JILS (JOURNAL *of* INDONESIAN LEGAL STUDIES)
NATIONALLY ACCREDITED JOURNAL (SINTA 2)
Published by Faculty of Law, Universitas Negeri Semarang, Indonesia
Volume 5 Issue2, November 2020 ■ ISSN (Print) 2548-1584 ISSN (Online) 2548-1592

RESEARCH ARTICLE

CYBERCIME IN ASEAN: ANTI-CHILD PORNOGRAPHY LEGISLATION

Robert Brian Smith
Walailak University, Thailand
222 Tahiburi, Tha Sala District, Nakhon Si Thammarat 80160, Thailand
✉ r.b.smith@unswalumni.com

Submitted: March 7, 2020 **Revised**: June 12, 2020 **Accepted**: October 20, 2020

ABSTRACT

Child pornography is one of the most pernicious crimes amongst the various forms of cybercrime. Offensive materials can be quickly disseminated over the internet with no respect for international borders. ASEAN leaders undertook at their 31st ASEAN Summit to prevent and tackle cybercrime including harmonising their laws. This paper is based on an analysis of the cybercrime legislation of all ten ASEAN countries to determine how the offence of child pornography is covered in their legislation. As the offence has extra-territorial consequences the analysis includes a discussion of the extraterritorial reach of the legislation. It was found that most of the jurisdictions have specific statutes or specific articles in their Criminal Codes concerning the crime of child pornography. They do not necessarily refer to cybercrime or computer-related crime. Mutual cooperation is essential in combating cybercrime as is legislation that clearly defines the offence and is agreed across all jurisdictions. The paper analyses the current status of harmonization of laws in ASEAN and discusses a possible way forward in the harmonization of anti-child pornography legislation across ASEAN.

Keywords: ASEAN; Anti-Cybercrime Legislation; Child Pornography; Cybercrime; Harmonization of Laws

TABLE OF CONTENTS

HOW TO CITE:
Smith, R. B. (2020). Cybercrime in ASEAN Anti-Child Pornography Legislation. *JILS (Journal of Indonesian Legal Studies)*, 5(2), 277-294. https://doi.org/10.15294/jils.v5i2.37931.

INTRODUCTION

Child pornography as an offence is not new. What is relatively new is the ability of offenders to use cyberspace to produce and distribute such materials almost instantaneously to their clients around the world. This provides a serious challenge to law enforcement agencies as the offence

becomes extra-territorial. In such a case which agency, in which country, has jurisdiction? The overarching concerns of cybercrime and cybersecurity are being addressed by governments around the world. They are recognizing that prevention of all types of cybercrime requires a coordinated international response.

In response to these concerns, ASEAN heads of government signed the *Declaration to Prevent and Combat Cybercrime* in November 2017. The Declaration acknowledged the importance of harmonizing cybercrime laws and encouraged members to explore the feasibility of acceding to existing regional and international instruments. It also emphasized the need for cooperation between the member states, their agencies and ASEAN Dialogue Partners as well as relevant regional and international organizations such as ASEANAPOL (ASEAN National Police), Europol and Interpol. The Association of Southeast Asian Nations (ASEAN) includes ten member states: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

Whilst there is no universally accepted definition of **cybercrime** this paper has adopted that defined in the *Convention on Cybercrime* 2001 (Budapest Convention). It can be offences against the confidentiality, integrity and availability of computer data systems (Art 2 to Art 6); computer-related offences where a computer is used to commit a crime (Art 7 and Art 8); content related offences (Art 9); offences related to infringements of copyright and related rights (Art 10); and ancillary liability and sanctions including attempting to committing an offence or aiding or abetting an offence (Art 11).[1]

The *Convention* only contains one set of content related offences, namely offences related to child pornography (Art 9). Child pornography includes pornographic material that visually depicts a minor, or a person appearing to be a minor, engaged in sexually explicit activity or realistic images representing such conduct (Art 9).

---

[1] Jonathan Clough, *A world of difference: the Budapest Convention on Cybercrime and the challenges of harmonisation*, 40 MONASH U.L.REV. 698, 711-15 (2014). For further reading, also see, *The Convention on Cybercrime 2001* (Budapest Convention), *hereinafter as* Budhapest Convention; Lennon YC Chang, *Legislative Frameworks Against Cybercrime: The Budapest Convention and Asia*, 327 *THE PALGRAVE HANDBOOK OF INTERNATIONAL CYBERCRIME AND CYBERDEVIANCE*, 327-343 (2002); Zahid Jamil, *Global Fight Against Cybercrime: Undoing the Paralysis*, 109 *GEORGETOWN J. INT. AFF.*, 109-120 (2012).

