedies, there is still low reporting rate of child trafficking cases. Those who report, more often than not, do not pursue the case to the end. The treatment of family and society of children and youth does not help much to address this problem.

There are several factors that contribute to the low reporting rate and/or low conviction percentage. The Philippine socio-cultural perceptions of children greatly impact on these trafficked minors' decision to report the crime or pursue a court case.

1.5 *Batang-bata ka pa*¹³ (You're just a child]

Philippine society does not have its own articulated and well-defined concepts of childhood and adolescence. Its construction of childhood is a combination of Dionysian and Apollonian by seeing 'children belong in families' and 'children are incomplete - less than adult.'

Inside the home, it is not uncommon to hear parents – or other members¹⁴ of a typically extended-Filipino family household – chastise a child/adolescent “[M]aking ka sa akin. Papunta ka pang lang, ako pabalik na.” (You have yet to travel the road I have traveled. So you listen to me.) A typical retort from a Filipino child is “Haaay! Eto na naman po kami! Parang sirang plaka. (Sigh! Here we go again! It's like a broken album.) This is an exchange that can be

¹¹ *Supra*, see 6

¹² *People vs. Baring, Jr.*, G.R. No. 137933, January 28, 2002, 374 SCRA 696

¹³ *Batang-bata ka pa* is a song popularized by the *Apo Hiking Society* whose members are Danny, Jimmy, and Boboy. The song, composed by Jimmy, presents the opposing views of Danny (depicted in the song as an adult Filipino) and Boboy (depicted in the song as a child). Danny posits that a child knows nothing and must listen to his elders while Boboy admits that although he is (still) a child, he knows that all human beings, including children, have rights. The song does not conclude with Danny and Boboy reaching a common ground. Until the end, Danny maintains his position that children know nothing about the ways of the world and must listen to the wisdom of the adults. Likewise, Boboy asserts that he wishes to find out for himself through the use of his self-determination and personal experience.

¹⁴ Such as grandparents, aunts, uncles, and cousins.

heard in any Filipino household – regardless of a family’s socio-economic standing in the community.

The perception of children as *musmos na walang alam* (mindless innocent beings) is supported by the community, at large. At church pulpits, priest/preacher tells children to just obey and abide whatever their parents say. In school, questioning a teacher is not encouraged because s/he represents authority. In media, young children are commonly depicted as cuddly and innocent or helpless and in need of adults’ protection. Teenagers, on the other hand, are shown either as dutiful children or confused and rebellious against elders.

This socio-cultural viewing of children as mindless innocent beings persists even in Philippine court rooms. Parents’ conformity and intervention in child-related cases also permeate court practice. A case in point is the Implementing Rules and Regulations¹⁵ of Republic Act 7610 that allow an abused child to file a complaint for any violation of the law’s provisions. In practice, however, police investigators still require an abused child’s parent/s or guardian to sign the criminal complaint to signify conformity and support. Sans so, the defense would make a hullabaloo out of this during the cross-examination of a complaining child.

Likewise, the presence of a parent’s or guardian’s signature in an abused child’s affidavit of desistance signals to the prosecutor and the judge the seriousness of the decision. Based on this author’s observations of actual court proceedings,¹⁶ the child is rarely asked by the judge or the prosecutor if she was consulted about the desistance or if she fully agreed to such decision. Again, these are reflections that even in courts Filipino children are seen and heard only if they are supported by adult family members.

Yes, Filipino children are better seen than heard at home. But Philippine society expects family members to help each other, particularly during

¹⁵ Sec. 16. Who may file a complaint. – A complaint against a person who abused a child may be filed by the:

- i. offended party;
- ii. parent or legal guardian;
- iii. ascendant or collateral relative of the child within the third degree of consanguinity;
- iv. duly authorized officer or social worker of the Department;
- v. officer, social worker or representative of a licensed child caring institution;
- vi. *barangay* chairman; or
- vii. at least three (3) concerned responsible citizens of the community where the abuse took place who have personal knowledge of the offense committed.

