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***The challenges of accessing protection, support and remedies for victims of human trafficking***

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## I. Introduction.

### A. *Objective and scope.*

On October 23<sup>rd</sup>, 2019, 39 bodies were found inside a tractor-trailer at Waterglade Industrial Park in Grays, about 25 miles east of central London<sup>1</sup>. All of the victims were Vietnamese. Following this horrific case there was an international cooperative investigation between Vietnam and the United Kingdom to bring those responsible to justice<sup>2</sup>. Unfortunately, this case is not the first time that people have been found dead in metal containers in England or on the way to other destinations. In June 2000, 58 Chinese immigrants were found dead in the back of a truck's container in the English port city of Dover<sup>3</sup>. In August 2015, another 71 corpses were discovered inside a sealed and locked freezer truck in Austria<sup>4</sup>. Initial investigations indicate that human trafficking and modern-day enslavement are the main reason<sup>5</sup>. The story is very common. People are reported to pay a sum of money, often going into debt to make the payment, and in exchange they are tucked into a container on the way to their destination; be it England, France, German or any other country. In order to pass through border security checkpoints equipped with monitors that can detect heartbeats and the heat signature of human bodies, they have to endure extremely low temperatures, complete darkness, and even airless environments. Once these people have

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<sup>1</sup> Author unknown, 'Essex Lorry Deaths: People Found Dead Were All Vietnamese.' (BBC News, 1 November 2019) <<https://www.bbc.com/news/uk-england-essex-50268939>> accessed 8 November, 2019

<sup>2</sup> Linh Do and Dinh Hau, 'Vietnam Uses Forensics in England Truck Deaths Investigation.' (Time, 27 October 2019) <<https://time.com/5711694/vietnam-forensic-samples-truck-england-deaths/>> accessed 8 November 2019

<sup>3</sup> Kim Sengupta, 'Essex Case a Grim Reminder of Horrific Tragedy 19 Years Ago.' (The Independent, October 24, 2019) <<https://www.independent.co.uk/news/uk/home-news/essex-lorry-deaths-people-smuggling-bulgaria-china-snakeheads-dutch-a9169171.html>> accessed 9 November 2019

<sup>4</sup> Helene Bienvenu and Marc Santora, 'They Let 71 People Die in a Stifling Truck. They Got 25 Years.' (The New York Times, 14 June 2018) <<https://www.nytimes.com/2018/06/14/world/europe/austria-migrants-truck.html>> accessed 9 November 2019

<sup>5</sup> Author unknown, 'Essex Lorry Deaths: People Found Dead Were All Vietnamese.' (BBC News, 1 November 2019) <<https://www.bbc.com/news/uk-england-essex-50268939>> accessed 8 November, 2019

arrived, they become victims of human trafficking through various types of exploitation, often to pay off debt to their traffickers.

Trafficking in human beings (THB) has a long legal and political history that sets the crime completely apart from other international legal phenomena. Despite all the effort that states have made, the issue has become even more complicated to address in the 21<sup>st</sup> century<sup>6</sup>. The common debates range widely, from the definition of “trafficking” to whether resources and attention should be used to focus on perpetrators or victims to sufficiently combat the crime. In this context, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime was adopted in 2000<sup>7</sup>. Widely known as the Palermo Protocol, it has mapped a space of popular agreement on the definition of trafficking<sup>8</sup> as well as affirming the role of victims of THB<sup>9</sup>. The protocol has several articles devoted to victims.<sup>10</sup> States are expected to assess victims’ status and participatory rights, and finally provide a mechanism that allows victims to access remedies. Nevertheless, in practice, THB victims are likely to face challenges in a legal context when trying to access protection and remedies.

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<sup>6</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 25 – 42

<sup>7</sup> United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted and opened for signature 15 November 2000, entered into force 25 December 2003) UN General Assembly Res. 55/25

<sup>8</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted and opened for signature 15 November 2000, entered into force 25 December 2003) UN General Assembly Res. 55/25. (Palermo Protocol) at art. 3

<sup>9</sup> Ibid at art. 7

<sup>10</sup> Ibid at art. 6 and 7

There has been considerable debate that the humanitarian aspect of victim protection is overshadowed by the anti-illegal immigration goal of many states<sup>11</sup>. THB victims are likely to be mistaken with illegal migrants, or, in many situations, the case starts as migrant smuggling, and then it turns into human trafficking once exploitation of the victim begins<sup>12</sup>. The overlap between these phenomena means that victims of THB are often mislabeled as illegal migrants by border control officials, which makes it extremely challenging to eliminate the issue of THB<sup>13</sup>. As a result, victims of trafficking can be treated as criminals or illegal immigrants, and face either arrest or deportation rather than receiving legal support and remedies.

However, that is not the only reason. This thesis argues that regarding implementation, states only focus on prosecution, mainly depending on criminal law, and showing reluctance in approaching cases from a human rights perspective, which prevents THB victims from accessing justice and remedies. At the international level, the Palermo Protocol contains binding provisions for prosecuting perpetrators, but only guidelines for victim protection, choosing instead to rely on the human rights framework for providing protection and support to victims. Within ASEAN, implementation is problematic due to a lack of a regional court or any independent monitoring institutions to assess states compliance with regional agreements. ASEAN is notorious for strictly applying the principle of non-interference, which lessens the capabilities of human rights monitoring and implementation systems. These issues result in weak regional protection for

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<sup>11</sup> Sarah H Krieg, 'Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights.' (2009) Vol. 15 European Law Journal 775–790 <<https://doi.org/10.1111/j.1468-0386.2009.00490.x>> accessed 14 November 2019

<sup>12</sup> Rocio Garza, 'Addressing Human Trafficking along the United States-Mexico Border: The Need for a Bilateral Partnership' (Spring 2011) Vol 19 Cardozo Journal of International and Comparative Law 413-450 <<http://biblioteca.cejamericas.org/bitstream/handle/2015/425/Garza.pdf?sequence=1&isAllowed=y>> accessed 14 November 2019

<sup>13</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 77-83; Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) issue 4 Anti-Trafficking Review 14-32 <<https://www.antitraffickingreview.org/index.php/atrjournal/article/view/88>> accessed 15 November 2019

victims, with no active mechanism available for individual victims to pursue justice and remedies. These issues filter down to the national level as this paper shows in the case study; Vietnam. By examining case law and legislation in Vietnam, this study shows there is a gap between the rhetoric of the THB legal framework and reality. Despite being a party to many agreements, both regional and international, the country takes a very conservative stance on human rights in terms of protecting and supporting victims.

By exploring these issues from the top down, the paper illuminates how current THB legislation does not favor victims *de facto*. In addition, the paper explores states' tendency to avoid their obligations to victims in the light of human rights law. Finally, the thesis believes that if victims are not adequately handled, there will be less successful prosecution of perpetrators, and the victims face the risk of being re-trafficked. As a result, the goal of the Palermo Protocol becomes impossible to reach and THB remains as a severe threat to society.

### *B. Methodology*

Chapter two will discuss THB at the international level, beginning by examining how the definition of THB has evolved over time, and what the impact has been. Using the legal framework built around the current definition, including human rights law, the thesis will seek to answer the question of to what extent states have obligations towards THB victims and how the human rights legal regime can be engaged to assist victims. Chapter three will focus on the regional level, taking the Association of South East Asian Nations (ASEAN) as a point of focus. By examining the accomplishments and remaining challenges of ASEAN, the paper will illuminate to what extent regional protections are available to THB victims and if it manages to carry out the implementation of regional commitments. Finally, chapter four will take Vietnam as a case study. Vietnam was chosen as the country is a member state of ASEAN and has ratified the Palermo Protocol, inter

alia. Additionally, as a developing country in ASEAN that is a THB hotspot, it will serve as a revealing case study for how the country responds to the international and regional commitments in building its national legislation and law enforcement. Chapter five will conclude.

The topic will be discussed primarily through review of relevant literature. Therefore, there will be no interviews or data gathering. The binding laws that will be used as main sources are the Palermo Protocol and regional agreements within ASEAN. In addition, soft law guidelines will also be discussed. Literature will include books, law journals and articles mainly, both online and in print version. These sources are studied among primary keywords such as victims, human trafficking, and access to remedies. Case law will also be reviewed when appropriate. To support chapter four, Vietnamese law and case law will be discussed and translated into English.

## II. Human Trafficking in International Law

In the 21<sup>st</sup> century, trafficking in human beings (THB) has remained as one of the most profitable and heinous transnational crimes<sup>14</sup>. For years, states have made many efforts to find a solution for this crime, from criminalizing the offense to giving victims a central role in legal proceedings and promoting cooperation among states<sup>15</sup>. However, the crime itself has also evolved to be more negatively complicated. It would be foolish to still approach THB through only the lens of slavery or forced prostitution and sex work only. The international community has come up with a crucial legal response; the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Commonly known as the Palermo Protocol, it was adopted in 2000. The Palermo Protocol functions as a basic standard for member states to base domestic policies on when building their national anti-trafficking response.

Nevertheless, the protocol has come under several intense criticisms<sup>16</sup>. In this chapter, the paper will study in detail the definition of THB in the Palermo Protocol, and discuss what the Protocol has achieved and what its limitations are, if any. This chapter will also question the nature of state obligations to victims of THB. In addition, implementation of the THB legal regime and accompanying monitoring mechanisms will be discussed. Through examining these issues, this

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<sup>14</sup> ECPAT International, 'Human Trafficking: The Third Largest Crime Industry in the World' (2018) <<https://www.ecpat.org/news/trafficking-the-third-largest-crime-industry-in-the-world/>> accessed 12 October 2019

<sup>15</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010)

<sup>16</sup> Ibid 77-83; Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) issue 4 Anti-Trafficking Review 14-32 <<https://www.antitraffickingreview.org/index.php/atrjournal/article/view/88>> accessed 15 November 2019; Jean Allain 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2015) Vol 7 Albany Government Law Review 112-142 <[https://doi.org/10.1163/9789004279896\\_015](https://doi.org/10.1163/9789004279896_015)> accessed 15 November 2019

paper will shed light on both the progress that has been made and the limitations of the legal regime regarding THB at the international level.

### *A. Legal definition*

THB has a long legal history, with the first international convention, the Convention Against White Slavery, being adopted in 1904<sup>17</sup>. As the title suggests, the first international convention on trafficking was only concerned with white women being forced into prostitution. Over time, the legal scope of trafficking has expanded significantly to reflect the nature of the issue. Indeed, the creation of the Palermo Protocol is the result of recognition that THB needed a new approach and a redefined definition. The negotiation, leading to a widely agreed upon definition, has been extremely controversial and divided as the crime has become more complicated<sup>18</sup>. For instance, “trafficking” formerly needed to have a transnational element, moving from one destination to another. In addition, due to gender bias, women and children were viewed as the only victims of THB, and there was no recognition for men<sup>19</sup>. In the 2000s, nevertheless, perspectives and laws have changed to acknowledge that victims can be trafficked within the territory of a state and that men can be legitimate victims<sup>20</sup>. Moreover, the different types of exploitation have widened from previously focusing almost exclusively on sex exploitation and servitude to include organ harvesting, forced begging and forced labor<sup>21</sup>. More recently, the overwhelming flow of illegal

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<sup>17</sup> International Agreement for the Suppression of the White Slave Traffic, 1 LNTS 83, done May 4, 1904, entered into force July 18, 1905, amended by a Protocol approved by the UN General Assembly on Dec. 3, 1948, 30 UNTS 23

<sup>18</sup> Janie A. Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) Vol. 108 The American Journal of International Law 609-649 <<https://doi.org/10.2139/ssrn.2315513>> accessed 14 October 2019

<sup>19</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 13-25

<sup>20</sup> Ibid; Note that the Palermo Protocol has no mention of crossing state borders as being a requirement of human trafficking and it acknowledges that all genders can be victims.

<sup>21</sup> Rocio Garza, ‘Addressing Human Trafficking along the United States-Mexico Border: The Need for a Bilateral Partnership’ (Spring 2011) Vol 19 Cardozo Journal of International and Comparative Law 413-450



migrants has increased the complexities of consent. For example, victims of THB could begin as illegal migrants who consent and even pay to be transported to a particular destination. However, upon arrival some migrants turn into victims of THB when their labor is exploited<sup>22</sup>. Despite the initial consent of the victim, they are still victims of THB.

In this context, the Palermo Protocol was built up to more broadly define the crime and set up parameters for future negotiations. It also introduced to the international community the “3P” paradigm – prevention, protection (of victims) and prosecution to combat the crime. According to the protocol, THB requires three elements: (1) an action element; (2) a means element and (3) a purpose element<sup>23</sup>. The action element includes activities before the exploitation step, including “recruitment, transportation, transfer, harboring or receipt of persons.”<sup>24</sup> This element can be understood as a break from the past when only the broker, the recruiters or the people directly exploiting victims would be prosecuted. Now the practice of possessing or maintaining people for the end purpose of exploitation can also be criminalized and prosecuted as THB. The means element refers to the different ways to distort people’s free will, stated in the Protocol as “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.”<sup>25</sup>. This element is only required for adults, not minors. The last element regarding purpose is expressed in the Protocol as

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<<http://biblioteca.cejamericas.org/bitstream/handle/2015/425/Garza.pdf?sequence=1&isAllowed=y>> accessed 14 November 2019

<sup>22</sup> Ibid

<sup>23</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted and opened for signature 15 November 2000, entered into force 25 December 2003) UN General Assembly Res. 55/25. (Palermo Protocol) at art. 3(a); Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 31-32

<sup>24</sup> Palermo Protocol at art. 3(a)

<sup>25</sup> Ibid

the purpose or intent to exploit the victim. The Protocol lists several types of exploitation in the definition, such as forced prostitution, organ removal, and forced labor<sup>26</sup>. Debate of this element is still ongoing because, beyond listing a few its forms, exploitation is not clearly defined in the Protocol<sup>27</sup>. This is one of the limitations of the Palermo Protocol which will be discussed further in section C of this chapter.

