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## Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance

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# HUMAN TRAFFICKING IN SOUTHEAST ASIA: UNCOVERING THE DYNAMICS OF STATE COMMITMENT AND COMPLIANCE

*Catherine Renshaw\**

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## INTRODUCTION

In the deep jungle that lies along the border between Thailand and Malaysia are the graves of hundreds of Burmese and Bangladeshi migrants. The graves were discovered by Thai and Malay authorities in May and July 2015, near deserted camps littered with chains and barbed wire cages. Some of the camps had been abandoned for many years, others only recently.<sup>1</sup> In the village of Tah Loh, local security guard Da-oh Saengmae recounted a hunting trip during which he sighted a set of graves in the jungle a mile across the Malaysian border: “I saw small stones and leaves and branches placed on top. I was afraid. We all just got away from the area. I knew it was the refugees – who else would be buried in the jungle?”<sup>2</sup>

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1. Subsequently, Malaysian police discovered twenty-eight abandoned camps and 139 gravesites along the fifty-kilometer border in Perlis. See *Malaysia Finds 139 Graves in ‘Cruel’ Jungle Trafficking Camps*, REUTERS (May 25, 2015, 10:38 AM), <http://www.reuters.com/article/us-asia-migrants-idUSKBN00A06W20150525>.

2. Jonathan Pearlman, *I Knew It Was the Refugees – Who Else Would Be Buried in the Jungle?*, THE TELEGRAPH (May 31, 2015, 5:37 PM), <http://www.telegraph.co.uk/news/>

In 2014, the U.S. Department of State ranked both Thailand and Malaysia as Tier 3 countries for human trafficking. Tier 3 is the lowest grade, reserved for states that are not making sustained efforts to comply with the Minimum Standards to address trafficking set out in the Trafficking Victims Protection Act (TVPA).<sup>3</sup> The consequences of a Tier 3 ranking can include the denial of non-humanitarian aid and development-related assistance.<sup>4</sup> In certain circumstances, Tier 3 rankings also raise barriers for countries wishing to enter trade agreements with the United States. On June 29, 2015, for example, Congress amended legislation relating to “fast track” international trade deals so that countries holding a Tier 3 ranking were excluded from the fast track process.<sup>5</sup>

One of the reasons why Malaysia was ranked Tier 3 in 2014 was because the number of convictions for trafficking had fallen, from twenty-one in the 2012-2013 reporting period<sup>6</sup> to just nine in the 2013-2014 reporting period.<sup>7</sup> Convictions are one of the more easily quantifiable measures of a state’s efforts to address trafficking.<sup>8</sup> In 2015, the number of convictions for human trafficking in Malaysia fell further still, to just

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worldnews/asia/thailand/11641802/I-knew-it-was-the-refugees-who-else-would-be-buried-in-the-jungle.html. In November 2015, Thai police arrested ninety-one individuals in connection with human trafficking. See Press Release, Fortify Rts., Thailand: Human Trafficking Case Obstructed, Chief Investigator in Hiding (Dec. 9, 2015), <http://www.fortifyrights.org/publication-20151209.html>.

3. Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. §§ 7101–10, amended by Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, 22 U.S.C. §§ 7101-7110 (Supp. III 2005), amended by TVPRA of 2005, 22 U.S.C. §§ 7101-10 (Supp. IV 2007), amended by William Wilberforce TVPRA of 2008, 22 U.S.C. §§ 7101-12 (Supp. III 2010), amended by TVPRA of 2013, Pub. L. No. 113-4, 127 Stat. 54; see Anne T. Gallagher & Janie Chuang, *The Use of Indicators to Measure Government Responses to Human Trafficking*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH RANKINGS 317 (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., 2012); Seo-Young Cho, Axel Dreher & Eric Neumayer, *Determinants of Anti-Trafficking Policies: Evidence from a New Index*, 116 SCANDINAVIAN J. ECON. 429 (2014); Alese Wooditch, *The Efficacy of the Trafficking in Persons Report: A Review of the Evidence*, 22 CRIM. JUST. POL’Y REV. 471 (2010).

4. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7107 (2000).

5. Legislation to reauthorize Trade Promotion Authority (“fast track” consideration of trade agreements), the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015), was signed into law by President Obama on June 29, 2015. Ian F. Ferguson & Richard S. Beth, *Trade Promotion Authority (TPA): Frequently Asked Questions*, CONG. RES. SERV. (July 2, 2015), <https://fas.org/sgp/crs/misc/R43491.pdf>.

6. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2013) [hereinafter 2013 TIP REPORT].

7. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2014).

8. Sobel writes: “[T]he number of prosecutions globally will indicate whether countries are making progress holding perpetrators accountable for what is both a horrific human rights problem and the fastest growing criminal enterprise in the world.” Amy Sobel, *What to Look for in the 2015 Trafficking in Persons Report*, HUM. RTS. FIRST (July 1, 2015), <http://www.humanrightsfirst.org/blog/what-look-2015-trafficking-persons-report>. For further analysis, see Gallagher’s discussion of some of the problems arising from a “success by numbers” approach to measuring progress in human trafficking, discussed *infra* note 160. Anne T. Gallagher, *A Shadow Report on Human Trafficking in Lao PDR: The US Approach vs. Interna-*

three.<sup>9</sup> In April 2015, Joseph Yun, the United States Ambassador to Malaysia, said that Malaysia was still not doing enough to combat trafficking, and that the country's leaders must demonstrate greater political will in protecting the victims of trafficking and prosecuting traffickers.<sup>10</sup> Yun pointed out that Malaysia was a relatively prosperous country with stable governance and the rule of law, and that its efforts to address trafficking should correspond with its capacity to address the problem.<sup>11</sup>

In the weeks before the release of the July 2015 Trafficking in Persons (TIP) Report, various media reports suggested that Malaysia would be upgraded from Tier 3 to the Tier 2 Watch List.<sup>12</sup> Coming in the immediate wake of the discovery of graves on the Malaysian side of the Thai-Malay border, this news confounded anti-trafficking activists and human rights groups. A bipartisan group of Members of Congress wrote to the State Department, saying that: "they had seen no reason during the reporting period for this year's TIP Report that would justify moving Malaysia back to the Watch List. If anything, the situation in Malaysia has grown worse. Malaysia has earned its place on Tier 3."<sup>13</sup> Members of the U.S. Senate wrote to the Secretary of State, expressing deep concerns about an "unwarranted" ranking upgrade for Malaysia in the 2015 TIP.<sup>14</sup> Within Ma-

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*tional Law*, 15 *ASIAN PAC. MIGRATION J.* 525 (2006) [hereinafter Gallagher, *A Shadow Report*]; see also Gallagher & Chuang, *supra* note 3.

9. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* (2015) [hereinafter 2015 TIP REPORT].

10. Jason Szep & Matt Spetalnick, *Special Report: State Department Watered Down Human Trafficking Report*, *REUTERS* (Aug. 3, 2015, 7:30 PM) [hereinafter Szep, *Special Report*], <http://www.reuters.com/article/us-usa-humantrafficking-disputes-special-idUSKCN0Q821Y20150803>; see also H.R. Con. Res. 65, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/65/text>.

11. Personal Correspondence with U.S. Embassy in Kuala Lumpur (Apr. 22, 2016) (on file with author).

12. Jason Szep, *Rights Groups Urge U.S. to Reconsider Malaysia Human-Trafficking Rating*, *REUTERS* (July 9, 2015, 6:33 PM) [hereinafter Szep, *Rights Groups Urge U.S. to Reconsider*], <http://www.reuters.com/article/2015/07/09/us-usa-malaysia-trafficking-idUSKCN0PJ2PK20150709>; Press Release, The Malaysian Bar, *Untimely and Unwarranted Upgrade in the Trafficking in Persons Report Compromises the Fight Against Human Trafficking* (July 22, 2015, 4:05 PM), [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_%7C\\_untimely\\_and\\_unwarranted\\_upgrade\\_in\\_the\\_trafficking\\_in\\_persons\\_report\\_compromises\\_the\\_fight\\_against\\_human\\_trafficking.html](http://www.malaysianbar.org.my/press_statements/press_release_%7C_untimely_and_unwarranted_upgrade_in_the_trafficking_in_persons_report_compromises_the_fight_against_human_trafficking.html).

13. Press Release, *Ways and Means Committee Democrats, 160 Members of Congress Call on State Department to Not Upgrade Malaysia Ranking in 2015 Trafficking in Persons Report* (July 17, 2015), <http://democrats.waysandmeans.house.gov/press-release/160-members-congress-call-state-department-not-upgrade-malaysia-ranking-2015>.

14. *E.g.*, Press Release, Bob Menendez for New Jersey, *Menendez Leads Bipartisan Senate Letter on Possible Unwarranted Ranking Upgrade for Malaysia in Human Trafficking Report* (July 15, 2015), <http://www.menendez.senate.gov/news-and-events/press/menendez-leads-bipartisan-senate-letter-on-possible-unwarranted-ranking-upgrade-for-malaysia-in-human-trafficking-report->; Press Release, Rob Portman: United States Senator for Ohio, *Portman Cautions Against Possible Unwarranted Ranking Upgrade for Malaysia in Human Trafficking Report* (July 15, 2015), <http://www.portman.senate.gov/public/index.cfm/2015/7/portman-cautions-against-possible-unwarranted-ranking-upgrade-for-malaysia-in-human-trafficking-report>.

laysia, proponents of human rights were similarly outraged. The Malaysian Bar Council decried the possible upgrade, stating that, “[t]he lives of an untold number of individuals bear silent testimony to the conclusion that Malaysia has yet to earn any upgrade.”<sup>15</sup> International non-governmental organizations (NGOs) joined the criticism. Human Rights Watch released a statement, which said that it “would be shocked if Malaysia were upgraded . . . [t]hey have done very little to improve the protection from abuse that migrant workers face. They have done precious little, frankly, to merit an upgrade.”<sup>16</sup>

In 2015, Malaysia was one of twelve countries negotiating the Trans Pacific Partnership (TPP) trade deal with the United States.<sup>17</sup> Many of the critics of Malaysia’s 2015 TIP upgrade drew a link between Malaysia’s new ranking and the Obama administration’s imperative of including Malaysia in the TPP.<sup>18</sup> On August 3, 2015, Reuters reported that analysts in the Office to Monitor and Combat Trafficking in Persons (OMCT), who had recommended that Malaysia retain its Tier 3 ranking, were “overruled by senior American diplomats and pressured into inflating assessments of 14 (fourteen) strategically important countries in this year’s Trafficking in Persons report.”<sup>19</sup> The Undersecretary of State for Civilian Security, Democracy, and Human Rights, which oversees OMTC, denied these reports.<sup>20</sup> The Undersecretary pointed to several justifications for Malaysia’s upgrade: Malaysia had recently drafted (but not yet passed into law) amendments that would strengthen existing anti-trafficking legislation,

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15. The Malaysian Bar, *supra* note 12.

16. Szep, *Rights Groups Urge U.S. to Reconsider*, *supra* note 12.

17. *Trans-Pacific Partnership (TPP) Overview*, MINISTRY OF INT’L TRADE AND INDUSTRY (last updated Aug. 19, 2015, 4:48 PM), <http://fta.miti.gov.my/index.php/pages/view/73>.

18. Nick Harmsen, *Trafficking in Persons Report: U.S. Upgrades Malaysia in Human Trafficking List Amid Protests from Rights Bodies*, ABC NEWS (July 15, 2015, 3:09 AM), <http://www.abc.net.au/news/2015-07-28/us-removes-malaysia-from-human-trafficking-list/6654350>; Dan Kedmey, *U.S. Removes Cuba, Malaysia from Human Trafficking List*, TIME (July 27, 2015), <http://time.com/3973022/cuba-malaysia-human-trafficking/>; Annie Kelly, *US Human Trafficking Report Under Fire as Cuba and Malaysia are Upgraded*, THE GUARDIAN (July 28, 2015), <http://www.theguardian.com/global-development/2015/jul/27/us-human-trafficking-in-persons-report-under-fire-cuba-malaysia-upgraded>; Carol Morello, *U.S. Drops Cuba and Malaysia from Human Trafficking Blacklist*, WASH. POST (July 27, 2015), [https://www.washingtonpost.com/world/national-security/us-drops-cuba-and-malaysia-from-human-trafficking-blacklist/2015/07/27/e2a9bb1e-2a9d-4c88-b7c6-583eea3aa9fe\\_story.html](https://www.washingtonpost.com/world/national-security/us-drops-cuba-and-malaysia-from-human-trafficking-blacklist/2015/07/27/e2a9bb1e-2a9d-4c88-b7c6-583eea3aa9fe_story.html); Matthew Pennington, *Kerry: Malaysia Trafficking Upgrade Not Due to Trade Talks*, ASSOCIATED PRESS (Aug. 6, 2015), <http://www.ap.org/> [<http://news.yahoo.com/kerry-malaysia-trafficking-upgrade-not-due-trade-talks-113043991.html>]; Jason Szep & David Brunnstrom, *U.S. Softens View of Malaysia, Cuba in Human Trafficking Report*, REUTERS (July 27, 2015), <http://www.reuters.com/article/2015/07/27/us-usa-trafficking-idUSKCN0Q11LJ20150727>; Jason Szep, Patricia Zengerle & Matt Spetalnick, *U.S. Upgrades Malaysia in Annual Human Trafficking Report – Sources*, REUTERS (July 8, 2015, 9:36 PM), <http://www.reuters.com/article/2015/07/09/us-usa-malaysia-trafficking-exclusive-idUSKCN0PJ00F20150709>; Hilary Whiteman, *Who’s Fighting Human Trafficking? U.S. Releases Rankings*, CNN (July 28, 2015), <http://edition.cnn.com/2015/07/27/world/us-trafficking-tip-report-2015/>.

19. Szep, *Special Report*, *supra* note 10.

20. *Id.*

and the migrants' graves were discovered in the jungle near the Thai border after the March cut-off period for evidence gathering for the TIP Report.<sup>21</sup>

There is a well-rehearsed debate between critics and proponents of the TVPA. Critics argue that the TIP Reports are politicized,<sup>22</sup> that the ranking methodology used is opaque,<sup>23</sup> that the regime undercuts the global anti-trafficking regime of the United Nations (the Palermo Protocol),<sup>24</sup> and that sanctions are ineffective.<sup>25</sup> Proponents respond that the reports are an important source of data on trafficking,<sup>26</sup> a useful tool for

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21. Special Briefing, U.S. Dep't of State, Under Secretary of State for Civilian Security, Democracy, and Human Rights Sarah Sewall on the 2015 Trafficking in Persons Report (July 27, 2015), <http://www.state.gov/r/pa/prs/ps/2015/07/245294.htm>.

22. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 465 (2006) [hereinafter Chuang, *The United States as Global Sheriff*]; see also *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H.R. Comm. on Int'l Relations*, 106th Cong. 1-2 (1999) (statement of Rep. Christopher Smith, Subcomm. Chairman); *U.S. Economic Sanctions: Good Intentions, Bad Execution: Hearing before the H.R. Comm. on Int'l Relations*, 105th Cong. 147-50 (1998) (statement of Jeffrey J. Schott, Senior Fellow, Inst. for Int'l Econ.); Anne Gallagher, *The 2015 US Trafficking Report: Signs of Decline?*, OPEN DEMOCRACY (July 31, 2015), <https://www.opendemocracy.net/5050/anne-gallagher/2015-us-trafficking-report-signs-of-decline>.

23. Gallagher, *A Shadow Report*, *supra* note 8, at 528-32; see also Nancie Caraway, *Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse*, 14 TUL. J. INT'L & COMP. L. 295, 298 (2005). Caraway provides the following criticism of the early TIP Reports:

The subsequent 2001 and 2002 Trafficking in Persons Reports drew considerable criticism both in the United States and abroad for glossing over state complicity in trafficking, being vague on law enforcement details, and focusing solely on sex trafficking rather than all forms of forced labor. The State Department report also exempted the United States from evaluation, did not include data on the numbers of victims in each country, failed to report the number of convictions, and did not provide concrete information on sentencing rates. Of particular concern to activists was the fact that the report did not indicate how many state officials were investigated, tried, and convicted of trafficking: essential indicators of corruption.

For a more recent view of how the TIP Reports might be improved, see Anne T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports*, 12 HUM. RTS. REV. 381 (2011) [hereinafter Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking*]. As Gallagher points out, until 2010 the United States did not include itself among the countries whose performance it reviewed.

24. Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 150-52 (2006); see also Mark Weisbrot, *Who is America to Judge?*, THE GUARDIAN (Mar. 11, 2009, 6:00 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2009/mar/11/state-department-human-rights>.

25. Chuang, *The United States as Global Sheriff*, *supra* note 22, at 439; see also Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 86 (2001).

26. Press Release, Polaris, Report Spotlights Human Trafficking Trends in the U.S. (Nov. 21, 2013), <https://polarisproject.org/news/press-releases/report-spotlights-human-trafficking-trends-us>.

international and domestic activists attempting to pressure states to increase efforts to address trafficking,<sup>27</sup> and that, in the absence of any global enforceability mechanism to address trafficking in persons, the TVPA represents a practical effort to shame, coerce, and pressure states into strengthening domestic policies to address human trafficking.<sup>28</sup> This debate is one that has existed since the inception of the TVPA.<sup>29</sup>

This Article does not return to this debate. Instead, it seeks to extend and deepen our understanding of the issues raised by the application of unilateral sanctions to the problem of trafficking in persons. Specifically, this Article examines whether unilateral mechanisms for influencing the human rights behavior of states complement regional measures to address human trafficking, or whether they in fact have negative effects. This is an important inquiry because human trafficking, at least where it occurs across borders, is preeminently an issue of regional concern. Addressing inter-state trafficking requires collaboration between countries of origin (from which victims are transported), countries of transit (through which victims are trafficked), and countries of destination (where exploitation occurs). The issue lends itself, therefore, in a practical way, to intergovernmental cooperation among states within a particular geographic region. Institutions situated at the regional level possess knowledge of the economic geographies that influence trafficking flows, and are in a position to foster cooperative efforts at borders and in relation to the return of trafficked persons. As Emmers and his colleagues argue, regional levels of governance encourage states at particular levels of development, with similar needs, to work together in enhancing their security, “with mutual confidence in their other partners based on their similarities rather than their differences.”<sup>30</sup> This Article asks what impact the unilateral regime of the

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27. Press Release, Amnesty Int'l, *Amnesty International Says DOS Country Reports Need to Be More Comprehensive* (Mar. 11, 2010), <http://www.amnestyusa.org/news/press-releases/usa-amnesty-international-says-dos-country-reports-need-to-be-more-comprehensive>.