¹⁶ In her capacity as co-principal researcher of the “Evaluation of the Competency Enhancement Training for Family Court and Single-Sala Judges and Personnel in Handling Child Abuse Cases Project.” The June 2006 to January 2007 impact study project was sponsored by the Philippine Judicial Academy-Supreme Court of the Philippines, Child Protection Unit Network, and The British Embassy-Manila.

difficult times. This characteristically Filipino's 'sense of family' adds to the pressure of children to work. It spells willingness for every family member – including the child – to endure great sacrifices for the welfare of the family (KABISIG, 1993). It then behooves parents to push their children to work, and/or the children to seek employment at an early age, thus making the latter susceptible to trafficking.¹⁷

1.6. Ayoko na! (I don't want to anymore!)

Child trafficking happens within and across borders in the Philippines. Poverty is the common denominator of the trafficked minors. Most of them got trafficked because of their strong desire to help their family survive and improve the economic condition. Some are like *Tina* who got trafficked without the knowledge of the family. The others come from families who met the recruiters; received their daughter's advance wage from the latter; but had no inkling that their child would be trafficked for sexual and other forms of exploitation. Nonetheless, there are also victims who got trafficked in their desire to raise extra pocket money to buy teenagers' products and commodities – e.g., cellular phones, cellular call cards/load, fashionable clothes and shoes, cosmetic products, and the like.

Whatever reasons that caused these minors into trafficking, filing and pursuing a court case is never an easy and expeditious process. *Ayoko na* is frequently a scenario that public prosecutors – or private prosecutors from children's non-government organizations¹⁸ representing trafficked minors – often encounter. Some trafficked minors express their desire to drop the complaint as early as the preliminary investigation¹⁹ stage. Others would say so at the trial stage. Most, however, would just disappear and, thus, leave the prosecution without its key witness to prove the accused's guilt beyond reasonable doubt.

¹⁷ De Vries, Saul, et. al. "The Local Trafficking of Filipino Girls for Employment: The Case of Girl-Children for Entertainment Work, Domestic Service, and Factory Work"

¹⁸ In Metro Manila: Child Justice League (CJL), International Justice Mission (IJM), Women's Legal Education, Advocacy and Defense Foundation (WomenLEAD), Sentro Para sa Alternatibong Lingap Panligal (SALIGAN). In Cebu City, Children's Legal Bureau (CLB).

¹⁹ Section 1. *Preliminary investigation defined; when required.* – Preliminary investigation is an inquiry or proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial.

x x x, a preliminary investigation is required to be conducted before the filing of a complaint or information for an offense where the penalty prescribed by law is at least four (4) years, two (2) months and one (1) day without regard to the fine. [Rule 112, Revised Rules of Criminal Procedure, effective December 1, 2000]

1.7 Factors influencing minors from complaining or giving evidence

The *sense of family* is one of the major reasons behind most trafficked minors' refusal to file a case against their traffickers. If ever a case is filed, prosecutors normally find themselves facing either situation: a trafficked child vacillating to testify or an affidavit of desistance or recantation executed by a trafficked child.

Usually, trafficked minors choose not to file a case or testify against the traffickers because they fear for their lives and that of their families. Traffickers know where they live, who their families are, and how to hunt them down.²⁰ In some cases, pressure from parents/guardians to accept the trafficker's settlement money compels a trafficked minor to let go of her case.

There are also trafficked minors who do not wish to file a case, or pursue one that had been filed, because of the court delay. They get tired and frustrated with the protracted litigation process. There are no existing data on how long it takes for a court to decide a child trafficking case. But a 2005 study showed that it takes 18 to 25.4 months for a rape case to reach final decision.²¹ While a rape case normally deals with a lone accused, the same is not true in child trafficking cases that usually involve more than one accused. Hence, the likelihood of longer court delay is even higher because there are more people at the accused's table wanting to present their defenses.

An eroded trust on the justice system is another factor. Amidst their lack of financial and other logistical resources, they see a court case as a futile exercise to fight off their traffickers whom they know to be paying protection money to some law enforcers.

There are those who prefer to just go back to the province; be reunited with their families; and move on with their lives rather than pursue a case that moves at snail's pace.

Others would rather work again and hope that fate would be kinder to them.