Despite efforts to clarify the definition of THB, there is still some ambiguity when separating THB from human smuggling<sup>28</sup>. These phenomena share some elements, such as that they are both transnational crimes and global issues, and they both involve the movement of people. More confusingly, cases can start as illegal migration, but end up as THB once the victims arrive at their destination<sup>29</sup>. Nevertheless, there are some fundamental characteristics that distinguish these two crimes. THB is regulated under the Palermo Protocol, while human smuggling is regulated under the Protocol against the Smuggling of Migrants by Land, Sea and Air<sup>30</sup>. Human smuggling occurs when an individual pays a smuggler to take them across a state's border without the state's allowance<sup>31</sup>. Meanwhile, THB occurs when a person is trafficked (domestically or internationally) for the purposes of exploitation through the use of force, fraud, coercion or deceit<sup>32</sup>. In this context,

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<sup>26</sup> Palermo Protocol at art. 3(a)

<sup>27</sup> Jean Allain 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2015) Vol 7 Albany Government Law Review 112-142 <[https://doi.org/10.1163/9789004279896\\_015](https://doi.org/10.1163/9789004279896_015)> accessed 15 November 2019

<sup>28</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 159-165

<sup>29</sup> Rocio Garza, 'Addressing Human Trafficking along the United States-Mexico Border: The Need for a Bilateral Partnership' (Spring 2011) Vol 19 Cardozo Journal of International and Comparative Law 413-450 <<http://biblioteca.cejamerica.org/bitstream/handle/2015/425/Garza.pdf?sequence=1&isAllowed=y>> accessed 14 November 2019

<sup>30</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted and opened for signature 15 November 2000) UN General Assembly Res. 55/25

<sup>31</sup> David Kyle and Rey Koslowski, *Global Human Smuggling: Comparative Perspectives* (2<sup>nd</sup> edition, The Johns Hopkins University Press; 2011) 4

<sup>32</sup> Palermo Protocol at art. 3(a)

the individual is the commodity in THB, whereas the movement of an individual is the main commodity of smuggling. Moreover, the element of consent is a core difference between these two<sup>33</sup>. When the means outlined in article 3(a) of the Palermo Protocol are employed, the consent of the individual is irrelevant. For minors, it is not necessary to prove that any of the means in article 3(a) were used in order for the case to qualify as THB<sup>34</sup>. In addition, human smuggling is considered as a crime against state law that controls passing through borders, whereas THB is an issue that targets the individual and violates the human rights of the individual. In practice, there will always be some overlap between THB and smuggling, but it is not infeasible to distinguish them and it is the obligation of states to identify these two crimes adequately<sup>35</sup>.

Overall, the definition of human trafficking has expanded over the years. It went from being thought of as a crime that affected mainly women and girls being abducted and coerced into the sex industry to being acknowledged as a global phenomenon that affects all genders in substantial ways. THB somewhat has become almost synonymous with modern-day slavery<sup>36</sup>. However, the expanding scope of the definition has led to criticism that the legal regime governing THB is becoming fragmented<sup>37</sup>. With each state responsible for drafting their own anti-trafficking legislation, it is a reasonable concern that interpretations will diverge to the extent that enforcement of the law, particularly with regard to the protection of victims, may be forgotten in the confusion.

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<sup>33</sup> Edward Kleemans, 'Expanding the domain of human trafficking research: introduction to the special issue on human trafficking' (2011) Vol. 14 *Trends in Organized Crime* 95-99 <<https://link.springer.com/article/10.1007%2Fs12117-011-9139-8>> accessed 22 October 2019

<sup>34</sup> Palermo Protocol at art. 3(c)

<sup>35</sup> Palermo Protocol at art. 11; Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 276-283

<sup>36</sup> Janie A. Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) Vol. 108 *The American Journal of International Law* 609-649 <<https://doi.org/10.2139/ssrn.2315513>> accessed 14 October 2019

<sup>37</sup> Jean Allain 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2015) Vol 7 *Albany Government Law Review* 112-142 <[https://doi.org/10.1163/9789004279896\\_015](https://doi.org/10.1163/9789004279896_015)> accessed 15 November 2019

*B. State obligations towards victims under human rights law and the Palermo Protocol*

First, the Palermo Protocol is not a human rights document as it was drafted under the auspices of the United Nations Office of Drugs and Crime (UNODC), a law enforcement body. However, it does not exist in a vacuum, as made clear by article 14 of the Palermo Protocol<sup>38</sup> which specifically acknowledges that human rights obligations of state parties are not affected by, and therefore exist alongside, the Palermo Protocol. Indeed, as succinctly stated by Anne T. Gallagher, “Trafficking goes to the very heart of what human rights law is trying to prevent”<sup>39</sup>. Therefore, it is reasonable to engage human rights law in order to understand what obligations states have regarding victims of THB. The paper argues that, to some extent, states do have positive obligations regarding protection and support for THB victims under human rights law.

In the *Siliadin*<sup>40</sup> case, the European Court of Human Rights (EU Court) ruled that France had a positive obligation under article 4 of the European Convention on Human Rights (ECHR)<sup>41</sup>, which prohibits slavery and forced labor. The applicant claimed that article 4 had been violated because she had been forced to work for several years without pay<sup>42</sup>. Note that the applicant was not claiming that France had directly violated her human rights because her exploitation took place at

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<sup>38</sup> Palermo Protocol at art. 14

<sup>39</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 5

<sup>40</sup> *Siliadin v France*, Chamber Judgment, European Court of Human Rights, Application No 73316/01, 26 Oct 2005; Holly Cullen, ‘*Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights*’ (2006) Vol. 6 Human Rights Law Review 585-592

<sup>41</sup> European Convention on Human Rights (adopted and opened for signature 4 November 1950, entered into force 3 September 1953) ETS 5

<sup>42</sup> The applicant was from Tonga and she arrived in France at age 15 under the supervision of a French citizen, who promised to provide her with an education and regularize her visa status. The original offer was for the applicant to do housework to pay back the cost of her flight, but upon arrival in France her passport was taken away and she became, in essence, an unpaid domestic servant. She had to work long hours, slept on a mattress on the floor, and was even ‘lent’ to other people at one point. She never received an education or became a legal resident.

the hands of private individuals. This is a direct parallel to trafficking cases, where the victims suffer from private individuals, not state actors. The court stated that:

“... the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have *positive obligations*, in the same way as under Article 3, for example, to adopt criminal-law provisions which penalize the practices referred to in Article 4 and to apply them in practice ...”<sup>43</sup>

In essence, the court ruled that states do have a positive obligation to discourage slavery, servitude, and forced labor. It is no longer convincing to simply claim that because no state actors were involved in the crime, the state cannot be held accountable. Although the *Silliadin* case was not prosecuted as THB, it proves that states have positive obligations concerning victims whose human rights have been violated, including but not limited to THB victims. Therefore, the paper believes that this case highlights the connection between human rights and THB, and how human rights law can regulate state accountability regarding THB victims, even when no state-actors are involved in the act of trafficking.

Another relevant case that brings human rights law into the equation is the *Rantsev*<sup>44</sup> case also tried under the EU Court. In this case, the court drew a direct connection between article 4 of the ECHR and state obligations regarding THB. The court stated:

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<sup>43</sup> *Silliadin v France*, Chamber Judgment, European Court of Human Rights, Application no. 73316/01, 2005, para. 89 (emphasis added)

<sup>44</sup> Ms. Rantseva was a Russian citizen who traveled to Cyprus to work as an “artiste”. Soon after arriving, she expressed her desire to return to Russia through a note and quit her job. She was subsequently arrested after being

“In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that *trafficking itself*, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 . . .”<sup>45</sup>

This statement makes it clear that THB, as defined under the Palermo Protocol, is to be interpreted alongside relevant human rights law. States positive obligations to the victims of human rights violations must be carried out in THB cases. In the statement above, the court is referencing article 4 of the ECHR. It is worth noting that Article 8 of the International Covenant on Civil and Political Rights (ICCPR) contains the exact same prohibition on slavery, servitude, and forced and compulsory labor<sup>46</sup>. This makes the application of human rights law to THB potentially further reaching at the international level.

The obligation of states to provide remedies to victims is also found in the body of human rights law. The ICCPR requires states to “ensure that any person whose rights and freedoms as herein recognized are violated shall have an effective remedy”<sup>47</sup>. As the case law reviewed shows, THB can violate one or more rights in the ICCPR. Because states have the obligation to provide victims with a domestic legal remedy to human rights violations that take place within their territory<sup>48</sup>, this

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reported to the police by her employer. Ms. Ransteva was then released by the police into the custody of her employer who took her to his apartment. While staying in his apartment, she died after going over the balcony railing and falling to the street below.

<sup>45</sup> Case of Rantsev v. Cyprus and Russia, European Court of Human Rights, Application no. 25965/04, 2010 (emphasis added)

<sup>46</sup> International Covenant on Civil and Political Rights (adopted and opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) at art. 8

<sup>47</sup> ICCPR at art. 2(2)

<sup>48</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UN General Assembly Res. 217A(III) (UDHR) at art. 8

is a solid path for victims of THB to seek remedies. In addition, the Palermo Protocol is not silent on this matter. Under article 6(6), each state party is required to “ensure that its domestic legal system contains measures that offer victims of trafficking in persons *the possibility* of obtaining compensation for damage suffered”<sup>49</sup>. It is important to note that states are only required to provide “the possibility” of compensation. States can satisfy this requirement by doing one of the following; allowing victims to sue offenders for civil damages, empowering criminal courts to force offenders to compensate victims, or establishing a fund from which victims can claim compensation<sup>50</sup>.

The general omission of obligations towards victims in the Palermo Protocol is purposeful, as states felt that costs of implementation would be too high<sup>51</sup>. Concerns that mandatory and extensive protection and assistance for victims of THB would interfere with the law enforcement aspect were also present among state parties<sup>52</sup>. Consequently, despite the fact that one of the three stated purposes of the Palermo Protocol is to protect and assist victims<sup>53</sup>, there is little in the way of actual mandatory protection and assistance provided to victims in the provisions. Article 6(3) contains the most significant victim protection measures. It requires states to “*consider implementing* measures to provide for the physical, psychological and social recovery of

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<sup>49</sup> Palermo Protocol at art. 6(6) (emphasis added)

<sup>50</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 354-360

<sup>51</sup> Legislative guide, ‘*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*’ at 288

<sup>52</sup> Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto at 366-373

<[https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074\\_ebook-e.pdf](https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf)> accessed 18 December 2019

<sup>53</sup> Palermo Protocol at art. 2(b)

victims...”<sup>54</sup>. In particular, the article lists four categories that states should consider giving special attention:

(a) Appropriate housing; (b) counseling and information...in a language that the victims of trafficking can understand; (c) medical, psychological and material assistance; and (d) employment, educational and training opportunities.<sup>55</sup>

The phrase “consider implementing” softens the obligations of states towards victims, and this is confirmed by the Legislative Guide to the Protocol which states that “requirements to provide assistance and support for victims incorporate some element of discretion.”<sup>56</sup>. The Legislative Guide notes that the “high costs of these benefits... precluded [them] from being made mandatory”<sup>57</sup> but that states are required to consider implementing them and are “urged to do so to the greatest extent possible within resource and other constraints”<sup>58</sup>. The Legislative Guide goes on to make an appeal to states to implement the victim protection measures of article 6(3) by pointing out that assisting victims “increases the likelihood that they will be willing to cooperate with and assist investigators and prosecutors” and that providing assistance to victims as soon as they are identified may “ultimately prove less costly than dealing with them at a later stage”, particularly in the case of child victims<sup>59</sup>. The overall result is that states are not obligated to implement the victim protection and assistance measures<sup>60</sup>, and therefore the article serves only to

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<sup>54</sup> Palermo Protocol art. 6(3) (emphasis added)

<sup>55</sup> Palermo Protocol at art. 6(3)

<sup>56</sup> Legislative Guide, *‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime’* at part 2, para. 52

<sup>57</sup> Ibid at part 2, para 62.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Palermo Protocol at art.6(3)



acknowledge the specific needs of THB victims. It is clear that state parties to the Palermo Protocol primarily view it as a law enforcement tool and not a human rights protection instrument<sup>61</sup>.

Children are entitled to more significant layers of protection under human rights law. The Convention on the Rights of the Child (CRC) specifically obligates states to take action to stop trafficking of children in Article 35<sup>62</sup>. In addition, the CRC contains other articles deeply relevant to trafficking in children<sup>63</sup>. General Comment no.6<sup>64</sup> from the Committee on the Rights of the Child notes that child THB victims “should receive assistance as victims of a serious violation of human rights”<sup>65</sup> and that “children who are at risk of being re-trafficked should not be returned to their country of origin unless it is in their best interests and appropriate measures for their protection have been taken”<sup>66</sup>. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) contains Article 6 which also is a clear obligation on states to “suppress all forms of traffic in women”<sup>67</sup>. Taken together, the CRC and CEDAW regime forms a strong layer of legal protection for women and children trafficking victims as vulnerable groups.

### *C. International Implementation*

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<sup>61</sup> Palermo Protocol Art. 5 on ‘Criminalization’ has strong legally binding language. For example, “each state party shall adopt...”. For an academic perspective on this issue, see: Sarah H. Krieg ‘Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights’ (2009) Vol 15 European Law Journal 775-790 <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-0386.2009.00490.x>> accessed 2 December 2019

<sup>62</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) at art. 35 “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.”