28. Laura Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act*, 17 LEWIS & CLARK L. REV. 931, 960-65 (2013). Shoaps writes: “Due to the Palermo Protocol’s lack of a proper enforcement mechanism, the TVPA has become a standard by which the United States holds other nations fiscally accountable for their actions.” *Id.* at 971.

29. The TVPA was introduced by the Clinton Administration in 2001. The Clinton Administration itself held the view that unilateral sanctions would be counter-productive. *See International Trafficking in Women and Children: Hearing Before the Subcomm. on Near E. & S. Asian Aff. of the S. Comm. on Foreign Rel.*, 106th Cong. (2000). Janie Chuang summarizes the arguments made during debate on the TVPA as follows: (1) sanctions would impede international cooperation “by causing governments to downplay the seriousness of their trafficking problems in order to avoid the direct or political consequences of sanctions”; and (2) sanctions would undermine cooperation between governments, local populations, and NGOs because the latter’s attempt to raise the profile of trafficking would be viewed as a threat. Chuang, *The United States as Global Sheriff*, *supra* note 22, at 455.

30. Emmers and his colleagues further argue: “Within the international arena there are simply too many states, with too great a capacity gap, to allow for the swift resolution of a particular problem.” Ralph Emmers, Beth K. Greener & Nicholas Thomas, *Securitisating Human Trafficking in the Asia-Pacific: Regional Organisations and Response Strategies*, in

TVPA has on the regional approach taking shape under the auspices of the Association of Southeast Asian States (ASEAN) and its recently established Intergovernmental Commission on Human Rights (AICHR).

There are three primary regimes that operate to influence the way states in Southeast Asia address the issue of human trafficking. The first is the global-level regime of the United Nations Trafficking Protocol. The global regime lacks coercive mechanisms and operates primarily to set standards and provide a framework for cooperation between states. The second is the unilateral regime implemented by the United States under the TVPA, which provides for sanctions against states that fail to meet minimum standards in addressing trafficking. The third is the regional regime evolving under the auspices of the Association of Southeast Asian Nations (ASEAN). In November 2015, ASEAN states signed the ASEAN Convention Against Trafficking in Persons, Particularly Women and Children.<sup>31</sup> In addition, there are multiple voluntary forums, schemes, and agreements, which overlay these formal processes, and which seek to foster cooperation in addressing trafficking. One of these is the 'Bali Process,' which includes all ASEAN states and key partners such as the United States, Australia, France, and the United Arab Emirates.<sup>32</sup>

In Part I of this Article, I explain some of the current theories about how and why states come to adopt human rights norms and then translate these norms into laws and policies. In Part II, I set out the contours of the TVPA and the global regime with which it coexists, the United Nations Palermo Protocol. Part III considers how ASEAN States have responded to the global anti-trafficking regime. Part IV explores how ASEAN states perceive the issue of human trafficking. Part V describes how ASEAN states have responded to the threat of sanctions under the TVPA. Part VI examines the emergence of a regional framework to address human trafficking. This Article concludes that unilateral measures implemented under the TVPA disrupt regional processes and retard the internalization of human rights norms about trafficking in persons.

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SECURITY AND MIGRATION IN ASIA: THE DYNAMICS OF SECURITISATION 59, 77 (Melissa Curley & Siu-lun Wong eds., 2008).

31. See *Chairman's Statement of the 27th ASEAN Summit*, ASEAN ¶ 4 (Nov. 21, 2015), <http://www.asean.org/storage/images/2015/November/27th-summit/statement/Final-Chairmans%20Statement%20of%2027th%20ASEAN%20Summit-25%20November%202015.pdf>. ASEAN was formed in 1967. ASEAN's current members are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, and the Socialist Republic of Vietnam.

32. See *About the Bali Process*, THE BALI PROCESS ON PEOPLE SMUGGLING, TRAFFICKING IN PERSONS AND RELATED TRANSNATIONAL CRIME, <http://www.baliprocess.net>. The Bali Process is a voluntary forum aimed at improving cooperation and information sharing. As well as the ten ASEAN states, the forum currently has thirty-eight other members, including the United States, the United Arab Emirates, France, and Australia. Furthering cooperation on addressing trafficking in persons is also addressed within the ASEAN Regional Forum (ARF) and the ASEAN-Europe Meeting (ASEM). See Ralf Emmers, Beth Greener-Barcham & Nicholas Thomas, *Institutional Arrangements to Counter Human Trafficking in the Asia Pacific*, 28 CONTEMP. SE. ASIA 490 (2006).



## I. WHY STATES CHANGE

In the 1990s, Thomas Risse and his colleagues set out to examine an important set of questions about the international human rights project: What are the conditions under which international human rights norms become internalized into domestic practices? Why is there such variation in the degree to which human rights norms are actually implemented? *The Power of Human Rights: International Norms and Domestic Change* put forward a “spiral theory of human rights,” which showed how states became socialized to human rights through a process that begins when states make tactical concessions and cosmetic changes (which might include the signing of human rights treaties), but which leads (under certain circumstances) to rule-consistent behavior.<sup>33</sup> Risse and his colleagues argued that when states make what they regard as ‘low cost’ concessions to domestic opponents, transnational human rights networks and international critics, the effect can be to empower and legitimate the demands of critics.<sup>34</sup> What follows is a dialogue between governments and critics, in which governments are forced to explain and justify norm-violating behavior.<sup>35</sup> Risse and his colleagues argue that, in the process of justification and explanation, states can become “entrapped” in their own rhetoric.<sup>36</sup> The more they are drawn into arguments with their critics, the more they are forced to make further concessions and justifications, so that “a process which began for instrumental reasons, with arguments being used merely rhetorically, increasingly becomes a true dialogue over specific human rights allegations in the ‘target state.’”<sup>37</sup> In this process, the international community supplements pressure “from below” (lobbying and advocacy from civil society and other domestic actors) with pressure “from above” (shaming, isolation, and perhaps sanctions implemented by international actors).<sup>38</sup> Risse and his colleagues argued that eventually, domestic and international actors may have sufficient leverage to pressure states to make further changes, such as bringing domestic laws into conformity with international norms.<sup>39</sup>

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33. See generally *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

34. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS*, *supra* note 33, at 25 [hereinafter Risse & Sikkink, *The Socialization of International Human Rights Norms*].

35. *Id.* at 28.

36. *Id.* at 27.

37. *Id.* at 28.

38. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 15-17 (2009). Simmons has shown particularly clearly, in issues that range from women’s rights to torture, how ratification of human rights treaties provides relatively weak domestic actors with the resources and leverage to pressure governments towards human rights reform.

39. Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 3 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 2013). Risse and his colleagues describe the stage where

The final stage of the spiral model, where states consistently comply with human rights norms, is characterized by lasting behavioral change. That is, states comply with norms even when there is no material incentive to do so. Rule-consistent behavior occurs when norms are internalized and become part of how states define themselves (the identity of states).<sup>40</sup> At this stage, ideas about human rights are regarded as right and appropriate, requiring no further justification in order to secure compliance.<sup>41</sup> Risse and his colleagues argue that the processes underpinning this final stage include communication, interaction, argumentation, and advocacy, which all help to transform instrumental commitments into lasting preference change.<sup>42</sup>

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domestic laws are brought into conformity with international laws as ‘prescriptive status.’ “Prescriptive status” means “that the actors involved regularly refer to human rights norms to describe and comment on their own behavior and that of others.” Risse & Sikkink, *The Socialization of International Human Rights Norms*, *supra* note 34, at 29. Risse and his colleagues argue that during the prescriptive status stage, governments adhere to the validity of human rights norms even when there is no material reason for them to do so. Evidence that a norm has assumed prescriptive status might include the ratification of international human rights conventions and their optional protocols, the institutionalization of norms in the constitution or in domestic law, the establishment of mechanisms for citizens to complain about human rights violations, and the government’s open acknowledgment of the validity of human rights norms. *Id.* at 29-31; Risse & Ropp, *supra*, at 6-7.

40. See Kai Alderson, *Making Sense of State Socialization*, 27 *REV. INT. STUD.* 415, 417 (2001). As a recent example of this, one could point to German Chancellor Angela Merkel’s exhortation to her fellow Germans in August 2015 to show compassion to refugees fleeing the Middle East and arriving in the thousands off the shores of Europe. “[T]he humane and dignified treatment of every single person who comes to us is part of the self-image which represents Germany. . . . There is no tolerance for people who question the dignity of others; there is no tolerance for those who are not willing to help.” Ken Bredemeier, *Merkel Faces Down Jeering Anti-Immigrant Protesters*, *VOICE AM.* (Aug. 26, 2015), [www.voanews.com/content/german-chancellor-to-visit-asylum-center-hit-by-far-right-riots/2932711.html](http://www.voanews.com/content/german-chancellor-to-visit-asylum-center-hit-by-far-right-riots/2932711.html).

41. The theories I have sketched above each in different ways draw upon individual-level psychology (shame, social status, material reward) to explain what motivates macro-level state practices. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 206-07 (2004). The anthropomorphism of constructivist scholarship has several critics. See, e.g., Jose Alvarez, *Do States Socialize?*, 54 *DUKE L.J.* 961, 969 (2005). Jose Alvarez calls theories about socialization ‘pop psychology.’ Skeptics such as Alvarez wonder whether people are really an appropriate metaphor for states, and how we can tell whether or not states are internalizing patterns of behavior or ideas about the appropriateness of norms and expectations about actions. Alvarez argues that “states (or ‘organizations’ in the abstract) do not ‘socialize’; people do.” For a response to some of the criticism, see Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 *DUKE L.J.* 983 (2005). In addition, see the earlier work of Goodman and Jinks, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004).

42. See Risse & Sikkink, *The Socialization of International Human Rights Norms*, *supra* note 34, at 34; see also JUTTA BRUNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 89 (2010); Jeffrey Checkel, *Why Comply? Social Learning and European Identity Change*, 55 *INT’L ORG.* 553, 560 (2001); James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 *INT’L ORG.* 943, 945 (1998); Harald Müller, *Arguing, Bargaining, and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations*, 10 *EUR. J. INT’L REL.* 395, 403 (2004).

However, *The Power of Human Rights* left several key questions unanswered. The stage between tactical concessions and rule-consistent behavior, for example, was under explained.<sup>43</sup> In 2013, Risse and his colleagues revisited the question of what moves states from commitment to compliance.<sup>44</sup> *The Persistent Power of Human Rights* addresses questions such as: Why do some states remain frozen at the stage of tactical concessions and not progress to rule-consistent behavior? How critical is the role of independent domestic authorities, such as courts, in supporting the transformation from commitment to compliance? What are the precise ways in which external sources of pressure, such as social shaming and sanctions, work to move states from tactical concessions to principled action? Are external processes always complementary to domestic processes, or are there circumstances in which external processes might be counter-productive?

The last question is taken up by Ryan Goodman and Derek Jinks in their contribution to *The Persistent Power of Human Rights*.<sup>45</sup> Goodman and Jinks suggest that, under certain circumstances, combining mechanisms can reduce the overall effect to levels below what any individual mechanism could have achieved in isolation.<sup>46</sup> Focusing on the timing and interaction of different mechanisms, Goodman and Jinks argue that strategies based on material inducement may be incompatible with socialization strategies and that material rewards or punishment may “crowd out” intrinsic motivation for engaging in proscribed behavior.<sup>47</sup> Using the language of compliance scholarship, their argument is that the result of interaction between the logic of consequences (which operate during the early stages of the spiral model and leads states to commit to human rights norms), and the logic of appropriateness or persuasion (associated with compliance), are unpredictable.<sup>48</sup> Tactical concessions might not always

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43. Beth Simmons, *From Ratification to Compliance*, in *THE PERSISTENT POWER OF HUMAN RIGHTS*, *supra* note 39, at 43, 57.

44. *THE PERSISTENT POWER OF HUMAN RIGHTS*, *supra* note 39.

45. Ryan Goodman & Derek Jinks, *Social Mechanisms to Promote International Human Rights*, in *THE PERSISTENT POWER OF HUMAN RIGHTS*, *supra* note 39, at 103, 104-05.

46. *Id.* at 105.

47. Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 *J. ECON. SURV.* 589 (2001). Frey and Jegen demonstrate that the ‘crowding-out effect’ referred to by Goodman and Jinks has been observed in many different areas of the economy and society. They identify the crowding out effect as one of the most important anomalies in economics, “as it suggests the opposite of the most fundamental economic ‘law’, that raising monetary incentives increases supply.” *Id.* at 590. The evidence presented by Frey and Jegen suggests that “under relevant circumstances, it is therefore not advisable to use the price mechanism to elicit a higher supply, and one should moreover rely on a quite different type of incentive, namely intrinsic motivation.” *Id.*

48. The logic of appropriateness and the logic of persuasion are not the same thing. The logic of appropriateness is associated with sociological institutionalism. It occurs when actors follow rules that “associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situations.” March & Olsen, *supra* note 42, at 951. The logic of persuasion, or argumentation, usually takes place before this,

lead to rule-compliant behavior, and in some cases, coercing states into making instrumental concessions might actually be destructive to the longer-term and deeper change that might result from other processes. This is a matter of practical concern for those who aim to secure rule-compliant behavior from states. Most human rights policies, projects, and campaigns are based on the assumption that securing tactical concessions is a useful and legitimate first stage in the process of promoting change. Goodman and Jinks argue that things are far more complicated.

## II. THE GLOBAL REGIME TO PREVENT TRAFFICKING IN PERSONS

There seems to be, at least at the level of rhetoric, a global consensus that trafficking is a moral evil and that states have a duty to prevent it and to protect its victims.<sup>49</sup> Trafficking, as defined in the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol),<sup>50</sup> involves the prominent violation of a range of individual civil liberties including: the prohibitions against slavery, servitude, and compulsory labor; liberty and security of the person, and, potentially, life.<sup>51</sup>

The Trafficking Protocol is the centerpiece of the global effort to end human trafficking.<sup>52</sup> The major elements of the Protocol are as follows.

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when actors are trying to work out what path of behavior to follow. Risse argues that where the logic of persuasion is operating, actors use collective communicative processes to determine whether cause-and-effect relationships are correct, whether norms of appropriate behavior can be justified, and which norms apply under given circumstances. Thomas Risse, *“Let’s Argue!”: Communicative Action in World Politics*, 54 INT’L ORG. 1, 4-5 (2000).

49. See Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609 (2014) (referring to several public campaigns, including “Walk Free” and “Give to Not for Sale”); *I Believe in a World Where Everyone Can Walk Free*, WALK FREE (2016), <https://www.walkfree.org/a-world-without-slavery/> (enabling readers to enter their contact information and sign a pledge committing to the abolition of slavery); *Give to Not for Sale*, NOT FOR SALE (2016), <https://www.notforsalecampaign.org/donate/> (enabling readers to make a donation and “give freedom”).

50. G.A. Res. 55/25, annex, Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000) [hereinafter Trafficking Protocol]. See generally ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010).

51. Lorna McGregor, *Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings*, 36 HUM. RTS. Q. 210, 239 (2014).

52. The Trafficking Protocol is one of the three protocols attached to the Transnational Crime Convention. Article 1 of the Transnational Crime Convention defines its purpose: “to promote cooperation to prevent and combat transnational organized crime more effectively.” G.A. Res. 55/25, annex, United Nations Convention Against Transnational Organized Crime, art. 1 (Nov. 15, 2000) [hereinafter Transnational Crime Convention]; see Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 975-76 (2001); see also Int’l Lab. Org. [ILO], *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, Doc. C182 (June 17, 1999) [hereinafter Worst Forms of Child Labour Convention]; G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Mar. 16, 2001) [hereinafter Optional Protocol on the Sale of Children]. Both the Worst Forms of Child Labour Conven-

First, the Protocol depicts human trafficking as a complicated form of organized crime, systematically run by transnational corporate agencies.<sup>53</sup> Indeed, the Protocol applies only to trafficking conducted by “an organized criminal group.”<sup>54</sup> Second, in relation to the prevention of trafficking, the Protocol places significant emphasis on border control.<sup>55</sup> Third, the Protocol attempts to distinguish human trafficking from practices such as people smuggling and illegal migration by emphasizing the elements of coercion and exploitation inherent in human trafficking.<sup>56</sup> The Protocol provides that consent is irrelevant in circumstances where coercion is present.<sup>57</sup> Finally, although the Trafficking Protocol encompasses all forms of exploitation, there is an emphasis placed on sexual exploitation.<sup>58</sup>

The United States Trafficking Victims Protection Act (2000) (TVPA)<sup>59</sup> was passed less than one month before the General Assembly adopted the U.N. Trafficking Protocol. Like the Trafficking Protocol, the TVPA has two primary purposes: combatting human trafficking (largely

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tion and the Optional Protocol on the Sale of Children are examples of other international instruments the United Nations has adopted addressing trafficking in children.

53. Trafficking Protocol, *supra* note 50, art. 4; Transnational Crime Convention, *supra* note 52, art. 2.

54. Transnational Crime Convention, *supra* note 52, art. 2 (defining an ‘organized criminal group’ as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes,” a ‘serious crime’ as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty,” and a ‘structured group’ as “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”).

