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The Criminal Justice Response to Human Trafficking

Recent Developments in the Greater Mekong Sub-region

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SYNOPSIS

This article highlights developments in the criminal justice response to human trafficking in the Greater Mekong Sub-region (GMS) over the last three years. Developments in the strengthening of the legal framework, criminal justice institutions and in support provided to victims are highlighted while acknowledging that progress has been uneven across the region. Many obstacles remain and more needs to be done to ensure that recent developments result in real change where it matters: better protected and supported victims; more and better quality prosecutions that are in accordance with international criminal justice standards; greater levels of cooperation between the GMS counties; and a donor community that is facilitating and supporting such changes.



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Introduction

This report will highlight developments in the criminal justice response to human trafficking in the Greater Mekong Sub-region (GMS)¹ over the last three years (2007-2009). This analysis is based on the following eight key elements, as identified by Gallagher and Holmes (2008):²

1. The legal framework;
2. Specialist police response;
3. Front-line law enforcement response;
4. Prosecutorial and judicial response;
5. Accurate identification of victims and the provision of protection and support once they have been identified;
6. Support to victims as witnesses;
7. International Cooperation; and
8. Coordinating support to the criminal justice response to trafficking.

While it is acknowledged that many obstacles continue to hamper the criminal justice response to trafficking, it is important to recognise that governments in the GMS have taken incremental steps to strengthen their criminal justice processes and have begun to overcome many obstacles. Significant improvement has been made in the level of support provided to victims of trafficking by criminal justice personnel with the cooperation of victim support agencies. This support must continue to develop so as to encourage other victims to cooperate with police and prosecutors and to ensure that those who do participate in the criminal justice process are able to access justice for the crimes committed against them.

1. The Greater Mekong Sub-region (GMS) was established in 1992 and comprises Cambodia, the Yunnan Province of the People's Republic of China, Lao People's Democratic Republic, Myanmar, Thailand, and Viet Nam. The GMS aims to promote development through closer economic links between members. The GMS program focuses on a range of different issues, including health and social matters associated with mobile populations. See <http://www.adb.org/gms/gmsprog10.asp> for more information on the GMS.

2. This framework is set out and described in detail by Anne Gallagher and Paul Holmes in: 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line', International Criminal Justice Review, Vol. 18, No. 3, 2008. (<http://icj.sagepub.com/cgi/content/abstract/18/3/318>).

1. The Legal Framework

An effective legal framework requires much more than simply criminalising human trafficking in the national legislation.

AN EFFECTIVE LEGAL FRAMEWORK INCLUDES:

- Criminal procedure and evidence laws that provide a solid legal basis for the investigation and prosecution of offences, particularly transnational crimes;
- The criminalisation of the range of crimes regularly committed during the trafficking process;
- Existing laws, treaties and agreements that enable governments to cooperate across international borders and facilitate mutual legal assistance, extradition and informal police to police cooperation; and
- Laws that enable the identification, seizure and forfeiture of proceeds of crime.

Thailand and Cambodia enacted specific human trafficking laws during this period that expand the definition of exploitation to cover a wider range of purposes³ and extending protection of the law to adult males as well as to women and children. The new Thai law outlines a range of protection and support measures that are to be provided to victims of trafficking, including immunity from prosecution for acts committed in connection with the trafficking process.⁴ China's accession to the Trafficking Protocol on 26 December 2009 is another important step forward.⁵ It is anticipated that the accession to the protocol will result in changes to the national legislation to better reflect the protocol's provisions.

Cambodia, Lao PDR, Myanmar and Thailand now define human trafficking in a way that generally reflects the internationally accepted definition.⁶ This has facilitated an increase in the previously very low number of male victims being identified in the sub-region and should also contribute to improved international cooperation on transnational offences because trafficking is now defined in similar terms.⁷

One risk that the criminal justice systems of the GMS must acknowledge and manage concerns an expanded definition of trafficking or exploitation being used to 'widen the net'⁸ in order to capture those involved in other offences that do not amount to human trafficking.

3. See section 4 of the Anti-Trafficking in Persons Act (BE 2551) [Thailand] and article 10 of the Law on Suppression of Human Trafficking and Sexual Exploitation (2007) [Cambodia].

4. See Chapter 4 of the Anti-Trafficking in Persons Law.

5. China's accession to the Protocol entered into force on 8 February 2010.

6. See article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. Myanmar enacted specific human trafficking legislation prior to the period under review. Lao PDR had also enacted a specific trafficking law for women and child victims and amended the Penal Code to create an offence of trafficking in persons prior to the period under review. Vietnam is currently drafting a specific human trafficking law.

7. See two previous SIREN reports that highlight the trafficking of male adult victims, namely: From Facilitation to Trafficking, 26 June 2007; and Exploitation of Cambodian Men at Sea, 22 April 2009.