Clough has provided a cogent discussion on **harmonization** in his critique of the *Convention on Cybercrime*. This author has broadened the focus of the original discussion to cover transnational crime. Clough emphasizes that '*harmonized does not mean identical*'[2] and that what is needed is the ability for enabling enforcement mechanisms to work effectively, taking into account national and regional differences influenced by each party's legal traditions, history and culture; with key issues including substantive and procedural law; as well as possible legal restrictions or prohibitions on mutual assistance and extradition. He further argues that an effective response to transnational crime must seek a harmonization model that seeks to accommodate and reconcile differences between the parties. He suggests that one solution could be to allow parties to exercise their right to declare reservations so that implementation can be adapted to the local conditions thus addressing the difficulties in achieving consensus between all parties. Finally, he argues that, in spite of these difficulties, harmonization is critical in the case of transnational crime such as cybercrime as there is a need to ensure that there is no safe haven provided to the offenders and there is effective cooperation between the various law enforcement agencies.

Nottage et.al recommend that ASEAN should improve its strategies for dealing with social and economic challenges by better promotion, assistance, and coordination from the bottom up rather than adopting a top-down strategy. They called this approach the 'shared regional value' (SRV). They argue that such an approach allows a regional organization to more likely to reach its full potential if it "explicitly recognizes that the primary interest of each of its members is seeking to advance their national interest; and second, the organization focuses on facilitating the advancement of those interests" in a disciplined way to obtain tangible outcomes and not just focus on process.[3]

Such an approach has been suggested by Smith (2019) based on the assessment of the difficulties associated with a region where there is a variety of languages and legal systems. He argues, therefore, that the

---

2 CLOUGH, *supra note 1*, at 701.

3 LUKE NOTTAGE, JUSTIN MALBON, JEANNIE PATERSON, & CARON BEATON-WELLS, ASEAN CONSUMER LAW HARMONISATION AND COOPERATION (INTEGRATION THROUGH LAW: THE ROLE OF LAW AND THE RULE OF LAW IN ASEAN INTEGRATION) 11587-11593 (Cambridge University Press, 2019), *hereinafter as* NOTTAGE.

drafting of a model set of laws in English, the working language of ASEAN is not a suitable approach. Rather, a treaty or convention would be a more appropriate approach. The treaty should set the minimum legal standards that must be achieved but allow for reservations for country specific conditions as long as the treaty's intent is met. This is independent of the language in which the law is drafted.

This research is based on an analysis of the cybercrime legislation of all ten ASEAN countries to determine how the offence of child pornography is covered in their legislation. As the offence has extra-territorial consequences the analysis includes a discussion of the extra-territorial reach of the legislation. Finally, it assesses how anti-child pornography laws could be harmonized across ASEAN and whether any of existing harmonization approaches that have been adopted in ASEAN could act as model.

ANTI-CHILD PORNOGRAPHY LAWS IN ASEAN

I. INTERNATIONAL TREATIES

All ASEAN members are state parties to the *Convention on the Rights of the Child* 1989 and all members except Singapore are state parties to its *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* 2000. Only the Philippines is a state party to the *Convention on Cybercrime* 2001.

Finally, all ASEAN members are state parties to the *ASEAN Convention Against Trafficking in Persons, Especially Women and Children* 2015.

II.NATIONAL LAWS

For this analysis the author has used the child pornography offences enumerated in Art 9 of the *Convention on Cybercrime* (abbreviated to the *Convention* further in this paper) namely:

a) Producing child pornography for computer distribution;

b) Using a computer system to offer or make available child pornography;
c) Using a computer to distribute or transmit child pornography;
d) Procuring child pornography through a computer system; and
e) Possessing child pornography in a computer system or on computer-data storage media.

ASEAN members have been very active since 2015 in enacting new or amended anti-child pornography legislation apparently encouraged and supported by international organizations. Six members enacted legislation over that period with Myanmar and Singapore enacting legislation in 2019.