55. See Trafficking Protocol, *supra* note 50, arts. 10(1)(a), 11(1)-(6), 12, 13.

56. *Id.* art. 3(a); see Phil Williams, *Trafficking in Women: The Role of Transnational Organized Crime*, in *TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* 126, 133 (Sally Cameron & Edward Neuman eds., 2008). In his market-orientated analysis of the problem of trafficking, Williams points out that the difference between alien smuggling and trafficking is that in the former case, demand comes from the aliens who are smuggled, whereas in the case of trafficking, demand comes from the entrepreneurs, businessmen and semi-legal enterprises that wish to profit from the trafficked persons. *Id.* at 128.

57. Trafficking Protocol, *supra* note 50, art. 3(b).

58. *Id.* art. 3(a) (defining ‘exploitation’ expansively to “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”); see GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING*, *supra* note 50, at 984-85. In relation to the issue of sexual exploitation, negotiations surrounding the drafting of the Trafficking Protocol were marked by intense debate about the ‘forced’ or ‘voluntary’ nature of prostitution. There is still a significant degree of contention about the characterization of prostitution as inherently exploitative and thus inevitably forced. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010). Ethnographic studies of women trafficked for prostitution highlight the complex dimensions of the notion of ‘choice’. See Larissa Sandy, *Sex Work in Cambodia: Beyond the Voluntary/Forced Dichotomy*, 15 ASIAN PAC. MIGRATION J. 449, 449-70 (2006).

59. Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7110 (2000).

through the prosecution of traffickers) and protecting the human rights of trafficked persons.<sup>60</sup>

The TVPA contains a set of Minimum Standards for combating trafficking, which require the government of a country to: “prohibit severe forms of trafficking in persons and to punish acts of such trafficking” by making trafficking a criminal offense; provide adequate punishment; prescribe appropriate sentences in cases of sex trafficking involving children or which include aggravated circumstances, such as rape, kidnapping, or death; prescribe “sufficiently stringent” punishment for severe forms of trafficking to deter others from committing the crime and to reflect the serious nature of the crime; and make “serious and sustained efforts” to eliminate trafficking.<sup>61</sup> In order to determine whether a government’s implementation efforts are “serious and sustained,” the TVPA delineates seven criteria. The first three criteria measure government efforts in the areas of prosecution, protection, and prevention. The remaining four criteria measure the degree of international cooperation, including aspects such as: investigation of severe forms of trafficking, extradition of traffickers, monitoring of immigration and emigration, and investigation and prosecution of public officials involved in trafficking.<sup>62</sup>

The Office to Monitor and Combat Trafficking in Persons, located within the U.S. State Department, publishes an annual Trafficking in Persons Report (TIP), in which countries are ranked into “tiers” of compliance with the TVPA: Tier 1, where a country is fully compliant, Tier 2, where a country is not fully compliant but making efforts to ensure compliance, Tier 2 Watch List, where a country is not compliant and the problem of trafficking is significant or increasing, and where a country makes a commitment to take additional steps to combat trafficking the following year but cannot provide evidence of doing so, and Tier 3, where a country is not compliant.<sup>63</sup> There is a two-year time limit for countries on the Tier 2 Watch List, and at the end of this two-year period, those Tier 2 Watch List countries that have not made significant efforts to address human trafficking are classified as Tier 3.<sup>64</sup>

The TIP Office “works closely with foreign governments to bring their domestic anti-trafficking laws and policies into compliance with the U.S. minimum standards.”<sup>65</sup> For example, the State Department provides a set of “model provisions for states to consider incorporating into their own domestic legislation” known as the Legal Building Blocks to Combat Traf-

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60. *Id.* § 7101.

61. *Id.* § 7106(a).

62. *Id.* § 7106(b).

63. 2015 TIP REPORT, *supra* note 9, at 45-48.

64. *Id.* at 47-48. In 2008, the reauthorization of the TVPA established a two-year time limit for the Tier 2 Watch List because previous practices allowed countries to remain indefinitely on this tier classification without incurring sanctions. See Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking*, *supra* note 23, at 383.

65. Chuang, *The United States as Global Sheriff*, *supra* note 22, at 467.

ficking in Persons.<sup>66</sup> The definitions of ‘exploitation’ in the Trafficking Protocol and the Legal Building Blocks are identical, except for the inclusion as part of the Building Blocks definition of “engaging in any other form of commercial sexual exploitation, including but not limited to pimping, pandering, procuring, profiting from prostitution, maintaining a brothel, child pornography.”<sup>67</sup>

In contrast to the Trafficking Protocol, which under the Organized Crime Convention has no machinery for oversight or enforcement,<sup>68</sup> the TVPA provides for a program of unilateral sanctions against countries deemed non-compliant with the Minimum Standards.<sup>69</sup> Sanctions for failure to meet TVPA standards can include the denial of non-humanitarian aid, non-trade-related assistance, and certain development-related assistance and aid from international financial institutions, specifically, the International Monetary Fund and multilateral development banks such as the World Bank.<sup>70</sup> In applying the U.S. Minimum Standards, the State Department considers whether countries are of origin, transit, or destination for trafficking; the extent to which government actors are involved or complicit in the trafficking; and what measures would be reasonable given

66. *Id.*

67. *See id.* at 468. The TVPA defines “severe forms of trafficking” as:

- a. sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
- b. the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102(9) (2000); *see* GALLAGHER, *THE INTERNATIONAL LAW OF TRAFFICKING*, *supra* note 50, at 39 n.118; U.S. DEP’T OF JUSTICE, *Model State Anti-Trafficking Criminal Statute* (2007), <http://www.csg.org/knowledgecenter/docs/pubsafety/ModelStateAnti-TraffickingCriminalStatute.pdf>. In relation to the complexities of defining sexual exploitation, *see* Alison Brysk, *Sex as Slavery? Understanding Private Wrongs*, 12 *HUM. RTS. REV.* 259 (2011). Brysk writes: “Sex work is not always slavery; sometimes it is “freely” chosen as the best of a terrible range of options available to poorly educated young women in patriarchal developing countries.” *Id.* at 264.

68. The Organized Crime Convention establishes a Conference of Parties with the power to review implementation of the Convention, request and receive information on implementation of the Trafficking Protocol, and make recommendations to improve the Protocol and its implementation. Transnational Crime Convention, *supra* note 52, art. 32(1); Conference of Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention Against Transnational Organized Crime on its First Session*, U.N. Doc. CTOC/COP/2004/6 (July 8, 2004). Gallagher writes that under this mechanism “reporting rates are low and the information received is uneven, shallow and often ambiguous. There is no opportunity to seek clarification from, or for dialogue with, state parties.” GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING*, *supra* note 50, at 469.

69. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7106 (2000).

70. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 16* (2003) [hereinafter 2003 TIP REPORT].

a country's resources and capabilities.<sup>71</sup> The object of the TIP Reports is to pressure governments to institute policies and strategies to reduce the trafficking of persons, using the threat of U.S.-imposed sanctions and the shame attached to international approbation that follows a low ranking in the TIP Reports.<sup>72</sup>

Anne Gallagher, an international expert on the law of human trafficking, argues that there is no substantive difference between U.S. standards relating to trafficking in persons and those that have emerged from the United Nations.<sup>73</sup> The indicators for both are largely the same and include criminalization of trafficking, number of prosecutions, and the number of 'victims' repatriated and their conditions of care. Nonetheless, Gallagher champions the Trafficking Protocol and is, by and large, critical of the U.S. approach. In 2007, Gallagher produced a study titled: *A Shadow Report on Human Trafficking in Lao PDR: the US Approach vs. International Law*.<sup>74</sup> In it, she argues:

[T]he US government, through its annual TIP report, has developed a unilateral assessment system based on standards derived from its own national legislation and reflecting its own understandings of the problem and its own views on the best solutions. Part One of this study has demonstrated that such an approach is conceptually faulty, politically divisive and ultimately unpersuasive. It hampers international norm development and thereby directly serves the interests of those States that wish to weaken and disengage from international rules, systems and processes.<sup>75</sup>

While recognizing that there may be some role for unilateral assessments of a state's efforts in some cases, Gallagher nonetheless contends:

[T]he impetus for development of an effective national response to trafficking must come from within. Unilateral assessments that do not derive their legitimacy from internationally agreed stan-

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71. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7107 (2000).

72. See Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking*, *supra* note 23, at 392. Although she is in many respects critical of the TIP Reports, Gallagher admits that "[w]ithout the Reports, our collective knowledge of trafficking-related exploitation would likely be less; individual governments would likely have greater control over the flow of information that properly belongs in the public domain; and even the most egregious failure on the part of a state to deal with trafficking-related exploitation would likely come at little reputational or other cost." *Id.*

73. Gallagher, *A Shadow Report*, *supra* note 8, at 531 ("In several important respects there is not much substantial difference. The US definition of what constitutes trafficking does not vary significantly from the definition contained in the Protocol. Both sets of standards highlight the need for criminalization, victim protection, prevention and cooperation with other countries. While the US framework of prosecution, protection and prevention is overly simplistic, it does potentially have the capacity to capture most of the major international legal obligations set out above.").

74. *Id.*

75. *Id.* at 549.



dards will therefore never be as significant or as legitimate as a judgment made on the basis of commitments voluntarily accepted by Lao PDR and endorsed by the international community of States. This is the value and the strength of international law.<sup>76</sup>

The fundamental distinction Gallagher perceives, between the U.S. approach and the U.N. approach, lies in the idea that greater legitimacy attaches to the Trafficking Protocol than to the TVPA by virtue of the fact that the former was negotiated and agreed upon in a multilateral forum, and then voluntarily accepted by states.<sup>77</sup> Over the past decade, however, the U.S. approach and the U.N. approach to the issue of trafficking in persons have been conflated, both in perception and in the way that anti-trafficking measures are undertaken, by U.N. agencies and NGOs.<sup>78</sup> The TIP Reports exhort states to subscribe to the Trafficking Protocol, giving the impression that the objectives of the two regimes are identical. At the same time, measures taken to prevent trafficking under the auspices of the United Nations are often funded by the United States, meaning that, in general, greater attention is paid to the issue of trafficking for the purposes of sexual exploitation than, for example, trafficking for exploitation of labor.<sup>79</sup>

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76. *Id.* at 550.

77. *See id.* at 549-50.

78. The TIP Reports contribute to the impression that the TVPA and the Trafficking Protocol have the same objective. The 2011 TIP Report, for example, acknowledges that:

The Trafficking in Persons Report monitors countries' anti-trafficking efforts against minimum standards set forth in the U.S. Trafficking Victims Protection Act of 2000 (Div. A, Pub. L. 106-386), as amended (TVPA), not the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), which supplements the UN Convention Against Transnational Organized Crime. The standards in the TVPA, however, are largely consistent with the framework for addressing trafficking set forth in the Palermo Protocol, both in form and content. Both define trafficking in persons as a set of acts, means, and purposes. Both emphasize the use of force, fraud, or coercion to obtain the services of another person. And both acknowledge that movement is not required, framing the crime around the extreme exploitation that characterizes this form of abuse.

U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 16* (2011). However, as Chuang notes, there are some critical distinctions between the two definitions. For example, the U.S. definition places emphasis on trafficking for the purpose of "commercial sexual exploitation." Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-02 (2000); Chuang, *The United States as Global Sheriff*, *supra* note 22, at 467. Chuang also notes that "though the sanctions regime does not explicitly require countries to adopt an abolitionist position, the combination of the funding restrictions and the Legal Building Blocks strongly signals to those in need of economic assistance that the path to gold lies on the abolitionist side of the road." Chuang, *The United States as Global Sheriff*, *supra* note 22, at 470. The Trafficking Protocol, on the other hand, emphasizes exploitation, which "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." Trafficking Protocol, *supra* note 50, art. 3(a).

79. Chuang, *The United States as Global Sheriff*, *supra* note 22, at 479-82.

## III. RESPONSE OF ASEAN STATES TO THE GLOBAL REGIME

The extent of trafficking in persons in Southeast Asia is difficult to assess, seeing as the borders of many Southeast Asian states are porous and trafficking may go undetected; citizenship and birth records do not exist in parts of Southeast Asia, making it difficult to identify trafficked persons; and trafficked persons may be reluctant to make reports to the police because the result can be deportation.<sup>80</sup> The extent of internal trafficking occurs on a scale and magnitude that is even more difficult to assess than cross-border trafficking.<sup>81</sup> The United Nations reports that, in 2012, there were 10,000 cases of trafficking in persons in South Asia, East Asia, and the Pacific.<sup>82</sup> It appears that since 1997 and the Asian Financial Crisis, trafficking has increased.<sup>83</sup> Although charting the geography of interstate trafficking flows is complicated, the overall pattern seems to be that people are trafficked from Laos, Cambodia, Vietnam, Indonesia, the Philippines, and Myanmar, into the relatively rich and developed countries of Malaysia and Singapore, and (sometimes) further abroad to Australia, Europe, and the United States.<sup>84</sup> China and Thailand are countries of

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80. See Ashley Blackburn, Robert W. Taylor & Jennifer Elaine Davis, *Understanding the Complexities of Human Trafficking and Child Sexual Exploitation: The Case of Southeast Asia*, 20 *WOMEN & CRIM. JUST.* 105 (2010). Alison Murray has shown how difficult it is to estimate the scale of trafficking and discusses the policy distortions that result from reliance on unsupported statistics. Alison Murray, *Debt-Bondage and Trafficking: Don't Believe the Hype*, in *FEMINIST POSTCOLONIAL THEORY: A READER* 413, x-y (Reina Lewis & Sara Mills eds., 1988).

81. Johannes Koettl, *Human Trafficking, Modern Day Slavery, and Economic Exploitation: A Discussion on Definitions, Prevalence, Relevance for Development, and Roles for the World Bank in the Fight Against Human Trafficking*, *SOCIAL PROTECTION & LABOR: THE WORLD BANK* (2009), <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0911.pdf>. Koettl writes: "Nobody knows the true numbers, but even conservative estimates suggest that at least 2.5 million children, women, and men are lured or forced across international borders every year – and many more are trafficked within their home countries – and put to work against their will, often under deplorable and unsafe conditions, held captive by physical, psychological, or financial threats." *Id.* at 3.

82. U.N. Office on Drugs and Crime [UNODC], *Global Report on Trafficking in Persons*, 69 No. E.13.IV.1 (2012) [hereinafter UNODC Global Report on Trafficking in Persons].

83. See Ruchira Gupta, *Human Trafficking in Asia: Trends and Responses*, in *ON THE MOVE: MIGRATION CHALLENGES IN THE INDIAN OCEAN LITTORAL* 69, 70-71 (Ellen Laipton & Amit Pandya eds., 2010).

84. Pierre Le Roux, *A Lethal Funnel: Prostitution and Trafficking in Women for Sexual Exploitation in Southeast Asia*, in *TRADE IN HUMAN BEINGS FOR SEX IN SOUTHEAST ASIA* 111, 129 (Pierre Le Roux, Jean Baffie & Gilles Beullier eds., 2010). The Global Report on Trafficking in Persons states, "in East Asia and the Pacific, most victims are trafficked domestically or from neighbouring countries" and "Thailand detects a significant number of victims from the greater Mekong area. Victims from the Mekong area and the poorer countries in South-East Asia are often trafficked to the richer countries." UNODC, *Global Report on Trafficking in Persons*, *supra* note 82, at 79. The greater Mekong area includes Cambodia, Laos, Myanmar, Thailand, Vietnam, and Yunnan Province, China.

both origin and destination, and also places where internal trafficking occurs.<sup>85</sup>

The engagement of ASEAN states with the U.N. regime for combating human trafficking has been equivocal.<sup>86</sup> Brunei has still not signed the Trafficking Protocol. Indonesia and Vietnam ratified the Protocol relatively late, in 2009 and 2012 respectively. Thailand did not ratify the Protocol until 2013. Singapore did not ratify until September 2015.<sup>87</sup> Although the other ASEAN states have ratified or acceded to the Protocol, only the Philippines and Cambodia have accepted Article 15(2), which provides for the submission of disputes to arbitration, or failing that, to the International Court of Justice.<sup>88</sup>

One explanation for the reluctance of ASEAN states to engage with the international regime is the disjuncture that exists between the global conception of the problem of trafficking, and the dimensions and scope of the problem as it exists in Southeast Asia. Let us consider this further.

First, the Trafficking Protocol emphasizes the nature of trafficking as an organized transnational crime. The idea of trafficking in the Trafficking Protocol is usually described along the following lines:

Over the last ten years, the issue of illegal migration has been increasingly linked to organised criminal groups that now largely control the smuggling and trafficking of people. People-traffickers and smugglers make high profits while risking relatively short prison sentences in comparison with drug dealers. They are connected to other transnational criminal networks involved in narcotics, arms trafficking, money laundering and counterfeit documentation and dispose over the necessary funds to purchase modern equipment and corrupt police and other government officials. Their activities rely on complex infrastructures and are taken more and more seriously by states.<sup>89</sup>

But there is scant evidence that the majority of trafficking in Southeast Asia is practiced predominantly as a systematic, patterned, and organized form of crime. Indeed, recent, ethnographically-oriented research points in precisely the opposite direction. Molland's work, for example, carried out along the Thai-Lao border, reveals that much trafficking is *not*

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85. UNODC Global Report on Trafficking in Persons, *supra* note 82, at 51, 72; Cheah Wuiling, *Assessing Criminal Justice and Human Rights Models in the Fight Against Sex Trafficking: A Case Study of the ASEAN Region*, 3 ESSEX HUM. RTS. REV. 46, 52-53 (2006).