Whatever reason a trafficked child puts forth after saying *ayoko na!* at the trial stage, the prosecution still bears the burden of proving the guilt of the trafficker beyond reasonable doubt. Without the story of the victim, the case of the *People of the Philippines*²² does not have much leg to stand on to merit a conviction.

²⁰ Sison-Arroyo, Nina Patricia. "Working with Law Enforcers and Prosecutors on the Anti-Trafficking Law: The NGO Experience"

²¹ The respondents were family court judges and prosecutors. See Feliciano, Myrna, *et. al.* (2005) "Gender Sensitivity in the Family Courts, UP Center for Women's Studies." page 69.

²² The plaintiff in a criminal complaint. The trafficked minor serves as a private complainant and the prosecution's key witness against the trafficker/s.

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PART II: FORENSIC VIDEOTAPE INTERVIEW (THE APPROACH)

2.1 Introduction

FORENSIC VIDEOTAPE INTERVIEW (FVI) is no longer novel and innovative in other jurisdictions. In Scandinavia, videotaping of investigative interviews of child abuse victims is the practice for the past forty years.²³ Prior to 1992, non-corroborated evidence of children was not admissible in United Kingdom (UK) courts. But times have changed. Children's evidence-in-chief can now be given through video-recording in UK.²⁴ Following the dismissal of the 1990 highly-publicized *McMartin Preschool* case,²⁵ forensic interview protocol became a mode in investigating child abuse cases in the United States.

In 2000, forensic videotape interview of children was first introduced in the Philippines. It is supported by Sec. 29 of the Child Witness Rule²⁶ which allows, under certain conditions, the admissibility of videotaped and audiotaped in-depth disclosure interviews.

For this paper, it might be helpful to see and understand how forensic videotape interview serves its purpose in cases involving small children and in cases concerning trafficked minors.

²³ McGough, L.S. (2002), "Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims, Law and Contemporary Problems" Vol. 65, No. 1, page 179. This article is also available at <http://www.law.duke.edu/journals/65LCPMcGough>.

²⁴ Wazir, R and N. van Oudenhoven (Eds.) (1998), "Child Sexual Abuse: What Can Governments Do? A Comparative Investigation Into Policy Instruments Used in Belgium, Britain, Germany, the Netherlands and Norway," page 49.

²⁵ More than 350 children alleged incidents of molestation at the preschool and in some public locations that included a market, a car wash, and a church. During the interviews, some children reported that, in addition to experiencing sexual abuse, they had been taken on plane rides and forced to drink blood and to watch animals being mutilated. Prosecutors asserted that the investigators appropriately used suggestive techniques to elicit disclosure from such young children. The defense, however, claimed that the interviewing and videotaping procedures were inept and that the investigators put ideas into the children's heads.

²⁶ *Supra*, see 6 in Part 1

2.2 FVI of small children

Usually, a forensic interview of a child occurs soon after at least one interview took place where a child made an allegation of abuse. The forensic interview is conducted to gather evidence that will be admissible at trial either: i) as a recording of the interview or ii) as testimony of the interviewer about what transpired during the interview.²⁷

Forensic videotape interview is very helpful in investigating abuses against small children. It is done in a one-on-one in-depth interview. It is conducted in a safe and child-sensitive environment by a trained member of a multi-disciplinary child protection team.

It minimizes trauma of small children and prevents their multiple interviews. It facilitates their disclosure since most of them do not have sufficient vocabulary to express themselves and understand adults' language. The interviewer adjusts his/her language and phrasing of questions to the developmental level of the child.

It preserves the details of the abuse that are still fresh in the mind of a small child. If done properly and professionally, it lessens the possibility of contamination of a child's recollection of the abuse.

Once the case reaches the court, the videotaped interview can be used to help a small child tell her story. Rather than subjecting her to lengthy direct examination, the videotaped interview is presented as the child's evidence-in-chief. Similar to other countries, cross examination is done in court and different strategies are devised to prevent the child from having full view of the accused.

2.3 FVI of trafficked minors

Most, if not all, of the trafficked minors undergoing forensic videotape interview have sufficient mental and verbal faculty to give their stories. But videotape forensic interview is done with them for a very important purpose: **to preserve their testimony.**

Forensic videotape interview is part of the contingency plan should the trafficked minor disappear and become unavailable to testify in court. NGO lawyers prosecuting child trafficking cases adopted this strategy because of the usual experience that trafficked minors do not often stay on to testify in court.