Brunei Darussalam has included child pornography in its revised *Penal Code* 2016. There are two offences: possession of indecent photograph of a child (s 293A) and taking, distribution, showing, advertising, and accessing an indecent photograph of child (s 293B). An indecent or obscene photograph or pseudo-photograph includes 'data stored on a computer disc or by other electronic means which is capable of conversion into a photograph or pseudo-photograph' (s 293C). While the offences are defined differently from those in the *Convention* it can be argued that they are compliant.

Cambodia is dependent on a 2007 *Royal Kram on Suppression of Human Trafficking and Sexual Exploitation* for prosecuting child pornography whilst its draft Cybercrime Law continues to be discussed within the government. If the draft Law is enacted as currently drafted the child pornography offences are fully compliant with the *Convention*. The current law defines child pornography as visible material such as in a photograph or video including in electronic form of a child's naked body "to excite or stimulate sexual desire" (Art 40). The offences are: distribute, sell, lease, display, project or present in a public place (Art 41); possess, transport, import, or export child pornography (Art 42); and produce child pornography (Art 43).

Indonesia's child pornography offences are dispersed across a number of laws with two being the most relevant to this study. The *Law on Child Protection* 2002 criminalizes the economic or sexual exploitation of a child (art 59 and art 88) although what constitutes economic or sexual exploitation is not defined. *Law No. 44 of 2008 on Pornography* is an all-embracing anti-pornography law that also includes offences related to child pornography. Section 1 of the law has a very explicit list as to what

constitutes pornography. It is forbidden to produce, distribute, import or export, duplicate or store pornography (ss 4.1 & 4.2). Every person is forbidden from watching and storing pornography (s 8); nor are they to be a model or object in pornography (s9) nor encourage another so to do (s10). It is also forbidden to allow children to participate in pornographic activities (ss 11, 12 & 16).

Under the **Lao PDR** Law on the *Protection of the Rights and Interests of Children* (2006) a person who 'produces, distributes, disseminates, imports, exports, displays or sells magazines, photographs, films, videos, VCDs, DVDs or other items of child pornography' is guilty of an offence (art 86). The law does not specifically refer to crimes committed using a computer system.

The *Sexual Offences against Children Act* 2017 of **Malaysia** includes a comprehensive set of child pornography offences; making or producing child pornography (Art 5); making preparations to make or produce child pornography (Art 6); using a child in making or producing child pornography (Art 7); exchanging or publishing child pornography (Art 8); selling child pornography to a child (Art 9); and accessing child pornography (Art 10). As is the case in Lao PDR, the Act does not specifically refer to crimes committed using a computer. A feature of the Act is the inclusion of detailed descriptions as to what constitutes an offence.

Myanmar enacted the Pyidaungsu Hluttaw Law No. 22/2019 - Child Law in July 2019. At the time of writing in March 2020 there was no official English translation available nor was it possible to obtain an unofficial version. Nevertheless, it is possible to identify the key features of the Law as it applies to child pornography which is defined in article 3(D) of Chapter 1. The definition includes activities undertaken using computer systems including distributing child pornography through websites and social networks. The offences are identified in art 66(D) of Chapter 18: namely possessing, offering, selling. or distributing child pornography as well as importing or exporting from abroad.

The *Anti-Child Pornography Act of 2009* of the **Philippines** has a very extensive and explicit set of definitions of child pornography (s 23). The offences (s 22) are not computer dependent. Under s 4 (c)(2) of the *Cybercrime Prevention Act of 2012* if a computer is used in committing the

offences as prescribed in the *Anti-Child Pornography Act* the penalty is increased by level of that mandated in the *Anti-Child Pornography Act*. As mentioned above, the Philippines is a state party to the *Convention*; hence its compliance. The offences are more extensively defined than those in the *Convention*.

Child pornography in **Singapore** became the defined offence of "child abuse" under the *Criminal Law Reform Act* 2019 which amended the *Penal Code*. The child abuse offences are: using or involving child in production of child abuse material (Art 377BG); producing child abuse material (Art 377BH); distributing or selling child abuse material (Art 377BL); advertising or seeking child abuse material (Art 377BJ); possession of, or gaining access, to child abuse material (Art 377BK); exploitation by abusive material of minor of or above 16 but below 18 years of age (art 377BL). Like the Lao PDR and Malaysian legislation, the Act does not specifically refer to crimes committed using a computer. As is the case of Malaysia, the Act includes detailed descriptions as to what constitutes an offence.