86. Blackburn et al., *supra* note 80.

87. Trafficking Protocol, *supra* note 50, at 3.

88. *See id.*

89. Ralf Emmers, *The Threat of Transnational Crime in Southeast Asia: Drug Trafficking, Human Smuggling and Trafficking, and Sea Piracy*, RES. UNIT ON INT'L SECURITY AND COOPERATION (UNISCI) DISCUSSION PAPERS 1, 5 (2003), <http://www.redalyc.org/pdf/767/76711296006.pdf>.

the prerogative of organized and calculating criminal groups,<sup>90</sup> but is carried out on an opportunistic basis, by friends, acquaintances, and sex workers themselves, who recruit among their peers on visits back to their village communities.<sup>91</sup> The research of Derks, Henke, and Vanna, carried out in the Mekong region, also concludes that trafficking is a “cottage industry,” involving family members, neighbors, and friends, and that no specific studies have revealed the “criminal networks” of human traffickers.<sup>92</sup> The work of Thierry Bouhours and his colleagues, in Cambodia, also casts doubt on claims about the high prevalence, profitability, and role of organized crime in human trafficking.<sup>93</sup> Bouhours points out that incarcerated traffickers in Cambodia are poor and uneducated individuals, and that 80% of them are women:

[Trafficker] activities are unsophisticated and conducted by sole operators or small casual or informal networks. Pushed by a lack of legitimate opportunities and pulled by the presence of illegitimate opportunities, to survive they engage in trafficking for very modest gains.<sup>94</sup>

Second, the Trafficking Protocol emphasizes the presence of coercion as the element that distinguishes trafficked persons from migrants or participants in people-smuggling schemes.<sup>95</sup> Yet, in Southeast Asia, the circumstances of poverty, which cause people to move or make them susceptible to being moved involuntarily (trafficked), severely complicate notions of consent.<sup>96</sup> There is a significant body of research demonstrating that in many cases, at least initially, the ‘victim’ of trafficking in Southeast Asia is a willing participant in a scheme that promises benefits, which might be economic (work, food, housing) or social (in the form of *chiwit*

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90. Sverre Molland, *The Inexorable Quest for Trafficking Hotspots Along the Thai-Lao Border*, in *LABOUR MIGRATION AND HUMAN TRAFFICKING IN SOUTHEAST ASIA: CRITICAL PERSPECTIVES*, 57, 57-58 (Michele Ford et al. eds., 2012) [hereinafter Molland, *The Inexorable Quest*]; see also Raimo Väyrynen, *Illegal Immigration, Human Trafficking, and Organised Crime*, U.N. U. WORLD INST. FOR DEV. ECON. RES. 1, 7 (2003).

91. See Sverre Molland, ‘*The Perfect Business*’: *Human Trafficking and Lao-Thai Cross-Border Migration*, 41 *DEV. & CHANGE* 831, 848 (2010); Sverre Molland, *The Value of Bodies: Deception, Helping and Profiteering in Human Trafficking Along the Thai-Lao Border*, 34 *ASIAN STUD. REV.* 211, 222 (2010) [hereinafter Molland, *The Value of Bodies*].

92. ANNUSKA DERKS, ROGER HENKE & LY VANNA, *REVIEW OF A DECADE OF RESEARCH ON TRAFFICKING IN PERSONS, CAMBODIA* 17 (2006).

93. Thierry Bouhours, Roderic Broadhurst & Chenda Keo, *Human Trafficking and Moral Panic in Cambodia: The Unintended Consequences of Good Intentions* 24 (*Am. Acad. of Political Sci.*, Working Paper, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2190704](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190704).

94. *Id.* at 24.

95. Trafficking Protocol, *supra* note 50, art. 3(a).

96. Blackburn et al., *supra* note 80, at 105 (“Over the past century, rampant poverty and political instability has marred the Southeast Asia region and has undoubtedly led to the infiltration of organized criminal networks seeking to exploit vulnerable men, women, and children.”).

*thansamay*, the “taste for modern life”).<sup>97</sup> Molland argues that while there do appear to be some cases of abduction, more commonly what occurs is deceptive recruitment, primarily about conditions of work (which are sometimes more restrictive than described) and earnings (which can be less than described).<sup>98</sup> In this way, much trafficking in Southeast Asia is conflated with, or hidden within, the broader (and more difficult to prevent) phenomenon of illegal migration.<sup>99</sup>

Third, it is not at all clear that, in Southeast Asia, the majority of trafficking occurs for the purpose of prostitution or sexual exploitation. The evidence would seem to show that exploitation of labor is at least as prevalent as sexual exploitation.<sup>100</sup> For those migrating from Lao PDR, for example, the largest site of exploitation seems to be labor outside of the sex industry.<sup>101</sup> Even in Cambodia, where there is significant evidence that trafficking does occur for the purpose of work in the sex industry, there is also evidence that equally as many persons, comprised mainly by men, are trafficked into other industries, such as: “factories; the agricultural sector and fishing industries, where they work in circumstances of actual or potential exploitation; for legal and illegal work; legal and illegal marriages; the organ trade, camel racing; and bonded labor.”<sup>102</sup>

Finally, the Trafficking Protocol places an emphasis on maintaining the integrity of borders.<sup>103</sup> Yet, many borders within Southeast Asia were

97. *Id.* at 115, 120-21; see Sandy, *supra* note 58, at 449. For an anthropological account of motivations for voluntary migration, see M.B. Mills, *Contesting the Margins of Modernity: Women, Migration, and Consumption in Thailand*, 24 AM. ETHNOLOGIST 37 (1997). Sverre Molland discusses *chiwit thansamay* (Thai) and *siwit thansamay* (Lao) in the context of trafficking in *Safe Migration, Dilettante Brokers and the Appropriation of Legality: Lao-Thai “Trafficking” in the Context of Regulating Labour Migration*, 85 PAC. AFF. 117, 123 (2012).

98. See Mely Caballero-Anthony, *Human Trafficking and Human Rights in Asia: Trends, Issues and Challenges*, in CROSS BORDER GOVERNANCE IN ASIA: REGIONAL ISSUES AND MECHANISMS 219, 219-66 (Michele Ford et al. eds., 2011); Molland, *The Inexorable Quest*, *supra* note 90; Molland, *The Value of Bodies*, *supra* note 91, at 222.

99. Didier Bertrand, *Migrations and Trafficking in the Lao PDR: Contextual Analysis of Sexual Exploitation and Victimization*, in TRADE IN HUMAN BEINGS FOR SEX IN SOUTHEAST ASIA *supra* note 84, at 157, 161-64.

100. Blackburn et al., *supra* note 80; UNODC Global Report on Trafficking in Persons, *supra* note 82, at 34 (“In the other regions, the shares of trafficking for forced labour are far higher than in Europe and Central Asia. In South Asia, East Asia and the Pacific, trafficking for forced labour is the major detected form of trafficking as it accounts for nearly two thirds of the detected victims.”).

101. Susan Kneebone & Julie Debeljak, *Combating Transnational Crime in the Greater Mekong Subregion: The Cases of Laos and Cambodia*, in TRAFFICKING AND HUMAN RIGHTS: EUROPEAN AND ASIA-PACIFIC PERSPECTIVES 133, 137 (Leslie Holmes ed., 2010).

102. *Id.* at 140.

103. The Trafficking Protocol states: “The Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.” Trafficking Protocol, *supra* note 50, art. 4. The Protocol supplements the United Nations Convention against Transnational Organized Crime. The Convention provides that a crime is transnational in nature if:

imposed, sometimes arbitrarily, by colonial rulers. Prior to this, they were ‘frontier’ areas, where neighbors and family travelled and traded without restriction.<sup>104</sup> In many cases, the traditions of unfettered trade and exchange have continued, because states lack either the incentive or the capacity to stem unofficial cross-border commerce.<sup>105</sup> In Hekou, for example, where the Nanxi River and the Red River merge, and China and Vietnam meet, tens of thousands of undocumented Vietnamese women, many of them under the age of eighteen, enter China illegally by boat.<sup>106</sup> In the Isaan region, where the Mekong River marks the border between Thailand and Laos, government regulations on both sides make legal migration a “lengthy, expensive, and difficult process,” unfamiliar to many people and avoided by most.<sup>107</sup>

The inadequacy of the global regime in reflecting the particularities of the practice of trafficking in Southeast Asia might plausibly explain the reluctance of states to subscribe to the Protocol. Yet, as the following section shows, the majority of ASEAN states have passed legislation aimed at addressing trafficking in persons. This legislation, without exception, draws heavily on the text of the Protocol and the TVPA. This raises two central and related questions. First, why, over the period of a decade, despite the disjuncture between the practice of trafficking and the global anti-trafficking architecture, have the member states of ASEAN passed broadly similar legislation, consonant with international norms, directed at preventing human trafficking and protecting the human rights of trafficked persons? In the language of compliance scholarship, this question can be put in the following way: what factors led to the decision on the part of states to give international human rights norms prescriptive status in domestic law? Second, what is the effect of global norms in these circumstances? Is the result compliance or rule-consistent behavior? If not, then what is the explanation for this?

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- (a) It is committed in more than one State;
  - (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
  - (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
  - (d) It is committed in one State but has substantial effects in another State.

Transnational Crime Convention, *supra* note 52, art. 3(2).

104. THONGCHAI WINICHAKUL, *SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION* 73-75 (1994); Pierre-Arnaud Chouvy, *Illegal Trades Across Mainland Borders of Southeast Asia*, in *THE TRADE IN HUMAN BEINGS FOR SEX IN SOUTHEAST ASIA*, *supra* note 84, at 305, 312.

105. Kneebone & Debeljak, *supra* note 101.

106. Zhang Juan, *A Trafficking ‘Not-Spot’ in a China-Vietnam Border Town*, in *LABOUR MIGRATION AND HUMAN TRAFFICKING*, *supra* note 90, at 95–98.

107. Bertrand, *supra* note 99, at 158 (discussing the dynamics of inter-state commerce in the greater Mekong region).

#### IV. DOMESTIC RESPONSE OF ASEAN STATES TO TRAFFICKING IN PERSONS

Every ASEAN state has passed specific legislation relating to human trafficking. Laos was the last to do so, with the National Assembly's adoption of the Law on Preventing Human Trafficking in December 2015.<sup>108</sup> In the majority of cases,<sup>109</sup> the legislation includes provisions for the protection of victims of trafficking, as well as for the prosecution of perpetrators, and references, to different extents, to the Trafficking Protocol definition of "trafficking in persons."<sup>110</sup>

In 2003, the Philippines passed the Anti-Trafficking in Persons Law of the Philippines, which sets the issue of trafficking within a human rights framework and provides a broad definition of trafficking, deeming the issues of consent irrelevant.<sup>111</sup> In February 2013, President Aquino signed the expanded Anti-Trafficking in Persons Act,<sup>112</sup> which strengthens powers to prosecute those who engage, or attempt to engage, in human trafficking, and provides increased protection for the rights of trafficked persons.<sup>113</sup> In 2004, the Government of Brunei announced the passage of the Trafficking and Smuggling Persons Order of 2004.<sup>114</sup> The means for procuring trafficking as set out in Section 4 of the Brunei legislation (threat, use of force or other forms of coercion, etc.) are identical to the means set out in the Trafficking Protocol.<sup>115</sup> In 2005, Myanmar's Anti-

108. See *Lao National Assembly Passes Law to Prevent Human Trafficking*, THAI PBS (Dec. 21, 2015, 9:37 AM), <http://englishnews.thaipbs.or.th/content/143067>.

109. At the time of writing, the Laos legislation had not yet been translated into English, and it was not possible to analyze the extent to which the Laos anti-trafficking legislation conforms to the provisions of the Trafficking Protocol.

110. The Trafficking Protocol defines "trafficking in persons" as "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." Trafficking Protocol, *supra* note 50, art. 3(a). Article 3(b) provides that the consent of the victim is irrelevant where the means referred to in Article 3(a) have been used. For the meaning of "exploitation," see *supra* note 58.

111. An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for Its Violations, and for Other Purposes, Rep. Act No. 9208, § 3(a), 99:31 O.G. 4916-25 (May 26, 2003) (Phil.).

112. An Act Expanding Republic Act No. 9208, Entitled "An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for Its Violations and for Other Purposes," Rep. Act No. 10364, § 16(d), (July 23, 2012) (Phil.).

113. Michael Lim Ubac, *Aquino Signs Expanded Anti-Trafficking Law*, PHILIPPINE DAILY INQUIRER (Feb. 14, 2013, 4:54 AM), <http://globalnation.inquirer.net/64303/aquino-signs-expanded-anti-trafficking-law>.

114. Trafficking and Smuggling of Persons Order (Act No. S 82/2004) (Brunei).

115. Compare Trafficking Protocol, *supra* note 50, art. 3 (stating the role of coercion in procuring trafficking as "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

Trafficking in Persons Law was decreed. Again, Myanmar's legislation sets out in identical form the prohibited means of procuring persons for the purpose of exploitation.<sup>116</sup> Myanmar's anti-trafficking law also replicates the definition of exploitation contained in the Trafficking Protocol.<sup>117</sup> In 2007, the Malaysian House of Representatives passed the Anti-Trafficking in Persons Act, which adopts the Trafficking Protocol language regarding means of trafficking<sup>118</sup> and the Trafficking Protocol definition of exploitation.<sup>119</sup> The Malaysian Act deems consent to be irrelevant, provides some measures for the care and protection of trafficked persons, and creates a high-level Council for Anti-Trafficking in Persons.<sup>120</sup> The Act was amended in 2010 to include the issue of migrant smuggling.<sup>121</sup> In 2015, further amendments were put before Parliament but have not, at the time of writing, been passed into law.<sup>122</sup>

In June 2008, Thailand introduced the Anti-Trafficking in Persons Act,<sup>123</sup> which replaces the 1997 Measures in Prevention and Suppression of Trafficking in Women and Children Act.<sup>124</sup> Thailand's 2008 Act extends protection to male victims of trafficking, and significantly strengthens the protection for victims of trafficking. The Thai legislation does not mirror the Protocol language as precisely as does the legislation of Myanmar, Brunei, and Malaysia. However, it does contain the essential elements of

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or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation"), with Trafficking and Smuggling of Persons Order, *supra* note 114, sec. 4 (referring to: "(a) threat; (b) use of force or other forms of coercion; (c) abduction (d) fraud; (e) deception; (f) abuse of power or of a position of vulnerability; (g) the giving or receiving of payments or benefits to achieve the consent of a person having control over another person").

116. The Anti Trafficking in Persons Law (Act No. 5/2005) § 3(a) (Myan.).

117. *See id.* (defining 'exploitation' as including "receipt or agreement for receipt of money or benefit for the prostitution of one person by another, other forms of sexual exploitation, forced labor, forced service, slavery, servitude, debt-bondage or the removal and sale of organs from the body").

118. Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (Act No. 670/2007) § 13(a)-(h) (Malay.), <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20670.pdf>.

119. *Id.* § 2.

120. *Id.* §§ 16, 25-26.

121. *Id.* As a consequence of the 2010 amendment, the Secretariat of the Council for Anti-Trafficking in Persons was renamed the Secretariat of the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants. *See Introduction*, MALAYSIAN MINISTRY OF HOME AFFAIRS (last updated May 20, 2016) [http://www.moha.gov.my/index.php/ms/?option=com\\_content&view=article&id=164&Itemid=579&lang=en](http://www.moha.gov.my/index.php/ms/?option=com_content&view=article&id=164&Itemid=579&lang=en).

122. The 2015 TIP Report discusses the proposed amendments to the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act and urges Malaysia to "[s]ign into law and implement amendments to the anti-trafficking law to allow trafficking victims to travel, work, and reside outside government facilities, including while under protection orders." 2015 TIP REPORT, *supra* note 9, at 234.

123. The Anti-Trafficking in Persons Act (B.E 2551/2008) (Thai.).

124. Measures in Prevention and Suppression of Trafficking in Women and Children Act (B.E 2540/1997) (Thai.).



the Protocol definition of trafficking.<sup>125</sup> The same may be said of Cambodia's Law on the Suppression of Human Trafficking and Commercial Sexual Exploitation, passed in 2008.<sup>126</sup> In March 2011, Vietnam's National Assembly passed the Anti-Human Trafficking Law and introduced a five-year anti-trafficking plan.<sup>127</sup> Until 2015, Singapore's government continued to rely on provisions of existing criminal and labor laws to prosecute traffickers and protect victims.<sup>128</sup> However, in 2014, Singapore's Parliament passed the Prevention of Human Trafficking Act,<sup>129</sup> which adopts the Trafficking Protocol definition of trafficking<sup>130</sup> and provides for a regime of punishments, which include a maximum \$100,000 fine, imprisonment for a term not exceeding ten years, and caning not exceeding six strokes.<sup>131</sup>

Bilaterally, there are a host of agreements and Memoranda of Understanding between ASEAN states on the issue of trafficking: for example, between Lao PDR and Vietnam,<sup>132</sup> between Cambodia and Thailand,<sup>133</sup> between Lao PDR and Thailand,<sup>134</sup> between Cambodia and Vietnam,<sup>135</sup>

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125. The Anti-Trafficking in Persons Act, (B.E 2551/2008) (Thai.) § 4.

126. Law on Suppression of Human Trafficking and Sexual Exploitation (Royal Kram No. NS/RKM/0208/005/2004) (Cambodia).

127. Law on Human Trafficking Prevention and Combat (Act No. 66/2011/QH12) (Viet.); Marianne Brown, *New Law in Vietnam to Tackle Changing Face of Human Trafficking*, VOICE OF AMERICA (Nov. 28, 2011, 7:00 PM), <http://www.voanews.com/content/new-law-in-vietnam-to-tackle-changing-face-of-human-trafficking-134671708/168246.html>.

128. As the 2013 TIP Report notes, "Singaporean law prohibits some forms of trafficking through its penal code and Women's Charter." 2013 TIP REPORT, *supra* note 6, at 327. In 2012, Singapore's government implemented a National Plan of Action designed to combat human trafficking. *Id.*

129. Prevention of Human Trafficking Act (No. 45/2014) (Sing.).

130. *See id.* §§ 2, 3(1).

131. *Id.* § 4.