<sup>63</sup> Ibid. at art 34 and 37

<sup>64</sup> UN Committee on the Rights on the Child ‘General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’ (2005) <<https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>> para. 53

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) at article 6: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

Having briefly discussed some of states obligation generally in the previous part, this section will have a closer look into the issue of practical implementation regarding THB victims. The implementation of international human rights law and the possibility of bring a THB case to the International Criminal Court (ICC) will also be considered, along with the current state of monitoring and reporting within the THB legal regime. Overall, the paper argues that, despite the progress that has been made, the definition of THB contained in the Palermo Protocol has been a source of confusion. In addition, ineffective monitoring systems have blunted the capability of international human rights law.

There are key factors which affect victims on the path to accessing remedies. The first legal problem is the limits of the definition in the Palermo Protocol. As a matter of fact, in order for victims to claim remedies and justice, they first need to be identified, recognized and given the status of victims of human trafficking. This status gives them the right to receive support and protection as well as the right to access repatriation and remedies<sup>68</sup>. Nevertheless, the key definition of what makes the case “human trafficking” is unclear<sup>69</sup>. The concept of trafficking in the Protocol requires that the practices of action (transport, recruit, harbor, etc..) need to come with an exploitative purpose<sup>70</sup>. On the surface this seems reasonable, but a question that the Protocol leaves unanswered is to what extent the unpleasantness of a work situation needs to be in order to qualify as “exploitation” and thus THB. For example, take the case of illegal migrants that have to work under bad conditions for low wages and depend on the recruiter. Are these people THB victims, and if so at what point did they stop being illegal migrants and become victims of human

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<sup>68</sup> Jean Allain ‘No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol’ (2015) Vol 7 Albany Government Law Review 112-142 <[https://doi.org/10.1163/9789004279896\\_015](https://doi.org/10.1163/9789004279896_015)> accessed 15 November 2019

<sup>69</sup> Ibid

<sup>70</sup> ibid

trafficking? The definition in the Palermo Protocol does not provide the basis to answer that question. Another debate that arises is what type of exploitation would make it a case of human trafficking<sup>71</sup>. For instance, in the cases of children who are forced to work to pay off their parent's debt or infants who are transported and harbored for illegal adoption purposes<sup>72</sup>. Can we consider these situations as THB? A major point of criticism of the THB definition is that exploitative purposes, no longer limited to only sexual exploitation and forced labor, have become too broad and potentially lead to an overlap with other phenomena<sup>73</sup>. As it stands now, states are mostly left with the responsibility of interpreting the vague definition from the Palermo Protocol when drafting their domestic law<sup>74</sup>.

However, there is some help in the form of a working group of State Parties that is attached to the Conference of Parties to the UN Convention against Transnational Organized Crime and the Protocols Thereto. This working group only meets annually, and it has been attacked for its lack of authority<sup>75</sup>. Criticism comes from the fact that the working group does not examine reports on individual states regarding implementation of the Palermo Protocol, nor, as expert Anne T. Gallagher says, does it “engage in constructive dialogue, or otherwise interact with States Parties in any meaningful way.”<sup>76</sup>. Despite justified criticism of the working groups' lack of meaningful action, the working group has made some progress with regard to expanding protection for victims. The working group noted in 2009 that state parties should “ensure victims are provided with

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<sup>71</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 34-42.

<sup>72</sup> Ibid at 47-48

<sup>73</sup> Janie A. Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) Vol. 108 The American Journal of International Law 609-649 <<https://doi.org/10.2139/ssrn.2315513>> accessed 14 October 2019

<sup>74</sup> Ibid

<sup>75</sup> Anne T Gallagher, ‘Two Cheers for the Trafficking Protocol’ (2015) issue 4 Anti-Trafficking Review 14-32 <<https://www.antitraffickingreview.org/index.php/atjournal/article/view/88>> accessed 15 November 2019 at section ‘The Challenge of Weak Implementation Machinery’

<sup>76</sup> Ibid

immediate support and protection, irrespective of their involvement in the criminal justice progress.”<sup>77</sup>. Additionally, the working group made a recommendation to state parties urging them to consider “not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.”<sup>78</sup>. Though not binding, these developments do give more clarity as to what exactly the Palermo Protocol expects from state parties and call more attention to victim protection as being an indispensable aspect in the effort to suppress human trafficking. In addition, the COP to the United Nations Convention against Transnational Organized Crime (UNTOC) recently adopted resolution 9/1<sup>79</sup> which should serve as a tool to promote greater dialogue between states regarding practical implementation practices. However, this resolution firmly declares there will be no system of ranking countries<sup>80</sup>, and that the system will be “non-adversarial and non-punitive”<sup>81</sup>. Therefore, this is a small step forward as the assistance that victims receive will still largely depend on the willingness and resources of the state in question.

The international human rights system can also be engaged when considering implementation of the THB legal regime. As mentioned earlier, the ICCPR prohibits slavery, servitude, and forced labor<sup>82</sup>. The right of the individual to choose their own employment freely<sup>83</sup> and to enjoy “just and

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<sup>77</sup> Conference of the Parties to the UNTOC, Working Group on Trafficking in Persons, ‘Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009’, UN Doc. CTOC/COP/WG.4/2009/2, 2009, paragraph 13(c)

<sup>78</sup> Working Group on Trafficking in Persons, ‘Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking’, UN Doc. CTOC/COP/WG.4/2010/4, 2009

<sup>79</sup> Conference of the Parties to the UNTOC, Working Group on Trafficking in Persons, ‘Mechanism for the Review of the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto held in Vienna from 15 – 19 October 2018’  
<<https://www.unodc.org/documents/treaties/UNTOC/Review%20Mechanism/Resolution/English.pdf>> accessed 18 December 2019

<sup>80</sup> Ibid section II, 4(b)

<sup>81</sup> Ibid section II, 4(f)

<sup>82</sup> ICCPR at art. 8

<sup>83</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) at art. 6

favourable work conditions”<sup>84</sup> are also regulated by international human rights law. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) even contains an article that specifically mentions trafficking<sup>85</sup>. However, the ability of the human rights system to monitor and enforce these rights is limited<sup>86</sup>. While THB is undeniably linked to human rights violations, that connection is not reflected in actual case law. The case law reviewed earlier in this chapter are good examples of cases that involve trafficking, but not the THB legal regime.

Furthermore, whether victims can take their claim to remedies to any international court has created another source of tension. Currently, there is no international court that oversees human trafficking offences, so the application of justice mostly depends on domestic courts. The Rome Statute, the founding document of the International Criminal Court (ICC), has wording that suggests the possibility of asserting legal jurisdiction over human trafficking offences<sup>87</sup>. In the Rome Statute, the crime against humanity of enslavement is included and defined as “the exercise of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”<sup>88</sup>. As it can be seen the language in the Rome Statute gives plausibility to the potential of bringing a human trafficking case to the ICC<sup>89</sup>. However, this potential remains latent as human trafficking is not considered as under direct jurisdiction of the ICC, and the scope of this study does not include a path towards unlocking this potential.

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<sup>84</sup> Ibid at art. 7

<sup>85</sup> CEDAW at art. 6

<sup>86</sup> For more information and perspective on the reasons behind this, see: Oona A. Hathaway, ‘Do Human rights treaties make a difference?’ (2002) Vol. 111 Yale Law Journal 1942 - 2034; Oona A. Hathaway, ‘Why do countries commit to human rights treaties?’ (2007) Vol. 51 Journal of Conflict Resolution 588 – 621; Ryan Goodman and Derrik Jinks, ‘Incomplete Internalization and Compliance with Human Rights Law’ (2008) Vol. 19 The European Journal of International Law 725 - 747

<sup>87</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010) Article 7(2)*, 17 July 1998, ISBN No. 92-9227-227-6 <<https://www.refworld.org/docid/3ae6b3a84.html>> accessed 4 November 2019

<sup>88</sup> Ibid

<sup>89</sup> Ibid

The paper also argues that weak implementation domestically goes hand in hand with an ineffective monitoring scheme. It is a state's obligation to criminalize THB and prosecute the perpetrators<sup>90</sup>. However, it is more like an additional option that states are encouraged to provide help and assist victims when they want to claim remedies<sup>91</sup>. Even though, as mentioned, there have been some developments in guidelines that expect states to not criminalize victims of THB for their unlawful acts while being trafficked and to pursue a more comprehensive support system in order for victims to easily access repatriation and remedies<sup>92</sup>.

It can be seen that there is no clear goal or parameter to assess to what extent states have achieved success in combating the crime and supporting victims. For the moment, states are given an indication of progress mainly from the reports that are produced unilaterally by the United States of America called Trafficking in Persons (TIP) reports, and also from reports by non-government organizations (NGOs)<sup>93</sup>. These reports usually give a brief review on the "3P" elements in each country with recommendations for improvement. However, the quality of the data and research methods that are being used in these reports are different from each other and have been criticized as being subjective<sup>94</sup>. Additionally, there are no clear provisions in any human trafficking international regulations of what to expect if states do not comply. Therefore, the commitment to allow victims access to justice and adequate remedies depend on the resources that states are willing to commit.

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<sup>90</sup> Palermo Protocol at art. 5

<sup>91</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 297 - 301

<sup>92</sup> Ibid

<sup>93</sup> United States Department of State, '2019 Trafficking in Persons Report - United States of America' (2019) 498 – 501 <<https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>> accessed 19 September 2019

<sup>94</sup> Sallie Yea, 'Editorial: The politics of evidence, data and research in anti-trafficking work' (2017) Issue 8 *Anti-trafficking Review* 1-13 <<https://www.antitraffickingreview.org/index.php/atrjournal/article/view/223/205>> accessed 2 August 2019

#### D. Conclusion

Overall, under international law, THB has changed its scope from the traditional slave trading activities to a more complicated phenomenon. The concept of the crime has expanded from the action element to include the dealer, the broker and people who harbor victims. Now, THB can be recognized under a variety of forms such as forced labor, forced marriage, sexual exploitation or organ removal<sup>95</sup>. On the one hand, the change in the definition has shown that THB is not a domestic issue, but more of a global phenomenon, and it requires a more comprehensive legal framework to counter the issue. It also indicates that the crime itself has changed and become more complex, involving other global problems like illegal migration. Thus, the law should be “in touch” and improved to catch up with the evolving nature of the crime. Most importantly, it can be agreed that victims’ roles are getting more attention and are being acknowledged within the international framework.

Of course, there will always be some drawbacks. As an umbrella measure to combat human trafficking globally, the Palermo Protocol has been an easy target to attack so far. Even though the protocol has had some accomplishments in expanding and mapping the definition of human trafficking to keep up with the crime, it is the THB definition that has become one of the most controversial topics within the international criminal community<sup>96</sup>. It is argued to be too vague and have too much overlap with other transnational crimes like migrant smuggling or conflict-related sexual violence<sup>97</sup>. Under international law, exploitation is not well-defined. Therefore, it leaves space for states to interpret and implement the law differently at the national level.

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<sup>95</sup> Palermo Protocol at art. 3(a)

<sup>96</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York; 2010) 1-12

<sup>97</sup> Anne-Marie de Brouwer et al, ‘The Nexus between Conflict-Related Sexual Violence and Trafficking for Sexual Exploitation in Times of Conflict’ (2019) Vol. 3 Journal of Trafficking and Human Exploitation 9–33

Despite the fact that the United States Department of State produces TIP reports that encourage states to put more effort in combating THB and pay more attention to victim protection, the drawbacks of a unilateral monitoring mechanism like this are substantial<sup>98</sup>. The paper argues that without a strict, effective, and official monitoring scheme at the international level, it is not possible to abolish THB. THB does not have its own court or group that has authority to punish states that are not in compliance or under the minimum standards that are used to judge a state's effort in dealing with the crime. Indeed, there is not even a legal minimum standard to assesses states implementation. An official standard by which states can be judged on their commitment to combat THB is a critical step, and is used in other international treaties<sup>99</sup>. Victims of THB cannot bring their case to the ICC and seek remedies and justice at the international level because the ICC does not have jurisdiction over this crime. Nevertheless, this study believes there is a possibility here. In the Rome Statute, the crime against humanity of enslavement does have elements of THB as it is mentioned in the Palermo Protocol<sup>100</sup>. This opens the potential for THB to be prosecuted under the ICC in the future. In practice, there is no case that has been prosecuted under the ICC so far, and therefore this study cannot assess if the international court can play an important role in combating THB and ensuring a better chance for victims to get remedies. Nevertheless, this is a worthy legal issue that warrants further study in the future, and it represents a chance for a landmark case in THB.

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<sup>98</sup> Janie Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (2006) Vol. 27 Michigan Journal of International Law 441 – 493

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=990098](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=990098)> accessed 31 December 2019

<sup>99</sup> For example: United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41

<sup>100</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, Art. 7(2)(c) <<https://www.refworld.org/docid/3ae6b3a84.html>> accessed 8 December 2019



### III. Human Trafficking and its Impact on South East Asia.

Having discussed of the impacts of trafficking in human being (THB) at the international level and the complexities for victims to access remedies, now the paper will go into detail at the regional level. The paper will explore the region of South East Asia, focusing on the Association of Southeast Asian Nations (ASEAN). The International Organization for Migration estimates that 200.000 – 225.000 people are trafficked annually in the ASEAN region, which constitutes roughly one third of the global trafficking trade<sup>101</sup>. As the US Trafficking in Persons (TIP) report in 2019 indicates, many countries in ASEAN have made insufficient efforts to meet with the minimum standards for combating the crime<sup>102</sup>. For example, Cambodia, Laos and Vietnam are all on the tier 2 watch list<sup>103</sup>. It is evident that this region remains as a hot spot for THB.

