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### Trafficking in Women and Children and an Observation to ASEAN Counter-Trafficking Efforts

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## I. INTRODUCTION

In the past century, trafficking in persons (TIP) has evolved rapidly and become one of the gravest human rights abuses confronting the international community. Globalization and the rapid economic and technological development are among the primary factors that foster TIP, making TIP one of the most lucrative illicit businesses in the world.

The glaring phenomenon of TIP is also prevalent in Southeast Asia. In the last decade alone, the UN noted that the number of trafficked people in Southeast Asia has soared up to three times the number of people that fall into slavery in the entire history of slavery in Africa.<sup>1</sup> The then Director of the United Nations Office for Drug Control and Crime Prevention (UNODC) stated that from 1990 to 2000, TIP victims in Southeast Asia have reached an astounding number of 30 million people.<sup>2</sup> However, despite the bombastic figures of TIP victims presented by various bodies, there is no reliable methodology that can actually present a comprehensive estimate of TIP victims in a given region, let alone internationally.<sup>3</sup> This phenomenon poses yet a bigger challenge, since it indicates that there is no reliable and comprehensive data on the number of TIP victims and the absence of such data will hamper protection measures for the victims and legislative solutions to TIP.

In response to the ever-growing problem of TIP in Southeast Asia, the Association of the Southeast Asian Nations (ASEAN) has placed a high priority in combating trafficking of women and children since the late 1980s. ASEAN has adopted various key instruments to overcome the growing number of trafficking victims in the region such as the ASEAN Plan of Action for Children, ASEAN Declaration to Combat Transnational Crime, and ASEAN Plan of Action to Combat Transnational Crime.

Since then, ASEAN has evolved tremendously in terms of enhancing cooperation among Member States to combat and prevent trafficking and has made significant strides in attempting to conform to international standards relating to the prohibition of TIP. Furthermore, all of AMS have become parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Most of them have ratified or acceded to various international instruments on transnational organized crimes and against TIP.

This paper will examine the challenges that TIP poses to the world and Southeast Asia in particular. It will then move to the counter-TIP measures that the international community and ASEAN have taken in combating and preventing the occurrences of

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<sup>1</sup> United States Committee for Refugees and Immigrants, *Trafficking in Women and Children: a Contemporary Manifestation of Slavery*, Refugee Reports, Vol. 21, No. 5, Summer 2000, 1 July 2000, p. 3; Barbara Crossette, *UN Warns that Trafficking in Human Beings is Growing*, New York Times, 25 June 2000, paras. 2 – 3, <[www.query.nytimes.com/gst/fullpage.html?res=9F0DE7DF1530F936A15755C0A9669C8B63](http://www.query.nytimes.com/gst/fullpage.html?res=9F0DE7DF1530F936A15755C0A9669C8B63)>, visited on 4 January 2011.

<sup>2</sup> Ibid.

<sup>3</sup> Jyoti Sanghera, *Unpacking the Trafficking Discourse*, in Kamala Kempadoo with Jyoti Sanghera and Bandana Pattanaik (Eds.), *Trafficking and Prostitution Reconsidered: New Perspective on Migration, Sex Work, and Human Rights*, (Paradigm Publishers, London: 2005), 1<sup>st</sup> Ed., pp. 11 – 13.

TIP, particularly in women and children. Part I will focus on the problem of TIP in general and moves towards the trafficking of women and children as well as the challenges in counter-trafficking measures in Southeast Asia. Part II will focus on the development of international law in responding to the ever-growing problem of TIP. Part III will focus on the development counter-trafficking measures that ASEAN has taken and the development of ASEAN mechanism in combating and preventing TWC. This part will include an overview of some of ASEAN key instruments on TIP and relevant bodies. Part IV offers recommendation in terms of what can be done to improve existing ASEAN mechanisms to combat and prevent TIP.

## **II. TRAFFICKING IN PERSONS: WOMEN AND CHILDREN IN SOUTHEAST ASIA**

### *a. Economic Perspective and Methods*

TIP has presented a grave danger to the protection of individual human rights and the international legal order. TIP has stood as a long-standing challenge that the world faces after the abolishment of slavery and slave trade in the late 19th century.<sup>4</sup> Practices of TIP exploit extreme and direct physical and/or psychological coercion that gives power to a person(s) over another person(s) life, an element that is similar to that of slavery.<sup>5</sup> This illegal trade in human beings for the purpose of economic exploitation and gain has been commonly addressed as modern day slavery, a ghastly mutation of traditional practice of slavery.

In the past, the traditional practice of slavery and slave trade were conducted under the premise of rights invested upon the slave masters by the State and/or religion but today's TIP does not need such premise and the perpetrators, trafficked other human beings with the knowledge that the practice is inhumane and that they are breaking the law. Historically, the economical motive of slavery was always accompanied by other justifications and/or motives for the practice and sometimes it did not necessarily involve any sort of trade activity, at least not until the 15th century.<sup>6</sup> According to Blake, during the early periods of the world, slavery was one of the direct consequences of war; prisoners of war at that time were, if they were not killed, treated as spoils of war and they lived in servitude under the thralldom of their conqueror.<sup>7</sup> Furthermore, there were justifications claimed to stem from religions that justify the slavery of people from a certain race or group,<sup>8</sup> slavery of prisoners of

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<sup>4</sup> M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 New York University Journal of International Law and Politics (1991), pp. 451 – 452. France abolished slavery in 1791 after the French Revolution; the British abolished slavery in 1833 – 1843; Sweden abolished slavery in 1846; Denmark in 1848; Portugal in 1856; the Netherlands in 1860; United States (Union) in 1862; Brazil in 1884; Spain in 1872; and Russia in 1898.

<sup>5</sup> Maggy Lee, *Trafficking and Global Crime Control*, (SAGE Publications Ltd., London: 2011), p. 21.

<sup>6</sup> In the 15<sup>th</sup> century slave trade made a huge turn to intercontinental trade, made it possible for Europeans to transfer slaves from Africa to Europe after the arrival of the Portuguese settlers in West Africa. By 1466, the Portuguese had taken significant control over the slave trade from the Slave Coast to Europe and the New World (Trans Atlantic Slave Trade).

<sup>7</sup> W.O. Blake, *The History of Slavery and the Slave Trade, Ancient and Modern*, (Osgood & Pkarce, Columbus, Ohio, 1861), p. 2.

<sup>8</sup> Genesis 9: 20 – 27; Exodus 22 : 2 – 3; Exodus 21 : 7 – 11; Deuteronomy 21 : 10 – 11; and Lev 25:45-46.

war,<sup>9</sup> forced marriage,<sup>10</sup> etc. Therefore, at a particular time in history, slavery was not only seen as a practice that could bring economic gain but also as a practice that was condoned and encouraged by the states and religions. These have shown that in the past, the slave masters believed that some people were inherently meant to live in slavery, either by birth, race, or as a result of war, and that they had absolute rights and ownership, granted by the States and religions, over the slaves including to treat their slaves as commodities.

Nowadays, unlike slavery, TIP practices have long left the biblical arguments or other justifications to justify its slavery practices and instead it is driven by nothing else than basic economic principle, the supply of and demand for cheap labors.<sup>11</sup> In applying this economic principle, the traffickers can be seen as those who try to meet the demands (in various countries all over the world) of cheap labors by providing them illegally, often from another country, which usually cannot be met due to legal constraints and border policies. The victims might give their consent at the first place since they expect that they will find a better livelihood. In this sense, both the traffickers and the victims constitute yet another part of the world's interconnected economic machinery in which we are all take part.<sup>12</sup> This is indeed a basic formula of economic globalization, supply and demand in an integrated global economy providing lucrative opportunities that traffickers find hard to resist.<sup>13</sup>

Aside from the global supply and demand of cheap labors, demands for trafficking for sexual exploitation that include a range of sexual services, sexual-related entertainment, child and adult pornography, and trafficking for marriages have also constituted one of the flourishing practices of TIP.<sup>14</sup> TIP business also expands to the illegal trade of human organs and body parts for the purposes of transplant surgery and other medical procedures.<sup>15</sup>

TIP is allegedly becoming the fastest growing crime conducted by organized criminal group<sup>16</sup>, after trafficking in drugs and firearms. Traffickers apply various methods to attract victims such as abduction and false promises of well-paid jobs in other countries.<sup>17</sup> In order to control the victims' movement, traffickers often confiscate the victims' passports and hold them in captive or under surveillance.<sup>18</sup> The victims were

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<sup>9</sup> Al-‘Anfal 8 : 70 – 71.

<sup>10</sup> Deuteronomy 15:12;

<sup>11</sup> Tony Bennett, *Preventing Trafficking in Women and Children in Asia: Issues and Options*, 1:2 IMPACT, FHI, September 1999, <[www.fhi.org/en/hivaids/pub/archive/articles/ioh/ioh12/prevent\\_trafficking\\_women\\_children\\_asia\\_options-and\\_issues.htm](http://www.fhi.org/en/hivaids/pub/archive/articles/ioh/ioh12/prevent_trafficking_women_children_asia_options-and_issues.htm)> visited on 10 March 2011.

<sup>12</sup> Karen E. Bravo, *The Role of the Trans-Atlantic Slave Trade in Contemporary Anti-Trafficking Discourse*, 9 Seattle J. for Social Justice (2011), p. 16; and United Nations Division for the Advancement of Women and United Nations Office on Drugs and Crime, *Trafficking in Women and Girls: Report of the Expert Group Meeting*, Glen Cove, New York, 18 – 22 November 2002, p. 2.

<sup>13</sup> United Nations Office on Drugs and Crime (UNODC), *The Globalization of Crime: a Transnational Organized Crime Threat Assessment*, UNODC, Vienna, 2010, pp. 1 – 3, <[www.unodc.org/documents/data-and-analysis/tocta/TOCTA\\_Report\\_2010\\_low\\_res.pdf](http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf)> visited on 10 March 2011.

<sup>14</sup> Maggy Lee, *Trafficking and Global Crime Control*, Supra No. 5, pp. 37 – 39.

<sup>15</sup> Ibid, pp. 42 – 43.

<sup>16</sup> Barbara Crossette, *UN Warns that Trafficking in Human Beings is Growing*, Supra No. 1.

<sup>17</sup> Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 Harvard Human Rights Journal (1998), p. 69.

