

ECPAT INTERNATIONAL JOURNAL

ISSUE : 9
JANUARY, 2014

THAILAND
EDITION

THE FIGHT AGAINST TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES

**ANALYSING
INTERNATIONAL AND
THAI LEGISLATION**

*Trafficking in Children
for Sexual Purposes:
Attempting to Estimate the
Phenomenon*

*Trafficking in Children
for Sexual Purposes:
International Standard*

*Trafficking in Children
for Sexual Purposes:
Thailand's Legislative
Response*

*The Protection of
Trafficked Child Victims
and Witnesses in the
Thai Criminal Justice
System*



ECPAT is a global network dedicated to protecting children.
We coordinate research, advocacy and action to end the
commercial sexual exploitation of children.



Author: Giulia Patané
Series editor: Rebecca Rittenhouse
Editorial assistance from: Karyn Stone

Layout & Design: Manida Naebklang

January 2014

Copyright © 2014, ECPAT International

This publication was produced with the financial assistance of the Irish Aid, Oak Foundation, and Sida.
The views expressed herein are solely those of the authors. The support received from the above-mentioned donors does not constitute endorsement of the opinions expressed.



ECPAT International

328/1 Phayathai Road Ratchathewi

Bangkok 10400 THAILAND

Tel: +662 215 3388, +662 611 0972 Fax: +662 215 8272

Email: info@ecpat.net Website: www.ecpat.net

TABLE OF CONTENTS

Preface	1
The Fight against Trafficking of Children for Sexual Purposes: Analyzing International and Thai Legislation	3
Trafficking in Children for Sexual Purposes: Attempting to Estimate the Phenomenon	4
Introduction	4
1. Challenges and Difficulties	5
2. Numbers: Global Overview	6
3. Numbers: Focusing on Thailand	7
Conclusions	9
Trafficking in Children for Sexual Purposes: International Standard	
Introduction	10
1. The Trafficking Protocol	11
1.1 Definition	11
1.2 Obligations	11
2. The Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography	13
2.1 Definitions	13
2.2 Obligations	13
Conclusions	14
Trafficking in Children for Sexual Purposes: Thailand’s Legislative Response	15
Introduction	15
1. Thailand’s International and Regional Ratifications	16
2. Thailand’s Definitions and Legislation on Trafficking in Persons	17
2.1 The Penal Code	18

2.2 The Prevention and Suppression of Prostitution Act	20
2.3 The Anti-Trafficking in Persons Act	21
3. Thailand Regional and Sub-Regional Actions	24
3.1 Regional Actions: ASEAN	24
3.2 Sub-Regional Actions: COMMIT	25
3.2.1 Bilateral Agreements	26
Conclusions	27

The Protection of Trafficked Child Victims and Witnesses in the Thai Criminal Justice System 28

Introduction	28
1. International Standards	29
1.1 Child Victim Protection Requirements	29
1.2 Child Witness Protection Requirements	30
1.3 Compensation	32
2. Thai Response to the Need for Protection of Child Victims and Witnesses	33
2.1 ASEAN “Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines”	33
2.2 The 2007 Constitution of the Kingdom of Thailand	34
2.3 The Anti-Trafficking in Persons Act	34
2.4 The Criminal Procedure Code	35
2.4.1 Investigation Phase	35
2.4.2 Trial Phase	36
2.5 The Witness Protection Act	37
2.6 Compensation in Thailand	38
Conclusions	39

Lessons Learned and Recommendations 40

Introduction	40
Lessons Learned	41
General Recommendations	41
Recommendations for Thailand	42

Bibliography 43

PREFACE

The release of ECPAT International's Journal Series No. 9 on *The Fight Against Trafficking of Children for Sexual Purposes: Analysing International and Thai Legislation* comes at a significant time for Thailand. In October 2013, Thailand ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol).

Thai legislation on the crime of trafficking in persons has existed since the 1997 Measures in Prevention and Suppression of Trafficking in Women and Children Act. This legislation was highly criticised and, as a result, was revised in 2008 in the form of the Anti-Trafficking in Persons Act. However, formal ratification of the Trafficking Protocol did not occur for another five years. The ratification came into force on November 16, 2013 and represents an important step forward for Thailand, as it will allow for a more collaborative approach to fight against human trafficking, both within the UN system and among other States.

According to the US Department of State's Trafficking in Persons Report 2013, "the majority of the trafficking victims identified within Thailand

are migrants from Thailand's neighbouring countries who are forced, coerced, or defrauded into labour or commercial sexual exploitation or children placed in the sex trade; conservative estimates put this population numbering in the tens of thousands of victims."

The trafficking of children for sexual purposes is a large component of ECPAT International's 2nd Edition Country Monitoring Reports on the status of action against commercial sexual exploitation of children and is identified as the cross-border or internal recruitment, transportation, harbouring, transfer or receipt of children for the purpose of sexual exploitation. ECPAT's Country Monitoring Reports take an in-depth look at the trafficking of children for sexual purposes at the national level by identifying and evaluating a country's relevant legislation, prevention measures, education and training programmes, plans of action, cooperation and coordination mechanisms, and protection policies regarding the commercial sexual exploitation of children (CSEC).

This ECPAT Journal seeks to analyse and explore the legal responses to the phenomenon of child trafficking for sexual purposes as a form of CSEC, both internationally and within Thailand. The articles will provide a broad overview of the

main international, regional and national instruments produced in the fight against trafficking of children for sexual purposes, the protection of its victims in Thailand and recommendations for ways in which Thailand can move forward in its fight against trafficking and CSEC. It should be noted that these articles focus only on the law itself and do not delve into the implementation of this legislation. This issue could perhaps be studied and analysed at a later date, once Thailand has had time to implement the Trafficking Protocol at the national level.

While this ECPAT Journal focuses on Thailand, it is important to emphasise that the crime of trafficking of children for sexual purposes happens in every country in the world and affects children from all walks of life. The challenges, good practices, and recommendations analysed and provided in these articles can be relevant to many other countries, in all regions of the world.

The first article of this Journal, *Trafficking in Children for Sexual Purposes: Attempting to Estimate the Phenomenon*, will focus on the general understanding of the phenomenon of trafficking in persons (especially children) for the purpose of sexual exploitation, with special attention paid to Thailand. It

will analyse the current situation of trafficking in persons by looking at data/numbers of trafficking victims, focusing on trafficking of children for sexual purposes both globally and in Thailand. At the same time it will recognise the challenges and difficulties in determining the real extent of trafficking in persons around the world.

In order to adequately evaluate Thailand's legal framework and its response to trafficking of children for sexual purposes, it is important to recognise the relevant international human rights instruments and the obligations they impose on their State Parties. The Journal's second article, *Trafficking in Children for Sexual Purposes: International Standard*, will provide international definitions and obligations of the Trafficking Protocol, the Convention on the Rights of the Child (CRC) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC).

Thailand has made a concerted and extensive legislative response to the international obligations identified in the three previous international instruments. In the third article of this Journal, *Trafficking in Children for Sexual Purposes: Thailand's Legislative Response*, an analysis of this legislative response will be conducted, specifically looking

at Thailand's Penal Code, the Prevention and Suppression of Prostitution Act and the Anti-Trafficking in Persons Act. It will also look at the regional and sub-regional legislative efforts carried out by Thailand and its neighbouring countries with regard to human trafficking.

The final article, *The Protection of Trafficked Child Victims and Witnesses in the Thai Criminal Justice System*, examines the protection of the victims of child trafficking for sexual purposes and witnesses within the Thai criminal justice process, including protection during the investigation and trial phases of a case, as well as victim compensation. Related provisions and measures can be found in Thailand's Constitution, its Child Protection Act, its Anti-Trafficking Act, as well as in its Criminal Procedure Code and its Witness Protection Act. These will be analysed to evaluate their effectiveness and to determine on which aspects Thailand should focus its implementation efforts.

This series of articles provides an overview of international and Thai legislation on trafficking of children for sexual purposes, as well as recommendations to aid in the country's ongoing efforts to fight this problem. ECPAT hopes that

this Journal can and will be used, not only by Thailand, but by other countries that face similar problems and may benefit from such analysis and recommendations.

Rebecca Rittenhouse
Research and Policy
Associate

ECPAT International

THE FIGHT AGAINST TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES:

Analysing International and Thai Legislation

This publication intends to analyse and explore the legal response to the phenomenon of child trafficking for sexual purposes as a form of commercial sexual exploitation of children (CSEC) in Thailand. This kind of child abuse is among the worst human rights violations a child can suffer. Despite the great deal of work that has been done in the fight against CSEC worldwide, in particular against trafficking in children, the phenomenon is still widespread, and the number of victims whose childhoods have been severely violated is too high.

The publication is structured in four parts. Part I will give a general overview of the phenomenon of trafficking in persons, in particular children, for sexual purposes. Given the difficulties in finding accurate numbers of victims and the magnitude of the crime, several reports will be described and compared, in order to present a snapshot of the current situation of trafficking in children. The focus will then move to Southeast Asia, one of the most significantly affected regions, with particular attention paid to Thailand.

Part II will examine the trafficking of children for sexual purposes in terms of legal proscriptions through an analysis of international standards. Particular attention will be paid to the definitions provided

by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (Trafficking Protocol or Palermo Protocol); and the definitions of the Convention on the Rights of the Child (CRC) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC). Analysis of international instruments will then focus on State Party obligations in order to understand the standard and how it compares to existing national legislative framework.

The third part of this journal will explore Thailand's national legal instruments, implemented to fight against trafficking in persons (and children). Part III will also examine Thailand's efforts, evident in recent years, in combating crimes related to CSEC. The ratification and signature of various international instruments, the establishment of several regional agreements, the promulgation of significant national laws and the promotion of and participation in Memoranda of Understanding with neighbouring countries demonstrate Thailand's genuine intent to effectively respond to the commercial sexual exploitation of children, especially trafficking of children for sexual purposes. The above instruments will be evaluated and strengths and

weaknesses will be compared.

The fourth and final part of the article will analyse the legal protection guaranteed to victims and witnesses of trafficking in children for sexual purposes. International standards will be compared to national Thai legislation, with particular focus on the Thai Constitution, the Anti-Trafficking in Persons Act, the Criminal Procedure Act and the Witnesses Protection Act.

This research is limited to an analysis of the legal documents enacted against child trafficking for sexual purposes in Thailand and excludes an analysis of the implementation challenges, problems with law enforcement and administrative strategies. The goal of this article is to give a broad overview of the main international, regional and national legal instruments produced in the fight against trafficking of children for sexual purposes and the protection of its victims in Thailand. The article also seeks to provide recommendations to assist the country's efforts in the fight against child trafficking. This research may also contain relevant information for countries facing similar challenges. These countries may benefit from consideration of this analysis and the final recommendations.

1

TRAFFICKING IN CHILDREN FOR SEXUAL PURPOSES: Attempting to Estimate the Phenomenon



INTRODUCTION

Part I will focus on the general understanding of the phenomenon of trafficking in persons (especially children) for the purpose of sexual exploitation, with particular attention given to Thailand. The current situation of trafficking in persons will be presented through collation of data. This data will also demonstrate some of the empirical and political challenges involved in gauging the magnitude of the crime. Nonetheless, these estimates are valuable to a general study and show the need for further investigation, especially in specific countries. The statistics will show the prevalence of this phenomenon in the Southeast Asia region, in particular Thailand. For this reason, the analysis will focus on Thailand as an emblematic example to be analysed as one of the areas in which more effort must be invested. A comparison between international figures and those reported by the Thai government will show how much more there is to do in the fight against trafficking in persons for sexual purposes.

1. Challenges and Difficulties

Understanding the real extent of trafficking in persons, worldwide and nationally, has always been one of the most significant and complex goals international organisations (IOs), governments and NGOs have attempted to achieve. Accurate statistics on the number of victims and offenders may be important to the formulation of effective strategies for the prevention of trafficking in persons, the prosecution of offenders, as well as for victim support. Providing as realistic a representation as possible is an important step to combating trafficking in persons, allocating the necessary resources and developing policies, plans and actions. Disaggregated data including, scope, location, gender, age typology of exploitation and involved criminal organisations or networks is also crucial to the above tasks. Incorrect estimates, both in excess and in deficit of the true reality, run the risk of compromising prevention measures and misinforming.

Although there is agreement on the significance and need for realistic estimates, obtaining accurate numbers has proven to be notoriously difficult. First, the illegal nature of this phenomenon makes investigations into the crime extremely difficult. As with other crimes, the study of the population involved in trafficking in persons (especially children) requires reaching a sample from a so-called “hidden population.”

A hidden population is a population with an unknown size, unidentified boundaries and due to stigmatisation of victims, one that features little cooperation from them. Access to trafficking victims and traffickers is problematic, not to mention potentially dangerous for the researchers (Kelly, 2002) and victims. For these reasons, research into trafficking in persons tends to rely on secondary indicators, such as prosecutions or investigation rates (Smith, 2011) or statistics on protected victims. From the existing data it is hard to determine if the cases reported, prosecuted, investigated and number of victims protected represent just the tip of the iceberg, or if a considerable number of incidents of trafficking are actually being identified. Consequently, it is hard to establish if and to what extent the recognised cases can be considered truly representative of the frequency of trafficking in persons (Tyldum & Brunovskys, 2005).

In addition to these empirical difficulties, the reliability of official data on trafficking in persons must be considered (Smith, 2011), due to the concept of “naming-and-shaming” (Howard, 2014). For example, in the widely cited US State Department Trafficking in Persons (TIP) Reports, based on the mandate of the Trafficking Victims Protection Act (TVPA) to assess foreign governments’ efforts in preventing and combating trafficking, governments may exaggerate reports of their efforts or under-report the incidences of (sex) trafficking in order to appear

more proactive (Smith, 2011). Furthermore, the Tier placement system of the US TIP Reports may also generate “perverse incentives for states” to gain access to financial aid or avoid sanctions (Smith, 2011). Similar considerations can be raised in relation to The Global Slavery Index (Howard, 2014). Furthermore, this kind of research often misses the opportunity to add to the numerical data “qualitative up-to-date research” allowing for significant study of the trends on human trafficking (Derbali, 2013).

A general warning on the reliability of trafficking data, especially when referring to sexual exploitation, should be raised. The use of data on trafficking from different sources should be carefully managed because the definition of trafficking used in research is inconsistent and because of the different purposes

The widespread focus on the trafficking of women and children for sexual purposes, on one hand, implies an overrepresentation of trafficking related to the sex industry and, on the other, ignores the trafficking of men and trafficking for other purposes.

It is the responsibility of academics, journalists, politicians and primary researchers to compile and use accurate data, omit unreliable statistics, and contextualise numbers and information in order to avoid sensationalism.

the research may have. In addition, human rights statistics often rely on “biased samples or poorly researched ‘guesstimates,’” and do not provide sufficient details on the crime or comparable data (Jordan, 2011). Moreover, the widespread focus on the trafficking of women and children for sexual purposes, on one hand, implies an overrepresentation of trafficking related to the sex industry (Feingold, 2005), artificially inflating statistics on the numbers of women and minors exploited sexually and, on the other, ignores the trafficking of men and trafficking for other purposes (Feingold, 2005; Jordan, 2011). Consequently, multiple interpretations and conclusions can be drawn from this data and unrealistic statistics generated, reproduced and perpetuated. Therefore, data, statistics and numerical information should be used discerningly. It is the responsibility of academics, journalists, politicians and primary researchers to compile and use accurate data, omit unreliable statistics, and contextualise numbers and information in order to avoid sensationalism.

2. Numbers: Global Overview

In spite of the aforementioned challenges and difficulties, many IOs, NGOs and governments have published estimates on trafficking in persons. Bearing in mind the problematic aspects of these estimates, it could be useful to look at the main statistics and data elaborated so far. Several organisations, depending on their individual goals, attempt to evaluate trafficked persons among forced labour victims (ILO, 2008 and 2012), trafficking of persons in the global crime scene (UNODC, 2012), number of persons in modern slavery, including trafficking (The Walk Free Foundation, 2013), global and local actions against trafficking (US Department of State, 2011 and 2012), and strategically assembled data sheets on regional information (UNIAP, 2010). This section will briefly examine the (different) numbers provided in their reports.

The ILO global estimate (ILO Action against Trafficking in Human Beings, 2008) showed that, among the 12.3 million people forced into labour, 2.44 million were trafficked. Among

the trafficked victims, 43% were trafficked for the purpose of sexual exploitation. ILO also reported that 1.2 million victims of trafficking were children. According to this report, the Asia-Pacific region appeared to have the highest number of people in forced labour as a result of trafficking. Another ILO report (ILO Global Report on Forced Labour, 2012), utilising a “new and improved statistical methodology,” revealed even more shocking data. The report stated that, of the 20.9 million people in forced labour, 4.5 million were forced into sexual exploitation. It explained that the Asian-Pacific region “accounts for by far the largest number of forced labourers.” The picture portrayed by the ILO is considered to represent a conservative estimate “given the strict methodology” used (ILO, 2012).