132. Agreement on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking, Laos-Viet., Nov. 3, 2010, [http://www.no-trafficking.org/reports\\_docs/legal/lao-viet\\_ht\\_mou\\_en.pdf](http://www.no-trafficking.org/reports_docs/legal/lao-viet_ht_mou_en.pdf).

133. Memorandum of Understanding on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking, Cambodia-Thai., May 31, 2003, [http://www.no-trafficking.org/resources\\_laws\\_regional.html](http://www.no-trafficking.org/resources_laws_regional.html) (follow "MOU between Cambodia and Thailand (Thailand and Cambodia) on Bilateral Cooperation in Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking 31 May 2003: English" hyperlink).

134. Memorandum of Understanding on Cooperation to Combat Trafficking in Persons, Especially Women and Children, Thai.-Laos, July 13, 2005, [http://www.no-trafficking.org/reports\\_docs/lao/laws/MOU-Lao-Thailand-Combat-Trafficking-2005-ENG.pdf](http://www.no-trafficking.org/reports_docs/lao/laws/MOU-Lao-Thailand-Combat-Trafficking-2005-ENG.pdf).

135. Agreement on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking, Cambodia-Viet., Oct. 10, 2005, [http://www.no-trafficking.org/reports\\_docs/legal/vietnam/mou\\_vn\\_cb\\_eliminate\\_tips.pdf](http://www.no-trafficking.org/reports_docs/legal/vietnam/mou_vn_cb_eliminate_tips.pdf).

between Myanmar and Thailand,<sup>136</sup> between Thailand and Vietnam,<sup>137</sup> and between Myanmar and China.<sup>138</sup> Not all of these agreements include the definition of trafficking contained in the Trafficking Protocol, but most provide details about the way that trafficked persons should be treated, for example, referring to the provision of medical and psychological care, and these agreements also make reference to the process for their return home, for example, by specifying a certain time frame. No ASEAN-wide extradition treaty currently exists, although several ASEAN countries have signed one with each other.<sup>139</sup>

At this point, let us return to some of the theories about why states commit to international human rights norms and then translate their commitments into domestic laws and policies. Theories cluster around three main ideas. First, many scholars, following the “spiral theory of human rights” described by Risse, Ropp, and Sikkink in *The Power of Human Rights*, argue that states act instrumentally in committing to international human rights norms, rationally balancing the costs and benefits of material and social sanctions and rewards.<sup>140</sup> The central argument of Risse, Ropp, and Sikkink is that tactical concessions by states (such as treaty ratification) provide domestic and international actors with the leverage and lobbying power they need to pressure states to give norms prescriptive status.<sup>141</sup> In this way, eventually, the passing of domestic legislation will follow ratification. In Part V, I argue that the explanation attached to the first stage of this process—tactical concessions motivated by sanctions and rewards—provides a plausible explanation for why ASEAN states passed domestic legislation to prevent trafficking. As I will show, however, this stage is not necessarily followed by compliance.

There are two other ways in which human rights change is commonly held to occur. One is where there is a community of states that practice certain patterns of behavior, and states within that community are encouraged to behave in ways that the community deems appropriate. Where the adoption of international human rights norms is part of this

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136. Memorandum of Understanding on Cooperation to Combat Trafficking in Persons, Especially Women and Children, Myan.-Thai., Apr. 24, 2009, [http://www.no-trafficking.org/reports\\_docs/legal/th\\_mn\\_mou\\_coop\\_tip\\_esp\\_womandchil\\_en.pdf](http://www.no-trafficking.org/reports_docs/legal/th_mn_mou_coop_tip_esp_womandchil_en.pdf).

137. Agreement on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking, Thai.-Viet., Mar. 24, 2008, [http://www.no-trafficking.org/reports\\_docs/legal/thai\\_vn\\_coop\\_elim\\_tip\\_en.pdf](http://www.no-trafficking.org/reports_docs/legal/thai_vn_coop_elim_tip_en.pdf).

138. Memorandum of Understanding on Strengthening the Cooperation on Combating Human Trafficking, Myan.-China, Nov. 11, 2009, <http://www.notip.org.cn/UserImages/00001039.pdf>.

139. See, e.g., Treaty On Extradition, Thai.-Cambodia, May 6, 1998, [http://sithi.org/admin/upload/law/Extradition%20Treaty%20between%20the%20Kingdom%20of%20Cambodia,%20and%20the%20Kingdom%20of%20Thailand%20\(1999\).ENG.pdf](http://sithi.org/admin/upload/law/Extradition%20Treaty%20between%20the%20Kingdom%20of%20Cambodia,%20and%20the%20Kingdom%20of%20Thailand%20(1999).ENG.pdf).

140. See, e.g., Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553, 554-56 (2001).

141. Risse & Sikkink, *The Socialization of International Human Rights Norms*, *supra* note 34, at 18.

pattern, states will, like their peers, also adopt human rights norms.<sup>142</sup> This is connected to, but distinct from, the third process of human rights change. This is where interaction, social learning, and deliberation about human rights norms occur among a group of states. The result is that states gradually redefine the way that they think about themselves and reshape their interests and preferences.<sup>143</sup> The result is a deeper level of commitment and better level of compliance, because norms are developed and articulated by, and between, a small number of states that share similar backgrounds, histories, borders, and concerns. We see this occurring, I argue, in relation to the response of ASEAN states to the issue of trafficking in persons.

#### V. RESPONDING TO PRESSURE

The most plausible explanation for why ASEAN states transposed international norms into domestic legislation centers on the influence and effect of the TVPA in encouraging the passage of domestic legislation and in generating policy measures. The history of Indonesia's anti-trafficking measures provides an illustration of the way the TVPA operates in this regard. In 2001, the United States published its first Trafficking in Persons Report, placing Indonesia in the Tier 3 category. Indonesia remained in the Tier 3 category in the 2002 report. On 30 December 2002, through Presidential Decree Number 88, 2002, Indonesia announced a National Plan of Action (NPA) to end human trafficking. The NPA references the specific criticisms made about Indonesia in the 2002 TIP, for example, "that there is currently not a comprehensive and specific trafficking law in Indonesia,"<sup>144</sup> and lists among its objectives the passage of laws to punish trafficking and traffickers and the protection of victims of violence, witnesses, and migrant workers.<sup>145</sup> The NPA recognizes "the need to ratify the Convention against Transnational Organized Crime of 2000 and two associated international protocols related to trafficking in persons in order to meet international standards" and the need to "synchronize international standards on trafficking with national laws through revision of the Criminal Code, Criminal Procedural Code, Marriage Law, Immigration Law, and the Law on the Human Rights Tribunal."<sup>146</sup> The NPA adopts a definition of human trafficking that conforms to the definition contained

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142. March & Olsen, *supra* note 42, at 961.

143. On the variables that affect the state definition of interests and preferences, see Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. (1994) and Alexander Wendt, *The State as Person in International Theory*, 30 REV. INT'L STUD. (2004).

144. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2002).

145. See COORDINATING MINISTRY FOR PEOPLE'S WELFARE, THE ELIMINATION OF TRAFFICKING IN PERSONS IN INDONESIA 2004-2005 10 (2005), [http://www.protectionproject.org/wp-content/uploads/2010/11/NAP-Indonesia\\_2004-2005.pdf](http://www.protectionproject.org/wp-content/uploads/2010/11/NAP-Indonesia_2004-2005.pdf).

146. See Neha Misra, *The National Plan of Action*, in TRAFFICKING OF WOMEN AND CHILDREN IN INDONESIA 219, 222 (Ruth Rosenberg ed., 2003), <http://www.solidaritycenter.org/files/IndoTraffickingPlan%20of%20Action.pdf>.

in the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons.<sup>147</sup> Following these efforts, in the 2003 TIP, Indonesia was placed in the Tier 2 category.<sup>148</sup>

By 2006, however, Indonesia had still not passed comprehensive anti-trafficking legislation and in the view of the United States, had not provided evidence of increasing efforts to combat trafficking.<sup>149</sup> In 2006, Indonesia was downgraded to the Tier 2 Watch List.<sup>150</sup> Following this, in April 2007, Indonesia's President signed into law a comprehensive anti-trafficking bill.<sup>151</sup> In the 2007 TIP, Indonesia was again returned to Tier 2.<sup>152</sup> Observers within Indonesia are candid about the fact that Indonesia's response to human trafficking has been motivated by the need to escape sanctions from the United States, such as restrictions on funds not only for counter-trafficking measures, but also for non-humanitarian and non-trade aid.<sup>153</sup>

There are many examples of this kind of responsiveness in Southeast Asia. In 2010, the Philippines was placed on the Tier 2 Watch List, which, according to Philippines Vice-President Jejomar C. Binay, placed at risk "some \$700 million worth of non-humanitarian and non-trade related aid from the US."<sup>154</sup> Legislation to prevent trafficking, including the Philippines Expanded Anti-Trafficking Act (2013), was passed explicitly "to make the fight against human trafficking more effective, as the country

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147. "Trafficking of women and children is any act committed by traffickers, which include one or more acts of recruitment, domestic and international transportation, transfer, sending, receiving and temporary harbouring or harboring at destinations – women and children – by means of threat, use of verbal and physical force, of abduction, of fraud, of deception, of the abuse of a position of vulnerability (for example when a person does not have any other choice, is isolated, addicted to drugs, trapped in debts, et cetera), of giving or receiving payments or benefits, where the women and children are used for the purpose of prostitution and sexual exploitation (including pedophilia), of legal as well as illegal migrant work, of child adoption, of work on fishing platforms, of being rendered as mail-order brides, of domestic work, of begging, of pornography industry, of illegal drug dealings, of organs sale, and other forms of exploitation." Presidential Decree No. 88 on the National Plan of Action for the Elimination of Trafficking of Women and Children (Indon.); see COORDINATING MINISTRY FOR PEOPLE'S WELFARE, *supra* note 145.

148. 2003 TIP REPORT, *supra* note 70; see also Chuang, *The United States as Global Sheriff*, *supra* note 22, at 481-82.

149. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 140 (2006) [hereinafter 2006 TIP REPORT].

150. *Id.*

151. The Eradication of the Criminal Act of Trafficking in Persons (Act No. 21/2007) (Indon.).

152. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2007) [hereinafter 2007 TIP REPORT].

153. Yuyun Wahyuningrum, Gender Politics in Trafficking Discourses in Indonesia 18 (Paper presented at the International Conference on Mainstreaming Human Security Oct. 4-5, 2007) (on file with author).

154. Press Release, ASEAN Trade Union Council, ASEAN Convention on Human Trafficking Sought (July 13, 2011), <http://aseantuc.org/2011/07/asean-convention-on-human-trafficking-sought/>.

remains in the United States State Department's radar as a venue that harbors the modern form of slavery."<sup>155</sup> Vice-President Binay stated:

[I]ncreasing the number of anti-human trafficking monitoring teams in entry and exit points in the country, strengthening anti-trafficking legislation and speeding up prosecution for trafficking cases. With all these initiatives in play, Tier 1 classification [fully compliant with anti-trafficking standards] is more than possible. Indeed, it is only a question of time.<sup>156</sup>

The government discourse surrounding the introduction of the 2013 Act was entirely focused on the potential for the new measures to change the Philippines' position in the TIP rankings. Introducing the bill, Presidential spokesperson Edwin Lacierda said:

We would like to improve our standing in the watchlist and we hope that, with this expanded coverage of anti-trafficking, we will be able to remove ourselves from the watchlist.<sup>157</sup>

Lacierda also stated:

This is a concern and a priority of our President and this measure will be enforced by the different agencies, especially by the Department of Justice as well as our police agencies . . . . Over a year ago we were taken out of that category—Tier 2. [But] we're still in the watchlist. We would like to improve our standing in the watchlist and we hope that, with this expanded coverage of anti-trafficking, we will be able to remove ourselves from the watchlist.<sup>158</sup>

In Thailand, the Thai government's Ministry of Social Development and Human Security, announced on April 3, 2013 the drafting of new anti-trafficking laws, designed to respond to the fact that:

[T]he United States has placed Thailand in the Tier 2 Watch List for three consecutive years in the Trafficking in Persons Report of its Department of State which could affect Thailand's image. The image of Thailand's exports into the American market could also be affected especially for seafood products which have been determined as products that involve the use of child labour, illegal foreign workers and human trafficking.<sup>159</sup>

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155. Michael Lim Ubac, *Stricter Anti-Human Trafficking Law Signed*, PHILIPPINE DAILY INQUIRER (Feb. 13, 2013), <http://www.philstar.com/headlines/2013/02/13/908396/stricter-anti-human-trafficking-law-signed>.

156. ASEAN Trade Union Council, *supra* note 154.

157. Angela Casauay, *Aquino Signs Expanded Anti-Human Trafficking Law*, RAPPLER (Feb. 13, 2013), <http://www.rappler.com/nation/21727-aquino-signs-expanded-anti-human-trafficking-law>.

158. Ubac, *supra* note 113.

159. Press Release, Ministry of Foreign Affairs of the Kingdom of Thailand, Invitation to Conduct News Reporting and Attend the Press Briefing for the Study Tour of the Diplo-

Writing specifically in relation to Southeast Asia, trafficking expert Anne Gallagher claims to have observed “multiple instances in which the open threat of a negative grade in the U.S. TIP Report provided the impetus for major reform initiatives, including the criminalization of trafficking.”<sup>160</sup>

Although several ASEAN states appear to have passed reforms directly in response to U.S. pressure, there has been caviling (which has been public, in the case of Singapore) about the lack of transparency and the subjective methodology employed to rank states into tiers of compliance, and accusations that rankings are based less on empirical evidence than on the political preferences of the United States.<sup>161</sup> Myanmar, for example, despite passing significant legislation directed at addressing trafficking in persons in 2005, was consistently ranked Tier 3 until 2012, when it finally achieved a Tier 2 Watch List ranking. This was the same year that the United States dropped many of its sanctions against Myanmar, and after Myanmar agreed to a joint plan against trafficking with the United States.<sup>162</sup> Chuang notes that Indonesia achieved a Tier 2 ranking in 2003, at around the same time that Indonesia became a key U.S. ally in the War on Terror.<sup>163</sup>

One of the criticisms of the TIP Reports is that they place significant emphasis on the number of convicted traffickers, and an increase in the number of convictions from previous years is viewed as an indicator of a country’s success in addressing the issue of trafficking.<sup>164</sup> For example, in 2004, Laos’ anti-trafficking office reported five convictions for trafficking-

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matic Corps, (Jan. 11, 2013), <http://www.mfa.go.th/main/en/media-center/14/31530-Invitation-to-conduct-news-reporting-and-attend-th.html>.

160. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING*, *supra* note 50, at 485. Gallagher further writes: “As explored at various points throughout this book, some of these responses have been highly problematic in human rights terms, a side effect that is not explored or even acknowledged by the U.S. Department of State’s reports themselves.” *Id.*

161. Xinhua Published, *Singapore Urges US to Adopt More Objective Methodology in Human Trafficking Report*, *GLOBAL TIMES* (June 26, 2013, 8:35 AM), <http://www.global-times.cn/content/791342.shtml>. When Russia was downgraded to Tier 3 in 2013, Russia’s Foreign Ministry was particularly blunt in its assessment of the ranking process. Konstantin Dolgov, the Foreign Ministry’s plenipotentiary for Human Rights, said in an official statement: “Unfortunately, instead of a deep and objective study into the growing scale of human trafficking, including in the United States itself, the authors of the report again used the unacceptable ideological approach that divides nations into rating groups depending on the US State Department’s political sympathies or antipathies.” *Moscow Attacks US Human Trafficking Report as Politicized and Arrogant*, *RT* (June 20, 2013, 10:20 AM), <https://www.rt.com/politics/trafficking-arrogant-politicized-report-992/>.

162. See Press Release, U.S. Dep’t of State, *United States – Myanmar Joint Plan on Trafficking in Persons*, (Nov. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/11/200675.htm>.

163. Chuang, *The United States as Global Sheriff*, *supra* note 22, at 481-82.

164. See Alese Wooditch, *The Efficacy of the Trafficking in Persons Report: A Review of the Evidence*, 22 *CRIM. JUST. POL’Y REV.* 471 (2011); Gallagher, *A Shadow Report*, *supra* note 8, at 531-532.

related crimes. The 2005 TIP Report placed Laos in the Tier 2 category.<sup>165</sup> The following year, Laos reported only one conviction for trafficking. Noting this, that year, the United States placed Laos in the Tier 3 category.<sup>166</sup> In 2007, however, the TIP Report lauded the fact that the Lao government had demonstrated progress in its anti-trafficking law enforcement efforts, reporting twenty-seven trafficking investigations that resulted in the arrests of fifteen suspected traffickers, twelve of whom were prosecuted. Laos was returned to Tier 2.<sup>167</sup> In relation to Thailand, the 2012 TIP Report noted that the Royal Thai Police initiated eighty-three investigations of trafficking in 2011: sixty-seven for sex trafficking and sixteen for forced labor, involving 155 suspected offenders and representing an increase from seventy such investigations in 2010. However, it also noted that investigations led to only sixty-seven prosecutions in 2011, compared to seventy-nine prosecutions in 2010. The report also noted that there were twelve trafficking-related convictions in 2011, a decrease from the previous year's eighteen convictions.<sup>168</sup> Thailand remained on the Tier 2 Watch List in 2012.

The problem with what Anne Gallagher describes as a “success by numbers” approach is that it:

[S]erves to discourage the development of longer-term capacities, systems and processes that are actually required for an effective criminal justice response. Conversely, it promotes a focus on the easy wins: the small players who can be identified and apprehended much more easily than those who are reaping the real financial rewards. The US standards are also silent on the issue of quality. All prosecutions seem to count, irrespective of their adherence to international criminal justice standards. The absence of an explicit qualitative element in the crucial area of prosecutions risks undermining basic rights including the right to fair trial as dysfunctional, often corrupt, national criminal agencies are called in to help secure a positive report card.<sup>169</sup>

The theories to which I have referred draw on individual-level psychology (shame, social status, and material reward) to explain what motivates macro-level state practices. From this perspective, let us consider the operation of the TVPA in relation to Southeast Asian states.