<sup>18</sup> Lan Cao, *The Transnational and Sub-National in Global Crime*, 22 Berkeley Journal of International Law 59 (2004), p. 65.

told that they have to repay all of the expenses that were spent to transport them to the destination country. The victims were forced to work under the condition of debt-bondage until all debts incurred to the traffickers are repaid.<sup>19</sup>

TIP is further spurred by several factors that create conducive contexts of trafficking such as: economic crises, lack of sustainable livelihoods, armed conflict, ethnic persecution, breakdown or reconfiguration of a State, restricted freedom of movement, gender biased policies, social inequalities, economic globalization, and wider processes of global and social transformation.<sup>20</sup> These factors alone do not cause trafficking, however they exacerbate the vulnerability of the victims and they provide the traffickers with abundance of opportunities to conduct one of the most lucrative illicit businesses in the world.

*b. The Trafficking of Women and Children*

Trafficking in Women and Children (TWC) has aroused unparalleled global and regional responses that the issue always fills in the global agenda of many countries in the world as well as that of global and regional organizations (the European Union and the United Nations for example). Even though the problem of TWC is not a new phenomenon however it was only in the past couple of decades that TWC has drawn international concern especially to respond to reports of sexual enslavement of women and girls after the end of the Cold War, the conflict in former Yugoslavia, and increasing frequency of the trafficking of children for sexual purposes.<sup>21</sup>

TWC is operating basically under the same principle as TIP in general, supply of and demand for (specifically) women and children to various kinds of ends. TWC has been a thriving international business. Hundreds of thousands, even millions, of women and children are trafficked and forced to work as prostitutes, domestic laborers, sweatshop laborers, or commercial wives and live under slavery-like conditions.<sup>22</sup> The US Department of State 2010 Trafficking in Persons Report gives an estimate that at least 12.3 million adults and children are in forced labor, bonded labor, and forced prostitution around the world and women and girls constitute 56% of these victims.<sup>23</sup> The International Labor Organization estimated that the traffickers generated up to USD\$ 32 billion annually through TIP.<sup>24</sup> Some estimates indicate that large numbers of trafficking victims come from Southeast Asia with over than

<sup>19</sup> Lan Cao, *The Transnational and Sub-National in Global Crime*, *Supra* No. 18, p. 65.

<sup>20</sup> K. Koser, *Asylum Policies, Trafficking and Vulnerability*, 38 *International Migration* 3, 2000, pp. 91 – 111; B. limanowska, *Trafficking in Human Beings in Southeastern Europe*, UNICEF, UNOHCHR, and OSCE-ODIHR, 2002; S. Sassen, *Women's Burden: Counter Geographies of Globalization and the Feminization of Survival*, 71 *Nordic Journal of International Law*, 2002, pp. 467 – 478; and United Nations Economic and Social Council, *Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, E/CN.4/2006/62/Add.I, New York (2006).

<sup>21</sup> Karen E. Bravo, *The Role of the Trans-Atlantic Slave Trade in Contemporary Anti-Trafficking Discourse*, *Supra* No. 12, p. 10 – 11; and Nora Demleitner, *Forced Prostitution: Naming an International Offense*, 18 *Fordham International Law Journal* (1994), pp. 163 - 164

<sup>22</sup> UN Special Rapportuer on Violence against Women, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, 53<sup>rd</sup> Session, Item 9(a) of the Provisional Agenda, E/CN.4/1997/47, United Nations Commission on Human Rights (UNCHR)12 February 1997, p. 19.

<sup>23</sup> United States Department of State, *2010 Trafficking in Persons Report*, 10<sup>th</sup> Ed., June 2010, pp. 7 and 34.

<sup>24</sup> International Labor Organization, *A Global Alliance against Forced Labor*, 93<sup>rd</sup> Session of the International Labor Conference, Geneva, (2005), p. 55.

225,000 people are being trafficked from Southeast Asia, which most of them consisted of women and children.<sup>25</sup> The then Director of UNODC, Arlachhi, even went as far to estimate the number of women and children falling victims to TIP in Southeast Asia for the purpose of sexual exploitation and forced labor alone has reached the astounding number of 30 million, bigger than the number of people falling to slavery in Africa during 15th – 19th century.<sup>26</sup>

Existing literatures have indicated that the largest number of women and children that are being trafficked in the world come from Asia.<sup>27</sup> The trafficking in Southeast Asia is mainly driven by the increasing demand and supply of women in the sex industries, the 'trade in brides', and domestic workers.<sup>28</sup> According to Piper, there is another category of TWC arising specifically in Asia; the trafficking of children for begging, as domestic workers, for adoption, as brides, and in other forms of labor.<sup>29</sup>

TWC is a demand-driven phenomenon and according to Sanghera, these demands drive the traffickers to search for workers who are inherently vulnerable and controllable in order to maximize their profit and to fulfill those demands as fast as possible.<sup>30</sup> Women and children fit this description hence generated the TWC phenomenon. Chuang argues that TWC in general is further exacerbated by a combination of several factors such as poverty, sexism, and racism that render women and children as vulnerable.<sup>31</sup> Sometimes, it is the society and the State that marginalized the position of children and women through their gender-based policies and society-imposed values. Chuang also argues that most victims come from developing countries or countries with economic transition and that the lower economic status of women and children combined with social status and tradition that live in a particular society can compel women and children to fall victims to trafficking.<sup>32</sup> Additionally, racial factor can play an important role that drive

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<sup>25</sup> Francis T. Miko and Grace (Jea Hyun) Park, *Trafficking in Women and Children: The US and International Response*, The Library of Congress, March 2002, p. 2; and United States Committee for Refugees and Immigrants, *Trafficking in Women and Children: a Contemporary Manifestation of Slavery*, *Supra* No. 1, pp. 2 – 3.

<sup>26</sup> United States Committee for Refugees and Immigrants, *Ibid*.

<sup>27</sup> *Ibid*; Francis T. Miko and Grace (Jea Hyun) Park, *Trafficking in Women and Children: The US and International Response*, *Supra* No. 25; and Nicola Piper, *A Problem by A Different Name? A review of Research on Trafficking in Southeast Asia and Oceania*, 43 *International Migration* 1/2, (2005), International Migration Organization, p.204.

<sup>28</sup> Nicola Piper, *Ibid.*, p. 208.

<sup>29</sup> *Ibid.*; Kritaya Archavanitkul, *Combating the Trafficking in Children and Their Exploitation in Prostitution and Other Intolerable Forms of Child Labor in Mekong Basin Countries*, Subregional Report Submitted to ILO, Bangkok: June 1998, <[www.seameo.org/vl/combat/frame.htm](http://www.seameo.org/vl/combat/frame.htm)> visited on 13 March 2011; Phil Marshall, *Globalization, Migration and Trafficking: Some Thoughts from the Southeast Asian Region*, Occasional Paper No.1, UN Inter-Agency Project on Trafficking in Women and Children in the Mekong Sub-Region, September 2001, <[www.childtrafficking.com/Docs/marshall\\_uniap\\_mekong\\_2001.pdf](http://www.childtrafficking.com/Docs/marshall_uniap_mekong_2001.pdf)> visited on 13 March 2011.

<sup>30</sup> Jyoti Sanghera, *Unpacking the Trafficking Discourse*, *Supra* No. 3, p. 7 – 8.

<sup>31</sup> Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, pp. 68 – 70.

<sup>32</sup> *Ibid*. Sometimes, TWC took place with the complicity of the family of the woman/child or the women themselves agreed to accompany the traffickers due to the social constraints and economic condition she is facing in her country believing that they will be able to find decent jobs to help their families.

traffickers to conduct their business across borders for the purpose of recruiting foreign women to meet the racial demands of certain market or brothel clientele.<sup>33</sup>

Although these factors are relevant to the TWC practices in Southeast Asian region, Piper indicates that there are more specific factors that contribute to the mushrooming TWC practices in Southeast Asia. Piper points out that, first, the TWC within Southeast Asia cannot be separated from the labor migration patterns and policies in the region as well as the ‘feminization’ and ‘illegalization’ of labor migration.<sup>34</sup> Second, TIP practices in Southeast Asia tend to target women and children to engage in the sex industries, which developed significantly as an integral part of the tourism industry.<sup>35</sup> Most countries in Southeast Asia have made the promotion and advancement of tourism industries as their national priority and accordingly, with plenty of supply, sex industry bloomed in Southeast Asian countries. Additionally, the society within Southeast Asia still impose social stigma especially to women that have been trafficked for sexual exploitations. This social stigmatization on these women might endanger them to be trafficked into the same business all over again, or, even worse, these women, shunned by the society, can become the traffickers that in turn identify potential victims that they are familiar with in the society and lure them into trafficking.<sup>36</sup>

c. Challenges in Counter-Trafficking Measures in Southeast Asia Region

Southeast Asia is frequently related to problems of human trafficking. Most countries in Southeast Asia have even been identified as major source, transit, and destination countries for TWC for the purpose of sexual exploitation.<sup>37</sup> Following the footsteps of other regions and governments, the countries in Southeast Asia started to raise their awareness and combat TWC. All of the countries in Southeast Asian region have criminalized trafficking, especially in women and children, under their domestic law either by enacting specific laws and regulations or incorporate it to their respective penal code.<sup>38</sup> Regional collaborations to eradicate and prevent TWC have also been established where they include not only cooperation among Southeast Asian countries but also involvement from other States (through their development aid agencies), global organizations, and NGOs.

Despite the vigorous counter-trafficking efforts that states, regional and global organizations have commenced, yet there remain considerable gaps in our understanding of TIP. These gaps pose challenges to the counter-trafficking efforts all

<sup>33</sup> Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, pp. 68 – 70; Nora Demleitner, *Forced Prostitution: Naming an International Offense*, *Supra* No. 21, pp. 188 – 189.

<sup>34</sup> Nicola Piper, *A Problem by A Different Name*, *Supra* No. 25, p. 205.

<sup>35</sup> *Ibid.* p. 210 – 211.

<sup>36</sup> Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, pp. 71 – 73; Asia Watch Women’s Rights Project, *A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand*, Human Rights Watch, New York: 1993, pp. 6 – 7 and 74.

<sup>37</sup> Nicola Piper, *A Problem by A Different Name*, *Supra* No. 25, pp. 203 – 205.