The UNODC Global Report on Trafficking in Persons (2012) analysed data on victims officially identified by national authorities between 2007 and 2010 or more recently and estimated the number of trafficked persons to be around 43,000. It revealed that the vast majority of victims were female and that girls represented the second

largest category of trafficked victims globally, after women (women 59% and girls 17%). A slight increase of the proportion of trafficked children was also observed when comparing the 2003 to 2006 and the 2007 to 2010 periods; this was particularly true for girls (UNODC, 2012).

Among the forms of exploitation, sexual exploitation represents, globally, the most frequently detected form. Regional variations, however, reveal important distinctions. For this reason, it is necessary to focus on a specific region of analysis to better understand the numbers and their possible explanations. According to one report, Southeast Asia and the Pacific “recorded a proportion higher than the global average: about 40 per cent of all victims [of trafficking in persons] detected between 2007 and 2010 were children” (UNODC, 2012) – the share of detected child victims is higher only in Africa and the Middle East. Trafficking in persons in Southeast Asia and the Pacific is generally confined to certain sub-regions or countries and the region includes destination, transit and origin countries in which the victims are trafficked, limiting need for movement outside the region. Although the forms of exploitation detected in the region reveal that trafficking for sexual purposes and for forced labour are almost equal, a closer analysis of these countries shows trafficking for forced labour, slavery or servitude is the most frequent form of exploitation reported in Indonesia

and Taiwan (UNODC, 2012). Alternatively, the most common reported form of trafficking in Thailand is for the purpose of sexual exploitation (UNODC, 2012). For this reason the next section will focus on Thailand.

Alarming data from the recent Global Slavery Index (Walk Free Foundation, 2013) revealed that there are currently 29.8 million people enslaved worldwide and 72.14% of those are in Asia, making it the most affected region in the world. The report estimated that 472,811 of all modern victims of slavery are in Thailand, the 24th highest ranking country worldwide.

The annual US Department of State TIP Report provides a global analysis of states’ actions against trafficking in persons. On the basis of the information provided by the governments, it reports the number of identified victims of trafficking was 46,570 in 2012 (US Department of State, 2013). The last TIP report (US Department of State, 2013) notes “social scientists estimate that as many as 27 million men, women, and children are trafficking victims at any given time.” Even this estimation is self-proclaimed as conservative.

The discrepancy between the numbers reported by governments and the estimates by social scientists shows an urgent need for concrete victim identification and prosecution of offenders.

3. Numbers: Focusing on Thailand

In relation to the specific phenomenon of trafficking in persons, Thailand can be defined as a central strategic knot. In fact, Thailand is a source, destination and transit country (US Department of State, 2013). This is particularly true for trafficking for sexual exploitation. In Thailand, 73% of victims detected were trafficked for sexual purposes (UNODC, 2012). Moreover, the number of estimated victims “who are forced, coerced, or defrauded into labour or commercial sexual exploitation of children placed in the sex trade” in Thailand is in the tens of thousands (US Department of State, 2012). According to the same report, this estimation is considered to be conservative (US Department of State, 2012). Another US Department of State report (the Human Rights Report – US Department of State, 2009) showed an estimated 60,000 children were involved in sexual exploitation in Thailand. According to The Protection Project (2007), children involved in sexual exploitation make up 40% of the total population involved in prostitution in the country. Currently, most children involved in commercial sexual exploitation in Thailand are from neighbouring countries, including, Cambodia, Laos PDR, Vietnam, Myanmar, and the People’s Republic of China (ECPAT International, 2011). Thai victims of trafficking are

found in Japan, Germany, the United States, the United Kingdom, South Africa and Australia, among others (Roujanavong, 2012).

However, the above estimates are not consistent with Thailand's official numbers on detected victims of trafficking and cases under investigation. The Mahidol Migration Center (2011) suggests the numbers of rescued and identified trafficking victims are microscopic, when compared to estimated numbers of actual victims.

Obviously, the official cases under investigation or being prosecuted, or the identified victims, cannot perfectly coincide with estimates of the trafficked population, as the latter is an approximation.

Nevertheless, the two data sets should be reasonably proportionate and this is not the case in Thailand. Little progress is evident when it comes to the implementation of Thai law, in terms of investigation and prosecution of traffickers.

Notwithstanding the creation of a solid legislative framework against trafficking in persons and in protection of children from trafficking and sexual exploitation, which is visible through the ratification of the main international instruments on trafficking in persons and the enactment of several national laws criminalising the action – first and foremost the Anti-Trafficking in Persons

Act, 2008 – investigation and prosecution surprisingly do not go hand in hand. In fact, the number of cases under investigation increased from 83 to 305 cases from 2011 to 2012 respectively and up from only 42 cases in 2008 (UNIAP, 2010), 95 cases in 2009¹ and 70 cases in 2010 (UNODC, 2012). The increase in cases being investigated shows a positive effort in initiating procedures within the criminal justice system; however, investigations are not followed by a consistent number of prosecutions (and convictions). The number of prosecutions even decreased from 67 in 2011 to 27 in 2012 (US Department of State 2013; Thailand Annual Report to the US Department of State, 2013).

The prosecution numbers are slightly different in a UNODC 2012 report², which showed the number of trafficking prosecutions in 2008 as 76; in 2009 (145); in 2010 (116); and 2011 (155). The same report (UNODC, 2012) revealed data collected by the Office of the Attorney General and paints yet another picture — 88 prosecutions in 2010 and only 67 in 2011 (confirming the data of the US Department of State). Most alarming is the data on actual convictions resulting from trafficking cases, which showed convictions registered by the Office of the Attorney General were 50

in 2010 and only 12 in 2011. The dramatically lower statistics are due to law implementation problems, poor data collection systems and corruption. The involvement of government officials in trafficking in persons' offenses is also an ongoing problem (Thailand Annual Report to the US Department of State TIP Report, 2013; Mahidol Migration Center, 2011; Willman, 2009). Furthermore, data collected by the Royal Police reveals that within trafficking in persons cases in Thailand, the vast majority of the exploitation that takes place is sexual, confirming previously examined global data. In fact, among 305 investigated cases of trafficking in persons, 226 were connected to prostitution (Thailand Annual Report to the US Department of State, 2013). Similarly, in 2011, among 83 investigated cases, 67 were categorised as trafficking for prostitution.

While the number of Thai child victims of commercial sexual exploitation appears to be in decline (ECPAT International, 2011; Baker, 2000), the local decline may have produced a spill over of trafficking beyond Thai borders. The decline of Thai child victims can be traced, primarily, to the population decline and related reduction of children per family (from 6 to less than 2), higher education levels, and

1. This data do not coincide with a UNIAP (2010) record, in which the reported number of trafficking in persons cases under investigation was only 35.

2. This report used data received from the Royal Thai Police and the Department of Special Investigation.

greater attention on the part of the legislation and law enforcements agencies, despite the existing practice by local officials of protecting the crime. However, although media focus and legal action, like the enactment of legal instruments, have led to a reduction of the phenomenon locally, it has also “forced” offenders to shift their attention to hill-top villages in Thailand or, more commonly, to neighbouring countries deemed less risky like Cambodia, Vietnam and Laos. This shift may occur for many reasons including, less preventative action in these countries, lack of law enforcement, lack of media coverage and public outcry. While media focus and legal action can be seen as positive steps, enacting these steps has extended, rather

than curbed, the reach of the human trafficking problem in the region.

Conclusions

The need to obtain numerical data on trafficking in persons (such as number of victims and potential victims, number of offenders, cases and prosecutions) derives from the need to expand and develop plans of action, policies and initiatives reasonably proportionate to the reality of this crime. However, challenges related to the collection or estimation of accurate numbers of the so called “hidden” phenomenon exist. Despite these difficulties, several organisations and governments attempt to

estimate the numbers of trafficking in persons’ cases and related victims and then publish their findings.

Analysis of the available data reveals a fundamental gap: the discrepancy between estimated cases and the concrete protection of victims and prosecutorial action. This gap confirms the need for more action orientated at the fight against trafficking in persons with respect to victim protection and prosecution of offenders. Along with these requirements, another point should be highlighted, particularly with regard to Thailand. A detailed system of data collection, including the ability to differentiate gender, age and typology must be implemented.

2

TRAFFICKING IN CHILDREN FOR SEXUAL
PURPOSES: **International Standard**

INTRODUCTION

This section will look at the major international standards in relation to trafficking in persons and trafficking in children for the purpose of sexual exploitation. The definition of the term trafficking in persons, with special attention to children, will be taken from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (Trafficking Protocol), the Convention on the Rights of the Child (CRC) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC). A brief analysis of the State Parties' obligations deriving from these standards will follow. Having an overview of the international standards will prove useful for a comparison between international and national legislation in order to assess the harmonisation level within a specific country.

1. The Trafficking Protocol

1.1 Definition

The Trafficking Protocol has had to overcome numerous obstacles since its inception, particularly the challenge of defining trafficking in persons.³ Despite numerous previous international documents addressing human trafficking, the Protocol's definition is the first international comprehensive legal definition of trafficking (Hyland Kelly, 2001; Fredette, 2009). The Protocol, in fact, created a "global language and legislation to define trafficking in persons" (Raymond, 2002). In its final version, "trafficking in persons" can be considered an umbrella term and a basis for the subject of the Protocol (Legislative Guide), covering different crimes, including various forms of modern exploitation (forced prostitution, forced labour, slavery, removal of organs) and State Parties have the obligation to establish these actions as criminal offenses (Article 5).

The definition (Article 3)⁴ is a determinant part of the Protocol and is "central to any legislation seeking to implement the Protocol" (Legislative Guide). Article 3 of the Trafficking Protocol identifies three

elements that amount to the crime of trafficking in persons:

1. Action: includes, but is not limited to, the "recruitment, transportation, transfer, harbouring or receipt of persons"
2. Means: "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"
3. Purpose: "for the purpose of exploitation."

The element of "purpose" introduces the perpetrator(s)'s specific intent (*dolus speciali*) to exploit the victim. This has two essential consequences. First, the actual exploitation need not take place⁵ and second, the exploitative purpose can be held by any of the individuals involved, thereby facilitating the demonstration of the commission of the crime of trafficking (Gallagher, 2010). Along with the term "exploitation," the Trafficking Protocol presents an open-ended list of actions included in the provision (exploitation of prostitution of others, other forms of sexual exploitation, forced labour or

services, slavery, or practices similar to slavery, servitude or the removal of organs). Individual elements of the definition (for example, exploitation of prostitution) do not need to be criminalised, leaving to the states dominion over laws and policy related to those actions (Legislative Guide).

The only exception to the necessary presence of all the three listed requirements, for the existence of trafficking in persons, is the case of trafficking of a person below the age of 18 (Article 3c). In fact, in the trafficking of children, the "simple" recruitment (or transportation, receipt, etc.) of a child for the purpose of exploitation implies "means," and therefore is automatically rendered trafficking of persons. According to the Trafficking Protocol's definition, it is possible to infer that "all children moved into exploitation and all adults moved into exploitation through force, deception, or other means" (Gallagher, 2010) are victims of trafficking in persons.

1.2 Obligations

The Trafficking Protocol identifies a number of obligations that States are required to respect. According to the aptly named "three P approach" (Potts, 2003), the Protocol focuses on prosecution,

3. See the Travaux Préparatoires for the Organized Crime Convention and Protocols.

4. Protocol to Prevent, Suppress And Punish Trafficking in Persons, Especially Women and Children, Article 3: "For the purpose of this Protocol: (a) "Trafficking in persons" shall mean 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) "Child" shall mean any person under eighteen years of age."

5. See also Par. 33 of the Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

prevention and protection. Similarly, Trafficking Protocol obligations can be divided into three groups: 1) the prevention and fight against trafficking in persons, particularly women and children; 2) protection and assistance for victims of trafficking; 3) promotion and facilitation of State Party cooperation (Gallagher, 2009).

Accordingly, States have the obligation to criminalise, investigate, prevent and prosecute trafficking in persons; provide assistance to and protect victims of trafficking in persons; and establish effective cooperation among States for the achievement of these goals. Criminalisation is primarily intended to cover the commission of the crimes identified in Article 3. Even if strong legislation cannot guarantee prosecution (Fredette, 2009), criminalisation of the actions indicated in Article 3 is essential not only punitively, but also as a deterrent against the commission of the crime (i.e. prevention) and as protection for the victims in isolating criminals. In accordance with the country's legal system, the attempt, compliance, and organisation or direction of trafficking in persons (Article 5) should also be criminalised. However, the Trafficking Protocol does not give any guidance in relation to sanctions. This is found in the applicable Convention against Transnational Organized Crime's Article 11, which requests sanctions to be proportionate to the gravity of the offence.⁶

States also have the duty to establish "comprehensive policies,

programmes and other measures" to prevent the crime (Article 9a) and cooperation in the construction of these programmes and policies is essential. Along these lines, the Trafficking Protocol requires that preventative strategies include both "cooperation with non-governmental organisations, other relevant organisations and other elements of civil society" (Article 9) and multilateral and bilateral agreements to "to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity" and to "discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking." There are three main approaches to tackling the problem of trafficking in persons: first, by addressing the factors that create victims (such as poverty, discrimination and violence); second, by addressing the demand; and finally, by addressing corruption and complicity (Gallagher, 2010).

Given that the crime is most commonly transnational, effective, specific and practical cooperation among countries is essential. The Protocol provides a series of State Party obligations on the specific need for cooperation among states and other relevant entities. The first and most general obligation calling for cooperation is found in Article 10 ("Information Exchange and Training"). Article 10 requires the sharing, in accordance with domestic law, of information in relation to potential victims or offenders, travel documents

across international borders, and information such as methodologies and techniques used by organised crime networks for the purpose of trafficking in persons. Cooperation that spans international borders and between border control agencies is crucial (Article 11), as is cooperation among States in the repatriation of victims. A basic State obligation, identified in Article 8, is the facilitation and acceptance of the repatriation of a victim of their nationality or who has a right of permanent residence in that country. The obligation to cooperate is not restricted to State to State cooperation. The Protocol also calls for cooperation between States and other entities, namely non-governmental organisations and other civil society organisations. Collaboration is needed at the phase of victim assistance (Article 6) and for the elaboration and establishment of prevention measures (Article 9). The lack of provisions in relation to extradition and mutual legal assistance in the Protocol implies the application of the relative norms of the Convention against Organized Crime. Section II of the Trafficking Protocol addresses the protection of and assistance to victims of trafficking in persons. These provisions are inspired by a victim-centred approach and cover aspects related to the situation of the trafficked person including, privacy and identity, the right to information, physical, psychological and social recovery and specific supports such as appropriate housing, legal assistance and counselling, medical treatment, and access to training and education (Article

6. As a Protocol to the Convention against Transnational Organized Crime, in case of lack of specific provisions of the Trafficking Protocol, the Convention applies.

6). State Parties must also enact mechanisms that offer victims of trafficking access to compensation. Moreover, victims have the right to remain, temporarily or permanently, in the territory of the State in which they are found, in consideration of humanitarian and compassionate factors (Article 7). A comprehensive group of rights are also connected to the repatriation process (Article 8). Special considerations must be given to the age, gender and special needs of the victims. The obligations related to victim protection will be further analysed in Part IV of this article.

2. The Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

2.1 Definitions

With specific reference to trafficking of children, two other international instruments explicitly mention this form of commercial sexual exploitation: the 1989 Convention on the Rights of the Child (CRC) and its Optional Protocol on the Sale of

Children, Child Prostitution and Child Pornography (OPSC).

The CRC explicitly refers to trafficking of children (Article 35) and other forms of commercial sexual exploitation of children (CSEC) – namely the inducement or coercion of a child to engage in any unlawful sexual activity, exploitative use of children in prostitution or other unlawful sexual practices and exploitative use of children in pornographic performances and materials (Article 34). Despite the importance of the CRC,⁷ no definition of trafficking is given.

Better elucidation is given by the OPSC, which reinforced the already strong framework of the CRC (Santos Pais, 2010). Even though the expression “traffic in children” is present only in the preamble, the definitions given in its Article 2⁸ are “sufficiently broad to encompass most situations in which children are trafficked” (Gallagher, 2010). Child prostitution (meaning the use of a child in sexual activities for remuneration or any other form of payment) and child pornography (meaning any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes) are

certainly included in the meaning of exploitation as intended in the Trafficking Protocol. Accordingly, when the action element of trafficking is combined with this kind of child exploitation, the crime of trafficking of children for the purpose of sexual exploitation is present.

2.2 Obligations

Trafficking in children for sexual purposes represents an important concern within the CRC and, above all, in its OPSC. These two international instruments set a series of obligations and standards which State Parties must respect. The following analysis will focus only on the specific obligations related to trafficking of children for sexual purposes. It should be noted that, in a broader perspective, each State has the obligation to assist and foster childhood and protect children’s inherent dignity and inalienable rights (Universal Declaration of Human Rights).