²⁷ *Supra*, see 21, page 180

The trafficked minor's story is captured on a videotape that is kept in an evidence room under lock and key. The chain of custody of evidence is followed to the letter. To protect its integrity, the videotape can only be taken out of the evidence room through a court subpoena. But the rule on chain of custody of evidence must still be strictly observed by the person subpoenaed to take and present it to court.

2.4 The unavailable child

Very often, the only witness in a child trafficking case is the trafficked minor. The police investigator and social worker are merely corroborative witnesses. Without the trafficked minor's – the key witness – testimony that can be corroborated by other testimonial evidence, the prosecution finds difficulty in proving the trafficker/s' guilt beyond reasonable doubt.

Surveillance and undercover operations reports, witnesses' investigators affidavits, scene of the crime report, medico-legal and dental²⁸ examination certificates, among others, help prove the case in court. Yet, the testimony – and positive identification made by a trafficked child of her trafficker/s – is necessary to pin down the accused.

Creative and anticipatory tactics are crucial in evidence gathering for child trafficking cases. This is where videotaped interview of trafficked minors under the Child Witness Rule becomes relevant.

Under Section 28 (c)²⁹ of the Child Witness Rule, the Supreme Court recognizes that there are instances that the child victim or witness is not available to personally appear in court. Under any of these situations, and even in the absence of the child-witness, the court may admit videotaped and audiotaped investigative or disclosure interviews as evidence, subject to the following conditions:

- i) Child witness is not available;
- ii) Interview of child was conducted by duly-trained members of a multi-disciplinary team or representative of law enforcement or child protective services when child abuse is suspected and to determine if such occurred;
- iii) Party offering the videotape or audiotape must prove: (a) identity of individuals present during the interview; (b) no suggestive questioning

²⁸ In the absence of a birth certificate evidencing minority, dental examination becomes necessary to prove the age of the child.

²⁹ A child is considered unavailable under the following conditions: deceased, suffers from physical infirmity, lack of memory, mental illness, or will be exposed to severe psychological injury. A child is also unavailable when absent from the hearing and attendance in court by the child cannot be procured.

of child; (c) capability of the recording device; (d) competence of the technician; (e) the videotape or audiotape is authentic and correct; and (f) the recording is duly preserved.

2.5 The key players

In Child Protection Unit of the Philippine General Hospital (CPU-PGH), a multi-disciplinary child protection team conducts the forensic videotape interview. The team is composed of a doctor (either a pediatrician or a child psychiatrist), a lawyer, a police investigator, and a social worker.

Anyone from the doctor, police, and social worker may take the role of forensic interviewer. To prevent influencing the direction of the investigation, the lawyer does not act as forensic interviewer. His/her presence is secured to ensure that questions on the elements of the crime being investigated are propounded and answered.

The interview is done by the forensic interviewer inside a child-friendly disclosure room. Adjacent to the disclosure room is the recording/viewing room. Through a one-way mirror that connects the two rooms, the rest of the team can view the interview.

Before any interview is done, the forensic interviewer takes the subject child to the recording/viewing room. There she meets the rest of the multi-disciplinary team.

In CPU-PGH, all members of the team have specialized training on child abuse investigation and case management. The Child Witness Rule specifically requires that the interview be conducted by duly-trained people. This requirement is one of the reasons why CPU-PGH does not allow just anyone to take part in this process. Otherwise, the admissibility and credibility of the videotaped evidence can be questioned.

2.6 When does it become problematic?

15 forensic videotape interviews of trafficked minors whose ages range from 14 to 17 years old were conducted between 19 July 2006 and 6 June 2007.³⁰ These minors were taken to CPU-PGH by the lawyers and social workers of an NGO that assists them in their respective court cases. The written request to CPU-PGH for the conduct of forensic interview was very clear: to help preserve their testimony.

³⁰ CPU-PGH Forensic Videotape Logbook for the period of July 2006 to present.