All ASEAN members, to some extent, serve as transit, origin and destination countries<sup>104</sup>. Singapore, for example, is considered to mainly be a destination country for trafficking, particularly for prostitution, with many victims coming from Vietnam, Thailand and China<sup>105</sup>. Meanwhile, the trend in Vietnam is more commonly Vietnamese being trafficked into exploitative situations like forced labor and forced marriages<sup>106</sup>. THB organized criminal groups will pose as a marriage or labor agency, and target women and men from the poorest regions of the Mekong

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<sup>101</sup> Annuska Derks, 'Combating Trafficking in Southeast Asia—A Review of Policy and Programme Responses; International Organisation for Migration' (2000) Research Series No. 2 See page 5.

<sup>102</sup> United States Department of State, '2019 Trafficking in Persons Report - United States of America' (2019) <<https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>> accessed 19 September 2019

<sup>103</sup> Ibid at 498-501

<sup>104</sup> Ranyta Yusran, 'The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment' (2017) Vol. 8 Asian Journal of International Law 258–292 <<https://doi.org/10.1017/s2044251317000108>> accessed 15 November 2019

<sup>105</sup> Thanh Van Trinh, 'Human Trafficking in Vietnam: A Review of Patterns and Legal Frameworks' (2015) Vol. 4 International Journal of Humanities and Social Science Invention 55-58

<sup>106</sup> Ibid

Delta or indigenous communities in the North Highlands that share a border with China<sup>107</sup>. They will be promised an international marriage or opportunities for well-paid jobs in foreign countries that will allow them to climb out of the poverty they experience at home<sup>108</sup>. As these victims reach the destination, they will quickly be forced into domestic labor or the sex trade. Likewise, women and children are trafficked for the purposes of sexual exploitation for tourists<sup>109</sup>. Forced labor in the fishing industry is also a common form of THB in ASEAN. It is reported that migrant fishermen from Myanmar, Laos, and Cambodia are lured into the gulf of Thailand, where they are isolated and exploited for long amounts of time on fishing boats, sometimes not returning to shore for months at a time<sup>110</sup>. They either receive no wages at all, or get paid with an extremely low wage that is significantly less than what they were promised<sup>111</sup>. The desperate need of migrants to have a good job as well as the poverty and the negative impact of globalization within ASEAN countries have made people vulnerable to traffickers<sup>112</sup>. On the other hand, the high demand for sexual services and cheap labor in developed nations have made trafficking one of the most profitable transnational crimes<sup>113</sup>. These “push” and “pull” factors in THB have created a

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<sup>107</sup> Tom Hancock, ‘Rural Chinese Men Are Buying Vietnamese Brides For \$3,200’ (*Business Insider*, 18 August 2014) <<https://www.businessinsider.com/rural-chinese-men-are-buying-vietnamese-brides-for-3200-2014-8>> accessed 21 October 2019

<sup>108</sup> Charles Tucker et al, ‘An Analysis of Human Trafficking for Sexual Exploitation in Vietnam and a Comprehensive Approach to Combatting the Problem’ (2010) Vol. 16 U.C. Davis Journal of International Law & Policy 437–481 <<https://jilp.law.ucdavis.edu/issues/volume-16-2/Ward.pdf>> accessed 30 December 2019

<sup>109</sup> Heather Montgomery, *Modern Babylon? Prostituting Children in Thailand* (Berghahn Books; New York 2006)

<sup>110</sup> International Labour Office, *Caught at Sea: Forced Labour and Trafficking in Fisheries* (2013) 8-10 <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/--declaration/documents/publication/wcms\\_214472.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/--declaration/documents/publication/wcms_214472.pdf)> accessed 15 December 2019; International Labour Office, *Exploitation of Cambodian Men at Sea: Facts about the Trafficking of Cambodian Men on Thai Fishing Boats* (2009) <[https://www.ilo.org/global/topics/forced-labour/WCMS\\_143251/lang--en/index.html](https://www.ilo.org/global/topics/forced-labour/WCMS_143251/lang--en/index.html)> accessed 22 December 2019

<sup>111</sup> Ibid

<sup>112</sup> Janie Chuang, ‘Beyond a Snapshot: Preventing Human Trafficking in the Global Economy’ (2006) Vol. 13 Indiana Journal of Global Legal Studies 137-163 <<https://doi.org/10.2979/gls.2006.13.1.137>> accessed 12 December 2019

<sup>113</sup> Ibid

complicated situation that requires ASEAN member states to come together and form a unified legal response.

In order to counter THB, ASEAN members have made extensive efforts. For instance, in 2004, the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children (ADWC) was adopted as a commitment by ASEAN member states to combat THB by prosecuting offenders and protecting women and children victims. For further protection of women and children, the ASEAN Commission on the Promotion and Protection of Rights of Women and Children (ACWC) was formed. The ACWC is designed to “uphold human rights as prescribed by...CEDAW [and] CRC...”<sup>114</sup>. Because all ASEAN member states are party to these international agreements<sup>115</sup>, the ACWC has solid ground from which to operate. As this paper discussed in chapter 2, CEDAW and the CRC are deeply relevant to the victims of THB. Therefore, the ACWC represents a potentially significant legal mechanism to safeguard the human rights of women and children THB victims within the region.

In November 2015, the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) was signed and ratified to reaffirm that THB is a common concern and that member states need to build a regional instrument to deal with this specific problem<sup>116</sup>. ACTIP also includes a whole chapter dedicated to the protection and assistance of victims of THB, which it takes as one of its main mandates<sup>117</sup>. In addition, all member states in ASEAN have their own

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<sup>114</sup> Terms of Reference of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children art. 1(1) <<https://acwc.asean.org/wp-content/uploads/2016/04/TOR-ACWC.pdf>> accessed January 3 2020

<sup>115</sup> Ibid art. 2(5)

<sup>116</sup> ASEAN Convention Against Trafficking in Persons Especially Women and Children (adopted 21 November 2015, entered into force 8 March 2016) <<http://agreement.asean.org/media/download/20160303122945.pdf>> accessed 25 November 2019 (ACTIP)

<sup>117</sup> Ibid Chapter 4(A)

national anti-trafficking action plan in order to fulfill their commitment to ACTIP<sup>118</sup>. On the other hand, the human rights system also offers the protection to THB victims within the region. The idea of THB as a human rights violation is reflected in the ASEAN Human Rights Declaration, which specifically grants the individual the right to not be subjected to THB<sup>119</sup>.

While the commitments of states at the international level in terms of protecting and supporting victims generally are ensured through several legal instruments<sup>120</sup>, the ASEAN region has one overarching human rights instrument; the ASEAN Intergovernmental Commission on Human Rights (AICHR)<sup>121</sup> with The Terms of Reference (TOR) serving as the document that sets out the criteria, agenda, and structure of the body<sup>122</sup>. The mandate of the AICHR is above all “to promote and protect human rights...of the people of ASEAN”<sup>123</sup>. The AICHR also takes into account the shared common concerns but difference in culture among states. It emphasizes regional cooperation in an effort to promote and protect regional human rights in order to meet international standards. States parties are expected to approach issues that stand in relation to human rights in a constructive, non-confrontational and step-by-step way, and all decisions are reached by consensus<sup>124</sup>. In other words, in theory, THB victims can use the AICHR as a primary instrument to pursue justice and remedies in ASEAN. Note that the AICHR works as a consultative intergovernmental body and abides by the most iconic “Asian way” – the non-interference

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<sup>118</sup> Ranyta Yusran, ‘The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment’ (2017) Vol. 8 Asian Journal of International Law 258–292 <<https://doi.org/10.1017/s2044251317000108>> accessed 15 November 2019

<sup>119</sup> ASEAN Declaration of Human Rights (adopted 18 November 2012) art. 13 <<https://asean.org/asean-human-rights-declaration/>> accessed 28 October 2019

<sup>120</sup> For example: ICCPR, CEDAW and CRC

<sup>121</sup> 15<sup>th</sup> ASEAN Summit held at Cha-am Hua Hin, Thailand on 23 October 2009

<sup>122</sup> Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (2009) <<http://www.aseansec.org/DOC-TOR-AHRB.pdf>> accessed 1 December 2019

<sup>123</sup> Ibid at para 1.1

<sup>124</sup> Ibid at paras 2.4-2.5 and 6.1

principle<sup>125</sup>. This principle, the paper argues later in this chapter, is one of the main factors that limits human rights implementation.

In spite of these efforts, THB still remains as a big problem in the ASEAN region. In this chapter, the paper argues that although there are some positive impacts of how ASEAN is dealing with THB and handling victims, there are several issues that impede victims trying to access justice and remedies. Firstly, the prevalence of the principle of non-interference in the region lessens the oversight capabilities of human rights monitoring organizations. Secondly, states tend to focus on the criminal side of THB and ignore victims. In addition, within ASEAN, there is no regional court to which victims of THB can bring their case. Instead, victims must depend entirely on domestic courts, and thus, protection and remedies are partially based on state resources and their ability to provide these services.

#### *A. The good.*

As a matter of fact, both the ADWC and ACTIP were created with the mission to suppress the crime of THB in ASEAN. However, some commentators criticize that ASEAN member states are using these legal frameworks to share information, but that they fall short of taking further steps<sup>126</sup>. The study argues that at the fundamental level, these multilateral agreements show that states have recognized that THB is not an ordinary transnational crime and it should be targeted as a serious threat to regional security and human rights. Most importantly, these regional agreements emphasize that states need to apply domestic provisions for the protection and assistance of THB

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<sup>125</sup> Ibid at para 2.1

<sup>126</sup> Sukma Rizal, 'The Securitization of Human Trafficking in Indonesia' (2008) Rajaratnam School of International Studies 162 - 208

victims as victims of human rights violations where applicable<sup>127</sup>. Unlike previous ASEAN legal agreements, such as the Bangkok Declaration, the Ha Noi Declaration of 1998 or the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, all of which mostly focus on criminalization of THB<sup>128</sup>, chapter IV of ACTIP is dedicated to support THB victims and it is the obligation of each member state to ensure their national legal regulations allow victims to obtain remedies. Indeed, one of the three stated purposes of ACTIP is to “protect and assist victims of trafficking in person, *with full respect for their human rights...*”<sup>129</sup>.

Furthermore, as part of supporting victims, identification is a vital step. ACTIP tackles this issue with a binding provision by saying ASEAN member states “shall establish national guidelines or procedures for the proper identification of victims”<sup>130</sup>. In order to fulfill this commitment, ACTIP recommends that states should consider allowing non-government organizations (NGOs) to assist in the identification process<sup>131</sup>. These NGOs can give recommendations on policy improvements or methodology that should take place in order to improve victim identification. In addition, ACTIP strengthens collaboration between state parties in supporting and assisting THB victims<sup>132</sup>. This would benefit in particular states that share similar cultures and/or a border in collecting adequate data about THB victims, enhancing border controls and improving protection of victims.

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<sup>127</sup> ASEAN Declaration of Human Rights (adopted 18 November 2012) art. 13: “no person shall be held in servitude or slavery in any of its forms, or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs.”

<sup>128</sup> Ranyta Yusran, ‘The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment’ (2017) Vol. 8 Asian Journal of International Law 258–292 <<https://doi.org/10.1017/s2044251317000108>> accessed 15 November 2019

<sup>129</sup> ACTIP at art. 1(b) (emphasis added)

<sup>130</sup> ACTIP at art. 14(1)

<sup>131</sup> Ibid

<sup>132</sup> Ibid

Looking back in history, it was only in the 1990s that “Asian values”<sup>133</sup> were still being used as a justification that blocked and frustrated any effort to establish a regional human rights monitoring organization in ASEAN<sup>134</sup>. The founding of AICHR has been a breakthrough in that regard, with its mandate to protect, support and uphold human rights<sup>135</sup>. Member states now have a bi-annual meeting in order to report their status in preserving human rights, their plans in dealing with current issues such as THB and human smuggling, and how they are improving the capacity to fulfill their mandates<sup>136</sup>. Issues in relation to THB victims, including the rights to justice and adequate remedies, and the rights and welfare of vulnerable groups (women, children, disabled people, ...), are also reported in this bi-annual meeting. Moreover, AICHR allows and is assisted by an NGO working group (Working Group<sup>137</sup>) that engages in all human rights issues that appear in ASEAN<sup>138</sup>. The Working Group encourages states to put forth their best effort to meet international human rights standards, and consistently report or share information and data with other states<sup>139</sup>. It also advocated “the setting up of thematic task forces to address migrant labour, human trafficking, internal conflict and terrorism”<sup>140</sup>. This helps to ensure the victims of such crimes are not neglected or forgotten and gain more consideration from states in building more effective protection and support methods. AICHR also plays a crucial role in pushing and

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<sup>133</sup> For more information about the debate surrounding “Asian values”, look at: Joanne Bauer and Daniel Bell, *The East Asian Challenge for Human Rights* (Cambridge University Press; 1999); Yash Ghai, ‘Human Rights and Governance: The Asia Debate’ (2000) Vol. 1 Asia-Pacific Journal on Human Rights and the Law 9-52

<sup>134</sup> Hitoshi Nasu and Ben Saul, *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge publishers; New York 2011) 2

<sup>135</sup> Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (2009) at art. 1(1) <<http://www.aseansec.org/DOC-TOR-AHRB.pdf>> accessed 1 December 2019

<sup>136</sup> Ibid at art. 6

<sup>137</sup> The “Working Group” was established by the Human Rights Committee of LAWASIA. The Working Group is a coalition that includes representatives of government institutions, academics, NGO representatives and human rights committees. Its stated goal is to establish an intergovernmental human rights commission. It was a driving force behind the creation of AICHR. More information can be found at: <http://aseanhrmech.org/aboutus.html>

<sup>138</sup> Hitoshi Nasu and Ben Saul, *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge publishers; New York 2011) 137

<sup>139</sup> Ibid at 141

<sup>140</sup> Ibid at 139

encouraging the implementation of both international and regional agreements. For example, in the 2017 meeting held on 29-30 of August, the focus was on “developing instruments for the implementation of ACTIP” and reviewing “human rights based ACTIP instruments in...supporting [THB] victims”<sup>141</sup>. In the latest meeting during late December 2019, the AICHR panel discussed children’s rights in the context of the CRC, with the goal of both raising awareness of the rights of children under the CRC and “institutionalizing monitoring and evaluation processes on the implementation of the General Comments...”<sup>142</sup>. These developments are promising because they show that the issue is being discussed in recent meetings. States taking the issue of victim protection seriously is an important step.