8. I use the term 'widen the net' to refer to "any process in which offenders are subject to more intrusive sanctions than before" as used by Roach (2000, 25).

THE CRIMINAL JUSTICE RESPONSE TO HUMAN TRAFFICKING: RECENT DEVELOPMENTS IN THE GREATER MEKONG SUB-REGION

Marriage brokering for consenting adults should not be confused with trafficking crimes. The facilitation of migration across international borders, even where such migration is illegal is not trafficking unless the purpose of that facilitated migration is exploitative and, in the case of adults, unless certain means such as deception or coercion are used. While commercial adoptions can potentially involve the commission of a number of criminal offences, those that do not intend to or do not result in the exploitation of the child should not be prosecuted as trafficking cases. In this area and in all others, offenders should be prosecuted for the offences they commit. It is a fundamental mistake to prosecute other forms of criminal behaviour as human trafficking when the criminal behaviour does not satisfy all the elements of the trafficking offence.

Guidance on the limitations of the national trafficking law is important. In this regard it is relevant to note that the Ministry of Justice in Cambodia has issued written guidance to police and prosecutors on the proper interpretation and enforcement of the new trafficking law.⁹

Thailand and Cambodia have also recently amended or enacted their criminal procedure laws. The amended Thai law was strengthened by appointing the Attorney-General (or his/her delegate) as the responsible investigator for transnational crimes¹⁰ and by expanding the role that female officers are to play in the collection of evidence and identification particulars from females.¹¹ The Extradition Act (2008) was enacted in Thailand, identifying human trafficking as a predicate offence¹² and allowing the transfer of criminal proceedings to Thailand where extradition is refused on grounds of nationality.¹³

The new Cambodian law provides specialist police investigators with a mandate to conduct independent trafficking investigations;¹⁴ clearly identifies that defendants are now entitled to an interpreter if required;¹⁵ and contains provisions that control the extradition of offenders to/from Cambodia.¹⁶

While a strong legal framework around trafficking is important for every country, the impact of that framework will ultimately depend on how effectively it is implemented. The following discussion focuses on how some of the most important changes are being put into practice at the national and sub-regional level.

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN) TREATY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (AMLAT)

The AMLAT provides the legal basis for ASEAN countries to undertake mutual legal assistance for offences of a transnational nature. In terms of the GMS countries, Cambodia, Lao PDR, Myanmar and Vietnam have ratified the AMLAT bringing to nine the number of States parties to this important regional instrument. China, although not an ASEAN Member State, could consider acceding to this treaty under article 30(2) as any State can accede to the treaty upon consensus by the original Parties. To date, no known requests have been made or received using this instrument for human trafficking related cases.

9. Guideline No. 20/09 dated September 23, 2009 on the application of Article 9: Illegal taking away of persons including minors of the Law on the Suppression of Human Trafficking and Sexual Exploitation.
10. Section 20 of the Criminal Procedure Code (Thailand).
11. Section 85, 132 and 133. These sections require female officers to search female victims, collect evidence from female victims (particularly relevant in the collection of evidence during sexual and/or physical assault investigations) and for female officers to take fingerprints and other identifying particulars from female suspects. These provisions may have influenced the decision to increase the number of female investigators in the Thai AHTD because female officers are now required to undertake a wider range of evidence gathering functions.
12. Section 7.
13. Section 25.
14. Article 60 of the Criminal Procedure Code.
15. Article 144 of the Criminal Procedure Code.
16. Articles 566-602 of the Criminal Procedure Code. Human trafficking related offences would constitute a predicate offence for extradition under article 571 as the penalties for trafficking related offences are greater than the two year minimum imprisonment required.

2. The specialist police response

There is now widespread agreement that a specialised police investigative capacity is required to effectively investigate human trafficking at the national level.¹⁷

A number of different law enforcement structures exist in the six GMS countries that reflect the diverse legal, political and social contexts within the sub-region. This diversity is also reflected in the different policing models employed to investigate trafficking at the national level.

In Lao PDR, the specialist police response was moved from the Immigration Department to the General Police Department in 2007. This development was reinforced by the establishment of the Anti-Trafficking Division (ATD) at the central level and the creation of an Anti-Trafficking Unit (ATU) in each of the seventeen provinces.¹⁸ This restructuring provides a specialist investigative response for trafficking cases at the national level and significant efforts are being undertaken to provide specialist training to the recently appointed staff, a quarter of whom are female.