One of the primary ways that the TVPA operates as an external motivator is through material inducement and material disincentive. The problem with material reward or punishment is that it has the potential to ‘crowd out’ intrinsic motivation states may have to follow norms for non-

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165. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* (2005).

166. 2006 TIP REPORT, *supra* note 149.

167. 2007 TIP REPORT, *supra* note 152.

168. *See* U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* (2012).

169. Gallagher, *A Shadow Report*, *supra* note 8, at 531-32.

material reasons.<sup>170</sup> Incentive-based or punishment-based policies suggest to states that preferred behavior (preventing trafficking, and protecting the rights of trafficked persons) is “not self-evidently appropriate or that the broader social environment does not adequately value self-motivated rule adherence.”<sup>171</sup> As Goodman and Jinks argue, if action can be justified by both normative sentiments and externally imposed material incentives or disincentives, then the result may be a negative effect on the internalization of norms.<sup>172</sup> The reasons are as follows:

First, the purpose of a regime of penalties and incentives is two-fold: to supply states with a rational reason for pursuing certain behavior and to supply a signaling effect, indicating that the proscribed behavior is abhorrent to a community of actors. In relation to the former, the inference that is generally drawn from the presence of material incentives or disincentives is that the reason for action is the material incentive, rather than a state’s moral character or principled beliefs. We see this clearly in the statements that have emanated from government representatives of the Philippines, Thailand, and Indonesia, when they have supplied reasons for their actions in relation to anti-trafficking measures. References to the importance of protecting the human rights of trafficked persons (where any exist) are almost entirely drowned out by references to the importance of avoiding negative sanctions from the United States. At a minimum, this creates confusion: how can one tell whether a government is acting out of a principled belief about how it ought to behave, or in pursuit of a material benefit? In relation to the “expressive function” of punishment (as a signal that the international community condemns the proscribed behavior), Goodman and Jinks argue that this is diminished if penalties and rewards issue from actors who have insufficient social standing vis-à-vis the signaled actors—“a narrow band of donor countries, a remote foreign court, unrepresentative segments of civil society, a hostile country.”<sup>173</sup>

Second, Goodman and Jinks argue that over-justification affects self-perception, causing actors to lose cognitive track of their motives for abiding by a norm. In these circumstances, actors are most likely to attribute their actions to material incentives. The result is that the strength of intrinsic motivation for observing a social norm is lost.<sup>174</sup> That is, states that comply (or would have complied) with a norm because it is an extension of their identity or internal value system, lose track of this as the reason for compliance, because of the presence of material reasons. This can delay the final stages of rule-consistent behavior or make it more shallow and difficult to sustain:

Accordingly, communicative exchanges within a domestic setting might shift toward the more limited agenda of powerful interna-

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170. Goodman & Jinks, *supra* note 45, at 106.

171. *Id.*

172. *Id.*

173. *Id.* at 110.

174. *Id.* at 111.



tional institutions when those institutions promote human rights through material inducements. One concern is that, had actors been left to their own devices, a broader and stronger human rights agenda might have emerged.<sup>175</sup>

Third, and relatedly, the provision of material incentives often compromises a sense of self-determination and degrades intrinsic motivation for engaging in behavior.<sup>176</sup> Goodman and Jinks suggest that where international coercion through material incentives is considered controlling, actors resist even normative practices that they would otherwise agree with. We can see this in the attitude taken by Singapore to the requirements of the TVPA. Singapore, despite implementing policies designed to prevent trafficking, refused to pass legislation for this purpose until 2015 and publicly expressed resentment at U.S. attempts to influence its domestic agenda.<sup>177</sup>

One might argue that this does not matter much. After all, if states are not intrinsically motivated to follow certain norms, then it is irrelevant how they are brought to include human rights norms on the domestic agenda. What matters is that they do *something*, regardless of why, or whether it is the result of coercion. It might also be argued that even if states are initially spurred to action by crude measures of coercion and bribery, this may begin a process (of education and reflection) that ends in genuine acceptance of, and respect for, a particular norm.

One response to such arguments is that the means by which states are led to adopt different norms *does* matter, because this affects how deeply and sincerely norms are promoted and acted upon. Granted, in circumstances where there is a blanket rejection of norms and denial that violations exist, then coercion and bribery that results in even superficial change might be seen as better than no change at all. But, where intrinsic motivation *does* exist, then coercive measures can lead to over-justification and problems around self-perception and self-determination.

Let us turn then, finally, to the question of whether an autochthonous regional conception of the importance of preventing trafficking in persons exists in Southeast Asia. Is there evidence to support the idea that if ASEAN states “had been left to their own devices, a broader and stronger human rights agenda might have emerged”?<sup>178</sup> Are ASEAN states sufficiently motivated to implement norms about trafficking for non-material reasons?

In the following section of this article, I describe how ASEAN states do in fact possess intrinsic motivation for pursuing anti-trafficking norms, born out of long-standing and deeply held concerns about state sover-

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175. *Id.* at 114.

176. *Id.*

177. Pearl Lee, *Singapore Disputes US Human Trafficking Report*, NEWS ASIA ONE (June 28, 2013), <http://news.asiaone.com/print/News/Latest%2BNews/Singapore/Story/A1Story20130626-432511.html>.

178. Goodman & Jinks, *supra* note 45, at 114.

eighty and the threat posed by the illegal trafficking of persons across borders; and also, more recently, born out of the work of the region's National Human Rights Institutions (NHRIs), which have focused on the human rights aspects of the practice of trafficking in persons. These reasons for actions are occluded by the discourse around the introduction of anti-trafficking measures, which focuses on immediate responsiveness to U.S. threats and TIP rankings.

## VI. ASEAN AND TRAFFICKING IN PERSONS

In 2004, the same year that ASEAN states signed the Declaration on the Elimination of Violence Against Women,<sup>179</sup> and agreed upon the Vientiane Action Program, which explicitly commits ASEAN to promote the awareness, education and protection of human rights,<sup>180</sup> ASEAN states signed the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children.<sup>181</sup> As well as identifying trafficking in persons as a security concern, the Declaration notes the link between social and economic rights, migration, and vulnerability to trafficking, and, strikingly, draws attention to the “immorality and inhumanity of this common concern.”<sup>182</sup> 2004 was also the year that the ASEAN Inter-Parliamentary Organization passed a Resolution on the role of Parliament in Combating Trafficking in Women and Children in the ASEAN region.<sup>183</sup> The Resolution noted that “the lack of education, unequal treatment and low status of women, poverty and unemployment of women, particularly in the ASEAN region, are major factors contributing to the causes of trafficking of women and minors.”<sup>184</sup>

In 2006, ASEAN published its ‘Responses to Trafficking in Persons: Ending Impunity for Traffickers and Securing Justice for Victims.’<sup>185</sup> A set of guidelines on trafficking in persons, endorsed by the Senior Officials Meeting on Transnational Crime (SOMTC) in 2007, provides guidance to criminal justice practitioners on international cooperation relating to trafficking in persons cases.<sup>186</sup> The ASEAN Intergovernmental Commission

179. Declaration on the Elimination of Violence Against Women in the ASEAN Region, June 30, 2004, [http://www.asean.org/?static\\_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4](http://www.asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4).

180. ASEAN, *Vientiane Action Program* (Nov. 29, 2004), <http://www.asean.org/storage/images/archive/VAP-10th%20ASEAN%20Summit.pdf>.

181. ASEAN, *ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children* (Nov. 29, 2004), <http://www.asean.org/asean-declaration-against-trafficking-in-persons-particularly-women-and-children-4/>.

182. *Id.* at pmb1.

183. ASEAN Inter-Parliamentary Organization, *Resolution on the Role of Parliament in Combating Trafficking in Women and Children in the ASEAN Region*, Res. 25GA/2004/Com/WAIP0/02 (Sept. 12-17, 2004).

184. *Id.*

185. ASEAN, *ASEAN RESPONSES TO TRAFFICKING IN PERSONS: ENDING IMPUNITY FOR TRAFFICKERS AND SECURING JUSTICE FOR VICTIMS* (2006).

186. See Ralf Emmers, *ASEAN and the Securitization of Transnational Crime in Southeast Asia*, 16 PAC. REV. 419 (2010).

on Human Rights (AICHR) identified human trafficking as one of the thematic studies to be undertaken within the first five years of AICHR, and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) included a focus on victims of trafficking in its 2012–2016 work-plan.<sup>187</sup> In their 2007 Joint Communiqué, ASEAN leaders foreshadowed the development of an ASEAN Convention on Trafficking in Persons.<sup>188</sup> On November 21, 2015, following the 27th ASEAN Summit, the ten ASEAN states signed the ASEAN Convention on Trafficking in Persons, Especially Women and Children.<sup>189</sup> The Convention lists its objectives as being: (a) to prevent and combat trafficking in persons, especially against women and children, and to ensure just and effective punishment of traffickers; (b) to protect and assist victims of trafficking in persons, with full respect for their human rights; and (c) to promote cooperation among the parties in order to meet these objectives.<sup>190</sup> To this end, as well as to encourage cooperative measures between states in relation to preventing trafficking and protecting and repatriating victims of trafficking, the Convention requires parties to adopt legislative or other measures to establish trafficking in persons as a criminal offence;<sup>191</sup> and to establish comprehensive policies, programs and other measures to prevent and combat trafficking in persons; and to protect victims of trafficking in persons, especially women and children, from re-victimization.<sup>192</sup>

In this final section, I argue that a regional approach to the issue of human trafficking in Southeast Asia has been generated from the ‘top down’ by states with similar concerns about sovereignty, territorial integrity, and threats to state security; and from the ‘bottom up’, by engagement between and among regional networks of NGOs and NHRIs. The driving factors behind these two interests in developing a regional approach to trafficking in persons are entirely different, and because of this, there is inconsistent and sometimes conflicting emphasis placed on differ-

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187. ASEAN Intergovernmental Commission on Human Rights, *Five-Year Work Plan of the ASEAN Intergovernmental Commission on Human Rights*, (2010–2015); ASEAN, *The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) Work Plan (2012–2016) and Rule of Procedure*, [http://srsg.violenceagainstchildren.org/sites/default/files/political\\_declarations/The-ASEAN-Commission-on-the-Promotion-and-Protection-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2012-2016-and-Rules-of-Procedures-ROP.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/political_declarations/The-ASEAN-Commission-on-the-Promotion-and-Protection-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2012-2016-and-Rules-of-Procedures-ROP.pdf) (last visited Aug. 15, 2016). At the time of writing, neither AICHR nor ACWC have produced any reports or made any investigations related to trafficking in persons.

188. ASEAN, *Joint Communiqué of the Sixth ASEAN Ministerial Meeting on Transnational Crime* ¶ 7 (2007).

189. ASEAN, *The ASEAN Convention on Trafficking in Persons, Especially Women and Children* (Nov. 21, 2015), <http://www.asean.org/storage/images/2015/November/actip/ACTIP.pdf>.

190. *Id.* art 1(a)-(c).

191. *Id.* art 5.

192. *Id.* art 11(1)(a)-(b). The Convention also contains a definition of “trafficking in persons” that draws heavily on the definition contained in the Trafficking Protocol.

ent aspects of the issue of trafficking in persons; on the protection of borders and the prosecution of the crime of trafficking, for example, as against the protection of the rights of trafficked persons. Nonetheless, divergent interests in eliminating trafficking are broadly congruous with a regional approach to the problem, and this explains why ASEAN states have shown increasing willingness to cooperate among themselves on the problem of trafficking in persons, even to the extent of appearing willing to subscribe to a legalized regime for addressing the issue. The backdrop to cooperative efforts is the imminent creation of a single ASEAN economic community. In 1997, on the thirtieth anniversary of ASEAN, ASEAN leaders adopted 'the ASEAN Vision 2020', foreshadowing the community: ten years later, the date for its birth was accelerated to 2015.<sup>193</sup>

The ASEAN Economic Community (AEC) Blueprint envisages, by 2015, the following: (a) a single regional market and production base; (b) a highly competitive economic region; (c) a region of equitable economic development; and (d) a region fully integrated into the global economy. The AEC is expected to transform ASEAN into a region with free movement of goods, services, investment, skilled labor, and freer flow of capital.<sup>194</sup> As we have seen, one of the aims stated in the ASEAN Charter is to alleviate poverty and address the development gap between ASEAN states.<sup>195</sup> The AEC, arguably, will generate economic growth, resulting in more jobs, improved livelihoods, and an overall reduction in poverty. But, it also has the potential to accentuate disparities within and between ASEAN countries and increase relative poverty and inequality, leading to cross-border migration and trafficking.<sup>196</sup>

First, let us consider the 'top down' perspective of states. Why is trafficking in persons an issue of joint concern to states in Southeast Asia? One part of the explanation centers on the particular notion of state security that prevails in the region. The idea of 'comprehensive' or 'overall security', originally coined by Japan in the 1970s, was adopted by Indonesia, Malaysia, the Philippines, and Singapore a decade later.<sup>197</sup> Within the framework of comprehensive security, national security depends not only

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193. ASEAN, *Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015* (Jan. 13, 2007). Each of the ASEAN pillars has its own Blueprint, and together, these Blueprints form the "Roadmap for an ASEAN Community 2009–2015."

194. ASEAN, ASEAN ECONOMIC COMMUNITY BLUEPRINT (2008), <http://www.asean.org/wp-content/uploads/archive/5187-10.pdf>.

195. ASEAN, *Charter of the Association of Southeast Asian Nations* art. 1, ¶ 6 (2007).

196. Phil Marshall, Project Manager of U.N. Inter-Agency Project on Trafficking in Women and Children in the Mekong Sub-region, *Globalization, Migration and Trafficking: Some Thoughts from the South-East Asian Region* (Paper presented at Globalization Workshop May 8-10, 2001), [http://www.childtrafficking.com/Docs/marshall\\_uniap\\_mekong\\_2001\\_.pdf](http://www.childtrafficking.com/Docs/marshall_uniap_mekong_2001_.pdf).

197. Rolfe examines the linkage between national and regional concepts of comprehensive security, and argues that comprehensive security includes political and social stability, economic development, orderly migration, and the health of the population. See Jim Rolfe, *Pursuing Comprehensive Security: Linkages Between National and Regional Concepts, Some*

on the absence of external military hostility, but also on the presence of socio-economic development.<sup>198</sup> Internal threats as well as external threats are recognized as having the potential to destabilize the state and undermine sovereignty. Different ASEAN states developed different perceptions about the nature of these internal threats, based on their different historical experiences. For example, Malaysia's concern with societal order grew out of its experience containing the communist insurgency from 1948 to 1960, and the recognition that its racial and religious cleavages could lead to dangerous disharmony.<sup>199</sup> Indonesia's concern, shaped by its struggle against Dutch colonialism, focused on the necessity of building a united Indonesian state.<sup>200</sup> For Singapore, a small island state, internal instability was viewed as exacerbating external vulnerabilities.<sup>201</sup> The idea of 'resilience' took shape among ASEAN's original members as part of the political discourse (Malaysia)<sup>202</sup> and as part of official policy (*keratasan nasional* "national resilience" in Indonesia). In Indonesia's case, national resilience consisted of strengthening and developing the nation's ideological, political, economic, socio-cultural, security, and defense capacities.<sup>203</sup>

As early as 1976, the idea emerged that the stability and internal and external security of individual states was dependent on the stability of other states in the region, and that regional resilience and national resilience were interdependent. At the first ASEAN Summit, ASEAN's five members declared that, "[t]he stability of each member state and of the ASEAN region is an essential contribution to international peace and security. Each member state resolves to eliminate threats posed by subversion to its stability, thus strengthening national and ASEAN resilience."<sup>204</sup> The Treaty of Amity and Cooperation in Southeast Asia, agreed upon at this same meeting, requires ASEAN member states to "endeavour to strengthen their respective national resilience in their political, economic, socio-cultural as well as security fields in conformity with their respective ideals and aspirations, free from external interference as well as internal subversive activities."<sup>205</sup>

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*Applications*, in *CONCEPTUALIZING ASIA-PACIFIC SECURITY* (Mohamad Jawhar Hassan & Thangam Ramnath eds., 1996).

198. David Dewitt, *Common, Comprehensive, and Cooperative Security*, 7 *PAC. REV.* 1, 3-4 (2007).

199. Muthiah Alagappa, *Comprehensive Security: Interpretations in ASEAN Countries*, in *ASIAN SECURITY ISSUES: REGIONAL AND GLOBAL* 50, 62-63 (Robert A. Scalapino et al. eds., 1989). Alagappa writes: "[I]nternally the two major security concerns have been the threat of communist insurgency and the threat of racial and religious extremism." *Id.* at 63.

200. *Id.* at 58-59.

201. *Id.* at 70-76.

202. *Id.* at 62-63.

203. *Id.*

204. ASEAN, *Declaration of ASEAN Concord* (Feb. 24, 1976) [hereinafter *Declaration of ASEAN Concord*], <http://www.asean.org/news/item/declaration-of-asean-concord-indonesia-24-february-1976>.

205. ASEAN, *Treaty of Amity and Cooperation in Southeast Asia* art. 3 (Feb. 24, 1976); see Dato Musa Hitam, Malaysia Deputy Prime Minister, Malaysia's Doctrine of Comprehen-

Transnational crime—specifically drug trafficking—was identified early on as a threat to comprehensive security and hence to national and regional stability.<sup>206</sup> Drug addiction and trafficking in drugs and crime were perceived as indicators of a state's inability to control its borders, and thus as signs of a weak state where leaders were unable to maintain social order.<sup>207</sup> Later, in the 1980s, drug trafficking and drug use fed concerns about Acquired Immune Deficiency Syndrome (AIDS) and the views of some ASEAN member states that AIDS was the result of homosexuality, prostitution, and heroin use.