### *B. The bad and the ugly.*

As mentioned, in order to combat THB, a human rights-based approach to law-enforcement is a necessity. Nevertheless, oversight and implementation regarding human rights in ASEAN has remained difficult in reality. What makes it so challenging for ASEAN to pursue and implement regional human rights mechanisms, in particular to protect and support THB victims? The answer that this study has found is the disconnection between the “western” idea of human rights versus the concept of “Asian values”<sup>143</sup> that makes it difficult to implement strong human rights oversight. Indeed, the argument around “Asian values” has faded after the 90s but its traces still can be found in recent agreements within ASEAN. For instance, in the ASEAN Declaration of human rights, it

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<sup>141</sup> Press Release: AICHR Cross-Sectoral Consultation on the Human Rights based Instruments related to the Implementation of the ASEAN Convention Against Trafficking in Person, especially Women and Children, 29-30 August 2017, Yogyakarta, Indonesia < <https://aichr.org/news/press-release-aichr-cross-sectoral-consultation-on-the-human-rights-based-instruments-related-to-the-implementation-of-the-asean-convention-against-trafficking-in-person-especially-women-and-childre/> > accessed 20 December 2019

<sup>142</sup> AICHR Holds Dialogue to Strengthen Awareness on the Rights of The Child, held at Manilla, Phillipines on 12 December 2019 <<https://aichr.org/news/aichr-holds-dialogue-to-strengthen-awareness-on-the-rights-of-the-child/>>

<sup>143</sup> Yash Ghai, ‘Human Rights and Governance: The Asia Debate’ (2000) Vol. 1 Asia-Pacific Journal on Human Rights and the Law 9-52



states that “all human rights are universal, indivisible, interdependent and interrelated”<sup>144</sup>, but then continues by emphasizing that:

At the same time, the realization of human rights must be considered in the regional and national context, bearing in mind different political, economic, legal, social, cultural, historical, and religious backgrounds.<sup>145</sup>

A similar statement can be found in the TOR of the AICHR<sup>146</sup>. Some scholars even suggested that the difference is evident by how Asian countries tend to put their attention more in economic development and political stability over civil and political rights<sup>147</sup>. Most significantly, the principle of non-interference is a mark from this “Asian values” trend. This principle, the study argues, significantly impacts how THB victims in ASEAN are protected and supported in the light of human rights. Ben Saul, Jacqueline Mowbray and Irene Baghoomians argue that human rights in practice in ASEAN have been considered more as an internal affair that is only dealt with by national authorities, rather than warranting any external scrutiny<sup>148</sup>. Such ideas along with the principle of non-intervention have constrained this region in many ways in addressing THB while upholding human rights as states can use non-intervention as a justification, or an excuse, to tie the hands of AICHR and the Working Group. In other words, states can approach THB with only criminal law aspect without giving much concern to victims or to human rights law under the name

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<sup>144</sup> ASEAN Declaration of Human Rights (adopted 18 November 2012) at art. 7

<sup>145</sup> Ibid

<sup>146</sup> Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (2009) art. 2(a) <<http://www.aseansec.org/DOC-TOR-AHRB.pdf>> accessed 1 December 2019

<sup>147</sup> Daniel Bell. ‘The East Asian Challenge to Human Rights: Reflection on an East West Dialogue’ (1996) Vol. 18 Human Rights Quarterly 641-667

<sup>148</sup> Hitoshi Nasu and Ben Saul, *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge publishers; New York 2011) 107-126

of sovereignty, and would not be considered as being in violation of their commitment under ACTIP or AICHR.

AICHR and its TOR play a crucial role as a regional monitoring instrument that observes and reports periodically on how states uphold and promote human rights issues in ASEAN. Most recently, AICHR has been addressing the issue of implementation of international human rights provisions in order to protect children from abuse and exploitation<sup>149</sup>. However, like other ASEAN human right bodies, AICHR has been criticized and questioned for its efficacy and some commentators even criticized it as a disappointment<sup>150</sup>, citing a “lack of teeth” and “independence”<sup>151</sup>, and ultimately calling it mere “window-dressing”<sup>152</sup>. It has not, as the UN hoped, become a “credible regional mechanism and help[ed] close the gap between human rights rhetoric and the reality...”<sup>153</sup>. In other words, if a victim of a human rights violation, for example THB, in ASEAN wished to pursue justice and remedies by using the regional human rights instruments, namely AICHR and its TOR, they would find the system inaccessible. AICHR is not a “watch dog” that can hold states accountable for violations of their obligations in term of human

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<sup>149</sup> Press Release: AICHR Cross-Sectoral Consultation on the Human Rights based Instruments related to the Implementation of the ASEAN Convention Against Trafficking in Person, especially Women and Children, 29-30 August 2017, Yogyakarta, Indonesia < <https://aichr.org/news/press-release-aichr-cross-sectoral-consultation-on-the-human-rights-based-instruments-related-to-the-implementation-of-the-asean-convention-against-trafficking-in-person-especially-women-and-children/> > accessed 20 December 2019

<sup>150</sup> Yessi Olivia, ‘Will the ASEAN Intergovernmental Commission of Human Rights (AICHR) Grow Its Teeth?’ (2014) Vol. 3 Jurnal Hubungan Internasional 149-158 < <http://journal.umy.ac.id/index.php/jhi/article/view/354> > accessed December 1, 2019; Yuval Ginbar, ‘Human rights in ASEAN - Setting Sail or Treading Water’ (2010) Vol. 10 Human Rights Law Review Page 504-518

<sup>151</sup> Pavin Chachavalpongpun, ‘Is Promoting Human Rights in ASEAN an Impossible Task?’ (The Diplomat, 19 January 2018) < <https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/> > accessed 21 November 2019

<sup>152</sup> Forum-Asia, ‘AICHR: A Window Dressing for ASEAN’s Commitment to Human Rights’ (Asian Forum for human rights and development, 27 October 2010) < <https://www.forum-asia.org/?p=6901> > accessed 22 November 2019

<sup>153</sup> Homayoun Alizadeh, Regional Representative, UN Office of the High Commissioner for Human Rights (OHCHR), Thailand. ‘ASEAN and Human Rights: Closing the Implementation Gap’ (22 October 2009) < <https://bangkok.ohchr.org/programme/asean/asean-human-rights-closing-implementation-gap.aspx> > accessed 22 November 2019

rights, nor does it contain a regional court in which individuals can file a case to pursue justice and remedies after exhausting options offered by domestic courts.

Meanwhile, ACTIP is the main THB specific convention in ASEAN, and it is influenced by the Palermo Protocol in several ways. The definition of THB in ACTIP is largely adopted from its international counterpart and secondly, ACTIP is also primarily a law enforcement document with binding language related to the prosecution of perpetrators<sup>154</sup> and non-binding language related to the protection of victims<sup>155</sup>. Regarding repatriation of victims, article 14.4 of ACTIP is adopted entirely from article 7 of the Palermo Protocol, both of which declare that states shall “consider adopting legislative...measures that permit victims of trafficking in persons to remain in its territory...in appropriate cases<sup>156</sup>. One can argue that as long as states parties do have provisions that “*consider*” granting victims staying in their territory temporarily or permanently, it can be considered that states have fulfilled their obligation, without actually extending the offer of permanent or temporary residency to a single victim. Moreover, because of no further explanation or description over “*appropriate cases*”, states are free to interpret this regulation in a way that may not be in the best interest of the victim. Unlike the Palermo Protocol, ACTIP does not even include that repatriation should be voluntary. Indeed, the study found that it seems to be in practice mandatory for THB victims to return to their origin countries by how states hesitate in handing out permission for victims to stay in their territory<sup>157</sup>. Therefore, granting residence status for THB victims as a form of remedy is not so promising within the ASEAN framework. In addition, ACTIP also bears the mark of the principle of non-interference. Article 4, titled “Protection of

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<sup>154</sup> ACTIP at art. 16(2): “Each state party shall take effective and active steps to detect, deter and punish...”

<sup>155</sup> ACTIP at art. 14(11): “Each state party shall make its best effort to assist in the reintegration of victims...”; ACTIP at art. 14(7): “Each state party shall consider... not holding victims of trafficking in persons criminally or administratively liable...”

<sup>156</sup> ACTIP at art. 14(4)

<sup>157</sup> ACTIP at art. 15

Sovereignty” makes it clear that intrusive measures cannot be conducted under the cover of ACTIP<sup>158</sup>.

On the other hand, a lack of enforcement and compliance mechanisms has been said to be an “iconic” part of ASEAN treaties and agreements<sup>159</sup>. One can argue that ASEAN agreements, ADWC for example, work more as a consultative workshop for THB without any concrete steps that can be implemented. Victims are mentioned as a crucial element in combating THB under ADWC but there are no practical guidelines for states to implement about what should be done and how to support or protect victims. Overall, through ADWC, states can mostly share their visions or strategies in their national anti-trafficking plans. However, this soft-law is not a binding instrument and without any enforcement mechanism, the paper argues that there is very little concrete action that takes place to actually meet the expectations of the ADWC. That being said, the existence of a binding legal document such as ACTIP is to ensure states fulfill their commitments. It is worthwhile to give ACTIP credit for dedicating chapter IV to the protection and assistance of victims. Nevertheless, there is also no adequate and transparent system that can be used to assess and evaluate achievements or weakness faced by ASEAN states in implementing regional agreements. Most importantly, there are no consequences that states face when they fail to be in compliance with these agreements. At the moment, ACTIP is a binding instrument, but remains weak and toothless. States parties in ASEAN, especially developing countries like Vietnam, Laos or Cambodia, might consider the reward for fully committing to providing remedies to and protecting victims to be inadequate in comparison to the costs. For victims, domestic courts

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<sup>158</sup> ACTIP at art. 4(2): “Nothing in this Convention entitles a Party to undertake in the territory of another Party the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of the other Party by its domestic laws.”

<sup>159</sup> Cheah Wulling, ‘Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region’ (2006) Vol. 3 Essex Human Rights Review 46–63  
<<http://projects.essex.ac.uk/ehrr/V3N1/Wulling.pdf>> accessed 25 November 2019

are the main instrument for them to access justice and claim remedies or protection because there is no regional court in ASEAN for people to bring forth any human rights cases. Therefore, it can be understood that THB victims in ASEAN would not have any chances to obtain remedies through any authorized organizations except NGOs, which falls short of a legal guarantee, once they fail to do so in domestic courts.

### *C. Conclusion*

Real progress has been made in both the area of human rights and specific THB agreements in ASEAN. Taken together, it is evident that states in the region both take THB seriously as an international crime requiring cooperation and multilateral agreements to suppress and recognize it as a violation of human rights. In many ways, the ASEAN framework is similar to the international framework. The definition of THB in ACTIP is substantially based on the Palermo Protocol<sup>160</sup>, and both the regional and international agreements share legally binding law enforcement and prosecution commitments and weak permissive language regarding state obligations towards victims. Assistance for THB victims in ASEAN depends largely on the human rights agreements. However, calling upon the human rights legal regime to fill in the gaps for the protection of victims is considerably more difficult within ASEAN due to the principle of non-intervention that pervades the human rights agreements in the region. In addition, the lack of a regional human rights court means that victims have no viable alternative if the domestic legal system does not deliver adequate remedies and justice.

However, it is important to note that many of the human rights agreements coming out of the region are relatively new, and it is perhaps too soon to judge their achievements and failures.

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<sup>160</sup> ACTIP at art. 2(a); Palermo Protocol at art. 3(a)

Despite problems in implementation, lack of transparency, and the sanctity of non-intervention in the region, the agreements reviewed in this chapter represent a step forward. The mandate of the AICHR to protect human rights has been criticized as being unfulfilled<sup>161</sup>, because as of yet the AICHR does not investigate individual complaints or the human rights situation in member states<sup>162</sup>. Instead, it focuses on promoting human rights. However, there is nothing in the AICHR that restricts it from carrying out these activities<sup>163</sup>.