Unlike in cases of small children whose interviews are often conducted with the support and written consent of their parents, the trafficked minors normally undergo this process without the knowledge and presence of their families. They are accompanied either by their lawyer and the assisting social worker or the houseparent of the temporary shelter where they are staying.

The consent form, a requirement for forensic interview, is signed not by the subject minor but by the companion-social worker assigned to the case. So, an interview becomes tricky when the issue of consent is articulated by the child.

Of the 15 interviews held between July 2006 and June 2007, only one trafficked minor bravely expressed her thoughts.³¹ Her words took the multi-disciplinary team by surprise. Her message was apparent: she agreed to the conduct of the forensic interview because she was promised it would be the last. What followed next was a feedback session by the forensic interviewer and this author to the child's lawyer. The team discovered that the just-concluded forensic videotape interview was the child's umpteenth interview.

The literature relative to the validity and admissibility of video-based testimony is replete. There is also innumerable publication dealing on techniques in conducting forensic videotape interview. Even the issues of accused's right to confrontation vis-à-vis suppression of exculpatory evidence have been widely debated and discussed.

But amidst all these discussion and literature, where is the child?

For the purpose of this discussion paper, the author is asking whether trafficked minors' consent were taken for the conduct of the forensic videotape interview. If yes, did they give informed consent and not just token consent? Were the use and purpose of the interview clearly explained to them? How do they see themselves in this entire process? How do they see themselves in the legal process for which the videotaped-evidence will be used? How could systems abuse be prevented so as not to compound the abuses suffered by these children? As succinctly expressed by a fellow CYD participant: can a forensic videotape interview violate the rights of a subject child? Whose interest is best served by video-based evidence?

The last part of this paper will address these questions.

³¹ See Wena's anecdote in Part III

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PART III: WHOSE INTEREST IS BEST SERVED? (DISCUSSION NOTE)

3.1 Introduction

WORKING with victims – children or otherwise, with varying nature of cases – requires constant self-introspection, review of theories and practice, and consultative and participatory process. In the daily grind of direct service provision work compounded by the number of child-victims to be attended to, the tendency is to forget and to attend to as many child-victims as possible. But how often does one find himself/herself confronted with a child's statement like:

"Yes, I have a question. A child has a right, hasn't she? What if I don't want to go on (with the case anymore)? I just want to go home to my family. This has been dragging on for a while already. This (referring to the interview) has become repetitive. I only agreed to come here because they (referring to the lawyers) said this would be the last (interview). I am just giving them three months. If nothing happens, I will leave Marillac (the shelter) and go home to my family."

- Wena*

The above-quoted statement was uttered by Wena, a 16-year-old trafficked victim. Before concluding the videotape interview, the forensic interviewer asked the teenaged girl if she wanted to raise some questions. Usually, trafficked children would say "[N]o" or timidly shake their heads. But in the instant case, Wena articulated well her thoughts, dismay, and criticism of the players and the process of case handling and management.

With Wena's anecdote as a backdrop, the author will attempt to raise some issues on the theme: *[F]orensic videotaped interview of an unavailable trafficked minor: whose interest is best served?*

* Not her real name

3.2 Beneficence/Non-maleficence

Using the above-quoted anecdote, will using the forensic videotape interview outweigh its benefits over its adverse effects?

The lawyer of the NGO that represents Wena requested the interview to preserve her testimony. Without it, the prosecution's case will be weakened. Not having the child's testimony on tape will hurt the case. Wena identified the perpetrators. She clearly stated the acts constituting the trafficking acts. She also established the place where the offense took place. The videotape can be used to bolster the prosecution's case and prove the jurisdiction of the court.

Conversely, presenting the videotape can hurt the *People's* case. Wena's concluding statement gives the accused ammunition to hurt the prosecution's evidence. If taken out of context – public defense and criminal law private practitioners have a way of twisting facts to their client's advantage – it could send a wrong message to the judge that Wena did not really want to pursue a case but was manipulated by an overzealous private prosecutor to give a recorded statement. Wena's non-appearance at the trial stage would boost the defense's theory.