In 1983, the Malaysian government officially declared illicit drug trafficking to be a threat to national security.<sup>208</sup> In 1988, ASEAN issued a Joint Declaration in which it stated that the illicit drug trade was a problem that “could escalate to such a level where perpetrators can pose serious political and security threats to the region.”<sup>209</sup> ASEAN Ministers argued that “[t]he management of such transnational issues is urgently called for so that they would not affect the long-term viability of ASEAN and its individual member nations.”<sup>210</sup> In this context, the decision to ex-

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sive Security, Speech at the Fourteenth Anniversary Dinner Harvard Club of Singapore (Mar. 2, 1984), in 17 FOREIGN AFF. MALAYSIA, 1984, at 94, 96 (identifying Malaysia's doctrine of comprehensive security, including “a secure Southeast Asia” and “a strong and effective ASEAN community” and arguing these goals required adherence to the principle of non-intervention and “the building of a structure of trust, confidence and goodwill between the ASEAN states”).

206. *Declaration of ASEAN Concord*, supra note 204 (calling for “[i]ntensification of cooperation among member states as well as with the relevant international bodies in the prevention and eradication of the abuse of narcotics and the illegal trafficking of drugs”). Subsequently, the ASEAN Declaration of Principles to Combat the Abuses of Narcotics Drugs was adopted in Manila, and this led to some initial proposals in responding to the issue of narcotics. ASEAN, *ASEAN Declaration of Principles to Combat the Abuse of Narcotics Drugs* (June 26, 1976), [http://www.asean.org/?static\\_post=asean-declaration-of-principles-to-combat-the-abuse-of-narcotics-drugs-manila-26-june-1976](http://www.asean.org/?static_post=asean-declaration-of-principles-to-combat-the-abuse-of-narcotics-drugs-manila-26-june-1976).

207. See Zarina Othman, *Myanmar, Illicit Drug Trafficking and Security Implications*, 65 *AKADEMIKA* 27 (2004). In relation to Myanmar and Southeast Asia, Othman writes: “Illicit trafficking in human beings, especially women and children, and trafficking in weapons and drugs, has become widespread enough to pose threats to the security and well-being and security of whole states and regions.” *Id.* at 28. Othman further writes: “Like the more traditional and other external security threats, these transnational threats are also capable of undermining law and order and creating devastating political-military, economic and social impacts.” *Id.* Emmers notes: “The issue of transnational crime is closely linked to the question of national sovereignty. On the one hand, transnational criminal activities represent a threat to the national sovereignty and integrity of independent states and endanger the survival of their governments.” Ralf Emmers, *Globalization and Non-Traditional Security Issues: A Study of Human and Drug Trafficking in East Asia 5* (Institute of Defence and Strategic Strategy, Working Paper No. 62, 2004).

208. Zarina Othman, *Human (In)security, Human Trafficking, and Security in Malaysia*, in *TRAFFICKING & THE GLOBAL SEX INDUSTRY* 47, 60 (Karen Beeks & Delila Amir eds., 2006).

209. ASEAN, *Joint Declaration for a Drug-Free ASEAN* (July 25, 1998), [http://www.asean.org/?static\\_post=joint-declaration-for-a-drug-free-asean](http://www.asean.org/?static_post=joint-declaration-for-a-drug-free-asean).

210. ASEAN, *Joint Communiqué, Twenty-Ninth ASEAN Ministerial Meeting* (July 20-21, 1996) § 44 [hereinafter *ASEAN Joint Communiqué*].

pand the membership of ASEAN in the 1990s to include Myanmar and Laos, which were major cultivators of opium poppies, led to increased concern about drug trafficking. At the 1996 meeting of ASEAN Foreign Ministers, Ministers:

recognized the need to focus attention on such issues as narcotics, economic crimes, including money laundering, environment and illegal migration which transcend borders and affect the lives of the people in the region. They shared the view that the management of such transnational issues is urgently called for so that they would not affect the long-term viability ASEAN and its individual member nations.<sup>211</sup>

At a regional conference on transnational crime held in the Philippines in 1997, Philippine President Fidel Ramos declared that “regional security continues to be assaulted by transnational crime and from time to time international terrorism.”<sup>212</sup>

The ASEAN Declaration on Transnational Crime, signed by Heads of State in 1997, draws attention to “the pernicious effects of transnational crime . . . on regional stability and development, the maintenance of the rule of law and the welfare of the region’s peoples,” and recognizes the need for effective regional modalities to combat these forms of crimes.<sup>213</sup> In 1999, ASEAN implemented a Plan of Action to Combat Transnational Crime, which instituted the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) and the Senior Officials Meeting on Transnational Crime (SOMTC), both bodies established to promote cooperation and coordination among ASEAN states in addressing human trafficking (as well as other transnational crimes).<sup>214</sup>

Although it had been mentioned earlier, it was not until the early 1990s that trafficking in persons came to be identified as a transnational crime that had the potential to threaten economic, political, and societal stability.<sup>215</sup> ASEAN’s concern about human trafficking was threefold:

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211. *Id.*

212. President Fidel V. Ramos, Address at the Meeting of ASEAN Ministers of Interior/Home Affairs (AMIHA) and First Conference to Address Transnational Crimes (Dec. 20, 1997).

213. ASEAN, *ASEAN Declaration on Transnational Crime* (Dec. 20, 1997), [http://www.asean.org/?static\\_post=asean-declaration-on-transnational-crime-manila-20-december-1997](http://www.asean.org/?static_post=asean-declaration-on-transnational-crime-manila-20-december-1997).

214. ASEAN, *ASEAN Plan of Action to Combat Transnational Crime* (June 23, 1999), <http://www.asean.org/storage/images/2012/publications/ASEAN%20Documents%20on%20Combating%20Transnational%20Crime%20and%20Terrorism.pdf>.

215. In July 1996, the ASEAN Ministerial Meeting declared that transnational crimes included drug trafficking and money laundering. ASEAN *Joint Communiqué*, *supra* note 210. The ASEAN Vision 2020, adopted by ASEAN leaders at the Second Informal Summit in 1997, foreshadowed the evolution of agreed upon rules of behavior and cooperative measures to deal with issues such as drug trafficking, trafficking in women and children, and other transnational crimes. The following year, at the ASEAN Summit in December 1998, ASEAN leaders adopted the ‘Hanoi Plan of Action,’ which began the process of articulating a platform for collaboration in combating human trafficking. In 1999, Foreign Ministers

first, it was seen as linked to drug trafficking. For example, Thailand's government in particular viewed trafficking of drugs and persons from Myanmar as an immediate threat to its security. Second, it had the potential to undermine orderly, legal migration, and hence, jeopardize relations between states, thereby threatening peace and security.<sup>216</sup> Third, it was something that was viewed as having the potential to undermine the moral foundation of the nation. In relation to this last point, Rizal Sukma recounts how in Indonesia, the Islamic-based Justice and Prosperity Party (PKS) argued that trafficking "disgraced Indonesia's dignity and identity as a nation," giving the impression that Indonesia is "incapable to protect its citizens and is grouped with countries which have bad records on trafficking in persons."<sup>217</sup> An official at the Indonesian Ministry of Women Empowerment agreed: "Indonesia is committed to eliminate human trafficking, especially women and children. This is a matter of national dignity and human rights."<sup>218</sup> Trafficking implies that the state cannot protect its citizens, particularly its most vulnerable citizens, *especially* women and children.<sup>219</sup>

The 1997 Asian Financial Crisis exacerbated poverty and, in Indonesia, intensified pressure for political change.<sup>220</sup> Thailand, recently democratic, urged that a solution to these problems was a reconceptualization of security along the lines of human security, which, it was argued, emphasized the needs of individuals and communities rather than the state and

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adopted the ASEAN Plan of Action to Combat Transnational Crime and in 2002, ASEAN countries agreed on a Work Programme to Implement the Plan of Action. See ASEAN RESPONSES TO TRAFFICKING IN PERSONS, *supra* note 185, at 66–67, 81. See generally Emmers, *supra* note 207, at 18.

216. For example, Malaysian-Thai relations were strained by the illegal entry into Malaysia of large numbers of undocumented workers from Bangladesh, Myanmar, and Thailand. In 2011, Malaysia announced a general amnesty for illegal immigrants to leave the country without punishment. More than 300,000 illegal workers, mostly from Indonesia, left Malaysia under the voluntary repatriation program. In September 2013, Malaysia announced plans to build a security fence along the border that separates Malaysia's Kelantan state from Thailand's Narathiwat province and to strengthen military patrols. *Malaysia to Erect Wall Along River Border*, MALAY. TODAY (Sept. 17, 2013), <http://www.malaysia-today.net/malaysia-to-erect-wall-along-river-border>; see Emmers et al., *supra* note 30, at 77.

217. Wahyuningrum, *supra* note 153, at 16.

218. Rizal Sukma, *Different Treatment: Women Trafficking in the Securitisation of Trans-national Crimes* (Paper presented at the Second NTS Convention Nov. 9-11, 2008) (quoting *Indonesia Belum Serius Antisipasi Perdagangan Manusia*, DETIKNEWS (Aug. 26, 2004, 5:11 PM), <http://news.detik.com/berita/198025/indonesia-belum-serius-antisipasi-perdagangan-manusia>), <http://www.rsis-ntsasia.org/activities/conventions/2008-beijing/rizal.pdf>.

219. *Id.* Sukma writes: "Central to the state-centric perspective or approach is the notion of woman trafficking as a problem that brings about negative implications for the interests of the state or the nation. In this context, the need to protect national dignity, the international image of the Indonesian state and the moral foundation of the nation become the key motivation behind efforts to address the problem of human trafficking." *Id.* at 4.

220. Mely Caballero-Anthony, *Revisioning Human Security in Southeast Asia*, 28 ASIAN PERSP. 155, 173-76 (2004).



regime security.<sup>221</sup> The idea was that poverty, illiteracy, and economic dislocation lead to violence, rebellion, and instability, all of which threatened the stability of the region as a whole. Economic development was viewed as the central plank of domestic stability.<sup>222</sup> In 1998, at the ASEAN Post-Ministerial Conference (ASEAN-PMC) in Manila in 1998, a Caucus on Human Security was held and the following year, an ASEAN-PMC Caucus was established on Social Safety Nets. Human security was taken up with alacrity by ‘track-two’ regional processes such as ASEAN ISIS and the Council on Security Cooperation in the Asia Pacific. There were some thirty track-two meetings from 1998 to 2002 that had human security as the principal focus or a major theme. In the ASEAN Political-Security Community Blueprint (2009), human trafficking was identified as a “non-traditional security issue.”<sup>223</sup> The Blueprint exhorts states to “further strengthen criminal justice responses to trafficking in persons, bearing in mind the need to protect victims of trafficking in accordance with the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children.”<sup>224</sup>

What I have described above shows the historical pedigree of the issue of trafficking in persons as a regional concern. There is evidence of state-led, autochthonous regional conceptions around the importance of preventing trafficking in persons, as part of a normative framework that involves the idea of transnational crime as a threat to the survival of the state.

The emphasis placed on securing the state by preventing crime and ensuring the integrity of borders does not necessarily translate into concern for protecting the human rights of trafficked persons. Indeed, the framing of trafficking as a transnational crime and security issue has the potential to undermine the rights of trafficked persons and elide key aspects of the reasons why trafficking occurs. The national dignity rhetoric, which emphasizes trafficked persons as rights-bearers *because* they are citizens of the state, and holds the value of these persons to be their role as emblems of the dignity of the state, is deficient in its failure to appreciate the nature of trafficking as a rights issue involving the denial of individual autonomy and self-direction.

In the final part of this section, I argue that there is also evidence of regional-level concern about trafficking in persons as a distinct human

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221. Surin Pitsuwan, *ASEAN Keynote Address Vision 20/20: Strengthening Human Security in the Aftermath of the Economic Crisis*, in *THE QUEST FOR HUMAN SECURITY: THE NEXT PHASE OF ASEAN?* 11, 13 (Pranee Thiriparat ed., 2001); see Amitav Acharya, *Human Security: East Versus West*, 56 *INT'L J.* 442, 448 (2001).

222. Amitav Acharya & Arabinda Acharya, *Human Security in the Asia-Pacific: Puzzle, Panacea or Peril?*, *CANCAPS BULL.* (2000).

223. ASEAN, *ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT* § B.4.1 (iv) (2009), <http://www.asean.org/wp-content/uploads/images/archive/5187-18.pdf>.

224. The 2008 ASEAN Charter establishes the ASEAN Political-Security Council (APSC) to coordinate the work of the ASEAN foreign ministers meeting, the ASEAN Law Ministers Meeting, and the ASEAN Ministerial Meeting on Transnational Crime. *Id.*

rights issue, caused by economic and social inequity. This concern has been generated from the 'bottom-up' by the region's national human rights institutions, by institutions within different states that have a human rights focus, and by networks of civil society actors.

The 1999 Bangkok Declaration on Irregular Migration (the Bangkok Declaration), which was agreed upon by ASEAN states (and others) at the conclusion of an International Symposium on Migration, Towards Regional Cooperation on Undocumented/Illegal Migration, acknowledges the links between migration, irregular migration, and human trafficking, notes the complexity of the issue of returning irregular migrants, and recognizes the human rights dimensions of the problem of trafficking in persons and worker exploitation.<sup>225</sup> It explicitly recognizes poverty as a root cause of trafficking and the need for international cooperation to promote sustained economic growth and sustainable development in the countries of origin as a long-term strategy to address irregular migration.<sup>226</sup> The Declaration is, of course, not legally binding, and although the Symposium recognized the need for a regional mechanism to deal with the problem of trafficking in persons and migration, the Declaration does not refer to the creation of an institution to promote, monitor, or enforce its goals.<sup>227</sup> The Bangkok Declaration has been followed by many other Southeast Asian regional declarations and statements that profess a commitment to addressing trafficking in persons as a human rights issue.<sup>228</sup>

It could be argued, of course, that such statements remain at the level of rhetoric; that ASEAN states are 'mimicking' concern for norms prioritized by the international community;<sup>229</sup> or that these instruments reflect

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225. International Symposium on Migration, *Towards Regional Cooperation on Irregular/Undocumented Migration*, BANGKOK DECLARATION ON IRREGULAR MIGRATION (1999).

226. The conference was organized by the Government of Thailand in cooperation with the Office of the High Commissioner for Human Rights and the International Office for Migration, and attended by ministers and government representatives from all ASEAN states and from other states within the broader Asia Pacific region (Australia, Bangladesh, China, Hong Kong, Japan, Republic of Korea, New Zealand, Papua New Guinea, Sri Lanka). The Bangkok Declaration encourages participating countries to strengthen their channels of dialogue, to reinforce their efforts to prevent and combat irregular migration by improving their domestic laws and measures, and to pass legislation to criminalize smuggling of and trafficking of persons.

227. See generally BHARGAVI RAMARMURTHY ET AL., *GLOBALIZING MIGRATION REGIMES: NEW CHALLENGES TO TRANSNATIONAL COOPERATION* (Joakim Palme & Kristof Tamas eds., 2006).

228. See ASEAN, *ASEAN Leaders' Joint Statement in Enhancing Cooperation Against Trafficking in Persons in Southeast Asia* (May 8, 2011); ASEAN Human Rights Declaration art. 13 (2013) ("No person shall be held in servitude or slavery in any of its forms, or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs.").

229. Mathew Davies, *Explaining the Vientiane Action Programme: ASEAN and the Institutionalisation of Human Rights*, 26 PAC. REV. 385, 385-406 (2013); Hiro Katsumata, *ASEAN and Human Rights: Resisting Western Pressure or Emulating the West?*, 22 PAC. REV. 619 (2009).

the views of international experts who are called in to advise on the drafting of regional statements and declarations.

However, the way these ideas have evolved belies this interpretation. Prominent in generating a human rights approach to trafficking has been the region's NHRIs. In Southeast Asia, NHRIs have been established in the Philippines (1987),<sup>230</sup> Indonesia (1996),<sup>231</sup> Malaysia (1999),<sup>232</sup> Thailand (2001),<sup>233</sup> and Myanmar (2011).<sup>234</sup> NHRIs are independent institutions created by governments, with a mandate to promote and protect human rights. They are tasked with critiquing government laws, actions, and policies that might hinder the realization of human rights or violate rights. Part of their role is to engage with the United Nations and to promote its treaties and policies; the other part is to engage with civil society and government within their own country. NHRIs are positioned, therefore, at the intersection between state, society, and the international community. NHRIs across the Asia Pacific region are linked by a regional network, the Asia Pacific Forum of National Human Rights Institutions (APF).<sup>235</sup> Southeast Asian NHRIs have formed their own sub-network, the Southeast Asian NHRI Forum (SEANF).<sup>236</sup>

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230. The Commission on Human Rights of the Philippines was created pursuant to the Philippines Constitution of 1987. CONST. (1987), art. XIII § 17 (Phil.). The role and functions of the Commission are set out in an Executive Order. Exec. Order. No. 163 (1987) (Phil.); see COMMISSION ON HUMAN RIGHTS OF THE PHILIPPINES, <http://www.chr.gov.ph/> (last visited Aug. 15, 2016).

231. Komnas Ham, the Indonesian National Commission on Human Rights, was originally established by Decree of the President of the Republic of Indonesia. National Commission of Human Rights Decree (Presidential Decree No. 50/1993) (Indon.); see KOMISI NASIONAL HAK ASASI MANUSIA, <http://www.komnasham.go.id/> (last visited Aug. 15, 2016).

232. SUHAKAM, the Human Rights Commission of Malaysia, was established by Parliament under the Human Rights Commission of Malaysia Act. Human Rights Commission of Malaysia Act (Act No. 597/1999) (Malay.). The Commission held its first meeting in April 2000. See OFFICIAL PORTAL: HUMAN RIGHTS COMMISSION OF MALAYSIA, <http://www.suhakam.org.my/> (last visited Aug. 15, 2016).