<sup>38</sup> Brunei Darussalam (2004 Trafficking and Smuggling of People Order); Cambodia (Law on Suppression of Human Trafficking and Sexual Exploitation of 2007); Indonesia (Law No. 21 of 2007 on the Elimination of Trafficking in Persons); Lao PDR (2005 Penal Law); Malaysia (2007 Anti Trafficking in Persons Act, amended in 2010); Myanmar (2005 Anti-Trafficking in Persons Act); Philippines (Anti-Trafficking in Persons Act 2003); Thailand (2008 Anti-Trafficking in Persons Act); and Vietnam (1999 Penal Code).

over the world, including in Southeast Asia. Some of the major challenges confronting the counter-trafficking efforts in Southeast Asia will be discussed in the subsequent paragraphs; however, the list is not intended to be exhaustive.

One of major challenges in the TIP discourse is the lack of reliable methodology that can give an accurate information and data relating to TIP globally and in a given region.<sup>39</sup> According to Lee and some experts, the world's knowledge on human trafficking is premised on the estimated volume of trafficking made by various regional and global organizations, state's institutions, NGOs.<sup>40</sup> This problem also happens in Southeast Asia.<sup>41</sup> TIP-related estimates come from varied and sometimes conflicting sources, as an example: the US State Department TIP Report states that since 2008 until 2010 at least 800,000 people are being trafficked each year,<sup>42</sup> while according to the ILO Minimum Estimate there are more than 1.2 million people being trafficked annually.<sup>43</sup> Another conflicting example is indicated through the statement of then Director of UNODC that there are 30 million women and children in Southeast Asia that are being trafficked for sexual purposes,<sup>44</sup> while according to a research conducted by Kevin Bales, there are 27 million people, men, women, and children, living in modern-day slavery.<sup>45</sup> Some research have indicated that the absent of sufficient and reliable data on TIP in Southeast Asia might be due to: 1) lack of a systematic and holistic research;<sup>46</sup> 2) the lack of standard and unambiguous definition on TIP offence and victim;<sup>47</sup> and 3) institutional resistance from law enforcers to making TIP-related data accessible or available;<sup>48</sup> The reliance on poor research and the absence of reliable data or estimates on the number of people falling victims to TIP, investigations, and prosecutions for example will make it difficult for States to determine a precise and effective design of TIP countermeasures.

The second problem in counter-trafficking measures is that most governments have the tendency to treat TIP as a migration problem.<sup>49</sup> To parallel TIP with stricter border

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<sup>39</sup> US Government Accountability Office, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance US Anti-Trafficking Efforts Abroad*, Report to the House of Representatives, July 2006, pp. 10 – 17.

<sup>40</sup> Maggy Lee, *Trafficking and Global Crime Control*, *Supra* No. 5, pp. 17 – 19; Jyoti Sanghera, *Unpacking the Trafficking Discourse*, *Supra* No. 3, p. 12; and Nicola Piper, *A Problem by A Different Name*, *Supra* No. 27, pp. 218 – 22.

<sup>41</sup> Albert Moskowitz, *Challenges and Priorities in Prosecuting and Adjudicating TIP Cases*, Asia Regional Trafficking in Persons Project (ARTIP), Paper Presented at the Trafficking in Persons Research and Data Forum, 3 – 4 November 2008, pp. 2 – 6.

<sup>42</sup> Alison Siskin and Liana Sun Wyler, *Trafficking in Persons: US Policy and Issues for Congress*, Congressional Research Service, 23 December 2010, p. 3. <[www.fas.org/sgp/crs/misc/RL34317.pdf](http://www.fas.org/sgp/crs/misc/RL34317.pdf)> visited on 18 March 2011.

<sup>43</sup> Patrick Belser, Michaele de Cock, and Farhard Mehran, *ILO Minimum Estimate of Forced Labour in the World*, ILO, Geneva: April 2005, p. 35.

<sup>44</sup> United States Committee for Refugees and Immigrants, *Trafficking in Women and Children: a Contemporary Manifestation of Slavery*, *Supra* No. 1, p. 3.

<sup>45</sup> Kevin Bales, *Disposable People, New Slavery in the Global Economy*, University of California Press, Berkeley: 1999, pp. 8 – 9.

<sup>46</sup> Nicola Piper, *A Problem by A Different Name*, *Supra* No. 27, pp. 218 – 219.

<sup>47</sup> Maggy Lee, *Trafficking and Global Crime Control*, *Supra* No. 5, p. 19; and Albert Moskowitz, *Challenges and Priorities in Prosecuting and Adjudicating TIP Cases*, *Supra* No. 41, pp. 6 – 7.

<sup>48</sup> Albert Moskowitz, *Challenges and Priorities in Prosecuting and Adjudicating TIP Cases*, *Supra* No. 41, p. 7.

<sup>49</sup> Maggy Lee, *Trafficking and Global Crime Control*, *Supra* No. 5, p. 29 – 31; Jyoti Sanghera, *Unpacking the Trafficking Discourse*, *Supra* No. 3, p. 12; and Nicola Piper, *A Problem by A Different Name*, *Supra* No. 27, pp. 218 – 219.

control policies will arguably expose a large number of potential unauthorized and forced migrants to the traffickers, since passing the borders by legal means seem impossible for them then traffickers or smugglers might be their only option. The third problem is the tendency to equate TWC with prostitution or for other sexual purpose.<sup>50</sup> This perception has dominantly influenced TIP-related research and counter-trafficking policies and regulations; and consequently it can undermine or neglect other forms of exploitation. For example, great extent of research have been conducted to scrutinize the issue of TWC for sexual purposes in the countries in the Greater Mekong Sub-region, however research in TWC phenomenon occurring in other Southeast Asian countries such as Indonesia and East Timor are hardly addressed.<sup>51</sup>

The fourth challenge represents the long-standing problem that has shrouded the region is corruption in the criminal justice system. Traffickers use corruption to guarantee the safety of their operation and escape prosecution. Many political leaders and government officials benefit from TIP and law enforcers receiving bribes from traffickers restrain themselves from conducting proper investigations and prosecutions on the traffickers.<sup>52</sup> In many instances, victims were even escorted to the border and molested by police officials.<sup>53</sup> This problem has hampered counter-trafficking efforts in the region significantly, secured impunity for the traffickers, and obstructed the victims' right to access to justice.<sup>54</sup>

### III. INTERNATIONAL LAW AND TWC

#### a. Early TIP Treaties

The first recorded international treaty that illegalized TIP was the International Agreement for the 1904 Suppression of the White Slave Traffic (1904 Agreement). The proliferation of this agreement was spurred by the fear that white women were being sold into slavery in South America, Middle East, and Asia.<sup>55</sup> It set up mechanisms to collect and coordinate information on international procurement of women for prostitution.<sup>56</sup> The agreement did not criminalize TIP and was criticized as discriminative since it only provided protection to a single racial group against TIP.<sup>57</sup>

It was only in 1910 that States are required to criminalize TIP through the adoption of the 1910 International Convention for the Suppression of White Slave Traffic of

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<sup>50</sup> Ibid.

<sup>51</sup> *A Problem by A Different Name*, *Supra* No. 27, p. 204.

<sup>52</sup> Willem Pretorius, *Law Enforcement Responses to Trafficking in Persons in Southeast Asia*, Asia Regional Trafficking in Persons Project, November 2008, pp. 8 – 9.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Karen E. Bravo, *Exploring the Analogy between Modern Trafficking in humans and the Trans-Atlantic Slave Trade*, 25 Boston University International Law Journal, 2007, pp. 215 – 216.

<sup>56</sup> International Agreement for the Suppression of the White Slave Traffic of 1904 (1904 Agreement), signed in Paris on 18 May 1904, 92 UNTS 19/[1949] ATS 19, Art. 1. The Agreement came into force on 21 June 1951 with 58 State Parties, <[www.cil.nus.edu.sg/1949/1904-international-agreement-for-the-suppression-of-the-white-slave-traffic-as-amended-by-the-1949-protocol/](http://www.cil.nus.edu.sg/1949/1904-international-agreement-for-the-suppression-of-the-white-slave-traffic-as-amended-by-the-1949-protocol/)> visited on 14 March 2011.

<sup>57</sup> Karen E. Bravo, *Exploring the Analogy between Modern Trafficking in humans and the Trans-Atlantic Slave Trade*, *Supra* No. 55, p. 217.

(1910 Convention).<sup>58</sup> Articles 1 and 2 of the 1910 Convention criminalize TIP limited to the criminalization of the procurement of women for prostitution:

*Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.*

*Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.*<sup>59</sup>

The 1910 Convention limited its context to the process of procurement and it did not address the end purpose of trafficking. Additionally, since the Convention only focused in criminalizing the procurement of women for prostitution, it did not cover TIP for other purposes such as forced labor, forced marriage, etc.<sup>60</sup>

In 1921, the International Convention for the Suppression of the Traffic in Women and Children (1921 Convention) was enacted<sup>61</sup> to extend the protection against TIP under the 1904 and 1910 Conventions<sup>62</sup> to children of both sexes<sup>63</sup> and it raised the age limit of minors from twenty to twenty-one years in the case of non-forcible recruitment for prostitution in accordance with the 2010 Convention.<sup>64</sup> Furthermore, unlike the preceding conventions the 1921 Convention change the terminology to include all women and children, not just whites.<sup>65</sup> However, the focus of the 1921 Convention was still on the procurement side and had not included the end purpose and the crimes committed against women and children once they 'fall into prostitution'.<sup>66</sup>

The last TIP-related international convention that was enacted prior to the establishment of the United Nations was the 1933 International Convention for the Suppression of the Traffic of Women of Full Age (1933 Convention).<sup>67</sup> The 1933

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<sup>58</sup> International Convention for the Suppression of the White Slave Traffic of 1910 (1910 Convention), signed in Paris on 4 May 1910, 30 UNTS 23/[1949], <[www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html](http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html)> visited on 14 March 2011.

<sup>59</sup> Ibid., Arts. 1 – 2.

<sup>60</sup> Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New legal Approaches*, 24 Houston Journal of International Law 3, Spring 2002, p. 558; Nora Demleitner, *Forced Prostitution: Naming an International Offense*, *Supra* No. 20, pp. 168 – 169; and Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, p. 75.