The CRC calls for each State Party to protect children from all forms of sexual exploitation and sexual abuse (Article 34) and for the adoption of “all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children

Article 36 requires States Parties to “protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.”

7. In fact, the CRC is one of the two international human rights treaties that explicitly refer to trafficking - the second being the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

8. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Article 2: “For the purpose of the present Protocol: (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration; (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration; (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”

for any purpose or in any form” (Article 35). As a general clause, Article 36 requires States Parties to “protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.” The protection of the child victims from any form of exploitation must be assured through physical and psychological recovery and reintegration in “an environment which fosters the health, self-respect and dignity of the child” (Article 39). Therefore, the CRC identifies three main State Party obligations in relation to the trafficking of children: to protect the child from exploitation; to assist, recover and reintegrate him/her; and to promote cooperation to prevent the phenomenon of trafficking.

More specific provisions derive from the OPSC. The first mandatory obligation is to criminalise the sale of children, child prostitution and child pornography (Article 1) as defined in the OPSC. The acts as defined in Articles 2 and 3 must be addressed by a national criminal or penal law “whether such offences are committed domestically or trans-nationally or on an individual or organised basis.” In accordance with the provisions of the national law, attempt, participation and complicity in the aforementioned crimes must also be punished (Article 3.2) and penalties should be proportionate to the grave nature of

the crime (Article 3.3). In relation to prosecution of the crime, the OPSC requests that the States Parties establish jurisdiction over the offences indicated for crimes committed in its territory, or by its nationals, or in offence against its nationals (Article 4), as well as include this crime in the list of its extraditable offences (Article 5).

A series of preventative strategies are identified in Article 9, particularly, dissemination of laws, administrative measures, social policies, promotion of awareness and the prohibition of material advertising the crimes listed in the OPSC. Coordination and assistance among States should be supported by the “greatest measure” during the crucial phases of investigation and criminal and extradition procedures (Article 6). In general, broad international cooperation should cover the largest possible period and area in relation to prevention, detection, investigation, prosecution and punishment, victim assistance, recovery, reintegration and repatriation and reduction of root causes (Article 10). Cooperation through multilateral regional and bilateral agreements should include both States authorities and national and international NGOs.

Victim protection is one of the central obligations recognised by

the OPSC. An in-depth analysis of these obligations and the legislative responses given by Thailand will be the central theme of Part IV. The main obligations dedicated to victim protection during the criminal justice process are detailed in Article 8 and Article 9, and relate to victim assistance, physical and psychological recovery and (re) integration.

Conclusions

This general overview of the main international legal instruments on trafficking in persons is intended to give the reader a basic understanding of international standards. The analysed international instruments provide definitions of specific crimes corresponding to State Party obligations of criminalisation of the identified actions. Furthermore, essential States’ obligations emerged in this analysis, showing the need for specific national legislation against trafficking in persons for sexual exploitation and for the consequent protection of trafficking victims, in particular children. The concepts explored in Part II will help with the analysis of Part III, where Thailand’s level of harmonisation with international standards will be explored.

3

TRAFFICKING IN CHILDREN FOR SEXUAL PURPOSES: Thailand's Legislative Response



INTRODUCTION

International standards to provide legal obligations in the fight against trafficking in persons can be “mere words” if not incorporated into the national system. This process starts first with the ratification of the main international instruments and the commitment of a State to bind itself to its international obligations. Secondly, and most importantly, concrete legislative action must follow ratification. It is through the national legal framework that the criminalisation of actions identified as crimes by international standards is accomplished.

Thailand has made a concerted legislative response to the international obligations identified in the international instruments, namely the Trafficking Protocol and the CRC and OPSC. Thailand's commitment to fight against trafficking in persons, especially children for sexual purposes, is

demonstrated in its criminal law (in particular in the Thai Penal Code and in the Prevention and Suppression of Prostitution Act) and in the specific act enacted on trafficking in persons, the Anti-Trafficking in Persons Act. These laws will be analysed herein.

Given the transnational nature of trafficking in persons, the provision of national instruments may be inadequate by themselves. A regional and sub-regional approach to the problem, with a practical cooperative process, is also necessary. The final section of Part III will look at the regional and sub-regional legislative efforts carried out by Thailand and neighbouring countries in the Mekong sub-region and in the ASEAN context.

1. Thailand's International and Regional Ratifications

Thailand's dedication to the international instruments to fight trafficking in children for sexual purposes is characterised by a recent step forward, the ratification of the Convention against Transnational Organized Crime (UNTOC) and its Trafficking Protocol. The ratification of the UNTOC and the Trafficking Protocol occurred on 17 October 2013 and came into force on 16 November 2013. The ratification should be recognised as an important step forward in the fight against trafficking in persons, as it opened the door to a deeper and more active collaboration and dialogue both within the UN

system and with other States. This fundamental step is the result of steady pressure from a number of UN agencies,⁹ other States¹⁰ (in particular the United States through its annual TIP Reports) and various NGOs.

Although Thai legislation on the specific crime of trafficking in persons has existed since 1997, with the much criticisable Measures in Prevention and Suppression of Trafficking in Women and Children Act and later in 2008 with the Anti-Trafficking in Persons Act, it still took five years for formal ratification of the Trafficking Protocol. This was likely due to the poor national legislation against transnational organised crime in general. In fact, in order to ratify the Trafficking Protocol, a State must be Party to the Convention against

Transnational Organized Crime, and Thailand lacked the necessary related legislation. The UNTOC and Trafficking Protocol's ratification was approved "in principle" in October 2012 by the Cabinet¹¹ but the official ratification was formalised one year later by HRH Princess Bajrakitiyabha Mahidol, the Permanent Representative of Thailand to the United Nations. The year delay was necessary to enact the required legislation bringing Thailand in line with international standards, in particular through the enactment of the UNTOC of 2013. This positive innovation in Thai international relations necessitates analysis of Thailand's current legislative framework against trafficking in persons.

With respect to the other analysed international instruments (CRC and

Thailand's dedication to the international instruments to fight trafficking in children for sexual purposes is characterised by a recent step forward, the ratification of the UNTOC and its Trafficking Protocol.

9. See for examples: the Committee on the Rights of the Child, Concluding Observation to Thailand, March 2006 (CRC/C/THA/CO/2) and February 2012 (CRC/C/THA/CO/3-4); or the Special Rapporteur on Trafficking in Persons, Especially Women and Children report on mission to Thailand, May 2012 (A/HRC/20/18).

10. Within the Universal Periodic Review process: Australia.

11. Thailand's Annual Report on Efforts and Progress on the Implementation of Anti-Human Trafficking Action Plan in 2012 for the U.S. Department of State's preparation of its Trafficking in Persons Report of 2013.

OPSC), Thailand acceded to the CRC in 1992 with two reservations. In 2010, Thailand withdrew its reservation to Article 7, in relation to birth registration, but continues to maintain its reservation to Article 22, in relation to the right to seek refugee status. Because of this, Article 22 will be subject to national law, regulation and prevailing practices in Thailand. In 2006, Thailand acceded to the OPSC, with no reservations.

Furthermore, as a member of ASEAN, Thailand agreed to develop a Regional Plan of Action to combat the crime of trafficking, which includes efforts to develop a draft ASEAN Convention against Trafficking in Persons. ASEAN member countries currently follow the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children (2004).

2. Thailand's Definitions and Legislation on Trafficking in Persons

As a State Party to the three aforementioned international documents, Thailand is obliged to put into place the related international law, meaning it must respect, fulfil and protect the human rights outlined in the ratified conventions and protocols. This is accomplished, in part, by the creation of necessary national legislation. The following analysis will look at Thailand's efforts in the fight against trafficking in persons through a study of three main

laws: the Penal Code (1956 – as amended in 1997); the Prevention and Suppression of Prostitution Act (1996); and the main crime-specific instrument enacted by Thailand against human trafficking – the Anti-Trafficking in Persons Act (2008). A better understanding of these instruments will allow for a comparison with the international standard, with the aim at evaluating the harmonisation effort undertaken by Thailand in recent years to accord with international standards.

The term “trafficking in persons” is not found in the Thai Penal Code, or in the Prevention and Suppression of Prostitution Act. It appeared in Thai legislation for the first time in the 1997 Measures in Prevention and Suppression of Trafficking in Women and Children Act and again in 2008 with the Anti-Trafficking in Persons Act. However, heretofore there were (and are) extant laws which use the Thai expression “ล่อไป หรือพา” which can be translated as “take away,” “bring,” or “traffic,” or the expression “ล่อไป,” meaning “lure.” These older laws, therefore, must also be noted and analysed, as they inform a significant part of the country's anti-trafficking mechanisms.

Although existing norms cover most criminal actions that would fall under the category of trafficking in persons, it is not clear which laws should be applied in practical cases. The decision is a central concern when it comes to calculating penalties for the offender, as well as for victim identification and protection. Therefore, laws or

Although existing norms cover most criminal actions that would fall under the category of trafficking in persons, it is not clear which laws should be applied in practical cases.

guiding principles regarding this decision and the subsequent management of actual cases must be put in place. This is necessary for the correct application of the law in two particular phases: the moment of victim identification (where the identification of an individual as a trafficking victim under the Anti-Trafficking Act, or as an injured person under the Penal Code, or as an offender under the Prevention and Suppression of Prostitution Act, will determine the subsequent treatment, protection and rights); and in the development of a practical protection plan, both in relation to recovery and reintegration and protection during the trial proceedings.

Current international standards do not call for specific penalties to be applied to those found committing these crimes. However, Article 11 of the UNTOC¹² requires sanctions to be proportionate to the gravity of the crime and to give due regard to deterrence. However, as examined in the next section, Thai penalties for trafficking of persons vary

12. Applicable in case of lack of specific provisions in the Trafficking Protocol.

greatly, ranging from very minor sanctions to capital punishment. In this sense, Thailand's ability to carry out sanctions proportionate to the crime may equally vary.

The following analysis of the legal instruments enacted to fight the crimes related to the trafficking of children for sexual purposes will look at the law's content, strengths and weaknesses and level of harmonisation with international standards.

2.1 The Penal Code

The first example of criminalisation of the acts outlined by the Trafficking Protocol and the OPSC in relation to the trafficking of children for sexual purposes is discernible in the Thai Penal Code. Some of the illicit actions criminalised by the Trafficking Protocol are found in the segments dedicated to the offence against liberty (Title XI, Chapter 1) and offences related to sexuality (Title IX), as amended by the Penal Code Amendment Act no. 14 in 1997.

Section 312 of the Thai Penal Code punishes whoever fraudulently receives, procures, sells, lures or takes away (or traffics) children. This provision was introduced by the Penal Code Amendment Act no. 14, but is now losing relevance due to the enactment of a more

specific law (the Anti-Trafficking in Persons Act). However, the norm is the expression of one of the first steps undertaken by Thailand in the protection of children from trafficking.

Title IX of the Penal Code, introduced by the same Amendment Act in 1997, outlined a series of crimes against sexuality, opened the door to greater protection for victims of sex crimes and can be assigned to trafficking for sexual purposes crimes. Section 282 criminalises¹³ procurement, luring and trafficking of a person, with the consent of that person, for indecent acts, in order to gratify the sexual gratification of another person. Section 283¹⁴ refers to the same offence aggravated by the use of deceitful means, threat, violence, unjust influence, coercion or any other means, which implies the absence of consent. Similarly, Section 284¹⁵ criminalises the act of taking another person away with the intention of committing an indecent act through threat or deceitful or other means. Section 282, unlike Section 284, is characterised by the element of the intent for sexual gratification of another person.

First, it is interesting to note the considerable difference in penalty terms between Sections 283 and 284, the latter demanding half the penalty of the former. Second, the

penalty stated in Section 284 is equivalent to that for the crime of Section 282, which necessitates the consent of the victim. Essentially, the procurement or seduction of an indecent act, in order to gratify the sexual desire of another person, with the consent of the victim (Section 282) is compared in terms of penalty to the same action, without the victim's consent and with deceitful means (Section 284). Since the only difference in Section 284 appears to be the lack of the element of intention to gratify the sexual gratification of another person, it can be inferred that similar actions are considered more serious if carried out in order to gratify the sexual gratification of another person, rather than only for the commission of an indecent act. Finally, the section lacks provisions relating to children. The inconsistency within this section of the Penal Code becomes evident in Section 283bis, which penalises¹⁶ whoever "takes away (...) [a minor] for an indecent act with the consent of such person" with very light penalties.

Candid criticism can be drawn as a result of the above analysis. First and foremost, the penalties lack consistency in severity. For example, there is a large range of minimum and maximum incarceration penalties. Case in point, Section 282 ranges from

13. The penalties for offences of Section 282 in relation to children vary from three to 15 years of imprisonment and a fine of six thousand to thirty thousand Baht where the victim is over 15 but not yet over 18 years old, and from five to 20 years of imprisonment and a fine from ten to forty thousand Baht if the victims is not yet over 15.

14. Section 283 provides that, in the case of a victim who is over 15 but not over 18, the crime will be punished with imprisonment from seven to twenty years and a fine from fourteen thousand to forty thousand Baht or life imprisonment; if the victim is not over 15, the punishment varies from ten to twenty years of imprisonment and a fine from twenty to forty thousand Baht or life imprisonment or the death penalty.

15. Section 284 provides for a punishment of imprisonment of one to ten years, and a fine of two to twenty thousand Baht.

16. Section 283bis provides imprisonment not exceeding five years or a fine not exceeding ten thousand Baht, or both (if the victim is over 15 but not yet 18 years old) and a maximum seven years of imprisonment or a maximum fine of fourteen thousand Baht, or both (if the victim is not yet 15 years old).

one to ten years and Section 283 from five to twenty years. This gives judges considerable power in deciding penalties for offenders and places the decision of the gravity of the offence almost entirely in their hands. It should be the responsibility of legislators to identify clear consequences for certain crimes and evaluate the appropriate penalties in relation to the gravity of the offence. Minimum penalties for these crimes are also extremely low for crimes of this nature. For example, the minimum imprisonment penalty in Section 282 paragraph 2 and 3 (procure, seduce, traffic for indecent acts against a child under 18 but not older than 15, and a child under 15 years old) is three years and five years, respectively.

The lightness of the penalties could be due to the required element of consent of the victim for the configuration of the crime. However, if the element of valid consent can be applicable with respect to adult victims, this cannot be considered pertinent dealing with children. When the criminal action is the procurement, seduction or trafficking of a *minor* for an indecent act, the consent of the victim cannot be considered (valid), precisely because the age of consent is internationally regarded as 18 years of age. The problem with the “consent” of a child victim and the related light penalties is, indeed, even more evident in Sections 283bis (take away for an indecent act a minor with the victim’s consent) and 312ter (receive, sell, procure, or traffic a minor with the victim’s consent). In these Sections, the consent of the victim influences penalties as the norm provides for

imprisonment for a maximum of five or seven years (depending on the age of the minor victim). In order to effectively harmonise national laws with existing international standards, amendment to the consent element of the crime and

relative penalties is necessary. Similar re-evaluation is needed for monetary penalties, which are significantly low when compared to other legal instruments, like the Prevention and Suppression of Prostitution Act and Anti-Trafficking

VICTIM	PENAL CODE
ADULT	Section 282 (procure, lure, traffic/take away for indecent act with consent, in order to gratify the sexual gratification of another person): <ul style="list-style-type: none">• 1-10 years and 2.000-20.000 Baht Section 283 (procure, seduce, traffic/take away for the sexual gratification of another person by using deceitful means, threat, violence etc.): <ul style="list-style-type: none">• 5-20 years and 10.000-40.000 Baht Section 284 (take away/traffic using deceitful means, threat, violence, for indecent act): <ul style="list-style-type: none">• 1-10years and 2.000-20.000 Baht
CHILD BETWEEN 15-18 YEARS OLD	Section 282: <ul style="list-style-type: none">• 3-15 years and 6.000-30.000 Baht Section 283: <ul style="list-style-type: none">• 7-20 years and 14.000-40.000 Baht or life imprisonment Section 283bis (takes away for indecent act with the consent of the minor): <ul style="list-style-type: none">• Maximum 5 years and/or maximum 10.000 Baht Section 312ter (receive, sell, procure, or traffic a person gaining illegal benefit even with the consent of that person): <ul style="list-style-type: none">• Maximum 5 years imprisonment• and/or fine not exceeding 10.000 Baht
CHILD NOT OVER 15 YEARS OLD	Section 282 <ul style="list-style-type: none">• 5-20 years and 10.000 - 40.000 Baht Section 283 <ul style="list-style-type: none">• 10-20 years and 20.000-40.000 Baht• Or life imprisonment• Or capital punishment Section 283bis (takes away for indecent act with the consent of the minor) <ul style="list-style-type: none">• Maximum 7 years and/or maximum 14.000 Baht Section 312ter (receive, sell, procure, or traffic a person gaining illegal benefit, even with the consent of that person) <ul style="list-style-type: none">• Maximum 7 years imprisonment• and/or fine not exceeding 14.000 Baht

in Persons Act. Despite the need for stricter penalties, the Penal Code’s criminalisation of specific crimes must be recognised as a positive step towards the protection of children from sexual offences.