In 2015 **Thailand** enacted the *Penal Code Amendment Act (No. 24)* to specifically cover the offence of child pornography. The Act included a very detailed definition of child pornography to be included in Section 1 of the *Penal Code* (section 3). Briefly, the definition of child pornography means obscene objects or materials of a child under 18 and includes those stored in a computer or other electronic device. A new Section 287/1 makes it an offence to possess or forward child pornographic material (section 4). A new section 287/2 makes it an offence for commercial purposes or through trade, to distribute, display in public, make, produce, circulate, or import or export child pornography (item 1). It is also an offence to trade in child pornography or distribute it or display to the public (item 2). Finally, it is an offence to publish or disseminate information that a person is carrying out an offence or publishes or disseminates information as to where or how to find child pornography (item 3).

Vietnam enacted its *Law on Children* in 2016. The law classifies use of children for pornography in any form as child sexual abuse (Art 4(8)). The law does not define pornography, however. It is an offence under the law to be "involve[d] in child sexual abuse, use violence against children, abuse or exploit children" (Art 6(3)). It is also an offence to: "Provide internet

service and other services; produce, reproduce, release, operate, disseminate, possess, transport, store and trade in publications, toys, games and other products whose contents cause adverse influence on children's healthy development" (art 6(10)).

III. JURISDICTION

All member states recognize extraterritorial jurisdiction over child pornography offenses when the alleged offender is a national of that State as described in their respective legislation:

a) Brunei Darussalam (*Criminal Procedure Code* art 7(f))[4]
b) Cambodia (*Royal Kram* art 3)[5]
c) Indonesia (see World Bank and the International Centre for Missing & Exploited Children 2015)[6]
d) Lao PDR (see World Bank and the International Centre for Missing & Exploited Children 2015)[7]
e) Malaysia (*Sexual Offences against Children Act* art 3)[8]
f) Myanmar (*Child Law* art 2(B))[9]
g) Philippines – not currently (see World Bank and the International Centre for Missing & Exploited Children 2015)[10]
h) Singapore (*Criminal Law Reform Act* art 377BO)[11]
i) Thailand (*Computer Crime Act* s 17 for computer related offences only)[12] and
j) Vietnam (see World Bank and the International Centre for Missing & Exploited Children 2015).[13]

---

4 *Criminal Procedure Code (rev 2001)* (Brunei Darussalam).
5 *Royal Kram NS/RKM/0208/005 on the Suppression of Human Trafficking and Sexual Exploitation* 2007 *(tr UNICEF (unofficial))* (Cambodia).
6 WORLD BANK AND THE INTERNATIONAL CENTRE FOR MISSING & EXPLOITED CHILDREN, PROTECTING CHILDREN FROM CYBERCRIME: LEGISLATIVE RESPONSES IN ASIA TO FIGHT CHILD PORNOGRAPHY, ONLINE GROOMING, AND CYBERBULLYING 2015 148-149 (A joint report of the World Bank and the International Centre for Missing & Exploited Children, 2015), *hereinafter as* WORLD BANK.
7 *Id.*, at 173.
8 *Sexual Offences against Children Act 2017* (Malaysia).
9 *Pyidaungsu Hluttaw Law No. 22/2019 - Child Law (Burmese)* (Myanmar).
10 WORLD BANK, *supra note* 6.
11 *Criminal Law Reform Act 2019* (Singapore).
12 *Computer Crime Act B.E. 2550 (AD 2007) (tr tentative)* (Thailand).

Three member states recognize jurisdiction over child pornography offenses when the victim is a national of that State:

a) Cambodia (*Royal Kram* art 3);
b) Singapore (*Criminal Law Reform Act* 2019 art 377BO); and
c) Thailand (*Computer Crime Act* s 17 computer related offences only).

In view of the legal variations across the various jurisdictions the next section describes the current status of legal harmonization in ASEAN to determine whether there is an appropriate model that might be used to better harmonize child pornography laws across the member states, especially as the internet is not constrained by national borders.

CURRENT STATUS OF HARMONIZATION OF LAWS IN ASEAN

I. INTRODUCTION

As discussed in section 1, one of the items that was acknowledged by the ASEAN heads of government in the *Declaration to Prevent and Combat Cybercrime* was the importance of harmonizing cybercrime legislation across ASEAN. The first task of this analysis is to determine whether there have been previous attempts at legal harmonization and the lessons learned.