<sup>61</sup> International Convention for the Suppression of the Traffic in Women and Children of 1921 (1921 Convention), signed in Geneva on 30 September 1921, 53 UNTS 39/[1950]. The Convention entered into force 24 April 1950 with 46 State Parties <[www.cil.nus.edu.sg/1947/1921-international-convention-for-the-suppression-of-the-traffic-in-women-and-children-as-amended-by-the-1947-protocol/](http://www.cil.nus.edu.sg/1947/1921-international-convention-for-the-suppression-of-the-traffic-in-women-and-children-as-amended-by-the-1947-protocol/)> visited on 14 March 2011.

<sup>62</sup> 1921 Convention, Art. 1.

<sup>63</sup> Ibid., Art. 2.

<sup>64</sup> Ibid., Art. 5.

<sup>65</sup> Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New legal Approaches*, *Supra* No. 60, p. 558.

<sup>66</sup> Ibid., p. 559; and Nora Demleitner, *Forced Prostitution: Naming an International Offense*, *Supra* No. 20, p. 170.

<sup>67</sup> International Convention for the Suppression of the Traffic of Women of Full Age of 1933 (1933 Convention), signed in Geneva on 11 October 1933, 150 UNTS. The Convention entered into force on 24 August 1934 <[www1.umn.edu/humanrts/instree/women-traffic.html](http://www1.umn.edu/humanrts/instree/women-traffic.html)> visited on 14 March 2011.

Convention, like its predecessors, still focus on criminalization of the procurement dimension of TIP and not yet to the end purposes since the end purposes were considered as a matter of domestic jurisdiction.<sup>68</sup> Under the Convention, even though a woman might give her consent to be trafficked into prostitution however, such consent could not be used as a defense for the crime of TIP.<sup>69</sup>

*b. Treaties under the United Nations*

Neither of the TIP-related international treaties prior to the establishment of the United Nations (UN) had ever tried to consolidate the international community efforts to combating TIP. Moreover, in the end of 1930s TIP issue was set aside due to the eruption of World War II. However, after World War II and with the establishment of the United Nations in 1945 the TIP problem was once again managed to recapture international attention. TIP-related international treaties under the auspices of the UN are aiming to consolidate the international anti-trafficking effort<sup>70</sup> and conceptualizing TIP challenge within a human rights framework.<sup>71</sup> After the end of World War II there are significant number of human rights and humanitarian law treaties that criminalized slavery-related practices and brand it as grave violation of human rights<sup>72</sup> however, there are four international treaties that specifically deal with the issue of TIP, women, and children, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation and Prostitution of Others; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1989 Convention on the Rights of the Child; and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

*1. The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation and Prostitution of Others*

In 1949, the UN General Assembly (UNGA) adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation and Prostitution of Others (1949 Convention).<sup>73</sup> The 1949 Convention superseded the 1904, 1910, 1921, and 1933 Conventions.<sup>74</sup> Article 1 of the Convention stated:

*The Parties to the present Convention agree to punish any person who, to gratify the passions of another:*

*(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;*

<sup>68</sup> Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, p. 75.

<sup>69</sup> 1933 Convention, Art. 1.

<sup>70</sup> Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, p. 75.

<sup>71</sup> Maggy Lee, *Trafficking and Global Crime Control*, *Supra* No. 5, p. 31.

<sup>72</sup> The 1948 Universal Declaration of Human Rights (Art. 4); The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 4); The 1966 International Covenant on Civil and Political Rights (Art. 8); The 1969 American Convention on Human Rights (Art. 6); 1981 African Charter on Human and People's Rights (Art. 5); The 1949 Four Geneva Conventions and the 1977 Additional Protocols; and the 1998 Rome Statute of the International Criminal Court (Art. 7).

<sup>73</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 (1949 Convention), signed in New York on 2 December 1949, 96 UNTS 271/UN Doc. A/RES/317. The 1949 Convention came into force on 25 July 1951 with 81 State Parties < [www.cil.nus.edu.sg/1949/1949-convention-for-the-suppression-of-the-traffic-in-persons-and-of-the-exploitation-of-the-prostitution-of-others/](http://www.cil.nus.edu.sg/1949/1949-convention-for-the-suppression-of-the-traffic-in-persons-and-of-the-exploitation-of-the-prostitution-of-others/)> visited on 14 March 2011.

<sup>74</sup> *Ibid.*

(2) *Exploits the prostitution of another person, even with the consent of that person*

Even though the Convention does not provide definitions of trafficking and forced prostitution however, under Article 1 it penalizes procurement, with or without consent, in both international and domestic TIP. It is also the first international instrument that acknowledges forced prostitution as a matter of international law.<sup>75</sup> In terms of consolidating international efforts to combat TIP, the 1949 Convention requires State Parties to establish an authority to coordinate and facilitate State's efforts to prevent and eradicate TIP.<sup>76</sup>

The 1949 Convention presents bolder innovations compared to its previous predecessors in its approach to the TIP problem. It includes preparatory acts, intentional acts, and attempts as punishable offences as well as enticement and deception of women when they are forced into prostitution.<sup>77</sup> Most notably, for the first time the 1949 Convention offers solutions to TIP problem by requiring State Parties to provide punishments for perpetrators of TIP,<sup>78</sup> urging state parties to cooperate and coordinate their anti-trafficking efforts, including extradition;<sup>79</sup> and prescribing victim-assistance programs.<sup>80</sup>

However, despite the revolutionary provisions at that time, the 1949 Convention also received many criticisms, mainly for its lack of definitions and conflicting provisions.<sup>81</sup> For example, the 1949 Convention does not give definition on the terms 'prostitution' and 'exploits' in its Article 1.<sup>82</sup> Second, according to Nelson, Article 2 of the Convention that criminalizes the management or finance of brothels can create a conflict with the trend in the military that organize and categorize prostitutes for soldiers.<sup>83</sup> Then can the practice in the military be equal to managing brothel under Article 2?

Third, even though Article 1 already excludes the defense based on consent, Article 12 of the Convention asserts that the offence shall be define in accordance with each State's domestic law, which usually allow for defense based on consent.<sup>84</sup> Lastly, the 1949 Convention provides nearly no incentive for victims to step forward to support the prosecutions of their traffickers. Since under Article 19, the victims are exposed to the possibility of being deported to their home country if they do not have legal resident status in a State Party territory.<sup>85</sup> Consequently, there will be only few perpetrators that will be tried since the principal victims are unable to support the prosecutions.

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<sup>75</sup> Nora Demleitner, *Forced Prostitution: Naming an International Offense*, *Supra* No. 20, p. 172; and Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, pp. 75 – 76.

<sup>76</sup> 1949 Convention, Arts. 13 – 15.

<sup>77</sup> *Ibid.*, Arts. 2 – 4.

<sup>78</sup> *Ibid.*, Arts. 1 – 3, 9, and 12.

<sup>79</sup> *Ibid.*, Arts. 8 – 9, and 13 – 15.

<sup>80</sup> *Ibid.*, Art. 19.

<sup>81</sup> Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, pp. 76 – 77; and Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New legal Approaches*, *Supra* No. 60, p. 562.

<sup>82</sup> Kathryn E. Nelson, *Ibid.*

<sup>83</sup> *Ibid.*, p. 563.

<sup>84</sup> *Ibid.*

<sup>85</sup> 1949 Convention, Arts. 18 – 19.

## 2. *The 1979 Convention on the Elimination of All Forms of Discrimination against Women*

The adoption of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (1979)<sup>86</sup> by the UNGA marked an important shift in the trend of counter-trafficking effort to view trafficking as a human rights issue. CEDAW is the first international convention that recognized the rights of women are human right and that discrimination against women solely based on sex ‘violates the principles of equality of rights and respect for human dignity’.<sup>87</sup>

Article 1 of CEDAW defines discrimination against women as:

*Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

It gives a very wide description of discrimination against women that it is easy for certain acts to be classified as discrimination and trafficking in women for forced prostitution, as the trend in previous conventions, can fit this definition. Since the traffickers targets women, among other victims, for the sole reason of their sex and vulnerability.<sup>88</sup>

Article 6 of CEDAW requires State Parties to take appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women. Interestingly, Article 6 specifically separates the ‘traffic in women’ and ‘exploitation of prostitution of women’; Chuang believes that this provision intends to include the protection of victims of trafficking for purposes other than forced prostitution.<sup>89</sup> The Convention established a supervision body (CEDAW Committee) to supervise the implementation of CEDAW by the State Parties and receive State Report for that purpose.<sup>90</sup> In 1999 UNGA adopted an Optional Protocol<sup>91</sup> that enables CEDAW Committee to receive individual complaints from nationals of State Parties and to communicate directly with States Parties and request them to take provisional measures to stop the alleged violations of the individual’s rights.<sup>92</sup> The Committee can also request the State Party concern to give a written explanation with regards to the complaint.<sup>93</sup> Most extraordinary is that CEDAW Committee has the power to launch an investigation on

<sup>86</sup> The 1979 Convention on the Elimination of All Forms of Discriminations against Women (CEDAW), 1249 UNTS 13/[1981], signed in New York on 18 December 1979 and come into force on 3 September 1981 with 186 parties <[www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en)> visited on 15 March 2011.

<sup>87</sup> CEDAW, Preamble., par. 7.

<sup>88</sup> Jyoti Sanghera, *Unpacking the Trafficking Discourse*, *Supra* No. 3, p. 7 – 8.

<sup>89</sup> Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, *Supra* No. 17, p. 78.

<sup>90</sup> CEDAW, Arts. 17 – 18.

<sup>91</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Optional Protocol), A/RES/54/4, 2131 UNTS 83/[2000], signed in New York on 6 October 1999 and come into force on 22 December 2000 with 102 State Parties <[www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](http://www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en)> visited on 16 March 2011.

<sup>92</sup> Optional Protocol, Arts. 2 and 5. Before the individual can submit a complaint to the Committee, the individual shall first have to exhaust all available local remedies in the concern State.

<sup>93</sup> *Ibid.*, Art. 6.

a State Party where there are indications of grave and systematic violations of CEDAW.<sup>94</sup>

However, CEDAW has been subjected to so many reservations by the States Parties and eventually diminish its effectiveness. In terms of victims' relief, CEDAW does not provide private remedies for trafficked women.<sup>95</sup> While the Optional Protocol has really given CEDAW Committee some muscle to enforce CEDAW and give a reliable venue for victims of trafficking to file their complaint nevertheless, there are still many obstacles. For example, the victims have to go through such as to exhaust all available local remedies, which in most cases it is only possible if they have the knowledge and means to do so. The problem will be more complicated if the victims are foreign nationals involved in forced prostitution where prostitution is considered as a crime in that particular State then they are exposed to criminal prosecution. In reality, it is hard for these women to fulfill the requirements set out in CEDAW before they can file a complaint to the Committee.