2.2 The Prevention and Suppression of Prostitution Act

Another pertinent national law to be considered is the Prevention and Suppression of Prostitution Act (1996). In this Act, prostitution is defined as:

“sexual intercourse, or any other act, or the commission of any other act in order to gratify the sexual desire of another person in a promiscuous manner in return for earning or any other benefit, irrespective of whether the person who accepts the act and the person who commits the act are of the same sex or not.”

Through this Act, it is possible to extrapolate an even broader definition of the crime, especially in relation to children. This law punishes any sexual intercourse or sexual act with a person below the age of 18, in a “prostitution establishment,” regardless of his or her consent (Article 8), with increased penalties if the victim is below 15 years of age. Heavier penalties are put forth in Section 9 (to procure, seduce or take away “any person for the prostitution of

such person, even with her or his consent and irrespective of whether the various acts which constitute an offence are committed within or outside the Kingdom”), in particular if the victim is a minor and/or if fraud, deceit, threat, violence, undue influence or coercion are used. The strongest provision of

the Act is Section 12¹⁷ and can be highly connected with what can be identified as trafficking in persons. The norm punishes the detention, confinement, deprivation of a person’s liberty, or the use of threat or violence in order to compel a person to engage in prostitution. An additional penalty is invoked if the

VICTIM	PREVENTION AND SUPPRESSION OF PROSTITUTION ACT
ADULT	<p>Section 9 (procure, seduce or take away any person for the purpose of prostitution of such person even with consent)</p> <ul style="list-style-type: none">• 1-10 years and 20.000-200.000 Baht• 1/3 heavier penalties if committed by fraud, deceit, threat, violence, etc. <p>Section 12 (detain, confine, deprive of liberty in order to compel other persons to engage in prostitution)</p> <ul style="list-style-type: none">• 10-20 years and 200.000-400.000 Baht• life imprisonment or capital punishment if result is grievous bodily harm or death
CHILD BETWEEN 15-18 YEARS OLD	<p>Section 8 (sexual intercourse or other acts otherwise against a minor in a prostitution establishment)</p> <ul style="list-style-type: none">• 1-3 years and 20.000-60.000 Baht <p>Section 9 (procure, seduce or take away any person for the purpose of prostitution of such person even with consent)</p> <ul style="list-style-type: none">• 5-15 years and 100.000-300.000 Baht• 1/3 heavier penalties if committed by fraud, deceit, threat, violence, etc.
CHILD NOT OVER 15 YEARS OLD	<p>Section 8 (sexual intercourse or other acts otherwise against a minor in a prostitution establishment)</p> <ul style="list-style-type: none">• 2-6 years and 40.000-120.000 Baht <p>Section 9 (procure, seduce or take away any person for the purpose of prostitution of such person even with consent)</p> <ul style="list-style-type: none">• 10-20 years and 200.000-400.000 Baht• 1/3 heavier penalties if committed by fraud, deceit, threat, violence, etc.

17. Suppression of Prostitution Act, Section 12: “any person who detains or confines another person, or by any other means, deprives such person of the liberty of such person or causes bodily harm to or threatens in any manner whatsoever to commit violence against another person in order to compel such other person to engage in prostitution.”

victim suffers grievous bodily harm (up to life imprisonment) or dies (life imprisonment or the death penalty). Monetary penalties put forth in the Act represent a strong strategy against prostitution, significantly larger than those found in other relevant acts.

However, this Act remains flawed. First, Section 8 (sexual intercourse or other act against a minor in a prostitution establishment), does not fit within a child protection context as it provides for offender incarceration of only one to three years for exploitation of victims between 15 and 18 years old, and from two to six years for exploitation of victims under 15 years of age. Based on the penalties found within the Act, it is clear the legislator's intention is to criminalise and punish more heavily those who "recruit" sex workers and facilitate their exploitation rather than clients, who are benefactors of the crime. However, criminalisation on the demand side is one of the keys to fighting the phenomenon of (forced) prostitution. This is especially true in the case of child sexual exploitation, where the specific demand and the large amount of money generated creates constant demand for new children to be introduced into the cycle. Soft penalties for clients, like the ones found in this Act, do not discourage offending and as a result, are unsatisfactory.

Aside from the criminalisation of exploitation through prostitution, the Act provides several norms in terms of prevention, protection and occupational development for victims. However, the provisions available under this Act cannot be considered sufficient to protect victims of sexual exploitation,

especially when compared to international standards. Sections 14 to 25 are dedicated to the establishment of duties and powers of the so called Protection and Occupational Development Committee Operational (POC) and the Changwat Provincial Protection and Occupational Development Committee (Changwat POC). The provisions of the Prevention and Suppression of Prostitution Act, despite laudable intentions, are extremely vague and lack specificity. This is especially true when it comes to the lack of a clear provision for concrete coordination and protection of victims of exploitation through prostitution. The Act, in Sections 5 and 6, criminalises any person who "for the purpose of prostitution (...) introduces herself or himself to, follows or importunes a person in a street, public place or any other place, which is committed in a open and shameless manner or causes nuisance to the public" and any person who "associates with another person in a prostitution establishment for the purpose of prostitution of himself or herself." The very word "victim" is, in fact, absent in the Act, and through this omission, makes Thailand's position on prostitution clear. From these norms, it becomes obvious that the purpose of this Act is criminalisation of prostitutes, without any

distinction in relation to consent, age, or exploitative condition.

Moreover, very little (if any) explanation of the role and duties of protection and development centres are included. The only activities explicitly required in the individual (victim) protection framework are the provisions of "occupational training" and otherwise non-specific "development." There is no mention of rights to medical assistance, safe accommodation, food, legal assistance or compensation. From this perspective, the Act is far from being in line with the international standard.

One of the major criticisms of the Prevention and Suppression of Prostitution Act relates to children. First, there is no explicit norm affirming the non-criminalisation of underage persons who are victims of exploitation through prostitution and no provisions expressly stating that children must be treated as victims, not offenders. This is confirmed by Sections 33 and 34, in which special regulations on punishments, protection and occupational training are provided for underage offenders under Section 5 or Section 6. Moreover, no specific provisions in relation to the protection of child victims and recognition of their special needs are mentioned in the Act.

The very word "victim" is absent in the Act, and through this omission, makes Thailand's position on prostitution clear.

2.3 The Anti-Trafficking in Persons Act

Thailand's definition of trafficking in persons is found in the specific national law. In 2008, Thailand introduced the Anti-Trafficking in Persons Act, which was a fundamental turning point in the fight against trafficking in persons

in Thailand. Its provisions opened the door to a more complete and detailed legal approach to the phenomenon of trafficking, an approach more in line with the international standard. Its provisions in terms of criminalisation, victim protection and compensation are of primary relevance, as are its definitions.

The Anti-Trafficking in Persons Act, Section 6,¹⁸ defines trafficking in persons as the act of:

“(1) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person, by means of the threat or use of force, abduction, fraud, deception, abuse of power, or of the giving money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control; or (2) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child.”

The actions identified above must be carried out for the purpose of exploitation.¹⁹ This broad definition includes all the actions identified by corresponding international standards. The definition of trafficking in children does not demand the action to be

characterised by any element relating to means. Consequently, it is enough to procure, buy, sell, vend, bring from or send to, detain or confine, harbour, or receive a child for the purpose of exploitation to compose the crime of trafficking in children.²⁰ This definition implies the irrelevance of victim consent — meaning it is impossible for a child to provide valid consent — and is in harmony with the definition provided by the Palermo Protocol. The Act dedicates several articles to the criminalisation of the

the actions defined as trafficking in persons, the Act also punishes other actions related to the crime. For example, whoever supports, aids, assists, demands, accepts or agrees to accept, or induces the commission of the offence of trafficking in persons is liable to be punished “likewise as the offender of the offence of trafficking in persons” (Section 7). Moreover, the criminal responsibility to prepare to commit the commission of trafficking in persons is subject to one-third of the punishment

VICTIM	ANTI- TRAFFICKING IN PERSONS ACT (Art. 52)
ADULT	Section 52 (trafficking in persons) - 4-10 years and 80.000-200.000 Baht
CHILD BETWEEN 15-18 YEARS OLD	Section 52 (trafficking in persons) - 6-12 years and 120.000 -240.000 Baht
CHILD NOT OVER 15 YEARS OLD	Section 52 (trafficking in persons) - 8-15 years and 160.000 -300.000 Baht

individual actions outlined in the definition of trafficking. The crime of trafficking in persons is punishable with imprisonment from four to 10 years and a fine from 80,000 to 200,000 Baht (Section 52). Heavier penalties are provided in the case of trafficking in children, especially where the child is under 15 years old.

In addition to the criminalisation of

determined for the offence itself (Section 8). If two or more persons conspire to commit the crime of trafficking in persons, the liability is no more than one-half of the entire penalty established for the crime (Section 9). If the crime is committed by three or more persons or by an organised criminal group, penalties are increased by one-half (Section 10). These provisions are a clear expression of

18. Anti-Trafficking in Persons Act, Section 6: “Whoever, for the purpose of exploitation, does any of the following acts: (1) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person, by means of the threat or use of force, abduction, fraud, deception, abuse of power, or of the giving money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control; or (2) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child; is guilty of trafficking in persons.”

19. Anti-Trafficking in Persons Act, Section 4: Exploitation means: “seeking benefits from the prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.”

20. Anti-Trafficking in Persons Act, Section 6 (2): Whoever does any of the following act “procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child; is guilty of trafficking in persons.”

the strong commitment of Thailand in the fight against trafficking, especially in recognition of the participation (and the necessary organisation and premeditation) of a group of persons.

Other elements may also influence the gravity of the punishment, including greater penalties depending on who commits the crime. Section 12 calls for penalties to double if the offences are committed by someone “professing to be an official and exercising the functions of an official without being an official.” Similarly, double the punishment is invoked when the offender actually holds certain positions in government or administrative departments.²¹

Most importantly, the Act clearly prohibits the criminal prosecution of trafficking victims for offences connected to their status as trafficking victims (Section 41). A victim of trafficking cannot be accused and prosecuted for the offence of: entering, leaving or residing in the country without permission - under the immigration law; giving false information to officials or using false travel documents; working without permission under the relative law; or committing the crimes covered by the Prevention and Suppression of Prostitution Act. The non-criminalisation of victims constitutes an essential provision aimed at practically protecting trafficking victims and encouraging the cooperation of victims in the

prosecution of the traffickers. It is a clear stance towards a victim-centred approach.

However, the norm (and the Act) fails to recognise the need for detailed anti-corruption regulations.

The Anti-Trafficking Act goes beyond the mere criminalisation of the actions defined as trafficking in persons, and provides a broad range of norms. Several sections are dedicated to the Anti-Trafficking in Persons Committee (Chapter 2), Powers and Duties of Officials (Chapter 3), a series of provisions related to victim protection and assistance (Chapter 4 – which will be analysed in Part IV) and the creation of a fund for trafficked persons (Chapter 5).

The Anti-Trafficking in Persons Committee consists of the Prime Minister, the Deputy Prime Minister, main ministers that are closely tied to the fight against trafficking in persons²² and four experts. The Committee’s duties include recommendation, direction and promulgation of regulations, duties and powers. To evaluate and monitor the policies, strategies and measures carried out under the Anti-Trafficking in Persons

Act, a specific committee, the Coordinating and Monitoring of Anti-Trafficking in Persons Performance Committee, was created.

Chapter 3, entitled Powers and Duties of the Competent Official, consists of a series of provisions aimed at facilitating investigations and regulating the reporting process in order to guarantee better coordination and management of the investigations. Section 28, which requires the official to present his or her identification card when performing duties, appears to be a norm aimed at tracking the actions of particular officials throughout the investigation process. The norm could be interpreted as recognition of the responsibility of officials during their investigations, especially in order to curb mismanagement of duties and powers. However, the norm (and the Act) fails to recognise the need for detailed anti-corruption regulations. The widespread phenomenon of corrupt officials involved in trafficking in persons was recognised in Thailand’s Anti-Human Trafficking Action Plan 2012-2013. As a result, official norms and strong criminalisation guidelines should be included in the Anti-Trafficking in Persons Act, given the nature of the phenomenon and the alarming frequency of incidences of bribery (US Department of State, 2013).

The provisions of Chapter 5 (the Anti-Trafficking in Persons Fund) have great potential. The Fund,

21. Section 13 lists the positions which determine an increase of penalties: as a member of the House of Representatives, member of the Senate, member of a Local Administration Council, Local Administrator, Government Official, employee of the Local Administration Organization, or employee of an organisation or a public agency, member of a board, executive, or employee of state enterprise, an official, or member of a board of any organisation under the Constitution.

22. Minister of Defense, Minister of Foreign Affairs, Minister of Tourism and Sports, Minister of Social Development and Human Security, Minister of Interior, Minister of Justice, and Minister of Labour. Anti-Trafficking in Persons Act, Section 15.

made possible by government funding, donations, contributions from international organisations and fundraising efforts, should assure the provision of assistance and protection of victims of trafficking, preventing and suppressing actions. A consistent source of funds could be generated from confiscation of offender profits and monetary fines paid by offenders. These additional resources could be a source for the Fund and contribute to the development of restorative justice for trafficking victims.

Some other criticisms should be raised. First, there is no mention of international, regional or sub-regional cooperation in prevention, investigation and prosecution of human traffickers or in protection of victims. The lack of any reference to the need for reciprocal assistance and collaboration, especially with neighbouring and affected countries, significantly undermines the efficacy of the Act. Second, very limited provisions (if any) are dedicated to preventative action. Finally, incarceration and monetary penalties in the Anti-Trafficking Act are vastly inferior to other norms. Proportionality between crime and sanction is positively noted; however, more specific and augmented penalties should be in place for crimes against children. Despite these criticisms, in cases involving children, the law (correctly) does not require the means element for the configuration of the crime of trafficking in children, endorsing one of the most significant provisions in the protection of child victims.

3. Thailand Regional and Sub-Regional Actions

3.1 Regional Actions: ASEAN

Effective cooperation is a crucial strategy against human trafficking, particularly because the crime often crosses borders and can involve repeated dislocation and phases of trafficking (or different elements of the crime) may take place in different locations. Cooperation among countries, especially neighbouring countries, becomes essential at all stages of the fight including, prevention, prosecution, victim assistance, protection and reintegration, and policy and strategy development. As the Trafficking Protocol (Section III) and the OPSC (Articles 6 and 10) require, countries should create measures to assist each other during investigations, prosecutions, punishment and all necessary legal proceedings, as well as during the phase of assistance and protection of victims. As underlined by Guideline 11 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the OHCHR,²³ international, multilateral and bilateral cooperation can have a vital impact in the fight against trafficking in persons.

In accordance with this requirement — and following the necessity of regional cooperation — in recent years, Thailand and its neighbouring countries have undertaken regional cooperation (through the

Association of South East Asian Nations - ASEAN), sub-regional assistance (with the Coordinated Mekong Ministerial Initiative against Trafficking - COMMIT) and multi or bilateral memoranda of understanding among governments and nongovernmental organisations. This section provides an analysis of the main cooperation instruments within the Southeast Asia region, looking in particular at the documents to which Thailand is a party.

ASEAN's international profile and leverage among State Parties is rising, and this is reflected in its efforts and endeavours. This is especially true when it comes to human rights. However, given the abstract and abstruse nature of many of its statements,²⁴ whether or not a clear policy can be developed at the regional and sub-regional level remains to be seen. ASEAN's commitment in the fight against human trafficking for sexual exploitation, in particular of children, exists, at least formally. Common interests as well as common binding rules are the basis of the ASEAN project. These are also reflected through dedication to the protection of victims and potential victims of trafficking for sexual exploitation. However, there are no ASEAN agreements that expressly condemn or address the commercial sexual exploitation of children.

Nonetheless, different documents can be considered a useful basis for understanding the ASEAN member countries' condemnation of this human rights violation. The

23. Guideline 11: "Cooperation and coordination between States and regions: Trafficking is a regional and global phenomenon that cannot always be dealt with effectively at the national level: a strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation can play an important role in combating trafficking activities. Such cooperation is particularly critical between countries involved in different stages of the trafficking cycle."

24. In particular in relation to the ASEAN Declaration of Human Rights.

ASEAN Tourism Agreement (2002) recalls States' commitments to the Global Code of Ethics for Tourism (UNWTO, 1999) in which sexual exploitation of children is explicitly condemned and which expressly asks for the "cooperation of all the States." The ASEAN Declaration against Trafficking in Persons, Particularly Women and Children (2004), although a mere declaration, reaffirms "the spirit" of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UNTOC (2000). The Declaration, however, lacks definitions, specificity and detailed intentions. Both the ASEAN Charter (2007) and the ASEAN Political-Security Community Blueprint (2009) provide a general promotion of human rights, even if these documents fail to specifically address child trafficking.