Myanmar employs a model based on a central level ATU that is supplemented by Anti-Trafficking Task Forces (ATTFs) in 'hot-spot' areas. There are now 21 ATTFs throughout the country, two of them established during the period under review,¹⁹ resulting in a strengthened presence in the west of the country. The vast majority of these investigators have undertaken specialist human trafficking training.²⁰

Thailand's specialist investigative response uses a different model to those highlighted above. The Anti-Human Trafficking Division (AHTD) was established in the Royal Thai Police in September 2009, to investigate human trafficking exclusively. The AHTD replaced the previous investigative unit whose responsibilities involved the investigation of a wide range of offences committed against women and children. While provincial police continue to investigate less complex trafficking cases, regular information regarding these cases is provided to the central level, providing a degree of coordination. The International Cooperation Centre (ICC) was also established in the AHTD in 2009 to facilitate international police cooperation. The rate of female personnel assigned to the AHTD rose to 22% at the end of 2009.

In Cambodia, the Department of Anti-Human Trafficking and Juvenile Protection (DAHT) was established in 2002, however, over the past three years it has expanded from seven provincial offices and now maintains a presence in all twenty-four provinces. The enactment of the Criminal Procedure Code (2008) also conferred a mandate on DAHT to undertake its own investigations, removing the previous constraint of having to investigate cases in partnership with judicial police officers who were not specialists in investigating human trafficking cases. The percentage of female officers in DAHT is now 14%, an increase of 9% over the last three years.

Vietnam established a centralised specialist investigation capacity, C14 - Unit 7, in 2005, mandated to undertake trafficking investigations that are of a complex and/or transnational nature involving women and child victims. Smaller specialist units exist in Hanoi, Ho Chi Minh City, Hai Phong and Lao Cai, however, the majority of women and child trafficking cases continue to be undertaken by locally based investigators.

17. Gallagher and Holmes (2008, 323).

18. Previous ATUs [or equivalent] existed in Savannakhet, Saravan, Champassak, Vientiane and Bokeo Provinces.

19. At Sitwe and Pathein.

20. More detail is provided on this specialist human trafficking training on page 5, see HTI Course.

China established the central level Anti-Trafficking Office under the Ministry of Public Security in 2007. Temporary provincial units were also established during a national anti-trafficking campaign in 2009. The Anti-Trafficking Office is mandated to conduct trafficking investigations that are of a complex and/or transnational nature involving women and child victims. As in Vietnam, the majority of women and child trafficking cases identified in China continue to be handled by local investigators.

The Mekong Sub-region has benefited from a greater engagement with ASEAN on the issue of trafficking. ASEAN, through its Senior Officials Meeting on Transnational Crime (SOMTC) supported by ARTIP, has developed, piloted and adopted a range of generic training materials for front-line law enforcement, specialist investigators and prosecutors. This approach aims to ensure the development of common standards and approaches to the investigation, prosecution and adjudication of trafficking cases throughout the ASEAN region. A significant proportion of specialist investigators from Cambodia, Lao PDR, Myanmar, Thailand, (and to a lesser extent China and Vietnam), have completed the *ASEAN Training Program on Trafficking in Persons for Specialist Investigators*.²¹ In keeping with ASEAN's approach, each course was individually customised for each of the six GMS countries. The police in Lao PDR and Myanmar have conducted devolved training courses (using the ASEAN training material mentioned above) for recently appointed investigators at the ATU/ATTFs over the past three years.

EVALUATION OF TRAINING ACTIVITIES

A variety of evaluation methods were used to assess the effectiveness of the training mentioned above. One of the most important involved participants being brought together one year after the completion of the course to identify if there were any changes in the way they performed their trafficking related investigations that could be attributed to the training. Another tool involved the analysis of finalised trafficking investigations and prosecutions through examination of the detailed police investigation file and the interview of police and prosecutors involved in the cases. These evaluations provided examples where investigators, as a result of the training: delivered improved support to victims during the investigation; referred more victims to support agencies; identified and remedied cases of victim misidentification; and increased police-to-police cooperation on transnational cases.

21. The predecessor to this course was the Human Trafficking Investigation Skills Course (HTI Course) developed by ARCPT/ARTIP. The ASEAN Training Program on Trafficking in Persons for Specialist Investigators was developed by ARTIP and endorsed by ASEAN SOMTC in June 2009. The purpose of this course is to improve the capacity of specialist law enforcement officials to investigate trafficking crimes through the use of reactive investigative techniques while protecting the human rights of victims. It is a two week course that consists of 14 modules.

3. The frontline law enforcement response

Frontline law enforcement officials (including general duties police, border guards and immigration and customs officials) are most likely to come into contact with victims and perpetrators of trafficking or to receive the initial information or complaint.

It is therefore essential that frontline officials have the knowledge, skills and ability to provide an effective first response when confronted with a human trafficking case.