The principle of non-maleficence or commonly translated as "*first, no harm*" is often considered to be corollary to the principle of beneficence, or the dictum "*do good and avoid evil.*" Interpreted on its own right, non-maleficence sometimes imply that if one cannot do good without also causing harm, then one should not act at all (in that particular circumstance).³²

Hence, had the multi-disciplinary team been aware of Wena's sentiments prior to conduct of the interview would it had been ethical to proceed with the process? Or ditch the interview and advise the lawyer that Wena's sentiments must be respected?

In the case of trafficked minors who resist the process because of fear of retaliation against her and her family, should forensic videotape interview be continued knowing that it might put the child's and her family's safety at risk?

Secondary trauma brought about by multiple interviews will not do a child any good. Proceeding with the interview would trigger this re-traumatization of a child. But knowing her strong desire to go home to the family, not getting

³² Ascension health (2007), Principles of Beneficence, http://www.ascensionhealth.org/ethics/public/key_principles/beneficence.asp

her story on video and tape would mean losing a crucial evidence for the case.

The difficulty with rigid application of beneficence/non-maleficence is that it makes action almost impossible in a situation where even the best actions may have *some* harmful results.³³ It may not be moral and ethical to still proceed with the interview, but it is necessary to protect the majority who would benefit from putting behind bars Wena's traffickers.

How about the Wena's right to autonomy, then?

3.3 Victims or agents

Can one honestly trust the decision of a child like Wena? Can the decision be left to her to decide what will or will not happen to the case? A categorical statement "*[i]f nothing happens, I will leave Marillac and go home to my family*" is a warning of her impending plan to get out, with or without the nod of her lawyers and the institution. What must be done to protect her?

Trafficked minors are victims of power relations, economic inequity, greed, and lust. At home, they cannot question their parents' decision yet they are expected to help feed the family. So they leave their homes and seek work. Economically disadvantaged, they fall prey to the sweet promises of recruiters, or, sometimes, acquaintances they have no reason to distrust. Once trafficked, they succumbed to the exploitation, greediness, and lust for profits of the traffickers. Often it's a case of *kapit sa patalim* (last option for the desperate).

All trafficked minor victims are vulnerable and must be protected. If parents cannot protect them, the State can rightfully step in to ensure that they are accorded full protection. Hence, if the parents of the trafficked minors were in any way instrumental to their trafficking, the latter can be placed – and must stay – in temporary shelters like Marillac Hills. Their family members can see them under supervised visitation. Monitoring of the visit is necessary to prevent family members from influencing and pressuring the child to withdraw the case. If such child decides to go back to her family, she cannot be automatically permitted to leave the institution. A social worker should first conduct risk assessment and parenting capability evaluation. Pending assessment results, keeping her in a temporary shelter is the best way to keep her safe.

On the other hand, trafficked minors assert their autonomy to decide. They want to be seen as persons who i) are not mere objects who cannot defend

³³ *Ibid*

their own interest and those of others; and ii) can exercise their agency. In whatever situation they find themselves in, they always attempt to assert this right.

Not all trafficked victims want to be rescued. Some of them refuse help because it means going home without food and they will leave again to look for work and money [Thanh-Dam Truong, 2007]. Some of them refuse to pursue a case because they find it burdensome and stressful. Some of them refuse to cooperate because they do not see how a case will improve the quality of their lives.

Hence, keeping them in a shelter – away from their family – may not be the best option to protect them. Their family is an important part of their social lives. Their family is the community they will go back to, with or without a case proceeding in court. They will find ways to escape and go back to their family. It is better to respect their decision and allow them to leave and return to their family where they can still be regularly visited and monitored along with their parents.

Looking at trafficked minors based on their numerical age and/or viewing them as vulnerable is not really seeing them as human beings. It is a typical adult's protectionist stance that disregards children's capacity to take active role in directing their lives and making changes along the way. It is a denial of their right to actively take part in constructing and determining their social lives.

3.4 *Passport to freedom*

Forensic videotape interview is not evil. In fact, it is a trafficked minor's passport to freedom. But putting it this way gives a negative connotation on the medium.

It is a reality that much improvement is needed to push the court process to move at a faster pace. Victim-blaming also happens during court proceedings. Even if a vigilant family court judge warns a defense counsel from badgering a child-witness, there is no guaranteeing that the lawyer would refrain from doing it to break the confidence and shake the moral of the prosecution's key witness. Once uttered, a victim-blaming statement already makes its negative and piercing mark on a child's emotional psyche and she begins to doubt herself.