### 3. *The 1989 Convention on the Rights of the Child*

The Convention on the Rights of the Child (CRC) was adopted by UNGA in 1989<sup>96</sup> and has become the most widely ratified human rights treaty in the world. Article 1 of CRC defines a child as a human being below the age of eighteen years old. There are several provisions in CRC that specifically deal with trafficking in children. Article 35 specifically addresses trafficking in children by asserting that:

*States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.*

This Article aims at providing wide protection to victims of trafficking, not only limited to trafficking for sexual purposes but also cover trafficking of children for the purposes of bonded labor, begging, forced marriage, slavery, and prostitution.<sup>97</sup> CRC also provides protection against the illicit transfer or non-return of children abroad; protection of children from involvement in drug trafficking; and protection of children from other forms of exploitation.<sup>98</sup>

CRC requires State Parties to take all appropriate measures to ensure the safety of children including protecting children from trafficking.<sup>99</sup> CRC also establish the CRC Committee to 'examine' the implementation of CRC by the State Parties at national level.<sup>100</sup> It also establishes a reporting mechanism where State Parties are obliged to submit a report on the measures that they have adopted to implement the rights in

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<sup>94</sup> Ibid., Art. 8.

<sup>95</sup> Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New legal Approaches*, *Supra* No. 60, p. 566.

<sup>96</sup> Convention on the Rights of the Child (CRC), 1577 UNTS 3/[1990], signed in New York on 20 November 1989 and come into force on 2 September 1990 with 193 State Parties < [www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) > visited on 16 March 2011.

<sup>97</sup> Economic and Social Commission for Asia and the Pacific, *Combating Human Trafficking in Asia: a Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practice*, UN Publication, Thailand: 2003, p. 253.

<sup>98</sup> CRC, Arts. 11, 33, and 36 respectively.

<sup>99</sup> CRC, Art. 39.

<sup>100</sup> Ibid., Art. 43.

CRC, the States are required to report once in every five years.<sup>101</sup> Unlike CEDAW Committee, CRC Committee cannot receive individual complaint.

Along with the growing concern of the significant international traffic in children during the 1990s, the UN adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRCOP) in 2000.<sup>102</sup> CRCOP obliges State Parties to prohibit and criminalize the sale of children, child prostitution, and child pornography.<sup>103</sup> It gives clear definitions the sale of children, child prostitution, and child pornography<sup>104</sup> and it obliges State Parties to establish jurisdiction in the traditional sense as well as quasi-universal jurisdiction over such offenses.<sup>105</sup> CRCOP also provide provisions that encourage State Parties to strengthen international cooperation for the prevention, detection, investigation, prosecution and punishment of those responsible for the offenses through extradition, mutual legal assistance, and seizure and confiscation of assets.<sup>106</sup>

#### 4. *The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*

In 2000, UNGA adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol),<sup>107</sup> it is one of the protocols to the 2000 United Nations Convention on Transnational Organized Crimes. The Protocol aims at promoting international cooperation on counter-trafficking, criminalizing trafficking and punishing the traffickers, and to protect and assist the victims of trafficking ‘with full respect for their human rights’.<sup>108</sup> Even though it is not considered as a human rights treaty, the Trafficking Protocol takes the human rights approach to render protection and assistance to the victims.<sup>109</sup> The Protocol applies specifically to TIP offences that are transnational in nature and involved organized criminal group.<sup>110</sup>

Article 5 of the Protocol obliges State Parties to adopt ‘legislative and other measures as may be necessary’ to criminalize TIP and all acts related to it. Article 3(a) of the Trafficking Protocol offers a definition of TIP as:

<sup>101</sup> CRC, Art. 44.

<sup>102</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227/[2002], signed in New York on 25 May 2000 and come into force on 18 January 2002 with 142 State Parties < [www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en](http://www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en)> visited on 18 March 2011.

<sup>103</sup> CRCOP, Arts. 1 – 3.

<sup>104</sup> Ibid., Art. 2.

<sup>105</sup> Ibid., Art. 4.

<sup>106</sup> Ibid., Arts. 5 – 10.

<sup>107</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 40 ILM 335 (2001)/UN Doc. A/55/383 (Annex II, p. 53)/[2005]ATS 27, signed in New York on 15 November 2000 and come into force on 25 December 2003 with 137 State Parties < [www.cil.nus.edu.sg/2000/2000-protocol-to-prevent-suppress-and-punish-trafficking-in-persons-especially-women-and-children-supplementing-the-united-nations-convention-against-transnational-organized-crime/](http://www.cil.nus.edu.sg/2000/2000-protocol-to-prevent-suppress-and-punish-trafficking-in-persons-especially-women-and-children-supplementing-the-united-nations-convention-against-transnational-organized-crime/)> visited on 18 March 2011.

<sup>108</sup> Trafficking Protocol, Art. 2.

<sup>109</sup> Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: a Preliminary Analysis*, 23 Human Rights Quarterly, 2001, p. 1003.

<sup>110</sup> Ibid., Art. 4.

... *the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*

The Protocol offers a very complex definition since it refers to three separate elements consisting of 1) the conducts involved (*recruitment, transportation, transfer, harbouring or receipt of persons*); 2) the means used (*threat or use of force or other forms of coercion, of abduction, of fraud, of deception...*); and 3) the purposes of the conducts (*exploitation of others*).<sup>111</sup> These three elements must be present in order for the Protocol to apply. However, in the case of trafficking in children, the element relating to means is waived.<sup>112</sup> Article 3 does not, however, define the terms *forced labor, slavery, and servitude*, this leads to the assumption that since these terms have been defined in other international instruments and therefore those definitions will be applicable in the operation of the Trafficking Protocol.<sup>113</sup>

The second part of the Protocol deals with protection of TIP victims. However Part II of the Protocol does not formulate a hard obligation for State Parties in terms of assistance and protection of TIP victims. The Protocol instructs State Parties to provide assistance and protection to TIP victims 'in appropriate cases and to the extent possible under domestic law'.<sup>114</sup> Under this Part, States Parties are encouraged to protect the privacy and identity of the victims, to give them information on and to provide assistance to facilitate the victims' concerns to be presented in the legal proceedings.<sup>115</sup> State Parties are also to consider implementing measures to provide for the physical, psychological and social recovery of the victims; endeavor to ensure the victims' safety in their territories; and ensure that their domestic legal systems provide victims the possibility to obtain compensation.<sup>116</sup> State Parties *may* let TIP victims to remain in their territories based on *appropriate consideration to humanitarian and compassionate factors*.<sup>117</sup> Gallagher noted that the weakness of this Protocol's protection provisions lies in its failure to explicitly acknowledge the victims' right to access information and remedies and this in turn will undermine the effectiveness of the Protocol.<sup>118</sup>

Part three of the Protocol is dedicated to prevention of TIP and international cooperation. Article 9 deals with prevention of TIP that requires State Parties to establish policies, programs, and other measures to prevent TIP and protect TIP

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<sup>111</sup> J. David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols*, Oxford University Press, New York: 2007, p. 323.

<sup>112</sup> Trafficking Protocol, Art. 3(c).

<sup>113</sup> Anne Gallagher, *Human Rights and the New UN Protocols*, *Supra* No. 109, p. 987; and J. David McClean, *Transnational Organized Crime*, *Supra* No. 111, p. 326 – 327. The term 'slavery' is defined in Article 1 of the 1927 Slavery Convention; the term 'forced labor' is defined in ILO Convention No. 29 concerning Forced or Compulsory Labor (1930); the term slave trade and practices similar to slavery are defined in the 1957 Supplementary Convention on the Elimination of All Forms of Slavery.

<sup>114</sup> Trafficking Protocol, Art. 6.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, Art. 7.

<sup>118</sup> Anne Gallagher, *Human Rights and the New UN Protocols*, *Supra* No. 109, p. 991.

victims from re-victimization.<sup>119</sup> These measures should involve the participations from other stakeholders such as NGOs.<sup>120</sup>

Lastly, the third part of the Protocol contains detailed provisions on law enforcement. In addition to measures such as extradition, establishing quasi-universal jurisdiction, mutual legal assistance, and freezing of assets of the traffickers regulated under the 2000 UN Convention on Transnational Organized Crimes (UNTOC),<sup>121</sup> under the Trafficking protocol State Parties agree to extend international cooperation by establishing exchange of information aiming at identifying perpetrators of TIP as well as methods that are used by traffickers;<sup>122</sup> training law enforcers in preventing TIP and protecting the victims' rights;<sup>123</sup> and strengthening respective State Party's border control to detect and prevent TIP.<sup>124</sup> In relation to the later, the inclusion of border control provisions in the Protocol confirms the long-standing notion that prevail in the field of international counter-trafficking efforts that TIP is still perceived as immigration issue. As Gallagher has highlighted, the Protocol still emphasizes on the interception of traffickers instead of the identification and protection of victims.<sup>125</sup> This issue in turn will yet result into another deficiency in the international counter-trafficking measures.

#### IV. ASEAN EFFORTS IN COMBATING TWC

##### *a. Southeast Asian Countries and TIP-Related International Treaties*

Since the early 1980s, the ASEAN Member States (AMS) have become more aware of the TIP problem blooming in the Southeast Asian region, especially in women and children. Aside from the organization effort to overcome TIP challenge, individual AMS has also tried to comply with international law on the prevention and eradication of TIP. Most of AMS have ratified the abovementioned international treaties that relate to international counter-trafficking measures, especially in women and children. The subsequent table will list each AMS status of ratification of the UN TIP-related international treaties that have been discussed in Part II.

AMS	1949 Convention	CEDAW	CRC	CROP	UNTOC	Trafficking Protocol
Brunei	-	24/05/06 (a)	27/12/95 (a)	21/11/06 (a)	25/03/08 (a)	-
Cambodia	27/09/04 (s)	15/10/92 (a)	15/10/92 (a)	30/05/02 (a)	12/12/05 (r)	02/07/05 (r)
Indonesia	25/09/03 (s)	12/09/84	05/09/90	24/09/01	20/04/09	28/09/09 (r)

<sup>119</sup> Trafficking Protocol, Art. 9(1).