There has been an increasing awareness of human trafficking amongst frontline law enforcement officials, particularly police, in all GMS countries over the past three years. This has been achieved through a range of dedicated national training and awareness raising programs. A number of the countries have developed a national human trafficking curriculum, drawn from a range of training sources, including the COMMIT Regional Training Program.²² These national programs continue to be delivered to frontline law enforcement officials in Thailand, Cambodia, China and Vietnam and provide participants with a basic understanding of human trafficking issues and good practices in countering this crime (UNIAP 2009). These programs appear to have been a particularly effective vehicle in Thailand and Cambodia for disseminating information to law enforcement officials on the recently enacted human trafficking laws, resulting in a better understanding amongst law enforcement of how to interpret and apply the new law.

The ASEAN Training Program on Trafficking in Persons for Front Line Law Enforcement Officials (ASEAN FLO course), endorsed by SOMTC in 2008, has now been customised for use in all GMS countries with the exception of China. National police trainers from Cambodia, Lao PDR, Myanmar, Thailand, and Vietnam now facilitate the delivery of this program. Evaluation of this training found that the program has strengthened frontline officials' ability to: (i) recognise human trafficking when they are confronted with it; (ii) more accurately identify victims; (iii) provide victims with increased protection and support and; (iv) enhance cooperation between frontline officials and specialist investigators.

The inclusion of a human trafficking component in the national police recruit/cadet curriculum is an area that requires more attention. A number of organisations are assisting the national police in the development of an appropriate curriculum that would ensure new police recruits graduate with a basic understanding of the crime of human trafficking and the basic elements of an effective frontline response.

A range of international agencies, non-governmental organisations and bilateral / regional projects are now involved in providing training to law enforcement agencies in the six GMS countries. This diverse range of training and awareness raising courses has resulted in an increased understanding of human trafficking by frontline law enforcement officials and more accurate identification of victims of trafficking. Given the range of donors and organisations involved, it is important to coordinate effectively to reduce the risks of duplication or conflicting messages. The management of this issue will be discussed under the coordinating the response component below.

22. The COMMIT Anti-Trafficking Training Programme for the Greater Mekong Sub-Region was developed by UNIAP. The goal of this course is to provide a thorough grounding in the subject of human trafficking in order to equip participants with the knowledge, understanding and skills to influence and enhance policy and practice in countering human trafficking in the GMS Region.

EVALUATION OF CRIMINAL JUSTICE TRAINING INITIATIVES

Attributing changes in work performance to a specific training initiative is rarely straightforward. It can be difficult to isolate the impact of training from other factors such as previous knowledge or experience on the part of trainees. Those who have been trained may also encounter resistance in applying new knowledge and skills to their daily work activities because of any number of institutional, operational and even cultural factors. It is recommended that the following four areas²³ be considered as part of any evaluation of training provided to criminal justice personnel:

1. Participants' reaction – what was their impression of the quality/relevance, of the training program?
2. Participants' learning - what changes could be documented with respect to knowledge, skills and attitude as a result of the training?
3. Participants' behaviour – what impact did the training have on how participants performed their duties?
4. Results – use the above findings to develop future inputs that target areas of need.

4. The prosecutorial and judicial response

In comparison with specialist investigators and front-line law enforcement, prosecutors and judges in the GMS have received significantly less training and support in the area of human trafficking. However, there have been important developments over the past three years.

In Thailand, the Office of the Attorney General (OAG) established the Centre against International Human Trafficking (CAHT) in May 2007. The CAHT coordinates the collection and analysis of human trafficking related information and in the provision of advice and training to a range of stakeholders. An informal 'prosecutor's network' was established in Thailand in 2009 that facilitates the dissemination of trafficking related information and encourages the 187 members to share advice on specific trafficking cases. While the establishment of a specialist prosecutors unit for human trafficking cases in Thailand is under discussion, no specialist unit with a mandate to prosecute trafficking cases has yet been formed. The OAG trained 550 prosecutors on the new trafficking law in 2009. This increased knowledge of the national law amongst prosecutors has resulted in greater cooperation between the OAG and the Ministry of Social Development and Human Security (MSDHS)²⁴ which is responsible for victim support. As a result, there is anecdotal evidence of improved protection and support to victims and, apparently, an increase in the number of victim compensation claims being made to the Court.²⁵

23. These four levels of evaluation were identified by Donald L. Kirkpatrick and are widely referred to as 'The Kirkpatrick Model' of evaluation. See Victoria Gibson's Training Evaluation: The Case of the Police Service at www.rimb.mmu.ac.uk/symposium2009/.../Gibson,%20Victoria.pdf for more information on this model.

24. MSDHS is the government institution responsible for promoting social development and creating public equality and social justice in Thailand. See http://www.m-society.go.th/en/content_detail.php?pageid=223

25. Section 34 of the Anti-Trafficking in Persons Law (Thailand) requires prosecutors to inform victims of trafficking of their right to legal aid and of the right to claim compensation. Section 35 authorises the Public Prosecutor to claim compensation on behalf of the victim "...to the extent as informed by the Permanent Secretary for Social Development and Human Security..." The anecdotal evidence was obtained during discussions with prosecutors and government social workers, however no detailed analysis has been undertaken to date to measure the impact this provision has had on the number of successful compensation claims.