But through a videotaped interview, the child can help the prosecution's case without appearing at the trial stage. Through corroborative evidence, her video-based evidence can be taken as an exception to the hearsay rule.

She can disappear and move on with her life yet still fulfill her duty to herself and to the community by giving and leaving an essential piece of evidence. The prosecution can invoke the Child Witness Rule for the admissibility of her videotaped interview. The *People* has its evidence intact, she has her freedom.

Should she decide to appear at the trial stage, still the tape itself could be presented and adapted as her evidence-in-chief. It contains a fuller account of her experience that was given in a child-sensitive and safe environment. Again, it could be her passport to a shorter time on the witness stand and all she had to think of is the defense's cross-examination and the judge's clarificatory questions. It is even a better option compared to recalling everything on the witness stand.

Nonetheless, forensic videotape interview has its dangers if a trafficked minor is simply seen as a witness and not an individual with dignity, responsibilities, and vulnerabilities.

3.5. Witness or pawn

Sometimes, in a rush to accomplish other goals – successfully prosecuting the traffickers – one focuses on victims for the information they can provide or their usefulness to the *People's* case. Hence, the victim becomes a pawn in a struggle between the *People* and the accused, not an individual in need of services and deserving of respect.³⁴ Disenchantment and cynicism set in a child when she feels that she has no better use in a case but a piece of testimonial evidence. She does not see the justice system as a venue affording her redress for her violated rights.

Simply focusing on conduct of forensic videotape interview to preserve crucial evidence is a process that could reinforce the belittling of children. Coming from a family setting that expects her to bear the burden of ensuring their survival yet does not give her the space to speak up because she is 'merely a child,' can be a vicious cycle that silences a child yet expects her to make personal sacrifices for the sake of a case.

A trafficked minor needs to see how she fits in the picture as a person, not a mere object or a mere witness. For most prosecutors, an exhaustive, air-tight, and convincing forensic videotaped interview could help ensure successful prosecution. From author's personal and professional interaction with public and private prosecutors, most say that a verdict of conviction means that they have accomplished their duty and have protected the trafficked minor

³⁴ Brown, Widney. "A Human Rights Approach to the Rehabilitation and Reintegration Into Society of Trafficked Victims"

and other potential victims. But deep inside, it's a typical lawyer's intense desire to win each case. To borrow the words of one member of the Alternative Law Groups "[W]hat's the point of prosecuting if you will not get a conviction? That will make you a lousy lawyer in front of your colleagues." If a developmental lawyer thinks that way, one could already imagine the lengths that a mainstream and traditional legal practitioner would go to in order to win his/her case.

But for any trafficked victim, their traffickers' conviction is as important as the process they go through to get to the promulgation stage of a case. However, not all trafficked victims reach that stage where they get to hear the verdict. Some of them withdraw from the case before it could even prosper to a full-blown hearing.

The handling of and attitude towards victims by police add up to the harm already inflicted on trafficked minors. Complaints abound that trafficked victims are subjected to multiple and re-traumatizing interview by police investigators in child and gender-insensitive and public environment. Despite the presence of women's and children's protection desks in every police station, there are often complaints about the lack of privacy and the insensitive manner employed by police investigators towards victims. The experience at the police station affects a trafficked minor's viewing of forensic videotape interview. If a minor felt that she had been repeatedly subjected to interrogation – not investigation – to test her credibility and the truthfulness of her allegations, she would most likely go to a forensic videotape interview with a negative and fearful attitude about the process.

3.6 Informed choice

Is a child capable of giving consent? When can consent be considered an 'informed' one? When is it a 'token' consent?

For an informed choice to take place there must be varied and alternative options to choose from. Explaining the forensic videotape interview, in a way appropriate to the developmental level of a trafficked minor, is an important aspect prior to conduct of any interview. A trafficked child should be able to understand its process, its purposes, the people involve in its conduct, and her important and complementary role in it. Give her all the information that could help her to decide and act wisely on the matter.