<sup>120</sup> Ibid, Art. 9(3).

<sup>121</sup> United Nations Convention on Transnational Organized Crimes (UNTOC), 40 ILM 335 (2001)/UN.Doc A/55/383 at 25 (2000)/[2004] ATS 12, signed in New York on 15 November 2000 and come into force on 29 September 2003 with 159 State Parties < [www.treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://www.treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&lang=en)> visited on 20 March 2011.

<sup>122</sup> Ibid., Art. 10(1)

<sup>123</sup> Ibid., Art. 10(2)

<sup>124</sup> Ibid., Arts. 11 – 13.

<sup>125</sup> Anne Gallagher, *Human Rights and the New UN Protocols*, *Supra* No. 109, p. 994.

AMS	1949 Convention	CEDAW	CRC	CROP	UNTOC	Trafficking Protocol
		(r)	(r)	(s)	(r)	
Laos	14/04/78 (r)	14/08/81 (r)	08/05/91 (a)	20/09/06 (a)	26/09/03 (a)	26/09/03 (a)
Malaysia	-	05/07/95 (a)	17/02/95 (a)	-	24/09/04 (r)	26/02/09 (a)
Myanmar	14/03/56 (s)	22/07/97 (a)	15/07/91 (a)	-	30/03/04 (a)	30/03/04 (a)
Philippines	19/09/52 (r)	05/08/81 (r)	21/08/90 (r)	28/05/02 (r)	28/05/02 (r)	28/05/02 (r)
Singapore	26/10/66 (a)	05/10/85 (a)	05/10/95 (a)	-	28/08/07 (r)	-
Thailand	-	09/08/85 (a)	27/03/92 (a)	11/01/06 (a)	13/12/00 (s)	18/12/01 (s)
Viet Nam	-	17/02/82 (r)	28/02/90 (r)	20/12/01 (r)	13/12/00 (s)	-

**Table 1 – AMS Table of Ratification on TIP-related International Treaties**

Even though most AMS have not ratified or acceded to CRCOP to grant minors more protection against TIP, all AMS have ratified or acceded to CEDAW and CRC that offer basic protection to women and children against trafficking and oblige AMS to adhere to the standard protections set out in those treaties. In addition to the AMS accession or ratifications to these international treaties, all of the AMS have also had enacted their own domestic legislation criminalizing TIP, especially in women and children. Most of the AMS have enacted a special law on anti-trafficking, instead of just incorporates the offence under the penal code as will be demonstrated in the following table.

Countries	Domestic Legislation on Anti-Trafficking
Brunei	The Trafficking and Smuggling of Persons Order of 2004
Cambodia	Law on the Suppression of Human trafficking and Sexual Exploitation of 2007
Indonesia	Law No. 21 of 2007 concerning the Elimination of Trafficking in Persons
Laos	The Lao Penal Law of 2005 (Articles 24 and 27)
Malaysia	The Anti-Trafficking in Persons Act of 2007 (Act 670) – as Amended in 2010
Myanmar	The Anti-Trafficking in Persons Law of 2005
Philippines	The Anti-Trafficking Act of 2003
Singapore	Women's Charter of 1966 (as amended in 1996) and the Penal Code
Thailand	The Anti-Trafficking in Persons Act of 2008 (BE 2551/2008)
Viet Nam	Viet Nam Penal Code of 1999 (Articles 119 – 120)

**Table 2 – AMS Table of Domestic Legislation on Anti-Trafficking**

All of the AMS are also actively involved in international initiatives to combat TIP such as the Bali Ministerial Conference on People Smuggling, Trafficking in Persons

and Related Transnational Crime (Bali Process)<sup>126</sup> and the Asia-Europe Meeting that aims at enhancing ASEAN and European Union (EU) cooperation in traditional and non-traditional security issues such as TIP.<sup>127</sup> Both initiatives pledge to enhance international cooperation in regional and international information sharing, capacity building for the law enforcers, harmonization of law, police cooperation, and intelligence sharing.

*b. Outlining ASEAN Efforts in Combating TWC*

Over the years, ASEAN has endeavored to come up with an effective framework to combat TIP phenomenon prevailing in Southeast Asia. The ASEAN counter-trafficking efforts are now even more vigorous with the addition of 5 new members in 1986 – 1999. With a bigger ASEAN and the high mobility of people in the region, the problem of TWC has become a bigger concern for the AMS since it turns out to be harder to distinguish it from human smuggling phenomenon in Southeast Asia.<sup>128</sup> This section will discuss ASEAN instruments pertinent to counter-trafficking measures in Southeast Asia as well as its relevant bodies that implement ASEAN commitment in counter-trafficking.

*1. ASEAN Counter-Trafficking Instruments*

Since the 1980s, ASEAN has developed a special interest in the advancement of the rights of women and children however; it was not until the 1990s that TIP issue surfaced in ASEAN agenda. The 1990s marked a crucial timeframe for the AMS to build up their regional foundation in the combat against TIP. In 1993, AMS adopted a Resolution on the ASEAN Plan of Action for children in which the issue of trafficking in children was highlighted as one of the agenda in the child protection priority.<sup>129</sup> The 1993 Plan of Action aims at providing framework for regional cooperation for the survival, protection and development of children in the AMS through, among others, collaborative research, documentations and programs on trafficking of children and formulation and recommendation of policies and programs at the regional level.<sup>130</sup>

In 1995, the AMS took the issue more seriously by adopting the ASEAN Vision 2020 during the 2<sup>nd</sup> Informal ASEAN Summit.<sup>131</sup> In this document, the AMS pledged to cooperate in formulating ‘agreed rules of behavior and cooperative measures’ to

<sup>126</sup> Bali Process, <[www.baliprocess.net/index.asp?pageID=2145831401](http://www.baliprocess.net/index.asp?pageID=2145831401)> visited on 21 March 2011.

<sup>127</sup> 2007 Plan of Action to Implement the Nuremberg Declaration on an EU-ASEAN Enhanced Partnership, adopted in Singapore on 22 November 2007 at the ASEAN-EU Commemorative Summit <[www.aseansec.org/21122.pdf](http://www.aseansec.org/21122.pdf)> visited on 21 March 2011; and 2009 Phnom Penh Agenda for the Implementation of the ASEAN EU Plan of Action (2009 – 2010), adopted in Phnom Penh, Cambodia on 28 May 2009 at the 17<sup>th</sup> ASEAN-EU Ministerial Meeting <[www.aseansec.org/ASEAN-EU-PoA.pdf](http://www.aseansec.org/ASEAN-EU-PoA.pdf)> visited on 21 March 2011.

<sup>128</sup> Ralf Emmers, *The Threat of Transnational Crime in Southeast Asia: Drug Trafficking, Human Smuggling and Trafficking, and Sea Piracy*, Institute of Defense and Strategic Studies, Singapore, 2003, p. 6

<sup>129</sup> 1993 Resolution on the ASEAN Plan of Action for Children, adopted in Manila, the Philippines on 2 December 1993 by ASEAN Ministers responsible for Social Welfare, <[www.aseansec.org/2036.htm](http://www.aseansec.org/2036.htm)> visited on 21 March 2011.

<sup>130</sup> Ibid.

<sup>131</sup> 1997 ASEAN Vision 2020, adopted in Kuala Lumpur, Malaysia on 15 December 1997 by Heads of State/Government, <[www.aseansec.org/1814.htm](http://www.aseansec.org/1814.htm)> visited on 21 March 2011.

address 'problems that can only be met on a regional scale', which include trafficking in women and children.<sup>132</sup> The ASEAN Vision 2020 serves as a basis of further plan of actions and declarations on counter-trafficking efforts in Southeast Asia.

Soon after the adoption of ASEAN Vision 2020, the AMS also adopted the 1997 ASEAN Declaration on Transnational Crime.<sup>133</sup> In the 1997 Declaration AMS agreed that they have to take 'firm and stern measures' to combat transnational crime, including trafficking of women and children and most importantly, the 1997 Declaration established the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) to coordinate activities to fight transnational crimes.<sup>134</sup> Furthermore, it also requires the involvement of the ASEAN Chiefs of National Police (ASEANAPOL) and considers the establishment of an ASEAN Centre on Transnational Crime (ACOT).<sup>135</sup> The commitment to combating trafficking especially in women and children was once more reiterated in the Hanoi Plan of Action that was adopted in 1998 emphasizing on the implementation of the 1993 ASEAN Plan of Action for Children.<sup>136</sup>

The ASEAN Ministers Meeting on Transnational Crime (AMMTC) holds an important role in encouraging regional cooperation against transnational crime, including TWC. In 1999, during the 2<sup>nd</sup> AMMTC meeting, the AMMTC described transnational crime, including TIP, as non-traditional threat to security and adopted the ASEAN Plan of Action to Combat Transnational Crime,<sup>137</sup> the 1999 Plan of Action aims at encouraging AMS to expand their efforts in combating transnational crime at the national, bilateral, and regional levels with the overall focus on the strengthening regional commitment and capacity to combat transnational crime.<sup>138</sup> The 1999 Plan of Action requires all AMS to criminalize TIP under their domestic law.<sup>139</sup> So far, this is the first ASEAN regional instrument, although not binding, that requires the criminalization of TIP under each AMS domestic law. The Plan of Action also establishes the Senior Officials Meeting on Transnational Crime (SOMTC) to implement the policies and plans adopted by AMMTC and report to AMMTC accordingly.<sup>140</sup>

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<sup>132</sup> ASEAN Vision 2020, A Community of Caring Societies.

<sup>133</sup> 1997 ASEAN Declaration on Transnational Crime, adopted in Manila, the Philippines on 20 December 1992 by Ministers of Interiors at the 1<sup>st</sup> ASEAN Conference on Transnational Crime, <[www.aseansec.org/5640.htm](http://www.aseansec.org/5640.htm)> visited on 21 March 2011.

<sup>134</sup> Ibid., pt. 2.

<sup>135</sup> Ibid., pt. 4. ACOT is supposed to be responsible to coordinate the regional efforts against transnational crime including conducting in-depth analysis on and giving recommendations on appropriate regional strategies to fight transnational crime. However, until now the AMS have not yet achieved an agreement on the actual establishment of ACOT.