Prosecutor and police cooperation on transnational crimes has improved over the last three years as a result of amendments to the Criminal Procedure Code in Thailand that allows a prosecutor to be assigned to work with the police on transnational cases during the investigation phase.²⁶ A further benefit of the new arrangement is that the prosecutors on these joint teams (through the international affairs department) can send requests directly to the Central Authority of other countries in accordance with existing treaties or under national mutual legal assistance and extradition laws. It is anticipated that this team approach should result in better investigations and stronger prosecutions for transnational crimes. It is recommended that progress be monitored to assess whether this new procedure produces meaningful collaboration in practice.

The ASEAN Awareness Program on Trafficking in Persons for Judges and Prosecutors (ASEAN Awareness Course)²⁷ is a generic training program that was endorsed and formally adopted by ASEAN for use in its member States in 2008. This course has been customised for use in, and delivered in, all GMS countries except China. The ASEAN Skills Course on Trafficking in Persons for Specialist Prosecutors (ASEAN Specialist Prosecutors Course)²⁸ has been developed as an intensive five day training program and has been customised for use in, and delivered in four countries, including Cambodia and Thailand in the GMS.²⁹ It is expected that this training will increase the level of competence among prosecutors to analyse evidence, work more effectively with police, perform more persuasively in trial and ensure that victims and witnesses are better protected and supported. Detailed evaluation of these courses highlighted positive participant reaction to the course and to the development of knowledge, skills and attitude amongst participants. Evaluation of the impact of this training in the work environment has not been undertaken due to the recent delivery of those courses.

The Royal Academy of Judicial Professions in Cambodia incorporated the ASEAN Awareness Course into the in-service and induction training programs for judges and prosecutors.³⁰ In Lao PDR, the Prosecutors' School conducts an induction course that dedicates two days to the familiarisation of human trafficking related laws.

26. Section 20.

27. This course was developed by ARTIP and is of two days duration. This course has increased the awareness of trafficking among non-specialist prosecutors and judges and strengthened their capacity to recognise and understand basic legal concepts, trial issues and practical concerns often involved in human trafficking cases.

28. This course was developed by ARTIP. This curriculum has been piloted in four countries and will be submitted for ASEAN review and endorsement in 2010. The course will also be delivered in Vietnam in 2010.

29. This course will be submitted to ASEAN's SOMTC in June 2010 for consideration and endorsement. This course provides basic legal and courtroom skills training on litigation issues in human trafficking cases, including victim interview techniques, developing corroborative evidence for trial, preparing the victim to testify in court and delivering a persuasive closing argument.

30. The curriculum was developed by ARTIP in collaboration with the Royal Academy of Judicial Professionals, with support from the Asia Foundation.

5. Accurate identification of victims and the provision of protection and support once they have been identified

It is imperative that criminal justice personnel quickly and accurately identify victims of trafficking as they will only then be able to access the protection and support to which they are legally entitled.

Some countries in the GMS have legislated, issued policies and entered into bilateral agreements during the last three years outlining the nature of protection and support to be provided to victims once they have been identified.³¹ Many victims have benefited from these services although their availability and accessibility is not consistent throughout the GMS countries, or even across provinces in each country. Notable developments include the routine provision of legal advice for victims in Thailand; an increase in applications for compensation (that is expected to result in a greater number of victims being awarded compensation); and a greater level of victim access to shelter, vocational training and micro-credit. In addition, more male victims of trafficking are being identified in Cambodia, Lao PDR, Myanmar and Thailand than previously and higher numbers are accessing services than was the case three years ago.

Of continuing concern is the mandatory nature of some shelter regimes, particularly with respect to foreign victims of trafficking. Requiring victims to remain in shelters, sometimes for long periods while waiting for criminal proceedings to be completed, places an undue hardship on victims and can weaken their resolve to cooperate with law enforcement. It has been shown that routine detention of victims of trafficking is a violation of international law and never justifiable on policy grounds. Victim detention in a shelter could be legally defensible under certain, carefully circumscribed circumstances. However, the onus remains firmly on the State to justify each detention on a case-by-case basis and also to demonstrate how the protections provided by international law (for example, the right to judicial review of any detention) are being applied.³² In this respect, the new trafficking law in Thailand, which makes referral to a shelter discretionary, and provides for the possibility of temporary visas for foreign victims,³³ is a positive development. However, these new legal protections should be applied to a greater number and range of victims than is currently the case. All States are encouraged to abolish the routine or mandatory detention of victims, including in shelters. All States should also consider providing foreign victims with temporary visas to enable them to receive appropriate support, and where appropriate, to assist the criminal justice system in the prosecution of their exploiters.