Deinla has undertaken a definitive study of the development of the rule of law in ASEAN and has identified significant impediments to regional integration due to the structure of ASEAN itself in which consensus is the norm rather than binding rules or agreements. She found that the focus on economic integration has led ASEAN towards a soft regulatory regime and informal rulemaking which provides some checks on state discretion without limiting the sovereignty of the state and even within the member states themselves the rule of law is highly contested.[14] As a result, Deinla concluded that the plurality of national interests and the rule of law traditions in member countries are a serious impediment to

[13] WORLD BANK, *supra note* 6, at 297.
[14] IMELDA DEINLA, THE DEVELOPMENT OF THE RULE OF LAW IN ASEAN: THE STATE AND REGIONAL INTEGRATION 76-80 (Cambridge University Press, 2017).

developing a consensus on the type of rule of law in regional integration, particularly if it constrains the power of the member states.[15]

As will be seen below a change is occurring in the ASEAN Economic Community Pillar but there is virtually no change in the ASEAN Political and Security Community Pillar.

In his critique of the possibility of consumer law harmonization within ASEAN, Wibowo argues that differing legal systems and procedures make it difficult to develop suitable procedures to investigate and prosecute cross-border cases. Rather than harmonization, Wibowo recommends that the focus should be on strengthening and improving aspects of prevention and enforcement of cross-border consumer law with ASEAN member states assisting each other in the development of this capacity.[16]

This approach is disputed by Nottage et al[17] who argue that whilst consumer laws of ASEAN member states show considerable disparities in approach it will not necessarily impede "looser harmonization" if supported by stronger trans-governmental networks where the current networks of regulators and consumer groups are already seen as being fairly strong whilst those between legislators and judges are weaker. Whilst the local laws "reflect their own regional influences" they further argue that if there are stronger trans-governmental networks it may be a strength rather a weakness in support of the ASEAN model.

Whilst consensus is the preferred approach, ASEAN has at times unanimously agreed to more formal legal instruments, namely treaties and directives. As will be seen, even then, compliance is largely the concern of the individual member state. ASEAN Declarations, on the other hand are statements of intent and are not legally binding on any member, unless, of course, they contain a directive as will be seen is the case of the *ASEAN Cosmetic Directive*.

---

15 *Id.*

16 K. WIBOWO, THE HARMONISATION OF ASEAN COMPETITION LAWS. 156-158 (Yeo J, See A (Eds.), The ASEAN law conference 2018: A compendium of speeches, papers. presentations and reports, Academic Publishing, 2018).

17 NOTTAGE, *supra note 3*, at. 176-180.

II. TREATIES

The ASEAN Convention Against Trafficking in Persons, Especially Women and Children 2016 recognizes that, because ASEAN has proximate and connecting borders, there needs to be a transnational approach within ASEAN to human trafficking. For each of offences enumerated in the Convention the State Parties are required to 'adopt legislative and other measures as may be necessary to establish as criminal offences' (art 5(2)).

The Convention protects national sovereignty and territorial integrity as well as non-intervention in the domestic affairs of another state (art 4(1)). A Party cannot exercise its jurisdiction or performance of functions in the territory of another Party (art 4(2)). On the other hand, a party must adopt the necessary measures to establish its jurisdiction over the offences when they committed in the territory of that Party or on a vessel flying a flag of that Party or in an aircraft registered under the laws that Party (art 10(1)). A Party may also legislate to have jurisdiction if an offence is committed against a national of that Party or the offence is committed by a national of that Party or a stateless person who has their habitual residency in the territory of that Party (art 10(2)). Finally, they can legislate for jurisdiction over an offence, committed outside their territory, with the aim to commission a serious crime or offence within its territory (art 10(2)(c)(i). If a state does not allow extradition of its citizens who have committed an offence from its territory it is required to enact a law to cover such cases (art 10(3)). It could also enact legislation in relation to an offender in its jurisdiction [seeking refuge from prosecution in another jurisdiction where the offence was committed] where the current jurisdiction does not allow extradition (art 10(4)).