Finally, the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters (2004) represents an important document in the fight against (transnational) crimes and crucial cooperation among states. The Treaty has been ratified by all ASEAN countries, with the exception of Thailand, who has signed but not ratified.²⁵ The document requires State Parties to "render to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings." Even if not specifically dedicated to the fight against trafficking in persons, the instrument demonstrates the efforts of ASEAN countries in

implementing effective cooperation within the region, which could be crucial to the investigation and prosecution of transnational crimes, such as trafficking in persons. The path undertaken by ASEAN, through the establishment of a common vision under the motto "one vision, one identity and one caring and sharing community" (ASEAN Charter Preamble), could possibly reflect, at least formally, a commitment to the fight for human rights in general, and against trafficking in children for sexual purposes. Nevertheless, much still needs to be done before this journey can be considered complete and efficient, primarily in terms of the implementation of legal instruments.

3.2 Sub-Regional Actions: COMMIT

Detailed provisions showing more significant state interaction and commitment to the fight against trafficking in children is visible at the sub-regional level through COMMIT. Established in 2004, COMMIT is represented by Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam, and represents a considerable step in a unified direction. The aim of COMMIT is to "create a sustained and effective system of cross-border cooperation and collaboration to combat human trafficking" and to implement "innovative partnership between numerous GMS government ministries and development partners" in a consultative and collaborative approach (COMMIT Sub-Regional Plan of Action - SPA II 2008-2010). The main products

of COMMIT are the several Memoranda of Understanding (MoUs), both multilateral and bilateral, and the three Plans of Action (2005-2007, 2008-2010, and 2011-2013).

The first MoU on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region was signed by all COMMIT members in Yangon in 2004. The significance of the MoU is two-fold. First, it requires practical action from states in defining the problem (with the adoption of the UN definition of trafficking), the activation of measures and laws and strict cross-border cooperation (Yamada, 2011) in five main areas: policy and cooperation (national and international); legal frameworks, law enforcement and justice; protection recovery and reintegration; mechanism of implementation; and monitoring and evaluation of the MoU (COMMIT Sub-Regional Plan of Action - SPA II 2008-2010). Second, the MoU shows an active intent of the countries involved to include human rights protection, promotion and implementation in their foreign policies and external relations at the sub-regional level.

Nevertheless, the most common instruments used by states in their external expressions of agreements with other states are at a bilateral level. Bilateral and multilateral agreements are encouraged and realistic cooperation in the provisions of the necessary personnel and budgetary support is needed. Detailed planning for cross-border actions is a positive

25. Asia Regional Trafficking in Persons Project (ARTIP). Trafficking in Persons and the Criminal Justice Sector, Laws and Policies: Regional Framework around Trafficking in Persons. Available at: <http://www.artipproject.org/artip-tip-cjs/laws-policies-regional.html>.

exemplification of the seriousness of the intentions of the states, not limited to the mere letter of the law.

3.2.1 Bilateral Agreements

The first bilateral MoU was signed by Thailand and Cambodia in 2003. It was followed by seven other agreements among COMMIT member countries: Thailand and Laos (2005), Cambodia and Vietnam (2005), Thailand and Vietnam (2008), Thailand and Myanmar (2009), Myanmar and China (2009), Vietnam and China (2010) and Vietnam and Laos (2010). Even if all of the MoUs share similar structures and instruments, each one “reflects the bilateral relationship peculiar to the respective two countries at that time” (Yamada, 2011).

In the examination of the specific dynamics that exist in bilateral agreements on human trafficking, one state is generally considered the destination country and the other is the country of origin. In this context, Yamada (2011) explains that the country of origin will often need greater protection for its citizens and more information on the duties of the destination country. On the opposite side, the destination country will often attempt to limit its obligations, avoiding the specification of its duties of protection and give vague commitments.

Taking all these factors into account, generally the official discourse relating to trafficking within the region avoids addressing the true motivations behind migration (and consequently, prevention). That is to say, many countries do not want to officially admit that people wish to leave the country because of conflict or poverty. Alternately, the recipient country may not admit its attempts to curb immigration, or its lack of desire for low-skilled foreign workers. It is easier to shift focus and blame traffickers, thus the official dialogue tends to focus on anti-criminal efforts (GAATW, 2007). In consideration of Thailand’s relationship with other countries in the region, four bilateral agreements will be analysed: Thailand and Cambodia (2003), Thailand and Laos (2005), Thailand and Vietnam (2008) and Thailand and Myanmar (2009). The four MoUs are divided into similar sections that include definitions, preventative measures, protection of victims, and cooperation in the (prevention and) suppression of trafficking. The definition of trafficking provided by all analysed MoUs follows the Palermo Protocol. However, some differences exist. For example the Thailand/Cambodia and Thailand/Vietnam agreements provide an additional non-exclusive list of what is included in the definitions (in so giving specific examples of trafficking). The Thailand /Laos and

Thai/Myanmar memoranda do not include this specification. Moreover, the Thailand/Laos memorandum lacks a fundamental condition of the definition with respect to the protection of children — namely the consideration of a child as a victim of trafficking even if no means are used to recruit.

The Thailand and Laos agreement has further important deficiencies including a lack of stipulations that guarantee immunity from prosecution under immigration laws for victims of trafficking. This guarantee of immunity is, however, present in all other memoranda. This important provision is a fundamental evolution in the protection of victims of trafficking as, in the past, “girls forced into prostitution have sometimes been arrested as ‘illegal migrants,’ imprisoned and otherwise harshly treated pending return to their country of origin” (Hodgson, 1993). The Thailand/Cambodia and Vietnam/Myanmar agreements also explicitly assure the victims receive humane treatment without fear of being detained in any immigration detention centre while waiting for repatriation. Conversely, the Thailand/Laos memorandum merely states that general protection and safety of the victims should be ensured.

All the documents, with the exception of the Thai/Cambodian

Taking all these factors into account, generally the official discourse relating to trafficking within the region avoids addressing the true motivations behind migration (and consequently, prevention).

agreement, are named MoUs on (bilateral) cooperation for eliminating (or combating) trafficking in persons, especially women and children. The agreement between Thailand and Cambodia, instead, is named “Memorandum of Understanding (...) on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking.” The name of this particular MoU limits the provision to women and children, in so excluding adult male victims. Furthermore, throughout the text, any reference to trafficking is linked to women and children.

One final significant document is the Memorandum of Understanding on Operations between State’s Agencies and Non Governmental Organisations Engaged in Addressing Trafficking in Children and Women (2003), which shows the recognition of the State of the key role played by NGOs in fighting the phenomenon. However, the document places power for the decision related to the determination of the status of injured persons or victims in the hands of the Royal Thai Police. This feature makes it essential for training of all officials involved in the evaluation of cases, with particular care given to victim identification procedures.

Conclusions

Part III provided a thorough analysis of the main legal instruments used by Thailand and neighbouring countries to fight against trafficking in persons. Although a successful effort against this crime cannot limit itself to the legislative level and must also be translated into concrete action (namely, prosecution and implementation of laws), the constant drafting, promulgation and ratification of legal instruments highlights the intention of the country in shaping its “weaponries” against the crime of trafficking in persons.

The strengths and weaknesses of national laws on the actions identified by the Palermo Protocol relating to trafficking were also analysed. This analysis showed, on one hand, a sufficiently broad criminalisation of the conducts falling under the umbrella of the Trafficking Protocol and several adequately harmonised provisions in relation to definitions and sanctions. On the other hand, a number of inadequate regulations emerged. At the regional and sub-regional level, the analysed ASEAN and COMMIT documents represent a general regulatory framework for the protection of human rights and

children against human trafficking.

Although an explicit document against CSEC does not exist yet, the existing documents reveal intent toward the protection of trafficking victims. However, the model that gives a better and more detailed contribution to solving the problem is the bilateral agreements, in particular those found within COMMIT. Since 2003, there has also been a spate of bilateral agreements in the sub-Mekong region, which all attempt to co-operatively respond to the problem of trafficking. Nevertheless, these attempts are only partially successful and shortcomings include: severe lack of provision for child victims, indeed even a lack of recognition; remiss immunity to victims (MoU Laos and Thailand); and lack of mention of adult male victims (MoU Cambodia and Thailand). Given the wide reach of the problem, it is clear that trafficking for the purpose of prostitution remains a challenge within current government strategies. The analysis of these instruments demonstrates the need for more detailed, stringent legal documents and structured pro-active cooperation.

4

THE PROTECTION OF TRAFFICKED CHILD VICTIMS AND WITNESSES IN THE THAI CRIMINAL JUSTICE SYSTEM²⁶

INTRODUCTION

Despite the difficulties in identifying the exact number of victims (see Part I), it is known that human trafficking for sexual purposes is a crime that affects a vast number of children and timely and effective victim protection is crucial. Victim protection should begin as soon as they are identified and should include the most individualised approach possible, in order to secure the victim from further harm and increase the likelihood of complete recovery, reintegration and restoration. The criminal justice system is the main channel in which this protection approach should be carried out.

Part IV will examine the protection of child victims of trafficking for sexual purposes, especially within the context of the Thai criminal justice system. A strong protective system must be guaranteed to victims, particularly in those cases in which the victim is taking on the position of bearing witness. The international standard will be explained with the aim at understanding best practices and State obligations. After providing a general overview, the focus will shift to the response given by Thailand through its national legal framework.

Thailand's legal framework in protection of child victims and witnesses is dense with provisions and legal measures. These measures are found primarily in the Constitution, the Child Protection Act and the Anti-Trafficking Act. However, more specific provisions in relation to the phase of investigation and trial are traceable in the Criminal Procedure Code and in the Witness Protection Act. Strengths and weaknesses of each of these laws will be analysed, in an attempt to evaluate effectiveness and to identify aspects on which Thailand should focus its efforts.

26. Sections of this Part of the Journal edition are taken from the paper presented at the ICIRD Conference in Chulalongkorn University in Bangkok, Thailand the 22nd of August 2013, entitled "Child Testimony: Between Evidentiary Requirements and the Need to Protect the Child Witness/Victim of Commercial Sexual Exploitation – Thailand's Response," by Giulia Patané.

1. International Standards

The management of cases relating to trafficking in children for sexual purposes is extremely sensitive and requires the maximum possible care and attention. A prompt and efficient approach should be utilised by trained personnel, in coordination with all involved parties. From the very first steps of the case management within the criminal justice system, actions should comply with the short term needs of the child and, at the same time, address long term needs through a victim-centred approach. International standards for the protection of victims and witnesses will be analysed in this section, including the immediate needs of victims, and attention will also be given to the protections guaranteed to the victim bearing witness within the criminal justice system.

is guaranteed by Article 6.2(a) of the Trafficking Protocol and by the OPSC, Article 8.1(b) – which ensures that child victims are to be informed of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases. Furthermore, the right to be informed is outlined in the United Nations Economic and Social Council (ECOSOC) Guidelines (Paragraphs 19 – 20).²⁷ The right to information is a necessary precondition for empowering child victims to consciously participate in the criminal proceeding and should be enforced through a variety of means, including child friendly education materials (CDs, VCDs, brochures, printed materials) in a language understood by the victim.

The non-criminalisation of victims of trafficking is essential to guarantee the rights entitled to a victim and to ensure prompt

states: “Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons” (paragraph 7). The same principle is restated in the UNODC Manual (Tool 6.1). The ECOSOC Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime also define child victims and witnesses as “children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders.”²⁸ To avoid criminalisation of trafficked victims and assure the required protection, prompt identification of victims is necessary to protect the victim from being pursued by the perpetrator and for timely access to victims’

From the very first steps of the case management within the criminal justice system, actions should comply with the short term needs of the child and, at the same time, address long term needs through a victim-centred approach.

1.1 Child Victim Protection Requirements

The recognition of the right to information is of primary importance. This fundamental right

protection of the trafficked person. Non-criminalisation of victims is highlighted by the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, which explicitly

rights and protection mechanisms.

In practice, different groups of professionals and non-professionals may face situations in which victims are identified. These can

27. Two ECOSOC resolutions *Guidelines on Justice for Child Victims and Witnesses of Crime*. ECOSOC Resolution 2004/27 Guidelines on justice for child victims and witnesses of crime. Available at: <http://www.un.org/en/ecosoc/docs/2004/resolution%202004-27.pdf>; ECOSOC Resolution 2005/20 Guidelines on justice in matters involving child victims and witnesses of crime. Available at: <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>.
28. <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>, Para 9 (a).

include police officials, health professionals (doctors, nurses, and psychologists), immigration officials, labour inspectors and related NGOs working on the issue. This is why appropriate training on victim identification should be mandatory for all stakeholders involved. Accordingly, Article 10 of the Palermo Protocol requires State Parties to “provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons.”

Once a victim has been identified, medical treatment and safe accommodation must be guaranteed. These rights are protected by Article 6 of the Trafficking Protocol and Article 9 of the OPSC. Medical treatment should also be provided in accordance with the evidentiary requirements necessary to the trial phase, as timely medical evidence can, in fact, be major pieces of evidence in a trial. Therefore, coordination between health professionals and law enforcement (in particular, police officials and public prosecutors) is crucial. At the same time, medical evidence must be collected through the use of sensitive methodologies in order to avoid further victimization of the trafficked child. Safe housing and accommodation are also essential in order to keep the victims from further harm by offenders and to begin the necessary recovery and reintegration process through education, employment and training opportunities.

1.2 Child Witness Protection Requirements

Victim involvement in the criminal justice system carries with it a series of risks to be considered in order to arrange and implement effective victim protection. This becomes especially true if a victim is placed in the position of witness in the prosecution of his or her offenders. The primary risks are re-victimization or secondary victimization that may result during investigation and trial proceedings; potential threats, both physically and psychologically, as a consequence of their deposition in court and the outcome of the trial; and the considerable anxiety surrounding the, often lengthy, criminal trial. These risks may interfere with court depositions and require precautionary methods to ensure the victim’s experience during the trial is as traumatic-free as possible. All the aforementioned risks may increase considerably in cases involving children. Therefore, child victims bearing witness in a trial should receive special protective measures.

The Trafficking Protocol requires that victims of trafficking are allowed “to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence” (Article 6). The same Article identifies a number of obligations aimed at victim protection. In particular, privacy and identity of the victim should be secured and comprehensive

assistance should be provided during legal proceedings, including counselling and legal assistance. In applying the said provisions, age, gender and the special needs of the victims (in particular the special needs of children) must be taken into account.

Another central international document formulating standards, principles and guidelines for the protection of victims and witnesses is the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly with resolution 40/34 in November 1985. In addition to providing a comprehensive definition of victims,²⁹ the document introduced the right to be treated with compassion and respect for dignity and entitlement to “access to the mechanisms of justice and to prompt redress (...) for the harm that they have suffered” (Section 4, GA Declaration for Victims). Most importantly, under this document, victims have the right to assistance throughout the legal process, particularly those who have special needs (including children).

The UNODC’s Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crimes (2008), also called UN Witness Protection Manual, is another significant document. The Manual identifies three main objectives that States should strive for in order to ensure the protection of witnesses. First, assistance before and during the trial should be provided to help the witness “cope with the psychological and practical

29. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

implications of testifying in a court of law" (UNODC, 2008). Second, police measures must be provided to ensure the witness's physical security. Finally, special court procedures must be arranged "to ensure the witness's safety during the giving of testimony" (UNODC, 2008), and also when securing evidence. Witness assistance should ultimately cover the period beginning when the victim or witness is first identified until, and potentially extending past, the conclusion of the trial.

The above considerations must be even more strictly adhered to if the witness in question is a minor. The CRC and the two ECOSOC Resolutions 2004/27 and 2005/20 (entitled "Guidelines on justice for child victims and witnesses of crime" and "Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime") recognise and highlight the specific needs of a child in such positions. These documents provide motivation to States to elevate the protection of child victims and witnesses during the trial phase. For example, Article 3 of the CRC³⁰ introduces the "best interests of the child" principle,³¹ which must be applied to the treatment of child victims within the criminal justice system.

In recognition of the additional hardships children may suffer when assisting in the judicial process and the need for special protection that

children must be guaranteed, the two ECOSOC resolutions provide a detailed list of rights. These rights include the right to be treated with dignity and compassion; to be protected from discrimination; to be informed, to be heard and to express views and concerns; to effective assistance; to privacy; to be protected from hardship during the justice process; to special protective measures; to safety; and to reparation.