Indeed, as one commentator notes, “it is very important that such skeptical negativity does not set the AICHR up for a fall, wasting resources and benefiting nobody”<sup>164</sup>. This ‘skeptical negativity’ has been addressed by Termsak Chalermpananupap<sup>165</sup>, who served as the Special Assistant to the Secretary-General of ASEAN. In response to criticism that the AICHR ‘lacked teeth’, he said that “ASEAN would not have come this far if its Member States want[ed] to bite one another with sharp teeth just to get things done their own way”<sup>166</sup>. He goes on to add that the AICHR is “not an end in itself”, but rather “a new beginning”<sup>167</sup>. In this light, the principle of non-intervention is not an impassable obstacle, but something that can be worked around. Additionally, as human rights and THB issues are being mentioned and reported more frequently in recent AICHR meeting, it

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<sup>161</sup> Asian Forum for Human Rights and Development and ASEAN Parliamentarians for Human Rights, ‘Joint Statement: ASEAN Needs a Stronger Human Rights Mechanism’ (2019) <<https://reliefweb.int/report/world/joint-statement-asean-needs-stronger-human-rights-mechanism>> accessed 5 January 2020

<sup>162</sup> Homayoun Alizadeh, Regional Representative, UN Office of the High Commissioner for Human Rights (OHCHR), Thailand. ‘ASEAN and Human Rights: Closing the Implementation Gap’ (22 October 2009) <<https://bangkok.ohchr.org/programme/asean/asean-human-rights-closing-implementation-gap.aspx>> accessed 22 November 2019

<sup>163</sup> Yuval Ginbar, ‘Human rights in ASEAN - Setting Sail or Treading Water’ (2010) Vol. 10 Human Rights Law Review Page 504-518

<sup>164</sup> Hitoshi Nasu and Ben Saul, *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge publishers; New York 2011) 136

<sup>165</sup> Termsak Chalermpananupap, ‘ASEAN 10 – Meeting the Challenges’ (1999) <<https://asean.org/asean-10-meeting-the-challenges-by-termsak-chalermpananupap/>> accessed 26 December 2019

<sup>166</sup> Termsak Chalermpananupap, ‘10 Facts about ASEAN Human Rights Cooperation’ (2009) no. 5 <<https://www.asean.org/storage/images/archive/HLP-OtherDoc-1.pdf>> accessed 28 December 2019

<sup>167</sup> Ibid at no. 8

shows that the issue is not out of sight and out of mind. It is a hopeful sign that a criminal or human right court could be drafted and established as an evolutionary step that this region is in need of.

#### IV. Vietnam as a Case Study.

Vietnam is a Southeast Asian country that is a hotspot for trafficking in human beings (THB), functioning mainly as a source country, but also as a destination and transit country<sup>168</sup>. A study conducted in the UK between 2009-2018 identified 3,187 Vietnamese adults and children as potential victims of trafficking solely within the UK<sup>169</sup>. Indeed, Vietnamese rank among the top three nationalities that are most likely to be trafficked to the UK<sup>170</sup>. There is no exact figure for how many Vietnamese are trafficked per year because of ‘poor data collection’, ‘the reluctance of victims’ to report trafficking cases<sup>171</sup> and also due to the complex and secretive nature of the crime<sup>172</sup>. However, the news of 39 Vietnamese people who were trafficked to Europe shows that the issue is ongoing, and it is believed that the phenomenon is even worse domestically<sup>173</sup>. According to the United States Trafficking in Persons Report 2019, Vietnam is on the tier 2 watch list<sup>174</sup>. The country is reported to have increased prosecution, but remains weak on implementation, with a declining number of victims identified<sup>175</sup>. As the map below shows, drug

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<sup>168</sup> United States Department of State, ‘2019 Trafficking in Persons Report - United States of America’ (2019) 498 – 501 <<https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>> accessed 19 September 2019

<sup>169</sup> Debbie Beadle and Leah Davison ‘Precarious Journeys: Mapping Vulnerabilities of Victims of Trafficking from Vietnam to Europe’ (2019) ECPAT UK, Anti-slavery International, and Pacific Links Foundation <<https://www.antislavery.org/wp-content/uploads/2019/03/Precarious-Journeys-Mapping-vulnerabilities-of-victims-of-trafficking-from-Vietnam-to-Europe.pdf>> accessed 25 November 2019

<sup>170</sup> Ibid

<sup>171</sup> Thanh Van Trinh, ‘Human Trafficking in Vietnam: A Review of Patterns and Legal Frameworks’ (2015) Vol. 4 International Journal of Humanities and Social Science Invention 55-58

<sup>172</sup> Charles Tucker et al, ‘An Analysis of Human Trafficking for Sexual Exploitation in Vietnam and a Comprehensive Approach to Combatting the Problem’ (2010) Vol. 16 U.C. Davis Journal of International Law & Policy 437–481 <<https://jilp.law.ucdavis.edu/issues/volume-16-2/Ward.pdf>> accessed 30 December 2019; Sallie Yea, ‘Editorial: The politics of evidence, data and research in anti-trafficking work’ (2017) Issue 8 *Anti-trafficking Review* 1-13 <<https://www.antitraffickingreview.org/index.php/atjournal/article/view/223/205>> accessed 2 August 2019

<sup>173</sup> Paolo Zialcita, ‘U.K. Police Confirm Identities of All 39 Vietnamese Nationals Found Dead In Truck’ (National Public Radio, 2019) <<https://www.npr.org/2019/11/07/777222731/u-k-police-confirm-identities-of-all-39-vietnamese-nationals-found-dead-in-truck>> accessed 8 November 2019

<sup>174</sup> United States Department of State, ‘2019 Trafficking in Persons Report - United States of America’ (2019) 498 – 501 <<https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>> accessed 19 September 2019

<sup>175</sup> Ibid; 1128 victims were identified in 2016, 670 in 2017, and 490 victims in 2018



production and nail bars are the most common type of exploitation which Vietnamese victims face in Europe. Within ASEAN, the forms of exploitation are different, ranging from sex services to forced labor and even organ removal<sup>176</sup>.

The country has demonstrated effort in addressing the offense by adjusting its domestic law, ratifying international conventions<sup>177</sup>, both binding and non-binding, and collaborating with anti-trafficking NGOs<sup>178</sup>. Furthermore, the national Criminal Law 2015<sup>179</sup> and the Anti-Trafficking Law 2011 in Vietnam<sup>180</sup> contains instruments with the aims of prevention, prosecution and protection of THB victims. However, some commentators point out that these laws are more for “looking good”<sup>181</sup> and that the issue of implementation is not given enough scrutiny<sup>182</sup>. In this chapter, the thesis will study how these laws are enforced in practice by studying THB case law. This study argues that weak implementation regarding protection of and support for THB victims in Vietnam does not solely come from a lack of resources, improper training of authorities or corruption. Rather, the study finds that the country prefers to focus on prosecution, favoring a criminal law approach without linking the offences to human rights law. Additionally, there is a

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<sup>176</sup> Ibid

<sup>177</sup> Vietnam ratified the Palermo Protocol on 8 June 2012; Vietnam ratified the CRC on 28 February 1990; Vietnam ratified CEDAW on 17 February 1982

<sup>178</sup> United States Department of State, ‘2019 Trafficking in Persons Report - United States of America’ (2019) 498 – 501 <<https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>> accessed 19 September 2019; Debbie Beadle and Leah Davison ‘Precarious Journeys: Mapping Vulnerabilities of Victims of Trafficking from Vietnam to Europe’ (2019) ECPAT UK, Anti-slavery International, and Pacific Links Foundation <<https://www.antislavery.org/wp-content/uploads/2019/03/Precarious-Journeys-Mapping-vulnerabilities-of-victims-of-trafficking-from-Vietnam-to-Europe.pdf>> accessed 25 November 2019

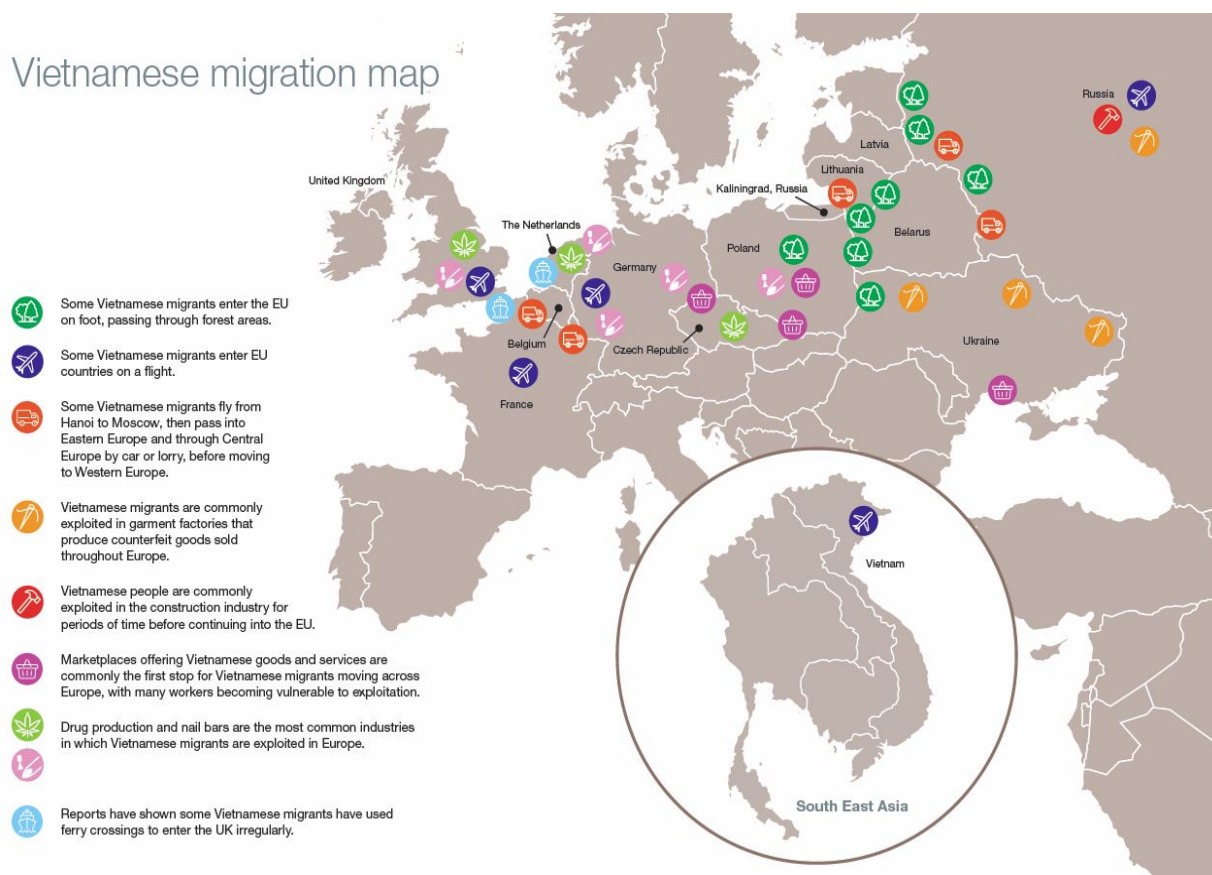
<sup>179</sup> Bộ Luật Hình Sự 2015 [*Criminal Law 2015*] (adopted 27 November 2015, entered into force 1 January 2018) Law no. 100/2015/QH13 <<https://thuvienphapluat.vn/van-ban/trach-nhiem-hinh-su/Bo-luat-hinh-su-2015-296661.aspx>> accessed 20 October 2019

<sup>180</sup> Luật Phòng, Chống Mua Bán Người 2011 [*Anti-trafficking Law 2011*] (adopted 29 March 2011, entered into force 1 January 2012) Law no. 66/2012/QH12 <<https://thuvienphapluat.vn/van-ban/trach-nhiem-hinh-su/Luat-66-2011-QH12-phong-chong-mua-ban-nguoi-122148.aspx>> accessed 20 October 2019

<sup>181</sup> Thanh Van Trinh, ‘Human Trafficking in Vietnam: A Review of Patterns and Legal Frameworks’ (2015) Vol. 4 International Journal of Humanities and Social Science Invention 55-58

<sup>182</sup> Ibid

disconnect between international and national in regulate and protect vulnerable group of children that the country stance still.



*Image credit: Precarious Journeys: Mapping Vulnerabilities of Victims of Trafficking from Vietnam to Europe*<sup>183</sup>.