In a related endeavor the International Telecommunications Union (ITU) is working with ASEAN to develop an ASEAN Child Online Protection code as either a Convention or Directive.[18]

Although ASEAN signed a framework agreement on intellectual property rights in 1995 it was not until ASEAN signed a free trade agreement incorporating a chapter on intellectual property rights with Australia and New Zealand in 2009 that cooperation on intellectual

[18] A GOWA, DRAFT ASEAN FRAMEWORK ON COP. *ITU-ASEAN Workshop on Child Online Protection*, Manila 13-14 September 2016. https://www.itu.int/en/ITU-D/Regional-Presence/AsiaPacific/ Pages/Events/2016/ Sept-COPa/home.aspx Accessed 8 Oct 2019

property rights accelerated.[19] Whilst there are no doubt a number of reasons for this change; the most likely is that the signatories recognized that time had arrived to better protect intellectual property rights and Australia and New Zealand were the right parties to facilitate the process.

III. DIRECTIVES

The *ASEAN Cosmetic Directive* (Schedule B of the *Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme* 2003) is a particularly interesting example of legal harmonization in ASEAN. Article 1(1) mandates that member states only allow market access to cosmetic products that conform to the provisions of the Directive including the Annexes and Appendices. Member states are responsible for ensuring that the measures in the Directive are implemented (art 12) and have 'full authority to enforce the law on cosmetic products found to be not complying with this Directive' (art 12(4)). The Directive also established the ASEAN Cosmetic Committee to coordinate, review and monitor the implementation of the Directive (art 10(1). It should be noted that, in line with ASEAN's philosophy neither Article 10(1) nor anywhere in the Directive gives ASEAN the authority to enforce compliance. Enforcement relies on mutual cooperation.

IV. DECLARATIONS

ASEAN conducts its operations through its three pillars, namely the ASEAN Political–Security Community, the ASEAN Economic Community, and the ASEAN Socio – Cultural Community which in turn have sectorial committees. This results in the release of dozens of declarations, agreements, communiques and statements on an annual basis. Rarely are they intended to be legally binding rather they are statements of intent. In view of this, the *ASEAN Cosmetic Directive* which was attached to an Agreement is in exception rather than the rule. Full details of ASEAN's operation can be found on their website (ASEAN 2019).

---

[19] Nurul Barizah, *The development of ASEAN's intellectual property rights law: From TRIPS compliance to harmonization*, 7 INDONESIAN L. REV. 95, 95-112 (2017).

DISCUSSION

AS has been seen there has not been a consistent approach to child pornography legislation across ASEAN members. Some legislation is extensive and in other cases very short. In some cases, the legislation has been incorporated into the Criminal Code and in other cases it is stand-alone legislation; at times access to more than one statute is required. In Indonesia the situation is even more clouded by including child pornography in an overriding anti-pornography law that applies to all. Some statues have extensive definitions of child pornography whilst in other cases it is brief. In some cases, the use of computer systems is included as one method of accessing child pornography whilst in other cases there is no mention of such systems.

At the outset it must be acknowledged that this analysis is based on the English translation of the legislation and may have missed some the nuances of the original as noted by Smith.[20]

There are a number of areas where the legislation of each country could be amended to better align their anti-child pornography laws across the ASEAN area, especially as child abuse in the form of child pornography is a pervasive problem throughout much of the region. This requires a common definition of child pornography with the offences covering "traditional" offences as well as those using computer systems and other electronic media. This should be accompanied by the consolidation of the Acts/Laws covering both types of offences. In the case of Indonesia, ideally the offences associated with child pornography should be moved from *Law No. 44 of 2008 on Pornography* to the *Law on Child Prote*ction 2002.

One of the interesting initiatives is that of Malaysia and Singapore, for example, where "illustrations" are provided as to what actions constitute an offence.

Extraterritorial jurisdiction over child pornography offences when the alleged offender is a national of that State is implicit in the case of Indonesia, Lao PDR, and Vietnam. Ideally, this should be explicitly stated in the child pornography legislation. Extraterritorial jurisdiction over child

[20] ROBERT BRIAN SMITH, HARMONISATION OF LAWS IN ASEAN: THE ISSUE OF LANGUAGE. IN: INTERNATIONAL SEMINAR FOR POLITICS, ADMINISTRATION AND DEVELOPMENT (INSPAD 2019) 115-120 (Walailak University, 2019).

pornography offenses when the victim is a national of that State is more controversial and is very much a matter for the extradition laws of the member state.