No law enforcement agency has the skills or resources to meet the requirements of victims of trafficking with respect to accommodation, medical attention, legal advice etc. It can also be argued that this is not an appropriate law enforcement function. In recognition of these realities, police and victim support agencies have strengthened their cooperation resulting in more effective services being provided to victims over the last three years. New shelters have been established in China, Lao PDR, Myanmar, Vietnam and Thailand and victims in all GMS countries are able to access a wider range of support services through referrals to these government and non-government support providers. The recent improvements in frontline law enforcement capacity to identify victims of trafficking referred to above should help to ensure these improvements benefit a greater number of victims.

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31. See: Cambodia - Policy on the Protection of the Rights of Victims of Human Trafficking (2009) and the Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies In Cases of Human Trafficking (2007); Thailand - Chapter 4 of the Anti-Trafficking in Persons Law (2008); Vietnam - Inter-Ministerial Circular Number 03/2008/TTLT-MPS-MOD-MOFA-MOLISA (Vietnam) that outlines support to be provided to female and child victims repatriated from outside Vietnam; and a bi-lateral agreement entitled, Bilateral Agreement between the Royal Government of Kingdom of Cambodia and the Government of Socialist Republic of Vietnam on Cooperation in Joint Standard Operation Procedures for Identification and Repatriation of Trafficked Victims (2009).
 32. See Anne Gallagher and Elaine Pearson, The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking, 32 Human Rights Quarterly (2010).
 33. Section 37 and 38 of the Anti-Trafficking in Persons Act.

The criminalisation of victims of trafficking for status related offences (most typically, illegal work and illegal migration) continues to be a problem in some GMS countries. Provisions such as those contained in the new Thai trafficking law that mandate non-prosecution for status related offences is an important step forward in improving victim protection and support as well as in encouraging victims to participate in the prosecution of their exploiters.³⁴

These positive developments are tempered by the fact that many victims continue to be unidentified or misidentified by criminal justice personnel and therefore are deprived of a range of possible protection and support entitlements.³⁵ Furthermore, once identified, the ability of authorities to adequately protect the victim (or their loved ones) from intimidation or interference from traffickers is often ineffective due to a lack of resources, corruption or ineffective international cooperation.

6. Support to victims as witnesses

The vast majority of human trafficking related investigations conducted in the GMS are of a reactive nature, meaning that cases are brought to the attention of police by victims or their families.

While proactive investigations can help to ease reliance on victim testimony it is important to accept that the expertise and resources required for effective proactive investigations are not available in most, if not all, GMS countries. It is therefore important to consider how victims can be encouraged to participate in the prosecution process.

Overall, there has been little progress in this area over the past three years in the GMS. Victims acting as witnesses in trafficking cases require greater access to comprehensive legal advice so that they are aware of their rights during the investigation, prosecution and trial stages. Victims and/or the prosecution often are unaware that they can request judges to consider a whole range of options designed to protect the victims in court, including: erecting temporary screens in court to prevent the witness from having to testify in full view of the accused; allowing the victim to testify from a remote location via video link; conducting the court proceedings *in-camera*; or allowing for pre-trial depositions which remove the need for the victim to appear during the trial.

In some cases screens are being used in courts in Thailand and Cambodia to protect the privacy of the victim. Also in Thailand, child victims routinely are permitted to testify via video link from a child-friendly room outside of the courtroom. A recent amendment to the Criminal Procedure Code in Thailand allows video recorded victim statements to be considered as admissible evidence³⁶ (although it is too early to see if this has had the desired effect of reducing the victim's trauma whilst providing their evidence in chief). The Thai national trafficking law and the criminal procedure code also permit the victim/witness to be deposed and cross-examined before a judge prior to trial. This allows the deposed statement

34. See section 41 of the Anti-Trafficking in Persons Act (2008 in Thailand). Also see UNIAP (2010, 60-63) that identifies legal provisions in Lao PDR and Myanmar that were implemented prior to the period under review that offer limited protection from prosecution to specific categories of victims. For more detail see article 25(6) of the Law on Development and Protection of Women (2004 in Lao PDR) and section 13(a) of the Anti-Trafficking in Persons Law (2005 in Myanmar).

35. See Olivie, A. (2008). Identifying Cambodian Victims of Human Trafficking Among Deportees from Thailand.

36. Section 172 of the Criminal Procedure Code as amended on 30 January 2008.

to be introduced at trial without the need for the victim to be present, and consequently allows the victim to return home earlier than was the case previously. This eliminates the need for the victim to remain in shelter accommodation for an extended period waiting for the criminal justice process to be completed.³⁷

Victims in the majority of the GMS countries are not always required to testify or to attend the court trials. Courts in many of the GMS countries frequently rely on victim statements provided to investigators, prosecutors and/or investigating judges to inform the court of the victim's allegations. This situation prevents the accused or their representative from cross-examining the victim to test the allegations. This procedure is helpful to the victim in so far as it eliminates the dangers and delay of testifying in court, but it raises serious concerns about the fairness of the trial process itself.