<sup>183</sup> Debbie Beadle and Leah Davison 'Precarious Journeys: Mapping Vulnerabilities of Victims of Trafficking from Vietnam to Europe' (2019) ECPAT UK, Anti-slavery International, and Pacific Links Foundation <<https://www.antislavery.org/wp-content/uploads/2019/03/Precarious-Journeys-Mapping-vulnerabilities-of-victims-of-trafficking-from-Vietnam-to-Europe.pdf>> accessed 25 November 2019

### A. National legislation responding to human trafficking

Similar to ACTIP, Vietnam's anti-trafficking legislation was created to clarify the phenomenon of THB, as well as enhance the procedure to identify, protect and support victims. The most important THB legislation in Vietnam are the Criminal Law 2015<sup>184</sup> and the Anti-Trafficking Law 2011<sup>185</sup>. Particularly, the Criminal Law 2015 has expanded the scope of THB<sup>186</sup>. Before 2015, a case is only THB if the victims were transferred out of the territory of Vietnam<sup>187</sup> and that provision was named as "trafficking in women"<sup>188</sup>, so there was clearly no consideration for men. Moreover, some provisions in Vietnamese legislation are expanded from and more detailed than those found in ACTIP. The country has shown impressive effort via detailed provisions for identification, protection and support of victims. For identification, there is a regulation under section 1, chapter VI of Vietnam's 2011 Anti-Trafficking law, guided by Decree 62/2012 and Joint Circular Number 1/2014<sup>189</sup>. The protection of victims is described in section 2, chapter VI of Vietnam's 2011 anti-trafficking law and by Decree 62/2012<sup>190</sup>. The entirety of chapter V of the domestic anti-trafficking

<sup>184</sup> Bộ Luật Hình Sự 2015 [*Criminal Law 2015*] (adopted 27 November 2015, entered into force 1 January 2018) Law no. 100/2015/QH13 <<https://thuvienphapluat.vn/van-ban/trach-nhiem-hinh-su/Bo-luat-hinh-su-2015-296661.aspx>> accessed 20 October 2019

<sup>185</sup> Luật Phòng, Chống Mua Bán Người 2011 [*Anti-trafficking Law 2011*] (adopted 29 March 2011, entered into force 1 January 2012) Law no. 66/2012/QH12 <<https://thuvienphapluat.vn/van-ban/trach-nhiem-hinh-su/Luat-66-2011-QH12-phong-chong-mua-ban-nguoi-122148.aspx>> accessed 20 October 2019

<sup>186</sup> Bộ Luật Hình Sự 2015 [*Criminal Law 2015*] (adopted 27 November 2015, entered into force 1 January 2018) Law no. 100/2015/QH13 at art. 150 and 151 <<https://thuvienphapluat.vn/van-ban/trach-nhiem-hinh-su/Bo-luat-hinh-su-2015-296661.aspx>> accessed 20 October 2019

<sup>187</sup> Judge Phạm Minh Tuyên, 'Thực trạng các vụ án mua bán người, mua bán trẻ em – Một số vướng mắc và kiến nghị' [*Law enforcement in practice of human trafficking and child trafficking – Clarifications and recommendations*] (2018) Tạp chí Tòa Án Nhân Dân điện tử [*Civil Court online Journal*] <<https://tapchitoaan.vn/bai-viet/nghien-cuu/thuc-trang-cac-vu-an-mua-ban-nguoi-mua-ban-tre-em-mot-so-vuong-mac-va-kien-nghy>> accessed 2 December 2019

<sup>188</sup> Bộ Luật Hình Sự 1999 [*Criminal Law 1999*] (no longer in force) at art. 119 <<https://thuvienphapluat.vn/van-ban/trach-nhiem-hinh-su/Bo-Luat-hinh-su-1999-15-1999-QH10-46056.aspx>> accessed 1 December 2019

<sup>189</sup> Hướng dẫn trình tự, thủ tục và quan hệ phối hợp trong việc xác minh, xác định, tiếp nhận và trao trả nạn nhân bị mua bán [*Guidelines for identification, investigation, and assistance of trafficked victims*] (entered into force 10 October 2014) Law no. 01/2014/TTLT-BCA-BQP-BLĐTBXH-BNG <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=38044>> accessed 20 November 2019

<sup>190</sup> Quy định căn cứ xác định nạn nhân bị mua bán và bảo vệ an toàn cho nạn nhân, người thân thích của họ [*Legislations in identifying trafficked victims and protecting victims and their families*] (entered into force 13

law is to provide support for victims and Chapter V is supported by Decree 9/2013 and Joint Circular Number 134/2013, both of which go into detail about what type of support victims are eligible to receive<sup>191</sup>. The country has gone into detail and created laws regulating the issues of identification, protection and support in separate legal documents in order to give more attention to the victims of THB. For example, the identification process is not only applied to Vietnamese people who are trafficked within the country and across borders, but is also used for foreigners that are trafficked to Vietnam<sup>192</sup>. Similarly, not only THB victims themselves can ask for protection, but their family members are eligible for protection also<sup>193</sup>. In addition, the cost of protection is the responsibility of the government<sup>194</sup>. Moreover, support for THB victims is regulated in more than one legal document with different types of support ranging from medical, physical, legal, educational, occupational and even loan support if THB victims wish to start a business<sup>195</sup>. The country also encourages the private sector and NGOs to participate in providing support for victims<sup>196</sup>. The laws are very detailed, even listing the minimum wage that a victim is eligible to receive<sup>197</sup>. Overall, it can be seen that Vietnam's anti-trafficking legislation are

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August 2012) Law no. 62/2012/ND-CP <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=27678>> accessed 17 November 2019

<sup>191</sup> Quy định chi tiết thi hành một số điều của Luật Phòng, chống mua bán người [*Guidelines for implementation of the Anti-Trafficking law 2011*] (entered into force 11 January 2013) Law no. 09/2013/ND-CP <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=28049>> accessed 8 November 2019

<sup>192</sup> Ibid

<sup>193</sup> Quy định căn cứ xác định nạn nhân bị mua bán và bảo vệ an toàn cho nạn nhân, người thân thích của họ [*Legislations in identifying trafficked victims and protecting victims and their families*] (entered into force 13 August 2012) Law no. 62/2012/ND-CP at art. 2 and 3 <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=27678>> accessed 17 November 2019

<sup>194</sup> Quy định chi tiết thi hành một số điều của Luật Phòng, chống mua bán người [*Guidelines for implementation of the Anti-Trafficking law 2011*] (entered into force 11 January 2013) Law no. 09/2013/ND-CP <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=28049>> accessed 8 November 2019

<sup>195</sup> Quy định căn cứ xác định nạn nhân bị mua bán và bảo vệ an toàn cho nạn nhân, người thân thích của họ [*Legislations in identifying trafficked victims and protecting victims and their families*] (entered into force 13 August 2012) Law no. 62/2012/ND-CP at art. 2 and 3 <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=27678>> accessed 17 November 2019

<sup>196</sup> Quy định chi tiết thi hành một số điều của Luật Phòng, chống mua bán người [*Guidelines for implementation of the Anti-Trafficking law 2011*] (entered into force 11 January 2013) Law no. 09/2013/ND-CP <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=28049>> accessed 8 November 2019

<sup>197</sup> Ibid at art. 3

somewhat in compliance with international and regional standard and the country has expanded provisions in term of supporting and protecting THB victims even beyond what is required in ACTIP. THB victims have the opportunity to utilize all the provisions that would benefit them not only in legal proceedings, but even in the next stage when victims build a life after their ordeal<sup>198</sup>. Furthermore, with this current expansion, victims are guaranteed to have a minimum wage of funds to cover the cost of protection<sup>199</sup>. Taking an important step further, family members of THB victims can also enjoy some of these rights too, and the support lasts even after the prosecution stage with government loan support if victims wish to start a business<sup>200</sup>.

A drawback from this positive movement though is that with the adoption of a new THB definition, the interpretation in practice is still limited. The title of the Anti-Trafficking law 2011 - “Luật Phòng, Chống Mua Bán Người 2011” – literally translates as “Anti Human Trading Law 2011”. Right in the title, it can be seen that the country focuses on the more traditional and restrictive transactional element of the crime. It can be argued that the action element contains trading activities, which in Vietnamese legislation is included as “mua - buying” and “bán – selling” over the victims, and that victims are people who are considered as a commodity for trading. This is closer to the traditional concept of a slave trade in which people are bought and sold, and therefore is a narrow interpretation of the human trafficking definition in the Palermo Protocol. In practice,

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<sup>198</sup> Quy định căn cứ xác định nạn nhân bị mua bán và bảo vệ an toàn cho nạn nhân, người thân thích của họ [*Legislations in identifying trafficked victims and protecting victims and their families*] (entered into force 13 August 2012) Law no. 62/2012/ND-CP <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=27678>> accessed 17 November 2019

<sup>199</sup> Quy định chi tiết thi hành một số điều của Luật Phòng, chống mua bán người [*Guidelines for implementation of the Anti-Trafficking law 2011*] (entered into force 11 January 2013) Law no. 09/2013/ND-CP <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=28049>> accessed 8 November 2019

<sup>200</sup> Quy định căn cứ xác định nạn nhân bị mua bán và bảo vệ an toàn cho nạn nhân, người thân thích của họ [*Legislations in identifying trafficked victims and protecting victims and their families*] (entered into force 13 August 2012) Law no. 62/2012/ND-CP <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=27678>> accessed 17 November 2019

the study also found that indeed judges also use the element of trading as a factor in order to rule that there was a THB case. In the following case law, this thesis will study how THB cases are handled and what type of protection and remedies are given to victims.

### *B. Vietnam case law*

In the case number 12/2019/HS-ST<sup>201</sup>, the perpetrators (Thao.M.P and Thao.C.S) both had been accused of luring through fraud two victims (L and V) from a village in Ha Giang province<sup>202</sup> to the border between Vietnam and China. The victims were promised a high paying job in a province of China that can help them and their families as the victims lived in a poor town of Ha Giang province. Noting that after gaining the trust from the victims, only Thao.M.P carried out the transfer, taking the victims through the China border and selling them to three unknown Chinese men in order to received 26.000 NDT ( €775). The money was shared by both of the perpetrators. The victims were kept in China and sold as wives for local people. The money the criminals received was used immediately after the offense. The victims later managed to escape and reported to the Vietnamese authorities themselves. In the County Court, the Judges' Chamber ruled that the perpetrators (both Thao.M.P and Thao.C.S) behavior counted as deceiving the victims even though only one perpetrator (Thao.M.P) transported the victims across the border. Both were charged with committing the crime of THB under articles 150(2), 51, 17 and 58 of the Criminal Law 2015<sup>203</sup>. The victims received an amount of money as compensation under article 48 of the Criminal Law 2015<sup>204</sup>. Because the money that the perpetrators received from the act of selling the victims was

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<sup>201</sup> Case no. 12/2019/HS-ST (7 April 2019) <<http://congbobanan.toaan.gov.vn/2ta280362t1cvn/chi-tiet-ban-an>> accessed 26 December 2019

<sup>202</sup> Ha Giang province is in the north of Vietnam and is close to the Chinese border. It is a hotspot for trafficking due to poverty of the local indigenous people.

<sup>203</sup> Case no. 12/2019/HS-ST (7 April 2019) at page 8, paras 1-3

<<http://congbobanan.toaan.gov.vn/2ta280362t1cvn/chi-tiet-ban-an>> accessed 26 December 2019

<sup>204</sup> Ibid at page 9, para 4

already spent purchasing a buffalo, the judges decided to confiscate the buffalo and use it as a main proof.

In this case, the national court did apply the new definition of THB in terms of prosecuting the perpetrators. All three elements of THB given in the Palermo Protocol (action, means and exploitative purposes) were used in the case to charge both perpetrators. More than that, the judge made clear in the comments that the crossing of the border was incidental, and that it was already sufficient for the perpetrators to be charged with THB once the exploitative purposes became clear.<sup>205</sup> The offense was committed when the perpetrators deceived the victims with the promise of high paying jobs in China, knowing that instead they would be trafficked and sold once they crossed the border. Firstly, these are all big steps forward. In the previous Criminal law of 1999, Vietnam considers the behavior as THB only if the perpetrators directly traffic the victims through the border of the country to foreign countries for exploitation<sup>206</sup>, with no criminal charges for the behavior of deception, fraud or other coercive methods. Moreover, from the court comment, it can be understood that even if the victims did not reach the border but were stopped on the way, the criminal charge would still be the same. Overall, this case is an indication that Vietnam has adopted elements from the international and regional definition of THB and is somewhat in compliance with the THB definition from Palermo Protocol and ACTIP. Moreover, the domestic legal system is actually applying it in real cases.

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<sup>205</sup> Ibid at page 5, para 2

<sup>206</sup> Bộ Luật Hình Sự 1999 [*Criminal Law 1999*] (no longer in force) at art. 119(1) <<https://thuvienphapluat.vn/van-ban/trach-nhiem-hinh-su/Bo-Luat-hinh-su-1999-15-1999-QH10-46056.aspx>> accessed 1 December 2019 A 119 (1). In this provision, applying its THB definition, only people who are directly involved in the act of transferring victims through the border would be guilty of a THB offense. The law does not consider the behavior of coercion, cheating or fraud as an act of trafficking. Moreover, the 1999 version only considers “women” as victims of THB, with no consideration for men.

However, the case also exposes some elements that highlight the debates about the problem of implementation. A very traditional scope of THB is still being used as a main element in law enforcement in practice. The judges, in comment number three about the characteristics of the case, stated that the criminal had considered people as “goods to be trading in market”<sup>207</sup>, evidenced by the fact that they traded the victims in exchange for money/material benefits. In this case, the material benefit was a buffalo, and it indeed was used by judges as proof that the perpetrators benefited. As mentioned above, THB in the Vietnam Anti-trafficking law 2011 contains “buying” and “selling” human, which represents a traditional idea of what is considered as THB. In this case, a trade took place, but THB does not always include such a straight forward trade. On the other hand, there is a clear disconnection with human rights throughout the entire legal proceedings. Despite legislation and provisions that were made in order to provide proper protection and remedies for THB victims, the Judges’ Chamber did not apply or even mention any of them. The main provisions used mainly came from criminal law, including the ruling about the compensation for victims. There was no consideration to link criminal law and human rights law nor was any human rights legislation used that would benefit victims in term of protection and remedies. Interestingly, compensation is the only remedy that victims in this case received, and it did not come from the national funds as it is regulated<sup>208</sup>. The compensation came entirely from the perpetrators which is regulated in criminal law and of course, there was no consideration given to further support after the prosecution. In the case that the perpetrators are no longer be able to pay for the compensation, does that mean the victims would receive nothing for remedies? The

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<sup>207</sup> Case no. 12/2019/HS-ST (7 April 2019) <<http://congbobanan.toaan.gov.vn/2ta280362t1cvn/chi-tiet-ban-an>> accessed 26 December 2019

<sup>208</sup> Quy định chi tiết thi hành một số điều của Luật Phòng, chống mua bán người [*Guidelines for implementation of the Anti-Trafficking law 2011*] (entered into force 11 January 2013) Law no. 09/2013/ND-CP <<http://vbpl.vn/TW/Pages/vbpq-toanvan.aspx?ItemID=28049>> accessed 8 November 2019



role and impact of human rights in this case, if any, can be found in a very brief judges' comment about the serious consequences ensuing from the perpetrator's actions, as the offense "directly infringed upon the human rights, liberty, honor and dignity"<sup>209</sup> of the victims. If the offense violated the human rights of the victims as the judges stated, shouldn't human rights law or other regulations that would benefit victims and preserve their rights be considered?