At this stage there are two items from the Convention on Cybercrime that would enhance the cooperation between the parties as they attack the scourge of child pornography. The following items should be considered but applied to all forms of child pornography and not just to cybercrime:

a) An article on international cooperation modelled on Article 23 – General Principles relating to International Co-operation of the *Convention*; and
b) An article on mutual cooperation adapted from the content of Title 3 – General Principles relating to Mutual Assistance.

As discussed in Section 4, ASEAN has used a number of different types of legal instruments to harmonize legislation across the member states. As the suggestions from this review are more aspirational and meant to improve co-operation rather than to change the substantive legislation of the member states a Directive would appear to be unnecessary. On the other hand, a Declaration would appear to be an ineffective approach. This leaves the possibility of a treaty.

The *ASEAN Convention Against Trafficking in Persons, Especially Women and Children* would appear to be an ideal model. The advantage of using this Convention as a model is that most of the more contentious issues have already been agreed. There is a clear need for an article on jurisdiction and extradition: article 10 of the *ASEAN Convention* is more relevant than that in the *Convention on Cybercrime*. Such a convention could include:

a) A detailed definition of what constitutes child pornography based on the best practice from analysis of the definitions in existing legislation of the member states;
b) A detailed list of child pornography offences including cybercrimes:
c) Footnotes or "illustrations" that provide examples as to what actions constitute and offence and which ones do not as used in the legislation of Malaysia and Singapore;
d) An article requiring the parties to enact or amend their laws on child pornography to ensure that their definition of child pornography is in conformity with those developed in a) above and that they include all of the offences developed for b) above

e) An article on international cooperation; and
f) An article on mutual cooperation.

Finally, the convention should allow the parties to make reservations to their consent to the articles of the Convention.

CONCLUSION

AS has been seen ASEAN members have recognised the pervasive nature of child pornography and are taking action at both the organisational and individual member levels. The analysis has shown that whilst each party has developed its own legislation harmonisation of their laws could strengthen their impact, especially due to the availability of computer systems that allow the offences to become transnational. ASEAN already has a variety of legal instruments that have been developed to further their cooperation. In the case of child pornography and its transition into a cybercrime it is recommended that ASEAN consider developing a Convention on Child Pornography modelled on the *ASEAN Convention against Trafficking in Persons, especially Women and Children*. The use of this Convention as a model is recommended as most of the more contentious issues appear to have been resolved and agreed by the ASEAN member states.

ACKNOWLEDGMENTS

This research is supported by an Australian Government Research Training Program (RTP) Scholarship.

REFERENCES

Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme, (signed and entered into force 2 September 2003).

Anti-Child Pornography Act of 2009 (Philippines).

ASEAN Convention against Trafficking in Persons, Especially Women and Children, signed 21 November 2015 (entered into force 8 March 2016).

ASEAN Declaration to Prevent and Combat Cybercrime, signed 13 November 2017.

Association of Southeast Asian Nations (2019) Home, https://asean.org/ Accessed 11 October 2019.

Barizah, N. (2017). The development of ASEAN's intellectual property rights law: From TRIPS compliance to harmonization. *Indonesian Law Review 7*(1): 95-112.

Broadhurst, R. (2006). Developments in the global law enforcement of cyber-crime. *Policing: An International Journal of Police Strategies & Management*, *29*(2), 408-433. DOI: 10.1108/13639510610684674.

Chang, L. Y. (2020). Legislative Frameworks Against Cybercrime: The Budapest Convention and Asia. *The Palgrave Handbook of International Cybercrime and Cyberdeviance*, 327-343.

Clough, J. (2014). A world of difference: the Budapest Convention on Cybercrime and the challenges of harmonisation. *Monash University Law Review 40*: 698-736.

Computer Crime Act B.E. 2550 (AD 2007) (tr tentative) (Thailand).

Convention on Cybercrime, opened for signature 23 November 2001, UNTS No 40916 (entered into force generally 1 July 2004).

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Criminal Law Reform Act 2019 (Singapore).

Criminal Procedure Code (rev 2001) (Brunei Darussalam).

Cybercrime Law (Cambodia (Draft V.1 Unofficial translation to English).

Cybercrime Prevention Act of 2012 (Philippines).