<sup>136</sup> 1998 Ha Noi Plan of Action, adopted in Ha Noi, Viet Nam on 15 December 1998 by Heads of State/Government at the 6<sup>th</sup> ASEAN Summit, pts. 4.4–4.5 <[www.aseansec.org/687.htm](http://www.aseansec.org/687.htm)> visited on 21 March 2011.

<sup>137</sup> 1999 ASEAN Plan of Action to Combat Transnational Crime, adopted in Yangon, Myanmar on 23 June 1999 <[www.aseansec.org/16133.htm](http://www.aseansec.org/16133.htm)> visited on 21 March 2011. The Plan of Action was adopted based on the 1997 Declaration on Transnational Crime.

<sup>138</sup> Ibid. Objective.

<sup>139</sup> Ibid., Programme of Actions/Priorities, Legal Matter, pt. 6.

<sup>140</sup> Ibid., Section D.(a).4.

Following international practice, in 2000 AMS adopted the ASEAN Plan of Action for Cooperation on Immigration Matters (Immigration Action Plan).<sup>141</sup> The Immigration Action Plan serves as one of the Action Plans realizing the 1997 Declaration on Transnational Crime. It listed several objectives that relate to immigration measures to combat TIP such as developing a strong network among ASEAN immigration authorities to combat trafficking in persons<sup>142</sup> and enhancing exchange of information between ASEAN immigration authorities with ASEAN Dialogue Partners, regional organizations, UN specialized agencies, and other international organizations especially in sharing critical information on the identities, movement and activities of criminal organizations involve in TIP.<sup>143</sup> The Plan of Action indicates the shifting paradigm of ASEAN policy in counter-trafficking from one of protection of women's and children's rights to the inclusion of TIP phenomenon as an immigration issue.<sup>144</sup> Moreover, similar with the provision in the 2000 Trafficking Protocol, the effort to identifying perpetrators of TIP and organized criminal groups becomes the heart of the Immigration Action Plan and paying less attention to efforts to identify victims of TIP that are transported across borders and eventually weaken the efforts to protect them.

In 2004, ASEAN made a tremendous leap in terms of enhancing its anti-trafficking policies and regional cooperation in criminal matters by adopting the ASEAN Declaration against Trafficking in Persons Particularly Women and Children (2004 Anti-Trafficking Declaration)<sup>145</sup> and the Treaty on Mutual Legal Assistance (MLAT).<sup>146</sup> The 2004 Declaration is the first ASEAN Declaration adopted to address specifically the issue of TWC in Southeast Asia. The Declaration affirms ASEAN stand to be in compliance with UNTOC and its Trafficking Protocol and declares that the AMS acknowledge TWC as an emerging regional problem and that they will undertake rigorous efforts to *effectively* address this problem. The 2004 Declaration has shown some improvements in terms of victims' protection compare to the 2000 Immigration Action Plan. Some of the key commitments in the Declaration that reflect victim-oriented approach are:

*To distinguish victims of trafficking in persons from the perpetrators, and identify the countries of origin and nationalities of such victims and thereafter ensure that such victims are treated humanely and provided with such essential medical and other forms of assistance deemed appropriate by the respective receiving/recipient country, including prompt repatriation to their respective countries of origin;<sup>147</sup> and*

<sup>141</sup> 2000 ASEAN Plan of Action for Cooperation on Immigration Matters, adopted in Davao City, the Philippines on 18 October 2000 at the 4<sup>th</sup> Meeting of the ASEAN Director-Generals of Immigration Departments and Heads of Consular Affairs Division of the Ministries of Foreign Affairs (DGCIM), <[www.aseansec.org/16572.htm](http://www.aseansec.org/16572.htm)> visited on 24 March 2011.

<sup>142</sup> Ibid., Section II.B. Specific Objectives, pt. 1.

<sup>143</sup> Ibid., Section III.F. Extra-Regional Cooperation, pt. b.

<sup>144</sup> Ibid., Section III.B. Information Exchange, pt. a.

<sup>145</sup> 2004 ASEAN Declaration against Trafficking in Persons Particularly Women and Children, adopted in Vientiane, Lao PDR on 29 November 2004 by Heads of State/Government at the 10<sup>th</sup> ASEAN Summit <[www.aseansec.org/16793.htm](http://www.aseansec.org/16793.htm)> visited on 24 March 2004.

<sup>146</sup> 2004 Treaty on Mutual Legal Assistance in Criminal Matters, signed in Kuala Lumpur, Malaysia on 29 November 2004 by ASEAN Ministers of Justice <[www.aseansec.org/17363.pdf](http://www.aseansec.org/17363.pdf)> visited on 24 March 2011.

<sup>147</sup> 2004 Anti-Trafficking Declaration, par. 5.

*To undertake actions to respect and safeguard the dignity and human rights of genuine victims of trafficking in persons.*<sup>148</sup>

In addition, the AMS also pledge to establish a regional focal network and to enhance regional cooperation through the establishment of focal regional network, maintaining regular exchange of information and border controls.<sup>149</sup> Despite the granting of wider protection for women and children, the focus of this Declaration in combating trafficking still rely heavily on immigration measures. Even though the Declaration urges AMS to distinguish the victims from perpetrators and to undertake actions to respect and safeguard victims' human rights, it still focuses on the repatriation of the victims to their respective counties of origin and it stays silent on the prevention measures that have to be taken to prevent the victims to be re-trafficked once they have been repatriated.

Adopted on the same day of the 2004 Declaration was the MLAT. Originally, the MLAT is not categorized as an ASEAN instrument since it was adopted on the initiative of the Malaysian Government and at the beginning, not all AMS signed and/ratified the MLAT. However, up to this day, all AMS, except Thailand, have signed and ratified the MLAT.<sup>150</sup> The MLAT provides a basis for international cooperation in criminal matters between AMS, which, among others, enables the collection of evidence in one State for the use in another State.<sup>151</sup> MLAT requires AMS to establish a Central Authority to make and receive Request on Mutual Legal Assistance (MLA request) in accordance to MLAT.<sup>152</sup> Article 5(2) of AMLAT makes it possible for the Central Authorities to expand their cooperation to the INTERPOL or ASEANAPOL. It is the first ASEAN instrument that is binding in nature, which can realize a more comprehensive and effective cooperation among AMS to investigate and prosecute traffickers. However, despite the number of transnational crime reported to occur in Southeast Asia, some studies indicate that there is only small numbers of MLA request were made after the entry into force of AMLAT in respective State Party and the number of request relate to trafficking were even smaller.<sup>153</sup>

Beside the abovementioned ASEAN instruments, there are also several recent ASEAN instruments that place counter-TWC as one of their priorities such as the 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007 Migrant Workers Declaration)<sup>154</sup> and the 2010 Master Plan on ASEAN Connectivity: One Vision, One Identity, One Community (Master Plan).<sup>155</sup> Both the 2007 Declaration and the Master Plan reiterate AMS commitment to take concrete measures to curb TIP, especially in women and children by applying stricter

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<sup>148</sup> 2004 Anti-Trafficking Declaration, par. 6.

<sup>149</sup> Ibid., para. 1, 3-4

<sup>150</sup> ARTIP Project, *MLAT Status*, <[www.artipproject.org/artip-tip-cjs/laws-policies-regional.html](http://www.artipproject.org/artip-tip-cjs/laws-policies-regional.html)> visited on 24 March 2011.

<sup>151</sup> MLAT, Arts. 1(1) and 1(2).

<sup>152</sup> Ibid., Art. 4(1).

<sup>153</sup> Gerard Smith, *The Criminal Justice Response to Human Trafficking: a Recent Developments in the Greater Mekong Sub-Region*, Strategic Information Response Network (SIREN), May 2010, p. 13.

<sup>154</sup> 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, signed in Cebu, the Philippines on 13 January 2007 by the Heads of State/Government at the 12<sup>th</sup> ASEAN Summit <[www.aseansec.org/19264.htm](http://www.aseansec.org/19264.htm)> visited o 24 March 2011.

<sup>155</sup> 2010 Master Plan on ASEAN Connectivity: One Vision, one Identity, One Community, adopted in Ha Noi, Viet Nam on 28 October 2010 by Heads of State/Government at the 17<sup>th</sup> ASEAN Summit <[www.asean.org/documents/MPAC.pdf](http://www.asean.org/documents/MPAC.pdf)> visited on 24 March 2011.

penalties to trafficker.<sup>156</sup> Again, the two instruments are taking the stance of their previous predecessors in focusing on the identification of the perpetrators rather than the victims. Both instruments still place TIP phenomenon as a part of migration issues that the region faces and not that of human rights issue. By focusing on the identification of the perpetrators and to take the view of TIP phenomenon as constituting a part of migration issues will undermine counter-trafficking measures in the region.

## 2. ASEAN Bodies/Subsidiaries Responsible for Counter-Trafficking Efforts

In the context of cooperation to curb transnational crime in Southeast Asia, there are at least four ASEAN Bodies/Subsidiaries that are engaged actively in curbing TWC. They consist of: 1) the ASEAN Ministerial Meeting on Transnational Crime (AMMTC); 2) the Senior Official Meeting on Transnational Crime (SOMTC); 3) Director-General of Immigration and Consular Matters (DGICM); and 4) ASEAN Heads of Police (ASEANAPOL).

The AMMTC was established in December 1997 based on the 1997 ASEAN Declaration on Transnational Crime. AMMTC meets once in two years and its main responsibility is to coordinate the activities of relevant ASEAN bodies in preventing and eradicating transnational crime, including TIP.<sup>157</sup> The AMMTC is the highest policy-making body on ASEAN Cooperation in combating transnational crime.<sup>158</sup> The work of AMMTC is assisted by the SOMTC that was established under the 1999 ASEAN Plan of Action on Transnational Crime.<sup>159</sup> SOMTC convenes at least once a year before the AMMTC and its main responsibility is to implement policies and plans adopted by AMMTC.<sup>160</sup> It has the power to establish ad hoc working groups or task forces that consist of experts in relevant fields to assist SOMTC work.<sup>161</sup> Most importantly, its task also include bolstering cooperation among ASEAN bodies dealing with transnational crime as well as cooperation in combating transnational crime with international agencies.<sup>162</sup>

Under the 1999 ASEAN Plan of Action to Combat Transnational Crime, DGICM is identified as one of ASEAN relevant bodies that deal with transnational crime, including counter-trafficking.<sup>163</sup> DGIM is obliged to report to AMMTC and cooperate with SOMTC on matters related to transnational crime.<sup>164</sup> According to the 2000 Immigration Action Plan, DGICM is intended to be the highest policy- and decision-making body on immigration matters in the institutional framework of ASEAN cooperation on immigration matters, its role also include the exchange of information on immigration and on matters related to irregular migration and trafficking in persons.<sup>165</sup> This role demonstrates the importance of DGICM role in combating trafficking since most of ASEAN endeavors to combat TIP rely heavily on border controls and immigration measures.