What if the child is not capable of giving consent (*i.e.*, does not speak the dialect)? Who is the best surrogate person to give it? Can the handling social worker's signature on the consent form be taken as an act serving the best interest of a subject child? Can it be deemed as a child's permission to proceed with the interview?

Malice cannot be automatically imputed on lawyers and social workers who are assisting any trafficked minor. Signing a consent form, for and in behalf of a child, is an act that puts one's name and license on the line. They do it to make the investigation and legal process less threatening to a child. They do it to send a message to a child that 'we are in this together.' But this also opens a space to misuse by some police and lawyers who are keen on getting the evidence on tape but do not pay attention to explaining the process to the subject child.

The child's verbal and written consent must still be secured. This gives a child a room to exercise self-determination. This allows a child to participate in a decision-making process that directly concerns her. The danger of opening this space, however, is that it exposes everyone to a possibility of a child categorically stating her resistance to conduct of any forensic videotape interview. In the same manner, a child who remains silent, agrees to sign the form, and dutifully partakes in the process may or may not really have given informed consent to the process. Her silence could also be indicia of the following:

- i) She understands and supports the process and knows that it is part of her healing process;
- ii) She knows the significance of video documenting her story, hence, she will not interpose any objection;
- iii) She does not see how video-documenting could help her in her current state but, to get it done and over with, she will just cooperate;
- iv) She is still in shock and leaves to the adults to take care of things for her and she will just do as they say;
- v) She abides by the rules because opposing will not take her anywhere since no one dignifies a 'mindless child's' opinion;
- vi) She sees lawyers in position of authority whose legal strategies should never be questioned; or
- vii) She doubts if the people around her represent her interest and thus, she remains silent to protect herself.

So a child's silence could either be her trust or skepticism about the process. It could also be due to her lack of information about the process. Likewise, it could also mean fear of authority figures. Nevertheless, silence should not be automatically taken as an indication of a child's agreement to the process.

3.7 Distributive justice

The resources for conduct of forensic videotape interview are limited. Yet the demand is very high. One argument is that limited resources should not be

utilized on hesitant children. It must be used wisely and poured on cases of cooperative minors with better chances of successful prosecution.

The other argument is that the issue is not about a child not wanting to go to court or taking part in the process of forensic videotape interview. For them, it is about wanting to see how a case or a process can help secure a better future for them.

Using Wena's story, her issues are valid. She questions the procedures she was subjected to; the unfulfilled promises given by her lawyers; the restraint on her space to exercise agency; and the toll that delay is taking on her. Given all these odds, Wena was asking the team to respect her rights as a child and as an individual.

3.8 Final note

Forensic videotape interview has great promise to help trafficked minors say their story in court. With or without the trafficked minor's testimony, it can be used and presented, along with other evidence, to prove the *People's* case. But before it becomes a standard operating procedure in evidence collection of child trafficking cases, the legal community, police, expert witnesses, and social workers must first sit down and discuss gray and contentious issues pertaining to its use.

To recapitulate, some of these issues are the following:

- ❖ Are the benefits of conducting forensic videotape interview worth any adverse effects on the child? On the *People's* case?
- ❖ When is the best time to conduct forensic videotape interview? Or should it take the place of police investigation?
- ❖ What steps/protocol must be observed before conducting forensic videotape interview? How do we help a child understand this process?
- ❖ Must written consent of the child be required? Should parents' (or the social worker's) signature suffice?
- ❖ How do we satisfy the question of "informed" consent of the child?
- ❖ Do we give a child a say on the matter and risk hearing her objection to the process? How prepared are we to allow a child's decision dictate our would-be actions?
- ❖ What steps must be taken to ensure that we do not violate the child's right to exercise agency?
- ❖ Does our theories and practice contravene the child's rights under the UNCRC?
- ❖ Should we utilize limited resources on cases of hesitant minors? Or use them wisely on cases of cooperative minors with better chances of successful prosecution

The above-bulleted points are some of the list of questions that the concerned disciplines must address first. However, any discussion will not be meaningful if the subject children themselves are not given their own space to be heard and listened to. A separate session – where they can freely speak up and not threatened by the presence of figures of authority – with them must be conducted. More than anyone else, their opinions must be secured.

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