Under the right to be protected from hardships during the justice process, the ECOSOC Guidelines (2005) require the use of child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims and modified court environments.³² In practice, these legal techniques can vary from the equipment within interview rooms, to the use of closed-circuit television/video conference (to avoid the physical presence of the child in court during the hearing), to the use of witness pre-trial statements. Privacy for the child must be secured in order to avoid potential revenge or retaliation by the offender. Privacy and identity of the victim can be assured through the use of technologies, such as voice and face distortion or through the physical separation of the witness and the accused (for example, giving the witness the option to testify anonymously or removing the defendant and the

public from the court room).

UNICEF and UNDOC have also produced a "Model of Law" (Justice in Matters involving Child Victims and Witnesses of Crime, 2009) which gives concrete examples of legal techniques and protection mechanisms for child victims and witness protection. However, the actions by the State can vary according to a wide variety of factors, including the nature of the crime, the typology of the victim (his/her personality, maturity, elaboration of trauma, degree of fear and capacity to face stressful situations), the relationship between the victim and accused person and the importance of the testimony.

With special reference to child victims of commercial sexual exploitation, including trafficking of children for sexual purposes, Article 8 of the OPSC provides specific State obligations and guidelines for the protection of child victims and witnesses during all stages of the criminal justice process. The obligations vary from the recognition of victim vulnerabilities and the subsequent need for support,³³ to the duty to provide information to the child in order to ensure active participation.³⁴ Obligations also include ensuring the protection of the child (and family),³⁵ privacy³⁶ and the avoidance of unnecessary delays.³⁷

30. Article 3, CRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

31. Debates on the interpretation of the term "best interests of the child" involve several issues. The vagueness of the words is one of the main criticisms (Zermatten, 2010), as well as the relativity of the concept in relation to time, culture (Freeman, 2011) of the country in which the child lives, and state resources. Indeed the Convention does not define the principle, leaving to the interpreter the role to fill with content what has been defined as the umbrella of the Convention.

32. <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>, Para 30(d).

33. Article 8 OPSC, paragraph 1(a) and (d).

34. Article 8 OPSC, paragraph 1(b) and (c).

35. Article 8 OPSC, paragraph 1(f).

36. Article 8 OPSC, paragraph 1(e).

37. Article 8 OPSC, paragraph 1(g).

1.3 Compensation

Victims of trafficking in persons can experience deep trauma and access to remedies for unjust damages suffered should be one of the main purposes of a victim-centred approach. The Special Rapporteur on trafficking in persons, especially in women and children, Ms Joy Ngozi Ezeilo, has repeatedly stated that trafficking victims have the right to effective remedies beyond compensation, including restitution, rehabilitation and punishment of those who are responsible for the crime.³⁸ In fact, remedies and reparation in general include not only meaningful compensation, but also restitution, rehabilitation, and satisfaction and guarantee of non-repetition (Gallagher, 2010). However, this section will limit its brief analysis to compensation, bearing in mind that the entire protection structure must be considered a form of remedy. This section will look at the provisions in relation to compensation and remedies of international documents, in order to compare with the provisions set by Thailand in its national legislation. The ability to legally seek compensation should be a fundamental right of victims of trafficking. The Organized Crime Convention (Article 25.2) and the Trafficking Protocol (Article 6.6) do not require State Parties

to guarantee compensation or restitution to victims, but oblige them to ensure that the State's "domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered" (Article 6.6, Trafficking Protocol). This means that, according to the Trafficking Protocol, victims must be guaranteed the chance to obtain compensation. The Trafficking Protocol surprisingly lacks any mention of other remedies. The Recommended Principles and Guidelines on Human Rights and Human Trafficking (Office of the High Commissioner for Human Rights, 2002), recommends that States ensure "victims of trafficking have an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible"³⁹ (Guideline 9). The Trafficking Protocol does not make mention of the source of compensation but the Legislative Guide to implementing the Protocol (Paragraph 60) lists three options which sufficiently meet the requirements of the Protocol. These options are: the possibility to sue the offender or others for civil damages; the possibility to award criminal damages or order for compensation or restitution against the person convicted in the criminal trial; and/or the possibility to obtain compensation from a

dedicated fund or scheme. The State's obligation will be satisfied if one or more of the said possibilities to obtain compensation exist.

Similarly, the OPSC requires States Parties to ensure that all victims of the offences identified in the OPSC have "access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible" (Article 9.4). The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted by the GA resolution in 2006) can provide direction in this regard. Even though the Principles and Guidelines are only applicable to gross human rights violations and humanitarian law violations, these principles could have value in guiding all human rights cases (Gallagher, 2010). With respect to compensation, the resolution emphasises how it should be "appropriate and proportional to the gravity of the violation and the circumstances of each case" (Paragraph 20) and should be provided for cases with economically assessable damage.⁴⁰

Detailed guide comes from the UNODC Model Law, which provides a long list of remedies that should be awarded to victims of trafficking

38. Special Rapporteur on trafficking in persons, especially women and children, 57th session of the Commission on the Status of Women. Concept Note, 14 March 2013: The Right to Effective Remedies for Trafficked Persons. Available at: http://www.un.org/womenwatch/daw/csw/csw57/side_events/OHCHR-Concept-Note-CSW-side-event-on-Effective%20remedies.pdf.

39. Restitution: "measures aimed at restoring the situation that exist[ed] prior to the violation [...] includ[ing] release of the victim from detention [...], recognition of legal identity and citizenship, return of property, ect." (Gallagher, 2010; Principle and Guidelines of the Rights to a Remedy and Reparation, par. 19). Rehabilitation: right of victims to "have their status and position 'restored'" including "provision of medical and psychological care as well as legal and social services" (Gallagher, 2010; Principle and Guidelines of the Rights to a Remedy and Reparation, par. 21). Satisfaction and guarantees of non repetition: such as "cessation of violations, verification of the facts, and full public disclosure of the truth" and the prevention of future violations (Gallagher, 2010).

40. "(a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services."

(Article 28).⁴¹ One of the UNODC Model Law's most important suggestions is the creation of a fund, independent from the criminal case, to compensate victims, even if the offender is never identified or prosecuted (which is a frequent occurrence). The creation of a national fund, for cases in which compensation from the offender is not available, was encouraged in 1985 by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Paragraphs 12 and 13). The Declaration underlined the necessity to create a fund for cases in which "victims (...) have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes" and/or when "family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization," need compensation.

2. Thai Response to the Need for Protection of Child Victims and Witnesses

Recently, perhaps following the ratification or signature of various international conventions,⁴² Thailand has adopted legislative measures

aimed at protecting witnesses and victims. Primary attention should be given to the Constitution of the Kingdom of Thailand (2007), the Anti-Trafficking in Persons Act (2008), the Thai Criminal Procedure Code (as amended in 1999, 2007 and 2008) and the Witness Protection in Criminal Cases Act (2003). Moreover, some direction comes from the ASEAN guidelines on criminal justice responses to trafficking in persons (2007) and the COMMITT MoU (see Part III). The next section will analyse the aforementioned legal instruments safeguarding victims and witnesses, with a special emphasis on children.

2.1 ASEAN "Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines"

One of the most victim-centred instruments in the ASEAN context is the Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines developed in 2007 with the objective of assisting the criminal justice system within Member Countries to protect and secure the victims of trafficking in persons (Part One) and improve cooperation between ASEAN States (Part Two).

The Guidelines insist on the urgent need for a strong, effective

and specialised criminal justice response to the crime of trafficking in persons, including training for all professionals involved (in particular prosecutors, judges, and investigators). The document shows a victim-centred approach, through several guidelines on the issue of victim and witness protection, their secure consent and cooperation, and the basic principle of non-criminalisation of victims (Guidelines B and C). The role of victims as witnesses in the criminal justice system implies additional protection is needed to stop potential reprisals from traffickers. For this reason, the Guidelines contain provisions to protect victim-witnesses (and their families), including through physical relocation (Guideline E). Specifically connected to the trial phase, alternatives to testifying in court and other victim-witness support measures are provided. Guideline D is dedicated to measures to assist child victims and stresses the protection of child victims of trafficking and their special needs and rights to protection, care and support. Part Two of the Guidelines calls for international legal, judicial and operational cooperation among States. The Treaty on Mutual Legal Assistance in Criminal Matters is referenced, emphasising its importance and the need for practitioners to use it. At the time of publication, Thailand has yet to ratify the Treaty.

41. The order of compensation should include: "(a) Costs of medical, physical, psychological or psychiatric treatment required by the victim; (b) Costs of physical and occupational therapy or rehabilitation required by the victim; (c) Costs of necessary transportation, temporary childcare, temporary housing or the movement of the victim to a place of temporary safe residence; (d) Lost income and due wages according to national law and regulations regarding wages; (e) Legal fees and other costs or expenses incurred, including costs incurred related to the participation of the victim in the criminal investigation and prosecution process; (f) Payment for non-material damages, resulting from moral, physical or psychological injury, emotional distress, pain and suffering suffered by the victim as a result of the crime committed against him or her; and (g) Any other costs or losses incurred by the victim as a direct result of being trafficked and reasonably assessed by the court."

42. CRC, OPSC, UNTOC, and the Trafficking Protocol.

2.2 The 2007 Constitution of the Kingdom of Thailand

Protection of children and child victims and witnesses of crimes should be included in the Constitution of the Kingdom of Thailand (2007) and the Thai Constitution does address some basic principles in relation to children. These principles are the basis by which national laws are guided. The first explicit mention of children's rights within the Constitution is found in Article 40(6)⁴³ and relates to proper protection during the judicial process and appropriate treatment for sexual violence cases. Part 9 of the Constitution (Right to Receive Public Health and Welfare Services from the State) refers to the child's "right to be protected by the State against violence and unfair treatment and the right to receive remedy in such case" (Article 52.2). The recognition of the special needs of children and the right to receive protection from violence and unfair treatment directly corresponds to the State's duty to safeguard child victims and provide them proper remedies.⁴⁴ Article 52 provides the general rights to all children and the related duty of the State to protect children's needs, but requires more detailed provisions and specific attention in cases involving child victims and witnesses within the criminal justice process.

With respect to child victims and witnesses, more specific norms are found in the sections dedicated to the judicial process (Constitution, Part 4).⁴⁵ In Article 40, the Constitution ensures basic judicial rights through a fair trial. Paragraph 4 of this article explicitly guarantees the right to be treated properly and the right to a fast and expeditious interrogation to the witness and to the injured person (as well as to the accused person, the plaintiff, the defendant and the concerned party of the case). The injured person and witnesses (as well as the defendant) have the express right to receive "protection, necessary and proper assistance from the State" (Paragraph 5). The defendant's right to an accurate, swift and impartial investigation and trial is extended to the injured person (Paragraph 7). Paragraph 6 of Article 40, reiterates the child's right to "proper protection during the judicial process and proper treatment" and assures the child's right "to receive proper treatment in cases related to sexual violence." The principles and rights laid out in the Constitution provide a good and broad basis for protection and should inspire detailed secondary laws to inform concrete action.

2.3 The Anti-Trafficking in Persons Act

The Anti-Trafficking in Persons Act (2008) contains specific

provisions on the protection of victims of trafficking in persons (Chapter 4, Provisions of Assistance and Protection of Safety to the Trafficked Persons, Articles 33-41). Appropriate assistance should include "food, shelter, medical treatment, physical and mental rehabilitation, education, training, legal aid, the return to the country of origin or domicile, the legal proceedings to claim compensation" and should take into account the human dignity of the victim and his/her sex, age, nationality, race and culture (Article 33). The trafficked person also has the right to be informed of the right to receive protection, as well as the right to compensation and legal aid (Articles 33 and 34).

Particular sections of the Anti-Trafficking Act are dedicated to the protection of the victim (and family). Specifically, Article 36 (Section 1) demands the competent official to provide safety and protection to the trafficked person and his or her family prior, during and after criminal proceedings. When the victim has the role of witness during the criminal proceedings, the Article cites the witness protection law, which should be applied in all respects (Article 36, Section 2). Coordination between the agencies of the country of origin and the country in which the victim and family are living and their home country shall be guaranteed (Article

43. Constitution of the Kingdom of Thailand (2007), Article 40 (6): "Children, youth, women and disabled or handicapped persons have the right to proper protection during the judicial process and proper treatment in the cases related to sexual violence."

44. Constitution of the Kingdom of Thailand (2007), Art. 52: Children and the youth have the right of survival and the right to receive physical, mental and intellectual development in accordance with their potential in a suitable environment, having prime regard to their participation. Children, the youth, women and family members shall have the right to be protected by the State against violence and unfair treatment and shall also have the right to receive rehabilitation in the event of such circumstances.

45. Constitution of the Kingdom of Thailand (2007), Art. 40 (4): an injured person, accused person, plaintiff, defendant, party to a case, concerned party, and the witness in a criminal case have the right to be treated properly during the judicial process which includes the right to fast and expeditious interrogation.

36, Section 3).

In order for the victim to obtain medical treatment, rehabilitation or compensation during the criminal proceedings, permission to stay in Thailand or temporary permission to work (taking into account humanitarian factors) may be given and officials shall assist the victim throughout the process (Article 37). In accordance with this last standard and taking into account the security and welfare of the victim (Article 38, Section 2), competent officials shall also assist with repatriation of victims to their country of origin (Article 38). Thai nationals and foreigners with permission to stay in the Kingdom or foreigners without identity documents with “reasonable ground to believe that such person has, or used to have a domicile or residence in the Kingdom lawfully” who wish to return to Thailand after being trafficked to another country should be assisted by officials who must “undertake whatever necessary to have such person return to the Kingdom without delay” (Article 39). Said provisions, in particular Articles 33 and 36, shall be carried out with the support of the Anti-Trafficking in Persons Fund (Article 44).

Despite the Chapter’s guarantee of the fundamental rights of trafficking victims, details on the

kind of protection guaranteed and comprehensive regulations on the delicate phases of investigation and trial should be elaborated on. Moreover, specific provisions in relation to child victims and witnesses are lacking. Supplementary provisions specifically dedicated to the protection of victims within the criminal justice process are found in the provisions of the Criminal Procedure Code.

2.4 The Criminal Procedure Code

The Thai Criminal Procedure Code details concrete actions that should be taken to safeguard witnesses and preserve the evidence of witness declarations. These measures were introduced through the recent amendments of Acts 26 B.E. 2007 and 28 B.E. 2008. Protective measures at the inquiry stage (to which the provisions of the Witness Protection Act must be added) will be analysed, followed by a look at actual trial provisions.

2.4.1 Investigation Phase

A first manifestation of victim/witness protection can be found in the provisions of Articles 132 and 133, amended by Act 28 B.E. 2008, in relation to inquiries. The information given by the injured

person (victim and/or possible witness) during this phase is often necessary to the prosecution and guides the investigative body’s inquiries. During the investigation phase, the injured person has a number of rights, such as the right to consent to examination and the right to a deposition free from police discouragement or use of fraud to discourage declarations. This provision demonstrates the need for a law specifically directed at police officials, barring the (apparently common) practice of discouraging victims from reporting a crime.

The Code gives particular attention to women involved in criminal cases related to sexuality. Paragraph 4 of Article 133 requires the investigation to be performed by a female inquiry official and allows for the presence of a person familiar to the victim during the interrogation. The only exceptions to these provisions are subject to the injured person’s consent or through (the easily exploited) “cause of necessity.” To ensure physical and psychological safety, the injured person also has a right to a “proper place” when facing the offender or accused, so to avoid being seen. With those two provisions, the weight (or lightness) of the words within the Code becomes apparent. For example, who will decide on the “cause of necessity?” What can be considered a “proper place?” What

Article 133 requires the investigation to be performed by a female inquiry official and allows for the presence of a person familiar to the victim during the interrogation.

parameters ought to be considered? The ambiguity of language recurs throughout the Code, undermining the great potential of the ideals it represents.

The 2007 amendment (Criminal Procedure Code Amendment Act no. 26 B.E. 2007) introduced two new articles (Articles 133bis and 133ter), specifically designed for the protection of child victims or witnesses, applicable during the inquiry stage and preliminary examination. Although limited to certain types of crimes,⁴⁶ the Code outlines the obligation of the inquiring officer to examine the minor victim or witness in a suitable place in the presence of a psychologist or social welfare worker, as well as a person requested by the minor and prosecutor. However, "in case of extreme emergency with reasonable cause" (Article 133bis, paragraph 5) and it is not possible to wait for both persons, the inquiry official may question the child in the presence of only one of the persons indicated. When this provision is necessary to invoke, it must be recorded in the file of inquiry. This provision, on the one hand, places a great degree of responsibility on the officer, but on the other, puts the decision at his or her sole discretion.