<sup>156</sup> 2007 Migrant Workers Declaration, par. 17 and Master Plan, par. 84.

<sup>157</sup> 1997 ASEAN Declaration on Transnational Crime, par. 2.

<sup>158</sup> 1999 ASEAN Plan of Action on Transnational Crime, Section D.(a).1.

<sup>159</sup> Ibid., Section D.(b).1.

<sup>160</sup> Ibid., Section D.(b).2-3.

<sup>161</sup> Ibid., Section D.(b).4.

<sup>162</sup> Ibid., Section D.(b).5-6.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid., Section D.(a).4 and D.(b).5.

<sup>165</sup> 2000 Immigration Action Plan, Sec. III – Institutional Capacity-Building, pt. a.

ASEANAPOL holds a unique position in the ASEAN counter-trafficking scheme. Even though ASEANAPOL is identified as an accredited civil society organization under the 2007 Charter of the Southeast Asian Nations (ASEAN Charter),<sup>166</sup> it is constantly involved in each of ASEAN effort to combat TIP, especially in women and children. It is also recognized as one of the relevant bodies under the AMMTC that is responsible in implementing AMMTC policies on transnational crime, including TIP, and report to AMMTC accordingly.<sup>167</sup> ASEANAPOL is also mentioned in the 2004 MLAT as one of the organizations that AMS can seek assistance from for the purposes of mutual legal assistance in criminal matters.<sup>168</sup> Most importantly, since 2004, after the adoption of the 2004 Trafficking Declaration and the adoption of the 2004 MLAT, ASEANAPOL conferences have been taken into consideration by AMMTC in determining ASEAN anti-trafficking measures. It holds an important role in the fight against trafficking since its main purposes that it has reiterated over the years are to coordinate police efforts from respective AMS to curb TWC, including exchange of information, holding regular meetings, and conducting joint training; conducting research; and encouraging each AMS to enact national legislation against TIP.<sup>169</sup>

There are of course further developments within ASEAN in terms of additional bodies that will potentially play important roles in the fight against TWC. The newly established ASEAN Intergovernmental Commission on Human Rights (AICHR) and ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC) have bring up the hope that ASEAN will start to utilize human rights approach in addressing pertaining issues that the region is facing. However, after the establishment of these two commissions in 2009<sup>170</sup> not much concrete measures have been taken to affirm AICHR and ACWC role in the fight against TWC.

The focus of the two Commissions is still evolving around developing their rules and procedures and internal mechanisms to carry out their mandates under the respective term of reference. Indeed it is still too early to tell whether how prominent AICHR and ACWC will play their role under ASEAN framework against TIP, especially women and children. However, one could hope that the long-awaited establishment of AICHR and ACWC will add human rights perspective and approach to the fight against TIP in ASEAN and tip the balance for the protection of victims as well as witness in the investigation and prosecution efforts against traffickers.

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<sup>166</sup> 2007 Charter of the Association of Southeast Asian Nations, signed in Singapore on 20 November 2007 by Heads of State/Government at the 13<sup>th</sup> ASEAN Summit and entered into force on 15 December 2008, Annex 2 – Entities Associated with ASEAN <[www.aseansec.org/21069.pdf](http://www.aseansec.org/21069.pdf)> visited on 26 March 2011.

<sup>167</sup> 1999 ASEAN Plan of Action on Transnational Crime, Section D.(a).1.

<sup>168</sup> MLAT, Art. 5(2).

<sup>169</sup> ASEANAPOL, Joint Communiques of the ASEAN Chiefs of Police Conference, 2004 – 2008, ASEAN Secretariat, <[www.aseansec.org/19503.htm](http://www.aseansec.org/19503.htm)>

<sup>170</sup> 2009 Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, adopted in Phuket, Thailand on 20 July 2009 by ASEAN Foreign Ministers at the 42<sup>nd</sup> ASEAN Ministerial Meeting <[www.asean.org/Doc-TOR-AHRB.pdf](http://www.asean.org/Doc-TOR-AHRB.pdf)> visited on 26 March 2011; and 2009 Terms of Reference of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children, adopted in Cha Am, Thailand on 22 October 2009 at the 2<sup>nd</sup> Meeting of the ASEAN Socio Community Council <[www.asean.org/documents/TOR-ACWC.pdf](http://www.asean.org/documents/TOR-ACWC.pdf)> visited on 26 March 2011.

## V. CONCLUDING REMARKS

Despite the intensity of the global counter-TIP measures, especially those in Southeast Asia, there are still some gaps that need to be addressed. The absence of a reliable methodology to deliver an accurate information and data relating to TIP has been a long-standing problem that needs to be resolved. To this point, information and data related to the description of the gravity of TIP are based on the application of various definitions and unreliable, sometimes conflicting, estimates. In addition to that, especially in the case of Southeast Asia, the absence of reliable information and data on TIP is considered due to the lack of systematic and holistic research and resistance from the law enforcers to make TIP-related information accessible. Even though producing and quantifying comprehensive information related to TIP is not an easy task, relevant stakeholders can start addressing the issue by solving the already identified root-causes in order to determine a methodology that would best cover these deficiencies for now.

The second challenge that restrains the global move of counter-TIP measures is the tendency of Governments to treat TIP as a part of migration problem. This tendency is reflected in various international instruments, including ASEAN instruments, which relate to counter-TIP. This leads to States implementing stricter border controls that will eventually can criminalize victims of TIP as violators of immigration law since many of them that were trafficked across border entered the country of transit/destination illegally. Additionally, this perspective can further expose the victims to get re-trafficked in cases where the victims were repatriated to their home countries without proper protection and precautionary measures. The problem with this stance is that many of the TIP-immigration policies proliferated under this stance mainly focuses on the identification of traffickers and their modus operandi and pay little attention to the rights of the victims. As many experts have pointed out, this paper is of the opinion that in order to address this issue and prevent the criminalization of TIP victims (and re-victimization) States ought to start to see TIP phenomenon as a human rights problems instead of mere immigration issue. A shift of perspective to tackle TIP is required; Governments should start to fend not only the security of their borders but also the rights and interests of TIP victims. It will surely take a lot more effort from the law enforcers to identify the victims but at the same time it will reassure the implementation of a more holistic approach in eradicating and preventing TIP.

With regards to TWC, the general trend that prevails until now is to associate TWC with the purpose of prostitution or other forms of sexual exploitation. The influence of this trend plays a predominant influence to the proliferation of various TIP-related research and counter-TIP policies, especially in Southeast Asia. Hence, many counter-TIP efforts are directed at curbing TIP for these purposes in the countries of origin rather than in the countries of transit and destination and this is exactly what took place in Southeast Asia. Furthermore, the focus of TWC for the purposes of prostitution and other forms of sexual exploitation ultimately overshadow other occurrences of TWC for the purposes other than sexual exploitation. In this way many TIP victims will go under the radar since they are not trafficked for the purposes of prostitution and other forms of sexual exploitation. And there is also the problem of corruption in the criminal justice system that further frustrates counter-TIP efforts in Southeast Asia. It has constituted as a deep-rooted and systematic problem in most countries in Southeast Asia hampering all law enforcement efforts.

In relation to counter-TIP efforts in Southeast Asia, ASEAN has made substantial progress by adopting various instruments and encouraging regional cooperation among its members and international cooperation to combat TIP. It has recognized TIP, especially in women and children, as an emerging regional problem and the AMS are highly committed in combating this crime through enhancing regional and international cooperation. The AMS, individually, also pledge to improve its national capacity to realize its commitment to eradicate and prevent TWC.

Still, combating TIP is a not an easy task, in spite of the progresses that have been made by ASEAN in the past two decades, ASEAN still need to improve its counter-TIP strategies and framework. Individual AMS also faces challenges that create gaps in ASEAN counter-TIP efforts such as poverty, development and economic gaps, different legal systems and traditions, and the different domestic priorities in addressing TIP phenomenon. The lack of regional definition of TIP as well as inadequate institutional mechanism in ASEAN can weaken ASEAN counter-TIP efforts. Additionally, ASEAN still segregate the handling of TIP from labor issues while as it has been known that TIP indeed occurred due to demand for cheap labor. Therefore, by putting TIP as security challenge and labor migration as a social and cultural challenge instead of placing some portion of labor migration under the security challenge together with TIP will definitely constitute a setback in ASEAN efforts to combat TIP.

In order to address these issues challenging the ASEAN counter-TIP efforts, ASEAN should firstly tend to the issue of regional definition of TIP that encompasses all purposes of TIP to better cover the gaps in identifying and apprehending traffickers as well as protecting the victims' rights and interests. Human rights perspective in handling TIP cases is of great necessity to be implemented together with the already existing mechanism, i.e. immigration and border control measures. Regional institutional review and necessary institutional reforms should also be taken to facilitate a more rigorous and systematic counter-TIP efforts. Special attention should be given to the affirmation of the role of relevant regional bodies, such as the ASEANAPOL that currently is still identified as accredited civil society organization under the ASEAN Charter while it has played an important role under ASEAN framework of counter-TIP. It is also necessary to define and enhance the role of AICHR and ACWC in the fight against TIP. In terms of regional and international law-enforcers' collaboration in counter-TIP efforts, a single point of authority should be established in each AMS in order to guarantee the reliability of information and to create an integrated mechanism which eventually will make it easier in cases where quick-response is required. Last but not least, efforts should also be carried out to raise public awareness of TIP phenomenon, especially in women and children.

Together with its repeated pledge to overcome TIP phenomenon prevailing in Southeast Asia, ASEAN should take concrete measure to realize those commitments such as adopting a legally binding instruments to cover all of the identified gaps in it counter-TIP efforts. The adoption of a legally binding instrument by AMS will also confirm ASEAN seriousness in combating TIP, especially TWC, in the eye of the international community and eventually paving a way to strengthening the realization of a solid ASEAN Community in 2015.