**THE CONTINUING RELIANCE ON REACTIVE INVESTIGATIONS IS
PROBLEMATIC FROM A NUMBER OF DIFFERENT PERSPECTIVES:**

- It ensures that many cases of trafficking go undetected.
- It makes victim testimony the centre of the prosecution case.
- Victims may be unable or unwilling to testify against their exploiters.
- The court process itself may be damaging to already traumatised witnesses.
- Failure on the part of investigators to secure corroborative evidence may place additional and unwelcome pressure on victim-witnesses.

37. Section 31 of the Anti-Trafficking in Persons Law.

7. International Cooperation

While human trafficking can and does occur domestically in the GMS, there is often a transnational component to the crime. International cooperation is therefore required in order to conduct professional and thorough investigations and to prosecute transnational cases.

Cooperation can be both formal (extradition and mutual legal assistance) or informal (e.g. exchange of intelligence between specialist police trafficking units). The legal basis for formal international cooperation can be a bilateral or multilateral treaty, national legislation or the principle of reciprocity (by which one country will cooperate if the other agrees to do the same in the future). There does not necessarily need to be a legal basis for informal cooperation.

There have been some developments in formal cooperation over the last three years. As mentioned, the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters (AMLAT) has been ratified by four States of the GMS, providing the basis for international cooperation in the collection of evidence in one State, for the use in another State.³⁸ While Thailand has yet to ratify the AMLAT, it did enact the Extradition Act (2008) which identifies trafficking offences as predicate offences³⁹ and allows for the transfer of criminal proceedings to Thailand where extradition is refused on grounds of nationality.⁴⁰ Four of the States in the GMS have also ratified The United Nations Convention against Transnational Organized Crime⁴¹ and its Trafficking Protocol which provides an alternative legal basis for international legal cooperation in trafficking cases.

A continuing concern is the extremely small number of requests for formal mutual legal assistance in the GMS for human trafficking cases. Cooperation between States must increase in order to raise the standard of investigations and to identify greater numbers of criminals involved in trafficking in source, transit and destination countries.

Informal police-to-police cooperation is one area that has seen some encouraging developments. A number of Border Liaison Offices (BLOs) have been established at the China/Myanmar, China/Lao and China/Vietnam border areas to facilitate police cooperation on human trafficking cases.⁴² There have been positive results regarding the conduct of a small number of joint investigations, exchanges of intelligence and faster repatriation of victims as a result of operations of these BLOs. The Heads of Specialist Units Process (HSU), involving the regular meeting of the heads of the specialist police anti-trafficking units throughout ASEAN, continues to exchange intelligence on specific human trafficking cases.⁴³ The HSU process involves all GMS countries with the exception of China and will soon be formally incorporated into ASEAN, thereby ensuring its on-going sustainability. Some significant successes have been identified as a result of the HSU including the arrest of offenders and the rescue and repatriation of victims of trafficking.

Various Memoranda of Understanding (MoUs) were also entered into during this period and have improved cooperation, particularly in the repatriation of victims. Recent MoUs include those between Myanmar/China, Myanmar/Thailand, Vietnam/Cambodia and Vietnam/Thailand.

The Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region (COMMIT MoU) is a significant agreement that provides direction and a degree of coordination at both the national and sub-regional level. Governments of the GMS have developed the Sub-Regional Plan of Action II (SPA II) (2008-2010), and some have also developed National Plans of Action that reflect the content of the SPA II.

38. Cambodia, Lao PDR, Myanmar and Vietnam.

39. Section 7.

40. Section 25.

41. Cambodia, China, Lao PDR and Myanmar have ratified the Transnational Organized Crime Convention (TOC) and its Trafficking Protocol. Thailand has signed the TOC and its Trafficking Protocol while Vietnam has signed the TOC.

42. Seven BLOs were opened in Dongxing, Pingxiang and Jingxi in Guangxi Province and Hekou City in Yunnan Province (to cooperate with Vietnam), in Ruili and Zhangfeng in Yunnan Province (to cooperate with Myanmar), as well as in Mengla in Yunnan Province (to cooperate with Lao PDR) to strengthen international police cooperation and to facilitate the repatriation of trafficking victims and to prosecute traffickers.

43. The HSU Process was initiated in 2004 and ARTIP provided financial and technical support to the HSU during 2004-2009. ARTIP continues to provide technical support to this initiative which is now self-funding.

8. Coordinating support to the criminal justice response to trafficking

States, international organisations and other donors that provide funding to the governments of the GMS to strengthen their criminal justice response to trafficking, must work to implement their counter-trafficking activities in a coordinated manner.