The Code also states that the psychologist or social welfare worker may carry out the examination if they are of the opinion that the examination of the child could negatively impact the

psyche of the child ("strong mental effect" Article 133bis). Furthermore, "many repeated questions" (Article 133bis) should not be permitted without reasonable cause. Article 133ter aims to protect the wellbeing (physical and mental) and anonymity of the child. It states that the naming ("pointing") of the accused (or any person) by the victim or child witness should be done in a location suitable for a minor and it should ensure that the child cannot be seen by the accused. The presence of a psychologist or social welfare worker, the prosecutor and a person required by the child is compulsory at this time. However, this can be avoided if requested or because of "necessary causes." During the examination of the child, images and voice recordings and registration should be arranged in case they are needed during the trial (Article 133bis, paragraph 4). Some weaknesses are noted. For example, the Code lacks clarity and is strewn with vagaries. The great decisive power wielded by investigating officers is also a concern. Furthermore, unlike the psychologist, the social welfare worker and the prosecutor participating in the examination, the investigating officer cannot be "challenged" by the child witness or victim (Article 133bis, paragraph 3).

2.4.2 Trial Phase

The Criminal Procedure Code's protection of vulnerable witnesses during trial is regulated by Division III of the Code. It was developed

through three amendment acts: the Criminal Procedure Code Amendment Acts 20 B.E. 1999; 26 B.E. 2007; and 28 B.E. 2008.

The selection of possible techniques to protect child witness is largely left up to judges. The court is required to evaluate the case and the seriousness of its circumstances in order to apply procedures that best fit the situation. The first decision may be whether or not to conduct the trial in open court, which is normally required by law. The exception to this rule is identified in Article 177, which gives the court the power to seal the trial, considering the "public order or good morals, or in order to prevent secrets concerning the security of the state" (Article 177).

If the court determines open testimony may be detrimental for the child, or if requested by another party, the court may arrange for visual and audio reproduction of the inquiry examination (Article 172ter, paragraph 2). In case of extreme necessity, where the child cannot be brought to court, those recordings can be admitted as testimony (Article 172ter, paragraph 3). When a child testifies in court, the judge may lead the hearing and ask questions of the witness (directly or by means of a psychologist or a social welfare worker). The court may also allow other parties to formulate questions for the child, which will then be posed by a psychologist or social welfare worker (Article 172ter).

46. Article 133bis: "In case of a sexual offence, offence against life and body which is not in light of an affray, offence against liberty, offence of extortion, offence of robbery and offence of brigandage under the Criminal Code, a case of an offence under the law on protection and suppression of prostitution, a case of offence under the law on protection and suppression of women and children trafficking, a case of an offence under the law on servicing houses or any other offence liable to a term of imprisonment, if the victim or witness is a child not yet over its eighteenth year, the inquirer shall"

In accordance with international requirements, paragraph 3 of Article 172, allows for the presentation of evidence in court without direct confrontation of witnesses with the accused. The techniques used for this purpose are “closed circuit television, electronic media or any other way as prescribed by the rule of the chief of justice” (Article 172, paragraph 3). This examination may be conducted by a psychologist, a social welfare worker or other person with whom the victim is comfortable. This provision is, however, only applicable if deemed necessary as a result of age, state of health, mental status or sexuality of the witness or his or her fear of the accused.⁴⁷ The ambiguity of the provision is evident both in the definition of sexuality as one of the criteria to be evaluated and without identification of the person responsible for that evaluation.

2.5 The Witness Protection Act

Witness protection programmes have three interrelated goals: to protect the physical and mental vulnerability of victims/witnesses in a criminal proceeding, to prevent intimidation of witnesses and to ensure that evidence or statements gathered during investigation will

not be distorted at trial as a result of the witness’s fear or suffered threat (Akapin & Jaemsotheen, 2006). In 2003, with the aim of achieving these goals, Thailand created the Witness Protection Act.

The Act provides two different levels of protection, one general and one special. The Act’s provisions claim that the general protection of witnesses should be guaranteed whenever “a witness loses his/her security.” In such a case a competent official from criminal investigation, interrogation, prosecution or the Witnesses Protection Bureau has the task of designing and enacting appropriate measures. These may include “a safe place for the witness; change of name/family name, domicile, identification, and information that would reveal the identity of the witness as appropriate, and the personal status of the witness and nature of the criminal case” (Section 6, paragraph 3). Where necessary, protection may be extended to the witness’s relatives (Section 7).

The measures for special protection are reserved for witnesses of specific crimes⁴⁸ and may include the relocation of the witness, change of identity, allowance for daily living expenses not exceeding one year (although extendible up

to two years), help with career development and education, legal assistance and security support (Section 10).⁴⁹ The Act also stresses the importance of victim and witness confidentiality.

Although the Witness Protection Act can be considered an important step forward for Thailand in the development of a concrete protection system for its witnesses and an essential legal base for a more efficient criminal justice system, the law, regrettably, has limitations. The first evident limitation is an absolute lack of specificity. For example, guidelines have not been established for the agencies that should provide protection and no explanations are provided for how these provisions should operate (ARTICLE 2, 2006). For this reason, “people who are to become witnesses and also the officials responsible for providing protection of the witnesses do not fully understand the boundaries, the rights, authority and means of witness protection as there is no clear procedure to follow” (Kankaew, 2011).

The concrete functionality of the programme is deeply and negatively impacted by limited resources and government capacity. At the end of 2005, the office had only

47. Article 172, paragraph 3: “In the taking of evidence, where the consideration of sexuality, age, status, health and mental state of a witness or his afraidness to the accused person has been made, a procedure may be made without direct confronting of a witness and the accused person. This may be made by applying a closed circuit television, electronic media or any other way as prescribed in the rule of the chief justice and it may be inquired through a psychologist, a social worker or other person whom the witness has confidence in.”

48. Section 8: “A witness in the following [types of] cases may be eligible to the privilege of special protection measures: (1) A case under the law on narcotic drugs, money laundering law, anti-corruption law, or customs law; (2) A case related to national security under the Penal Code; (3) A sexual offence under the Penal Code relating to the luring of a person for the sexual gratification of another; (4) A criminal offence in the nature of organised crime under the Penal Code, including any crime committed by a criminal group with a well established and complicated network; (5) A case punishable with at least 10 years of imprisonment; (6) A case that the Witness Protection Bureau deems appropriate to arrange for protection.

49. Section 10: The Witness Protection Bureau shall arrange for one or more of the following special protection measures: (1) A new place of accommodation; (2) Daily living expenses for the witness or his/her dependants not exceeding one year, with extensions as necessary for three months each time, not exceeding two years; (3) Coordination with the relevant agencies in order to change the first name, family name and information that may contribute to knowledge of the personal identity of the witness, including arrangements for a return to original status; (4) Action to help the witness have his/her own career, and training, education and other means of proper living for his/her life; (5) Assistance or action on behalf of a witness for his/her lawful rights; (6) Arrangements for a bodyguard service for a necessary period of time; (7) Other actions to assist and support a witness with his/her security as appropriate.

ten officers, without necessary qualifications and training (ARTICLE 2, 2006; Kankaew, 2011). A lack of female officials has also shown to decrease the efficacy of the programme, especially in situations where the witness is female (Kankaew, 2011). Finally, the Act provides very light penalties (imprisonment not exceeding one year or a fine not exceeding 20,000 Baht, or both) in case of disclosure of information related to the witness under protection. These limitations are reflected by the number of witnesses actually under protection. From programme inception until 2010, only 69 people have benefited from the programme, including 25 in 2010 alone (Kankaew, 2011).

Most importantly, provisions specifically about children are not provided. The special needs of a child witness must be recognised and regulated with specific provisions aimed at providing ad hoc protection of these vulnerable victims.

2.6 Compensation in Thailand

To understand the compensation available to victims (of trafficking) in Thailand, three main documents should be reviewed: the Damages for Injured Persons and Compensation and Expenses for the Accused in the Criminal Cases Act 2001 (Compensation Act); the Criminal Procedure Code (Chapter II, Article 40); and the specific provisions of the Anti-Trafficking in Persons Act (Articles 34-35). According to the Compensation Act a person whose "life, body or mind has been injured by a

criminal offence committed by another person" (Section 3) has the right to compensation, without affecting any rights or benefits under other laws (Section 5). The damages which an injured person is entitled to compensation for are those indicated in Section 18, including expenses for medical treatment (physical and mental), death, lost earnings and other compensation. The Act entitles the injured person to request compensation of damages only in relation to specific offences listed in the Act (Section 17 and attached list). Among the crimes named on the list, crimes against sexuality (Penal Code, Title IX) are included. Nevertheless, Article 312ter of the Penal Code, meaning to receive, sell, procure, or traffic a minor to gain illegal benefit, even with the consent of that person, is not listed, possibly excluding the victims of such a crime from demanding compensation under this Act. The Compensation Act established a Committee Determining Damages for Injured Person and Compensation, which has the exclusive power to decide on damages, compensation and expenses (Section 8).

Additional procedures to claim for compensation within a criminal process are regulated in the Criminal Procedure Code, Chapter II, in particular Article 44(1). In this case, compensation can be requested for death, bodily harm, mental harm, or loss of bodily freedom, reputation, or property injury, arisen from the offence committed by the accused person. Reimbursement of the compensation shall be enforced on the accused person. The articles in Chapter II regulate the procedure (also in relation to time, evidence

and motions) to be followed within the criminal trial.

Finally, The Anti-Trafficking in Persons Act standardises the right to compensation of trafficked persons and the procedure to claim it. First, the victim has the right to be informed of his/her right to compensation of damages resulting from the commission of trafficking in persons and the right to legal aid, in which the officer has the duty to inform the victim (Article 34). Secondly, where the victim expresses the intent to claim such compensation, the Public Prosecutor, on behalf of the trafficked person, shall claim said compensation thereof (Article 35). The request for compensation of damages can be inserted either in the "criminal prosecution or by way of motion filed at any time during the trial of the criminal case in the Court of the First Instance" (Article 35, Section 2). In case the Court so decides, the trafficked person will be regarded as a creditor and the Director General of the Legal Execution Department shall be bound to execute the judgement (Article 53, Section 3). No costs shall be imposed for the judgement related to the claim for compensation and its execution (Article 35, Section 4).

Lastly, Chapter 5, Articles 42-51, introducing the Anti-Trafficking in Persons Fund, offer significant provisions in relation to victim assistance. In fact, Article 44 grants money and property of the Fund to be used to assist victims under Article 33 (food, shelter, medical treatment, physical and mental rehabilitation, legal aid, etc.) and Article 36 (victim and family protection and victim

The lack of an explicit reference to compensation within the Anti-Trafficking Fund potentially reduces the level of protection

return and repatriation). At first glance these provisions appear to establish that the Fund covers compensation for trafficked persons. But a closer look reveals that, when Article 44 lists the purposes of the Fund, compensation is not explicitly mentioned, only the legal proceeding to claim compensation (through the reference to Article 33). Even if many of the listed purposes of the use of the Fund (in particular, medical treatment, physical and psychological rehabilitation, education, etc. of Article 33) can be considered as part of it, meaningful compensation is not limited to medical treatment and psychological rehabilitation and should also include compensation for physical and mental damages, lost opportunities, material damages, moral damages, legal assistance, costs, etc. The lack of an explicit reference to compensation within the Anti-Trafficking Fund potentially reduces the level of protection otherwise provided by this potentially strong Act.

Conclusions

Part IV has highlighted the most problematic and delicate aspects of the protection of child victims and witnesses. International standards provide guidelines that States should follow in the formulation of procedural laws to protect victims and avoid secondary victimization that may result during the trial. Pressure from the international community and its standards and the monitoring mechanisms of the United Nations have encouraged Thailand to implement protection for witnesses and victims, especially children. Many positive steps have been made, at least at the legal level, as first basic steps down the long path toward full protection for child witnesses and victims.

Nonetheless, there are many ways in which the practical application of those laws and mechanisms are weakened: ambiguity of wording, many exceptions to protective rules, the disproportionate power entrusted to the inquiring officials in essential determinations, and a general tendency not to specify details, guidelines, criteria and practical aspects. As a result, the legal ideal is often subject to conflicting interpretations. Even where the law is clear, its practical application is dependent on subjective assessments of an individual, who may be reluctant to apply new laws. For example, the opportunity to let a child testify through video is often rejected

by the judge due to “technical problems” (US Department of State, 2009). Judges often do not implement protective measures as they doubt the “validity of video testimonies and often require the presence of the child victim during the court hearing for cross-questioning” (ECPAT, 2011b). Furthermore, the police force has a tendency to avoid taking cases involving children because of the necessary involvement of multiple agents and sometimes even interview the child without the necessary safeguards (ECPAT, 2011b).

The incorrect application of the law and its lack of clarity have led the Committee on the Rights of the Child to recommend, in its concluding observations on the report of Thailand (2012), adequate legal provisions and regulations and the protection of all children victims and witnesses. Thailand’s efforts to satisfactorily protect child victims and witnesses is still ongoing and requires a change in the approach that certain individuals (police officers, judges, witness protection officers) often take towards children. Additional research on the reasons behind the lack of implementation of the law is necessary.

LESSONS LEARNED AND RECOMMENDATIONS

INTRODUCTION

Estimates of victims of trafficking in persons are tremendously high, while the data from official databases on investigations, prosecutions and victims protected reveal extremely poor trafficking counter-actions and results. Since the production of the Trafficking Protocol, the crime of trafficking in persons continues to create countless victims and continues to financially benefit criminals.

International standards were explained in order to provide a comparison for all the national legislations dealing with the crimes covered by the Protocol. Particular attention has been paid to the trafficking of children for the purpose of sexual exploitation, narrowing the focus to this specific form of exploitation and deepening the analysis on the particular needs of a specific group of victims, children.

The need to investigate the national legislation of Thailand is essential for both its geographic location at the heart of Southeast Asia and its growing economic position. Thailand is also a country of origin, transit and destination for trafficking of persons, making it an important case study. Analysis of its legal framework may contribute to our understanding of other countries with similar cultural and social conditions, or other nations facing analogous challenges.

Moreover, this analysis comes at a crucial time, as evident by Thailand's recent ratification of the Trafficking Protocol. The ratification demonstrates the commitment of the country to respect the obligations outlined by the Protocol, but the real demonstration of this commitment must be evident in the national legislation. That is why this Journal focuses on the analysis of the current Thai legislation on trafficking in persons.

Particular attention has been paid to the three main obligations arising from the Protocol: prosecution (specifically the criminalisation aspect), prevention (especially regarding cooperation with other countries) and protection (with particular emphasis on witnesses). Several observations and conclusions can be drawn from this study. These observations led to the development of the lessons learned and recommendations. Despite being inspired by the specific example of Thai legislation, these recommendations are relevant to any country wishing to improve its legal framework in the fight against trafficking in children for sexual purposes.

This Journal has limited its analysis to the legislation against trafficking in persons. As a result, the following recommendations will be inevitably bound to the existing legal framework. However, some additional practical suggestions will be offered with regards to implementation of the law.

Lessons Learned

- Reliable numerical data on trafficking in persons is difficult to compile and access.
- Research often uses different definitions of trafficking in persons or exploitation, making comparison of data impracticable.
- Data on the so called “hidden population” relies primarily on secondary indicators, which may not reflect the reality of the situation.
- An excessive focus of research on trafficking of women and children for sexual purposes may lead to an overrepresentation of trafficking into the sex industry and to the omission of trafficking of men and trafficking for other purposes.
- Current national statistics on prosecutions and victim protection often do not disaggregate sex, age, type of exploitation, nationality and other information useful to the development of disaggregated data.
- Despite the difficulties accessing relevant statistics, the existing data on the number of cases of the trafficking of children for sexual purposes is vast and far exceeds the number of prosecutions and victims assisted, both worldwide and in Thailand.
- There is a large gap between legislation and its implementation and further research into these gaps is needed. International standards run the risk of remaining mere words on paper if not translated into nationally enforced legislation.
- Legislation on child trafficking is an ongoing and dynamic process which must adapt to economic and political changes in supply and demand and to changing methods and means of trafficking.
- Punishments for the crime must be sufficiently onerous as to make the cost-benefit ratio of the crime of child trafficking unappealing.
- The legislation against trafficking in persons is largely punitive and does not incentivise anti-trafficking actions.
- Trafficking is not only an issue of supply, but much more so of demand, which is not sufficiently addressed by legislation.
- When there are multiple laws and norms with differing terms and conditions, it becomes more likely that both victims and perpetrators will fall through the cracks.
- When multiple laws are applicable to a situation, well-defined protocols for how to apply the law should exist.
- As trafficking is a trans-regional and trans-national issue, it requires inter-regional and international cooperation to create effective prevention mechanisms and collaborative investigation and prosecution measures.
- Trafficking in persons introduces multiple violations of human rights that need to be addressed. The State has a duty to alleviate the violations suffered by the victims.
- Victim protection and restoration starts with the principles of victim identification, non-

criminalisation, information, assistance and primary needs guaranteed.

- Victims bearing witness are at a greater risk of threats and require unique protection efforts.
- Children have specific needs that must be addressed in each phase of the intervention: prevention, education, victim identification, victim protection, investigation, trial and compensation.