Deinla, I. (2017). *The Development of the Rule of Law in ASEAN: The State and Regional Integration*. Cambridge: Cambridge University Press, Kindle Edition.

Gowa, A. (2016). *Draft ASEAN Framework on COP. ITU - ASEAN Workshop on Child Online Protection*, Manila 13-14 September 2016. https://www.itu.int/en/ITU-D/Regional-Presence/AsiaPacific/ Pages/Events/2016/ Sept-COPa/home.aspx Accessed 8 Oct 2019

Jamil, Z. (2012). Global Fight Against Cybercrime: Undoing the Paralysis. *Georgetown Journal of International Affairs*, 109-120.

Law No. 44 of 2008 on Pornography (Indonesia).

Law on Child Protection 2002 (tr Refworld) (Indonesia).

Law on Children (Law No. 102/2016/QH13) (tr SoftLaw) 2016 (Vietnam).

Law on the Protection of the Rights and Interests of Children (Translation Endorsed by the Law Committee of the National Assembly of the Lao PDR) 2006 (Lao PDR).

Nottage, L., Malbon, J., Paterson, J., and Beaton-Wells, C. (2019). *ASEAN Consumer Law Harmonisation and Cooperation (Integration through Law: The*

Role of Law and the Rule of Law in ASEAN Integration) Cambridge: Cambridge University Press, Kindle Edition.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

Penal Code (Chapter 224) (Current version as at 15 Oct 2019) (Singapore).

Penal Code (rev ed 2016) (Brunei Darussalam).

Penal Code Amendment Act (No. 24) B.E. 2558 (2015) (tr Wikisource) (Thailand).

Pyidaungsu Hluttaw Law No. 22/2019 - Child Law (Burmese) (Myanmar).

Royal Kram NS/RKM/0208/005 on the Suppression of Human Trafficking and Sexual Exploitation 2007 *(tr UNICEF (unofficial))* (Cambodia).

Sexual Offences against Children Act 2017 (Malaysia).

Smith, R.B. (2019). *Harmonisation of laws in ASEAN: The issue of language. In: International seminar for politics, administration and development (INSPAD 2019)*. Thailand: Walailak University.

Wibowo, K. (2019). *The harmonisation of ASEAN competition laws*. In: Yeo J, See A [Eds.], The ASEAN law conference 2018: A compendium of speeches, papers. presentations and reports, pp 156-158, Singapore: Academic Publishing.

World Bank and the International Centre for Missing & Exploited Children, *Protecting Children from Cybercrime: Legislative Responses in Asia to Fight Child Pornography, Online Grooming, and Cyberbullying 2015* (A joint report of the World Bank and the International Centre for Missing & Exploited Children, 2015).

ABOUT AUTHORS

Dr. Robert Smith is an Australian international development specialist currently working on projects in Nepal and Cambodia. Most of his international experience is in South Asia and Southeast Asia. He is also an Academic Advisor at Walailak University in Nakhon Si Thammarat Thailand. In addition, he is currently an off-campus Master of Philosophy (Law) student at the University of New England in Armidale, Australia. His thesis topic is *CybercrimeLlegislation in ASEAN: Cooperation and Harmonisation.* He is an active researcher with his wife who is a Law Lecturer at Walailak University. His recent publications include: B. Smith & N. N. Smith (2019) Investor-state dispute settlement and infrastructure projects: a potential impediment to good engineering and planning outcomes in Australia?, Australian Journal of Multi-Disciplinary Engineering, DOI: 10.1080/14488388.2019.1619503, Smith, Robert Brian; Smith, Nucharee Nuchkoom: & Smith, Darryl Robert (2015) "Recent Development of an Emission Trading Scheme in Thailand" in Ken'ichi Matsumoto & Anton Ming-Zhi Gao (Editors) *Economic Instruments to Combat Climate Change in Asian Countries*, pp 153-172. The Netherlands: Kluwer Law International, dan Smith, Robert Brian; Smith, Nucharee Nuchkoom: & Smith, Darryl Robert (2014) "FIT and its implementation in Thailand: Legal Measures, Implementation, Challenges, and Solutions" in Anton Ming-Zhi Gao & Chien Te Fan (Editors) *Legal Issues of Renewable Energy in the Asia Region: Recent Development in a Post-Fukushima and Post-Kyoto Protocol Era*, pp 127-146, The Netherlands: Kluwer Law International.