These organisations must also ensure that their work is coordinated closely with the national plans and priorities of the target country. Donors should also ensure that their support is directed towards the implementation of international and regional standards that guide the national criminal justice response to trafficking.

Thus far, cooperation and coordination between donors in counter-trafficking has generally been ad-hoc. One example of good practice is the establishment of an Advisory Group to the National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and Sexual Exploitation in Cambodia. The role of the Advisory Group includes the promotion of coordination amongst donor agencies, civil society partners and government stakeholders. The Advisory Group is also promoting the development of a consistent national curriculum for criminal justice agency training schools through the sharing of counter-trafficking training materials. The ASEAN training programs discussed in component 2 and 3 (for police) and 5 (for prosecutors and judges) are a regional example of a coordinated approach that seeks to promote the adoption and integration of common standards and practices throughout the ASEAN/GMS region.⁴⁴

CONCLUSION

This article has shown that there has been some important progress over the past three years in strengthening the criminal justice response to trafficking in the GMS. However, that progress is uneven and incremental. More needs to be done to ensure that changes to laws, practices, institutions and procedures result in real change where it matters: better protected and supported victims; more and better prosecutions that are in accordance with international criminal justice standards; greater levels of cooperation and collaboration between GMS countries; and a donor community that is facilitating and supporting such changes.

44. This is particularly the case for the five ASEAN member states. China has not had the same level of exposure to these specific ASEAN courses as it is not an ASEAN member state. A small number of Chinese police have participated in training courses that have utilised the ASEAN material.

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LEGISLATION LIST

Cambodia

Code of Criminal Procedure of the Kingdom of Cambodia (2008).

Law on Suppression of Human Trafficking and Sexual Exploitation (2007).

China

Criminal Law of the People's Republic of China (1997).

Lao PDR

Law on Development and Protection of Women (2004).

Penal Code 2005.

Myanmar

Anti-Trafficking in Persons Law 2005.

Thailand

Anti-Trafficking in Persons Act (B.E. 2551) [2008].

The Criminal Procedure Code Amendment Act (30 January 2008).

Extradition Act (B.E. 2551) [2008].

Vietnam

Penal Code 2000

KEY RECOMMENDATIONS

1. All governments in the GMS should continue to review their laws that criminalise human trafficking. China's recent accession to the Trafficking Protocol and Vietnam's continuing work in drafting a specialist anti-trafficking in person law provide an opportunity to ensure that all GMS countries define trafficking in a consistent way that reflects the internationally accepted definition provided in the Trafficking Protocol.
2. Governments in the GMS should closely monitor human trafficking prosecutions to ensure that an expanded definition of trafficking or exploitation is not being applied to 'widen the net' in order to capture those involved in other offences that do not amount to human trafficking.
3. All investigators appointed to the specialist police response units in each of the GMS countries should receive training that is consistent with the ASEAN Training Program on Trafficking in Persons for Specialist Investigators with a view to ensuring they have the knowledge and skills required to conduct a reactive investigation of human trafficking cases in accordance with international and regional standards.
4. Front line law enforcement officials in the GMS who are likely to come into contact with victims and perpetrators of trafficking should receive training that is consistent with the ASEAN Training Program in Trafficking in Persons for Front Line Law Enforcement Officials with a view to ensuring that they have the knowledge and skills to provide an effective first response when confronted with the crime of trafficking in accordance with international and regional standards.
5. A human trafficking component should be included in the national police training curriculum for recruits/cadets and for in-service training programs.
6. All judges and prosecutors should receive training consistent with the ASEAN Awareness Program on Trafficking in Persons for Judges and Prosecutors in order to ensure they have the necessary knowledge of the crime of trafficking and the relevant legal framework.
7. Prosecutors likely to be regularly involved in the prosecution of trafficking cases receive training consistent with the ASEAN Skills Course on Trafficking in Persons for Specialist Prosecutors in order to ensure they have the knowledge and skills to effectively prosecute such cases in accordance with international and regional standards.
8. A human trafficking component should be included in the national training curriculum for judges and prosecutors in all GMS countries.
9. Governments in the GMS should ensure that victims of trafficking are not detained, including in shelters. Consideration be given to providing foreign victims with temporary visas to enable them to receive appropriate support, and if appropriate, to assist the criminal justice system in the prosecution of their exploiters.
10. Victims should be provided with a range of support services including comprehensive legal advice so that they are aware of their rights during the investigation, prosecution and trial processes.
11. Investigators should, where appropriate, consider the more regular use of pro-active investigation techniques to supplement their reactive investigations and to reduce the current heavy reliance on the victim as a witness.
12. Greater efforts should be directed towards international cooperation and to the use of international cooperation tools including mutual legal assistance and extradition to ensure that offenders in the source, transit and destination countries are identified, investigated and prosecuted.



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