General Recommendations

- Given the prevalence of the crime of child trafficking for sexual purposes, special task forces should be created to handle the investigation and prosecution of child trafficking related crimes. These task forces should cooperate internationally and any funds appropriated from these crimes should go directly towards the investigation and prosecution of future cases and to the protection of victims, including compensation.
- An international, regional and national database on child trafficking should be established to further aid the process of investigation and prosecution. This should identify individuals under investigation, with arrest warrants in their names and individuals found guilty of child trafficking, child sexual abuse and related crimes.
- A public database should be created to diffuse the image of convicted criminals and

related (minimum) data after the conviction in order to warn the public, especially when the criminal remains at large.

- The public database should be available in different languages, have child-friendly sections and facilitate the exchange of information between law enforcement agencies and the public.
- National databases on victims of trafficking should be created.
 - Data should be organised by sex, age, type of exploitation and nationality.
 - Data should be accessible while also ensuring the confidentiality of victims.
- All States should ratify the UN Trafficking Protocol.
- Within 12 months of the ratification, State Parties should:
 - Ensure that the definition of trafficking in persons is harmonised with the international standard
 - Ensure that anti-trafficking legislation includes appropriate criminalisation, preventive and protective measures, as well as provisions for cooperation with other states
 - Promote and organise specialised training for stakeholders
 - Develop an appropriate data collection system.
- More investment is necessary in a global education programme in order to reduce the demand for child labour and trafficked children, especially in countries where the rate of occurrence is high.
- Financial punishment for the crime of trafficking of children should be proportionate in order to eclipse the financial gain of the crime, either potential or accrued.
- State Parties should consider incentivising the reporting of trafficking so that individuals are encouraged to give information to authorities when they suspect trafficking of children.
- Legislators, investigators and prosecutors should be adaptable to growing trends and manifestations of the crime.
- Wherever possible, investigators and prosecutors should minimise the child victim's contact with the judicial process and the accused trafficker, to allow for the child to return to normal life as quickly and smoothly as possible.
- Funds gathered from the prosecution of child trafficking crimes should contribute to protection, recovery, assistance and compensation of victims.
- An international and national fund for the compensation of victims of trafficking should be created, especially for cases in which the offender is not caught.

Recommendations for Thailand

- When multiple or overlapping laws are applicable to a case, protocols for applying the law should exist.
- Penalties for similar crimes falling under the umbrella of trafficking in persons, as defined by the Trafficking Protocol, should be consistent.
- A large range in the severity or duration of punishments should be avoided.
- Consent of the victim should not reduce the gravity of the crime or the consequences, especially when dealing with children.
- Stronger criminalisation on the demand side of crimes related to sexual exploitation (of children) should be implemented.
- Non-criminalisation of victims should be explicitly stated in each law related to the crimes covered by the Trafficking Protocol.
- Confiscation of offender goods should be assigned by law, to assist with victim protection and compensation.

BIBLIOGRAPHY

- Agreement Between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Person, Especially Women and Children and Assisting Victims of Trafficking, 2008. Available at: http://www.no-trafficking.org/resources_laws_thailand.html
- Akapin, C. & Jaemsotheen, U., 2006. Thailand and the Protection of Victims, Particularly Women and Children Against Domestic Violence, Sexual Offences and Human Trafficking. ASEAN Law Association Publication.
- ALRC, 2006. ARTICLE 2: Special Report: Protecting Witnesses or Preventing Justice in Thailand. Vol. 5, no. 3 ISSN 1811 7023.
- Anti-Trafficking in Persons Act, 2008. Available at: [http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20\(eng.\).pdf](http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/trafficking_in_persons_act_b.e%202551%20(eng.).pdf)
- ASEAN Charter, 2007. Singapore. Available at: <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>
- ASEAN Declaration against Trafficking in Person, Particularly Women and Children, 2004. Vientiane, Lao People's Democratic Republic. Available at: <http://www1.umn.edu/humanrts/research/Philippines/ASEAN%20Declaration%20Against%20Trafficking%20in%20Persons%20Particularly%20Women%20and%20Children.pdf>
- ASEAN Guidelines on Criminal Justice Responses to Trafficking in Persons (2007). Available at: http://www.artipproject.org/artip-tip-cjs/tip-cjr/recent_developments/ASEAN-PG_Web_English_Final.pdf
- ASEAN Political-Security Community Blueprint, 2009. Jakarta. Available at: <http://www.asean.org/archive/5187-18.pdf>
- ASEAN Tourism Agreement, 2002. Phnom Penh. Available at: <http://www.asean.org/news/item/asean-tourism-agreement>
- ASEAN Treaty in Mutual Legal Assistance in Criminal Matters, 2004. Kuala Lumpur, Malaysia. Available at: <http://assetrecovery.org/kc/node/eb706c7d-a340-11dc-bf1b-335d0754ba85.0;jsessionid=8138E3B9CC219C058F26A9EA420B4C0B>
- Baker, S., 2000. A Changing Situation of Child Prostitution in Northern Thailand: A Study of Changwat Chiang Rai, Chang Mai ECPAT. Available at: http://www.ecpat-thailand.org/th/changing_situation_changwat.pdf
- COMMIT Sub-Regional Plan of Action SPA 2005-2007. Available at: http://www.no-trafficking.org/reports_docs/commit/commit_spa1_achievements.pdf
- COMMIT Sub-Regional Plan of Action SPA II 2008-2010. Beijing, China. Available at: http://www.no-trafficking.org/reports_docs/commit/commit_spa2_final.pdf
- COMMITT Memorandum of Understanding on cooperation against trafficking in persons in the Greater Mekong Sub-region. Available at: http://www.ilo.org/asia/info/WCMS_160937/lang--en/index.htm
- Committee on the Right of the Child (2011). Consideration of the Reports Submitted by States Parties Under Article 44 of the Convention Combined Third And Fourth Periodic Reports of States Parties due in 2009, Thailand, CRC/C/THA/3-4.

- Committee on the Right of the Child, (2012). Consideration of Reports Submitted by States Parties Under Article 44 of the Convention. Concluding Observation: Thailand, CRC/C/THA/CO3-4.
- Committee on the Rights of the Child (2004). Consideration of Reports Submitted by States Parties Under Article 44 Of The Convention Second Periodic Report Of States Parties due in 1999, Thailand, CRC/C/83/Add.15.
- Committee on the Rights of the Child, (2012). Consideration of reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Concluding observations: Thailand, CRC/C/OPSC/THA/CO/1.
- Constitution of the Kingdom of Thailand (2007). Available at: http://www.no-trafficking.org/resources_laws_thailand.html
- Convention against Transnational Organized Crime. Available at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>
- Convention on the Rights of the Child, 1989. Available at: <http://www2.ohchr.org/english/law/crc.htm>
- Cotter, 2009. Combating Child Sex Tourism in Southeast Asia. In *Denver Journal of International Law and Policy* 493.
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly with resolution 40/34 of 29 November 1985. Available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>
- Derbali, S., (2013). Trafficking in Thailand: what the Tip doesn't say. *The Guardian*, 27 June 2013. Available at: <http://www.theguardian.com/global-development-professionals-network/2013/jun/27/tip-report-and-thailand>
- ECOSOC Resolution 2004/27 Guidelines on justice for child victims and witnesses of crime. Available at: <http://www.un.org/en/ecosoc/docs/2004/resolution%202004-27.pdf>
- ECOSOC Resolution 2005/20 Guidelines on justice for child victims and witnesses of crime. Available at: <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>
- ECPAT International, (2011a). Global Monitoring, Status of Action Against Commercial Sexual Exploitation of Children, Thailand. Available at: http://ecpat.net/EI/Pdf/A4A_II/A4A2011_EAP_Thailand_FINAL.pdf
- ECPAT International, (2011b). Alternative Report Following The Initial Report from Thailand on The Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale Of Children, Child Prostitution And Child Pornography. Available at: http://www2.ohchr.org/english/bodies/crc/docs/ngos/Thailand_ECPAT_OPSC.pdf
- Feingold, D., (2005). Human Trafficking. Think Again. *Foreign Policy* Sep/Oct 2005. ProQuest Social Science Journals. Available at: <http://www.hrusa.org/workshops/trafficking/ThinkAgain.pdf>
- Fredette, K. (2009). Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation. *Cardozo Journal of International Law & Comparative Law*, Vol. 17.
- Freeman, M. (2011): 'Culture, Childhood and Rights'. *The Family in Law*. Vol. 5 Nr.15. Available at: <http://www.mishpat.ac.il/files/650/3610/3618/3619.pdf>

- GAATW, (Global Alliance Against Trafficking in Women), 2007. Collateral Damage: the Impact of Anti-Trafficking Measures on Human Rights around the World. Bangkok. Available at: http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf
- GAATW, (Global Alliance Against Trafficking in Women), 2010. Beyond the Borders: Exploring Links Between Trafficking, Globalization and Security. Bangkok. Available at: http://www.gaatw.org/publications/WP_on_Globalisation.pdf
- Gallagher, A. (2010). The International Law of Human Trafficking. Cambridge University Press. Cambridge.
- Hodgson, 1993. Sex Tourism and Child Prostitution in Asia: Legal Responses and Strategies. In Melbourne University Law Review 512.
- Howard, N. (2014). Keeping count: the trouble with the Global Slavery Index. The Guardian, 13 January 2014. Available at: <http://www.theguardian.com/global-development-professionals-network/2014/jan/13/slavery-global-index-reports>
- Hyland , K. (2001). The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Human Rights Brief 8, no. 2. The Washington College of Law Journals & Law Reviews. Available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1492&context=hrbrief>
- ILO, 2006. Anti Child Trafficking Legislation in Asia: Bangladesh, Nepal, Pakistan, Sri Lanka, Thailand & Indonesia. TICSA II. Bangkok. Available at: http://www.ilo.org/asia/whatwedo/publications/WCMS_BK_PB_76_EN/lang--en/index.htm
- ILO, 2008. ILO Action Against Trafficking in Human Beings. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_090356.pdf
- ILO, 2012. Global Estimate of Forced Labour. Available at: http://www.ilo.org/washington/WCMS_182004/lang--en/index.htm
- Jordan A., 2011. Fact or Fiction: What Do We Really Know About Human Trafficking? Center for Human Rights & Humanitarian Law. Washington College of Law. Available at: http://www.issuelab.org/resource/fact_or_fiction_what_do_we_really_know_about_human_trafficking
- Kankaew K., 2011. In Fourth Regional Seminar On Good Governance For Southeast Asian Countries Co-hosted by UNAFEI and the Department of Justice of the Republic of the Philippines 6-9 December 2010, Manila, the Philippines. Available at: http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_all.pdf
- Kelly, L. (2002). Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe. IOM Migration Research Series No. 11. Available at: http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/serial_publications/mrs11b.pdf
- Kelly, L. (2005). "You Can Find Anything You Want": A Critical Reflection on Research on Trafficking in Persons within and into Europe. Data and Research on Human Trafficking: A Global Survey. IOM. Available at: http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/data_res_human.pdf
- Mahidol Migration Center – MMC, (2011). Snap Shot Stories: Invisible Victims of Trafficking in Thailand. Mahidol Migration Center, Institute of Population and Social Research. Available at: [http://www.burmalibrary.org/docs12/MMC-Trafficking\(en\).pdf-red.pdf](http://www.burmalibrary.org/docs12/MMC-Trafficking(en).pdf-red.pdf)

- Memorandum of Understanding Between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking, 2003. Available at: http://www.no-trafficking.org/resources_laws_thailand.html
- Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar, 2009. Available at: http://www.no-trafficking.org/resources_laws_thailand.html
- Memorandum of Understanding Between The Government of the Lao People's Democratic Republic and the Government of the Kingdom of Thailand on Cooperation to Combat Trafficking in Person, Especially Women and Children and Assisting Victims of Trafficking, 2005. Available at: http://www.no-trafficking.org/resources_laws_thailand.html
- Memorandum of Understanding on Cooperation Against Trafficking in Person in the Greater Mekong Sub-Region, 2004. Yangon. Available at: http://www.no-trafficking.org/content/pdf/final_commit_mou.pdf
- Office of the High Commissioner for Human Rights, 2002. Recommended Principles and Guidelines on Human Rights and Human Trafficking. Available at: <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>
- OHCHR, 2002. Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1. Available at: <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>
- Potts, L. G. Jr. (2002). Global Trafficking in human beings: Assessing the success of the Success of the United Nations Protocol to Prevent Trafficking in Persons. The George Washington International Law Review, Vol. 35.
- Prevention and Suppression of Prostitution Act, 1996. Available at: http://www.no-trafficking.org/resources_laws_thailand.html
- Protocol to Prevent, Suppress And Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000. Available at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>
- Raymond, J. (2002). The New UN Trafficking Protocol. Women's Studies International Forum, Vol. 25, No. 5. Available at: <http://www.heart-intl.net/HEART/030106/TheNewUNTrafficking.pdf>
- Roujanavong, W. (2012). Human Trafficking: a Challenge To Thailand And The World Community. Available at: http://www.unafei.or.jp/english/pdf/RS_No87/No87_11VE_Wanchai.pdf
- Santos Pais, M. (2010). The protection of children from sexual exploitation. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. International Journal of Children's Rights, Vol. 18.
- Smith, H. M. (2011). Sex Trafficking: Trends, Challenges, and the Limitations of International Law. Human Rights Review, Vol. 12. Available at: <http://college.lclark.edu/live/files/10777-2pdf>
- Thailand Annual Report to the U.S. Department of State, 2013. Available at: <http://www.nocht.m-society.go.th/album/download/08d77f3a6409a6d7dfa696b6fd16d331.pdf>

- The Criminal Procedure Code. Available at: <http://www.humanrights.asia/countries/thailand/laws/Criminal%20Procedure%20Code%20I.pdf>
- The Penal Code. Available at: <http://www.thailandlawonline.com/table-of-contents/thailand-criminal-law-translation>
- The Protection Project, 2007. International Child Sex Tourism Scope of the Problem and Comparative Case Studies, The Johns Hopkins University. Available at: <http://www.ecpat.nl/images/13/166.pdf>
- Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Organized Crime and the Protocols. Available at: http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf
- Tyldum, G. and Brunovskis, A. (2005). Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking. Data and Research on Human Trafficking: A Global Survey, IOM. Available at: http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/data_res_human.pdf
- UNIAP, 2010. The Mekong Region Country Datasheets on Human Trafficking. Available at: http://www.no-trafficking.org/reports_docs/siren/uniap_2010ht_datasheets.pdf
- UNICEF and UNODC, 2009. Justice in Matters involving Child Victims and Witnesses of Crime, Model of Law and Related Commentary. Vienna. Available at: http://www.unicef.org/albania/Justice_in_matters.pdf
- UNODC, 2008. "UN witnesses protection manual," Good practices for the protection of witnesses in criminal proceedings involving organized crime. New York. Available at: <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>
- UNODC, 2012. Global Report on Trafficking in Persons. Available at: http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf
- UNWTO, 1999. Global Code of Ethics for Tourism. Available at: <http://ethics.unwto.org/en/content/global-code-ethics-tourism>
- U.S. Department of State, 2011. Trafficking in Person Report. Available at: <http://www.state.gov/j/tip/rls/tiprpt/>
- U.S. Department of State, 2012. Trafficking in Person Report. Trafficking in Person Report. Available at: <http://www.state.gov/j/tip/rls/tiprpt/>
- U.S. Department of State, 2013. Trafficking in Person Report. Trafficking in Person Report. Available at: <http://www.state.gov/j/tip/rls/tiprpt/2013/>
- U.S. Department of State, 2009. 2009 Country Report on Human Rights Practices. Available at: <http://www.state.gov/j/drl/rls/hrrpt/2009/>
- U.S. Department of State, 2012. Country Reports for Human Rights Practices 2012. Available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>
- Walk Free Foundation, 2013. The Global Slavery Index 2013. Available at: <http://www.globalslaveryindex.org/>
- Willman, M. (2009). Human Trafficking in Asia: Increasing Individual and State Accountability Through Expanded Victims' Rights. Columbia Journal of Asian Law, no. 22.

Witness Protection in Criminal Cases Act 2003. Available at: http://www.no-trafficking.org/resources_laws_thailand.html

Yamada, 2012. Comparative Analysis of Bilateral Memoranda on Anti-Human Trafficking Cooperation Between Thailand and Three Neighboring Countries: What do the Origin and Destination Countries Agreed Upon?. Institute of Developing Economies, Discussion Paper no. 249. Available at: http://ir.ide.go.jp/dspace/bitstream/2344/1140/1/ARRIDE_Discussion_No.349_yamada.pdf

Zermatten, J. (2009). The Best Interest of the Child. Literal Analysis, Function and Implementation. Institute International des Droits des l'Enfants.



ECPAT International

328/1 Phayathai Road
Ratchathewi, Bangkok
10400 THAILAND
Tel: +662 215 3388, +662 611 0972
Fax: +662 215 8272
Email: info@ecpat.net | media@ecpat.net
Website: www.ecpat.net