233. The National Human Rights Commission of Thailand was established under the National Human Rights Commission Act. National Human Rights Commission Act (Act B.E. 2542/1999) (Thai.); see NATIONAL HUMAN RIGHTS COMMISSION OF THAILAND, <http://www.nhrc.or.th> (last visited Aug. 15, 2016).

234. The Myanmar National Human Rights Commission was established by the Myanmar National Human Rights Commission Law. Myanmar National Human Rights Commission Law (Act No. 21/2014) (Myan.); see REPUBLIC OF THE UNION OF MYANMAR: MYANMAR NATIONAL HUMAN RIGHTS COMMISSION, <http://www.mnhrc.org.mm/en/> (last visited Aug. 15, 2016).

235. See Andrew Byrnes, Andrea Durbach & Catherine Renshaw, *Joining the Club: The Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the Advancement of Human Rights Protection in the Region*, 14 AUSTRALIAN J. HUM. RTS. 63 (2008).

236. Catherine Renshaw & Kieren Fitzpatrick, *National Human Rights Institutions in the Asia Pacific Region: Change Agents Under Conditions of Uncertainty*, in HUMAN RIGHTS, STATE COMPLIANCE AND SOCIAL CHANGE 150, 150–80 (Ryan Goodman & Thomas Pagram eds., 2012).

In 1999, the then High Commissioner for Human Rights noted that NHRIs are “an under-utilized resource in the fight against trafficking.”<sup>237</sup> That same year, Anne Gallagher, Adviser to the High Commissioner on Trafficking, addressed the APF with a paper called “The Role of National Institutions in Advancing the Human Rights of Women: A Case Study on Trafficking in the Asia-Pacific Region.”<sup>238</sup> The APF later established a Trafficking Focal Point Network between member institutions and the APF. In 2010, all of the then-existing NHRIs in Southeast Asia signed a Memorandum of Understanding Against Trafficking of Women and Children.<sup>239</sup> The Memorandum begins with a statement about the principle of equal worth and dignity of women and children as members of the human family; adopts the definition of trafficking set out in the Trafficking Protocol; and makes detailed recommendations about the protection of victims, reparations, the provision of legal aid, and the development of victim-centered standards for dealing with trafficked persons. It exhorts states dealing with trafficking in persons to adopt “an inclusive perspective in its undertakings,” be accessible to civil society, be guided by the “best interest of the child” principle, and the “right of a woman against discrimination and gender-based violence in all its forms, particularly trafficking and exploitation.”<sup>240</sup>

The concern of the region’s NHRIs for the issue of trafficking in persons was driven very much from the ‘bottom up.’ It is important to consider how this kind of concern arises. As critics of constructivist approaches to international law and international relations have pointed out, studies of socialization too often remain at the level of theory, saying too little about “the actual people who are supposed to be engaged in ‘mimicry,’ worried about being shamed, or seeking to achieve substantial affective returns (‘cognitive comfort’).”<sup>241</sup>

An example of the sorts of interactions that lead to the evolution of a human rights-based approach to trafficking in persons is the visit of the Human Rights Commissioners from SUHAKAM, the Malaysian Human Rights Commission, to Kajang Women’s Prison, near the Malaysian capital Kuala Lumpur, in January 2003.<sup>242</sup> During their visit, Commissioners

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237. Mary Robinson, High Commissioner for Human Rights, Address at the Annual Meeting of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (1999).

238. Anne Gallagher, *The Role of National Institutions in Advancing the Human Rights of Women: A Case Study on Trafficking in the Asia-Pacific Region* (Paper presented at the Fourth Annual Meeting of the Asia Pacific Forum of Human Rights Institutions Nov. 11-12, 2002).

239. Southeast Asia National Human Rights Institutions Forum, Memorandum of Understanding Against Trafficking of Women and Children, Mar. 30, 2010.

240. *Id.*

241. See discussion relating to Alvarez’s criticism that “states (or “organizations” in the abstract) do not “socialize”; people do,” *supra* note 41.

242. See Catherine Renshaw, Andrew Byrnes & Andrea Durbach, *Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia*, 1 *ASIAN J. INT’L L.* 165 (2011) (discussing Sukhakam’s history and impact).

noticed that a large number of foreign nationals, mainly young girls, were being held in remand. In conversations with these girls, the Commissioners heard that many of them had come into the country because they had been “lured and coerced with promises of jobs as home help, in supermarkets or restaurants, with lucrative incomes, but inevitably ended up in the pernicious flesh trade, often against their will.”<sup>243</sup> Many of the girls were reluctant to tell their stories to officials, for fear of being deported. Distressed by the plight of these women, the SUHAKAM Commissioners formed a sub-committee to look into the issue, and the following year organized a forum on Trafficking of Women and Children—A Cross Border and Regional Perspective.<sup>244</sup> Prior to the forum, they held a series of roundtable dialogues on the issue of human trafficking, with personnel from the police, immigration officers, representatives of the Ministry of Home Affairs, the Ministry of Foreign Affairs, the Women Development Ministry, welfare officers, prison officers, representatives from the tourism ministry, NGOs, the Bar Council, academics, human rights practitioners and representatives from the embassies of Indonesia, Russia, Thailand, Cambodia, Vietnam, the Philippines, China and Myanmar. Discussion at the forum noted the complexities of the causes of trafficking and made various recommendations: that Malaysia ratify the Trafficking Protocol (which occurred five years later), that the government pass an Anti-Trafficking Act (passed in 2007) and that the role of NGOs “who operate at the grass roots level” in combatting trafficking be recognized.<sup>245</sup> An important signal was the message contained in the final written report of the forum, where SUHAKAM referred to the need to harbor “the political will of the government and social will of the people/civil society” to protect “foreign victims of trafficking,” and the state’s duty to “reach out to victims and send the message that human freedom and dignity will be protected.”<sup>246</sup> The report includes a statement about the nature of human trafficking as a rights violation which states that:

Traffickers violate the universal rights of all persons to life, liberty and freedom. It is an obstacle to the achievement of the objectives of equality and development. Trafficking of women and children impairs or nullifies the enjoyment by women and children of their basic human rights and fundamental freedoms.<sup>247</sup>

In June 2007, SEANF, then comprising the NHRIs of Malaysia, Thailand, Indonesia, and the Philippines, agreed to carry out a series of programs and activities in relation to five human rights issues of common concern, one of which was the issue of trafficking in persons. SEANF also

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243. TRAFFICKING IN WOMEN AND CHILDREN: REPORT OF THE HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM) 6 (2004).

244. *Id.*

245. *See id.* at 53 (reporting the details of the April 13-14, 2004 forum).

246. *Id.* at 60-61.

247. *Id.* at 4.

agreed to prioritize encouraging other ASEAN countries to establish NHRIs, so that they could more effectively engage with other institutions in cross-border issues of common concern. After Myanmar established its NHRI in 2011, it also joined SEANF. SEANF agreed to work cooperatively with civil society organizations, such as the Coalition Against Trafficking in Women in Asia-Pacific (CATW-Asia-Pacific) and the Global Alliance against Trafficking in Women (GAATW).<sup>248</sup> Since 2009, AICHR has provided another forum for interaction between different actors around the problem of trafficking. In November 2013, AICHR hosted a Regional Workshop on a Human Rights-Based Approach to Combat Trafficking in Persons, Especially Women and Children.<sup>249</sup> The Workshop discussed the adoption of a legally binding ASEAN Convention Against Trafficking in Persons (ACTIP) and a Regional Plan of Action to Combat Trafficking in Persons. The Workshop also highlighted the need “to infuse the ACTIP with a human rights-based approach.”<sup>250</sup>

What we see, in summary, among the ASEAN states that have NHRIs, and perhaps more broadly across the region since the establishment of AICHR, is evidence of the emergence of a shared understanding of the problem of international trafficking and a shared approach to addressing the problem. Between some key actors within ASEAN states, we see increased levels of exchange, both formal and institutionalized, and informal and voluntary. We also see engagement between actors pursuing different policy approaches, including the border guards, prosecutors, police, and NGOs focused on the protection of trafficked victims.<sup>251</sup>

As Acharya and others have argued, actors in democratic states are often more inclined to network with actors in other democratic states, and these networks are more efficient: the exchange of information is better, levels of trust are higher, and similar goals are pursued.<sup>252</sup> These things are part of what Acharya calls “participatory regionalism.”<sup>253</sup> Participatory regionalism implies two things. First, it implies acceptance of a more relaxed view of state sovereignty and the norm of non-interference in the domestic affairs of states, which permits more discussion of, and

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248. See SOUTH EAST ASIA NHRI FORUM, <http://seanf.asia/index.php/about-us/89-south-east-asia-nhri-forum> (last visited Aug. 15, 2016).

249. The workshop was held in Makati from November 27-28, 2013. See *Philippines Promotes Human Rights-Based Approach to Combat Trafficking in Persons, Especially Women and Children, in ASEAN*, REPUBLIC OF THE PHIL. DEP'T FOREIGN AFF. (Nov. 29, 2013), <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/dfa-releases/1501-philippines-promotes-human-rights-based-approach-to-combat-trafficking-in-persons-especially-women-and-children-in-asean>.

250. *Id.*

251. See, e.g., MYANMAR NATIONAL HUMAN RIGHTS COMMISSION, <http://mnhrc.org.mm/en/field-and-investigation-trips/> (last visited Aug. 15, 2016) (relating to the Field and Investigation Trips).

252. See Amitav Acharya, *Democratisation and the Prospects for Participatory Regionalism in Southeast Asia*, 24 *THIRD WORLD Q.* 375 (2003); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L. L.* 503 (1995).

253. See Acharya, *supra* note 252.

action on, problems facing the region and creates more space for non-government actors in the decision-making process.<sup>254</sup> Second, it implies a “close[r] nexus between governments and civil society in managing regional and transnational issues.”<sup>255</sup> The result is greater domestic discussion and debate over foreign policy goals, higher levels of transparency, increased availability of information, greater levels of openness, understanding and trust between states, a greater space for civil society, and greater willingness on the part of states to be accommodating to the concerns of civil society. All of these things increase the likelihood that states will respond to demands for regional solutions to problems such as the environment, refugees, trafficking in persons, and migration, and allow regional institutions to address sensitive issues.

It remains to be answered why trafficking persists, in the face of what I argue is the apparent legitimacy of the regional anti-trafficking norm among both states and civil society actors in Southeast Asia, and despite a plethora of domestic legislation directed towards ending the practice of trafficking that exists across the region. There are several explanations. First, and most obviously, there is limited state capacity and resources, and the underlying causes of trafficking, including, for example, poverty, domestic instability and corruption, are intractable. Regional bodies such as the ASEAN Secretariat have only limited capacity and resources to coordinate member states’ actions. Second, there is also the influence of non-state actors, such as the multinational companies that employ irregular migrants and trafficked persons.

Finally, there remain entrenched proclivities that augur against cooperative efforts. Concerns about state sovereignty and patterns of non-cooperative behavior stymie the effectiveness of regional approaches. The 2004 ASEAN Declaration Against Trafficking in Persons, for example, which places the issue of trafficking within the context of ASEAN’s efforts to address transnational crime, declares an urgent need for a “comprehensive regional approach” to addressing the problem.<sup>256</sup> Yet it also contains a ‘claw-back’ provision relating to any cooperative efforts, in the form of a statement that only “to the extent permitted by their respective domestic laws and policies need concerted efforts be taken to effectively address the problem.”<sup>257</sup>

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254. *Id.* at 382.

255. *Id.*

256. *ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children*, *supra* note 181, pmb. (“[Reaffirming] the Ha Noi Declaration of 1998 and the Ha Noi Plan of Action, which, among others, committed to intensify individual and collective efforts to address transnational crimes, including the trafficking in person[s].”). The ASEAN Declaration on trafficking also refers to “ASEAN’s unwavering desire to embrace the spirit behind the United Nations Convention against Transnational Organized Crime and its relevant protocols” even though at the time of signing only Laos and the Philippines had ratified the Trafficking Protocol. *Id.*

257. *Id.*

What cannot be discounted, however, in answering why trafficking persists, is the distorting effect of the U.S. regime to end trafficking, which undermines regional normative commitment and pushes states towards superficial and unilateral efforts to end trafficking. The U.S architecture to end trafficking in persons, particularly the TVPA, has made the progress of ASEAN states towards preventing trafficking in persons slower and more uneven than it might otherwise have been, and has undermined an inchoate, genuinely autochthonous regional approach to the human rights problem of trafficking in persons.

#### CONCLUSION

The broad point made in this Article is that it matters whether or not law reflects the social reality with which it is supposed to deal, and it matters how law is brought into being. My argument has been that the global approach to human trafficking, applied in Southeast Asia, lacks legitimacy. In the first place, it does not adequately reflect the social reality of the practice of human trafficking in Southeast Asia. This is because both the Trafficking Protocol and the TVPA are based on certain assumptions about the practice of trafficking that do not match the particularities of the practice in the region. One of these assumptions is that what defines trafficking, and distinguishes it from practices such as migration and people smuggling, is the element of *coercion*: trafficked men, women, and children do not choose to move or be moved, or would not so choose if they were apprised of the conditions that awaited them at their destination. This is partly tied to the idea that human trafficking is about sexual exploitation and that all sexual commerce involves exploitation.<sup>258</sup> The reality in Southeast Asia is that the circumstances of poverty and economic deprivation complicate notions of coercion in ways that law has difficulty responding to. Another assumption is that the perpetrators of trafficking are involved in large-scale criminal enterprises and that their victims are usually unknown to them. But, there is no compelling evidence that this is the case in Southeast Asia, and crime control measures designed to detect and prevent this kind of crime expend the scarce resources of states. A final assumption is that borders are logical political and geographical divides between states, and that policing borders is the best way to prevent trafficking. Again, this is not the case in Southeast Asia. Borders are not accepted as logical divides in many parts of Southeast Asia, nor are people within borders necessarily 'citizens' who enjoy the protection of the state.

Second, the global regime lacks legitimacy because of the unilateral actions of the United States under the TVPA, and the influence of the TIP Reports. It is difficult (if not impossible) to distinguish which of a state's anti-trafficking efforts flow from a commitment to fulfill obligations under the Trafficking Protocol, which flow from a state's fear of reprisals from

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258. *Id.*; see Julia O'Connell Davidson, *New Slavery, Old Binaries: Human Trafficking and the Borders of 'Freedom'*, 10 GLOBAL NETWORKS 244 (2010); Ronald Skeldon, *Trafficking: A Perspective from Asia*, 38 INT'L MIGRATION J. 7 (2000).



the United States under the TVPA, or which flow from a genuine and principled commitment to ending the practice of trafficking. As we have seen, Indonesia, the Philippines and Thailand often explicitly explain domestic efforts to address trafficking in terms of a response to the U.S. TIP Reports. Singapore, in contrast, which has still not signed the Trafficking Protocol, but which has nonetheless put in place measures to combat trafficking, does not concede that its actions are in any way a response to its ranking in the TIP Reports. What is clear is that the TIP confuses and distorts public and self perceptions about states' responses to human trafficking.

Why is this a problem? After all, the approach to human trafficking promoted by the U.N. is a web of interlocking and complementary laws and policies at the domestic, regional, and international levels.<sup>259</sup> Why could the coercive measures of the United States not be complementing other processes, such as socialization among states within the region?

One answer to this is that explicit incentive-based policies in the TVPA suggest that preventing trafficking, and protecting the human rights of trafficked persons, is not self-evidently appropriate to ASEAN states. This directly affects the way the problem is perceived, the way responses are interpreted and the way that legislation is implemented and enforced on the ground. Another answer is that incentive-based policy suggests that the broader social environment does not adequately value self-motivated rule adherence. In any regard, the net effect is to diminish the value of principled pursuit of a policy. It is impossible to determine what proportion of the failure of trafficking policy in Southeast Asia can be attributed to the influence and effect of the TVPA, but I suggest that it is significant.

As well as sketching the contours of the unilateral approach and its effects in Southeast Asia, this Article has charted the emergence of a regional approach to addressing the issue of trafficking in persons. As we have seen, this approach is formed by multiple and somewhat conflicting patterns of response to the issue of trafficking in persons. The most obvious regional response focuses on trafficking in persons as a security issue of concern to states because it is a potential threat to national and regional stability. But, I also plot out another response, generated bottom-up from the experience of actors (NHRIs) brought into contact with the issue of human trafficking in direct ways, which contributes to shaping a distinct human rights approach to the issue of trafficking in persons. Below these broad levels of response, there are other complexities and contradictions in the regional vision. For example, it is possible to distinguish between the approach and attitude of ASEAN's more democratic states, and those that are less so; and between the concerns and preoccupations of 'sending' as compared to 'receiving' states.

The argument is that given the nature and scope of the issue, and considerations of geography, socio-cultural understandings between states,

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259. U.N. Office on Drugs and Crime [UNODC], *General Assembly Reviews Efforts to Combat Human Trafficking* (May 13, 2013), <https://www.unodc.org/unodc/en/frontpage/2013/May/general-assembly-reviews-efforts-to-combat-human-trafficking.html>.

and levels of interaction between rule-makers and administrators in different states, the appropriate level for managing the issue of trafficking in persons is the regional one. Furthermore, we can see the emergence of a regionally based, multilateral response to the issue of human trafficking, where the parameters of the problem of human trafficking in Southeast Asia are defined not only as an issue of security, but also as an issue of the violation of individual rights. This is taking place incrementally, through a process that engages many domestic institutions and the regional networks that operate between them, and which through interaction and engagement, generate a shared regional understanding about the nature of the problem and the parameters of a solution. There is evidence of moral consciousness-raising, argumentation and persuasion among regional peers, by national and regional actors, both governmental and non-governmental, coupled with the alignment of interests among states that share instrumental reasons for advancing a particular joint project. What emerges from this is a specifically *regional* understanding of the problem of trafficking that is particularly well suited to promoting the internalization of norms about preventing trafficking. The 2004 ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children and the ASEAN Convention on Trafficking in Persons (currently being negotiated) are reflections of this regional vision.