In another THB case, case number 29/2019/HS-ST<sup>210</sup>, the disconnection with human rights is again reflected. Similar to the case above, the only reference to human rights is found in comment number six, in which the judges state that the perpetrators had "directly violated basic human rights including liberty, honor and human dignity, and also causing physical harm to the victims"<sup>211</sup>. However, in the final judgement, the Judges' Chamber ruling was that the perpetrators had committed the crime of THB under article 151 of the Criminal Law of 2015<sup>212</sup> for trafficking children without any mention of or consideration to apply other relevant legislation. Additionally, despite the confirmation of human rights violations, the judges make it clear in another comment that the crime is a phenomenon that threatens security and socioeconomic development<sup>213</sup> more than an issue of immorality and inhumanity for the individual. Again, the victims only received compensation through criminal law with no further support from national funds after the

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<sup>209</sup> Case no. 12/2019/HS-ST (7 April 2019) at page 5, para 3 <<http://congbobanan.toaan.gov.vn/2ta280362t1cvn/chi-tiet-ban-an>> accessed 26 December 2019

<sup>210</sup> Case no. 29/2019/HS-ST (15 July 2019) <<http://congbobanan.toaan.gov.vn/2ta342652t1cvn/chi-tiet-ban-an>> accessed 28 December 2019; Case summary: In 2007, in the province of Lang Son, Vietnam (located in the north of Vietnam, bordering China), Khuat.T.P and Nong.T.T trafficked two women, Dang T.M.L and Be.T.H.N, over the border and into China. The perpetrators lived near the border between China and Vietnam and were friends with the victims. They promised the victims a free trip to China. The victims agreed and after arriving in China, their documents were taken away and they were sold to a brothel where they were forced to work as prostitutes. The victims were separated from each other and both later managed to escape and reported their cases to the border police at the border between Vietnam and China. The victims were all under 16 years old and hence they were considered as children according to the Vietnam's domestic laws.

<sup>211</sup> Ibid at page 9, para 6

<sup>212</sup> Ibid at page 9

<sup>213</sup> Ibid at page 9, para 6

prosecution. Even more, the case also challenges the question of whether the current legal framework in Vietnam somewhat violates international human rights law in terms of protecting the rights of children. Note that the victims in this case were considered children because they were under 16 years old, not the global standard of 18 years old<sup>214</sup>. According to Vietnam's Children's law of 2016<sup>215</sup>, children are people who are under 16 years of age<sup>216</sup>. This provision is applied to all other domestic legislation that have regulations about children. This is not in compliance with the global and regional concept of children as people under 18 years of age. For example, in the CRC, children are people who are under 18<sup>217</sup> and ASEAN also views children as people who are under 18<sup>218</sup>. This is by no means a guarantee that there is a concrete violation taking place just because the country lowers the age to be considered a child. However, the thesis argues that Vietnam has somewhat violated human rights by going against the global trend and is not fulfilling their commitment in term of protecting children, particularly those who are 16 to 18 years old. This results in cutting the opportunity for people age 16 to under 18 from enjoying their rights as children, as well as increasing their obligations at an early age. In the context that Vietnam was the first country in Asia, and the second one in the world to ratify the CRC<sup>219</sup> and has ratified regional human rights and THB treaties<sup>220</sup>, this represents a considerable gap between rhetoric and reality. Indeed, Vietnam is consistently requested by human rights advocates, civil society, and other governments to adjust the law in order to fulfill their commitment to protecting children,

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<sup>214</sup> One victim was born in 1992 and the other was born in 1993. They were trafficked and sold in 2007, so they were under 16 years of age.

<sup>215</sup> National Assembly of Socialist Republic of Vietnam [*Childrens Law*] (adopted 5 April 2016, entered into force 1 June 2016) Law no. 102/2016

<sup>216</sup> Ibid at art. 1

<sup>217</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) at art. 1

<sup>218</sup> ACTIP at art. 2(d)

<sup>219</sup> Vietnam ratified the Convention on the Rights of the Child on 28 February 1990

<sup>220</sup> Vietnam is party, et al, to the AICHR, ACWC and ACTIP

particularly children who are threatened by crimes such as THB<sup>221</sup>. Nevertheless, the country applies the principle of non-interference and the need for labor as a justification to not do so<sup>222</sup>.

What remains confusing and unclear in these cases are the identities of those perpetrators whom directly exploited the victims after they were sold in China<sup>223</sup>. In most cases, these people remain unknown and what happens to them after the prosecution is no longer a concern of the authorities. Vietnam and China do in fact have a bilateral agreement<sup>224</sup> to collaborate in investigation and prosecution as well as assist victims in returning home, but clearly such cooperation is not being implemented. When the perpetrators can commit heinous crimes like this with impunity, it is reasonable to predict that those criminals would keep looking for new networks and target new victims, and that the effort to combat THB in the country would be a drop in the ocean.

### *C. Conclusion*

In general, Vietnam indeed struggles with implementation in terms of protecting and supporting THB victims, a fact which is corroborated by the United States' 2019 Tips report <sup>225</sup>. However, the country does show a positive movement regarding the issue that is shown by recent adjustments and improvements to the domestic legal THB framework, as well as allowing more participation

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<sup>221</sup> Author unknown, 'Legal age for children should be adjusted for better protection' (Vietnam News: The National English Language Daily, 31 August 2019) < <https://vietnamnews.vn/society/534847/legal-age-for-children-should-be-adjusted-for-better-protection.html> > accessed 21 September 2019; UNICEF, 'Annual Report 2017: Vietnam' (2017) at 10 "UNICEF Viet Nam leveraged at high level to advocate for raising the age of children to under 18."; United States Department of State, '2019 Trafficking in Persons Report - United States of America' (2019) 498 – 501 " <<https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>> accessed 19 September 2019

<sup>222</sup> Ibid

<sup>223</sup> In both of the cases (case no. 29/2019/HS-ST and case no. 12/2019/HS-ST) represented in this chapter, the Chinese perpetrators who bought and exploited the victims were only briefly mentioned. There is no sign that they suffered any consequences.

<sup>224</sup> Memorandum of Understanding on Cooperation Against Trafficking in Persons in the Greater Mekong Sub-Region (signed 29 October 2004) < [http://un-act.org/wp-content/uploads/2015/07/COMMIT\\_MoU.pdf](http://un-act.org/wp-content/uploads/2015/07/COMMIT_MoU.pdf) > accessed 1 December 2019>

<sup>225</sup> United States Department of State, '2019 Trafficking in Persons Report - United States of America' (2019) 498 – 501 " <<https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>> accessed 19 September 2019

from NGOs in order to meet its commitments. As the court documents show in the cases above, Vietnam's domestic laws and enforcement policies are somewhat in compliance with international and regional agreements. However, the study finds and argues that Vietnam is reluctant to apply human rights law, which negatively impacts on victim protection. This is a structural barrier that complicates THB protection for victims, and goes beyond issues identified by the United States' 2019 Tips report, like the presence of corruption and lack of adequate training for state actors. In essence, domestic courts still approach THB as a crime that harms socioeconomic development, rather than a human rights violation against the individual. Despite statements from the judges presiding over the cases that acknowledge the human rights violations which took place in both cases, only criminal law was actually used. Within Vietnam, THB victims can only rely on criminal provisions for only one type of remedy; compensation taken directly from the perpetrators.

There is also a significant legal issue in the domestic law regarding people who are ages 16 to under 18 years old. Legally and practically, they are treated as adults and have no protection and support as victims of child abuse. Despite having ratified the CRC and other agreements designed to give special protection to all children under 18 years old<sup>226</sup>, Vietnam is persistent in maintaining that the age of majority is attained at 16 years old, denying the chance for many THB victims to enjoy their rights as children.

As Vietnam takes the mantle of Chair of ASEAN for 2020<sup>227</sup>, these issues exist in the country is something that needs to be considered. Only 50 years ago, the country was devastated by war, and the problems that the country faced were extreme poverty, famine and lack of infrastructure. In that light, Vietnam has come a long way, but there is still much work remaining. While agreeing

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<sup>226</sup> Vietnam ratified the CRC on 28 February 1990

<sup>227</sup> ASEAN Chair information < <https://asean.org/asean/asean-chair/> > accessed 5 January 2020

that abolishing THB is an important task under ACTIP and the Palermo Protocol, Vietnam does not seem ready to treat THB as a human rights violation in law enforcement and make THB victims a priority. However, in the long term, with consistent pressure and workshops from the Working Group and meetings of AICHR, it can be expected that Vietnam will answer the legal requirement to enhance the implementation of international and regional agreements, particularly in term of combating THB with a victim-oriented approach. Additionally, with this new position, it will create both pressure and opportunities for Vietnam to fulfill its obligations under regional agreements like ACTIP.

## V. Conclusion.

*“But today, in too many places around the world - including right here in the United States - the injustice of modern slavery and human trafficking still tears at our social fabric. During National Slavery and Human Trafficking Prevention Month, we resolve to shine a light on every dark corner where human trafficking still threatens the basic rights and freedoms of others.”*<sup>228</sup>

– Barack Obama, January 2017

The international legal regime designed to combat THB has come a long way since the 1904 Convention on White Slavery. Unfortunately, THB has also evolved. As globalism connects the world in countless ways, perpetrators of THB take advantage of the inter-connectedness of today’s world to exploit others in horrific ways. Of course, it would be negligent to indicate the way that international law has approached THB is a complete failure by somehow creating difficulties for victims to gain justice and to access remedies or protection. In many respects, the Palermo Protocol and also the ACTIP do have a few achievements they can take credit for. Therefore, there are more steps that need to be taken to completely put the crime in the history books and prevent such actions from happening in the future.

As a whole, the main aspiration of this thesis is to show how the current international and regional protection and assistance for victims of THB are inadequate, and how these deficiencies are reflected in domestic law. As it stands now, states have very few obligations towards victims

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<sup>228</sup> The White House Office of the Press Secretary, ‘Presidential Proclamation -- National Slavery and Human Trafficking Prevention Month 2017’ (28 December 2016) <[https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/presidential-proclamation-national-slavery-and-human-trafficking?fbclid=IwAR19Yy8RLTnk\\_lrqiqLQz8xebHPDYQ7mh4ofyx-4-32j6NZ4RnfOE8fwec](https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/presidential-proclamation-national-slavery-and-human-trafficking?fbclid=IwAR19Yy8RLTnk_lrqiqLQz8xebHPDYQ7mh4ofyx-4-32j6NZ4RnfOE8fwec)> accessed 25 November 2019

outside of human rights law. In ASEAN, where human rights law is thinly applied, the protections and remedies available to victims are further reduced. As ASEAN member states integrate with the international community and with each other, it is important to scrutinize the accomplishments and failures of ASEAN institutions. While maintaining a sense of optimism about how far ASEAN has come and also the humility necessary to see how much work remains, this thesis hopes to provide a constructive legal perspective on the condition of the THB legal framework in ASEAN.

This study aspires to add its voice to the conversation in the international community that seeks to eradicate human trafficking. Especially, for those who wish to have more research and understand more about the issue of THB in Vietnam, this paper hopes to contribute to the fundamental level of knowledge and awareness. This thesis also hopes to call attention to the importance of taking a victim-centered approach to THB. As the Legislative Guide to the Palermo Protocol argues<sup>229</sup>, a victim-centered approach is in the long-term best interest of all parties. Victims who receive assistance and remedies are much more likely to participate in prosecution, and they are much less likely to be re-trafficked. A re-trafficked victim is a completely avoidable drain on state resources. Therefore, the two main concerns that states have for implementing strong victim protection obligations, namely interference with law enforcement efforts and high costs, are not well-grounded. Law enforcement and a victim-centered approach can coexist and leading to a better overall strategy.

On the other hand, the study believes there are more to research in the region of South East Asia. The main limiting factor identified is the non-interference principle, a remnant of the “Asian values” debate of the 1990s. This principle is incorporated into all major ASEAN agreements, and

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<sup>229</sup> *Legislative Guide ‘United Nations Convention against Transnational Organized Crime’* at part 2, para. 52

further research should be conducted into how this principle could be strategically limited in order to both preserve the core sovereignty, and cooperation of member states while strengthening the capabilities of existing regional institutions, and exploring the possibility of a regional human rights court available to individuals. A regional court is sorely needed in ASEAN as a way to promote cooperation among member states and give victims of human rights violations an option to claim justice and remedies when domestic courts have failed. The scope for a regional court like this could exist under the TOR of the AICHR, which does not seem to preclude the possibility. However, considerably more study is needed, in both the discipline of law as well as international relations, to give a more comprehensive assessment of how such a court could be formed. The ICC could lead the way in this regard on the international stage by expanding its scope to include THB. Indeed, this has been a subject of academic interest already<sup>230</sup>, and such a development would be groundbreaking.

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<sup>230</sup> Joshua Nathan Aston, *Trafficking of Women and Children: Article 7 of the Rome Statute* (Oxford Scholarship Online; 2016); Tom Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2005) Vol. 54 *The International and Comparative Law Quarterly* 445-457; Jane Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute' (2011) Columbia Law School <[http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim\\_GSL\\_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf](http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim_GSL_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf)> accessed 5 January 2020; Clare Frances Moran, 'Human Trafficking and the Rome Statute of the International Criminal Court' (2014) Vol. 3 *The Age of Human Rights Journal* 32-45



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