

NTS Insight, no. IN18-06, August 2018

Human Trafficking: In the Shadows of the Law

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ABSTRACT

Almost two decades since the adoption of the UN Convention against Transnational Organised Crime, and specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, the debates on addressing human trafficking have not veered far beyond questions of law enforcement efficacy. What makes law enforcement against human trafficking so challenging in the East Asia region? This NTS Insight examines the nature of international legal frameworks that address human trafficking and the way they influence regional and domestic anti-trafficking legislation in East Asia. It argues that human trafficking as a crime is often “hidden” from the one-size-fits-all anti-trafficking legal regime adopted in domestic or national settings. The report argues that drawing the crime of human trafficking out of the shadows is made difficult by (i) the ambiguous definition of human trafficking in international law; (ii) the disjuncture between human trafficking contexts in East Asia and what international anti-trafficking legal regimes seek to address.



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Recommended citation: Foo Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, No. IN18-06 (Singapore: RSIS Centre for Non-Traditional Security Studies (NTS Centre)).

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INTRODUCTION

The first NTS Insight on Human Trafficking, *Combatting Human Trafficking in East Asia: Mind the Gaps* identifies key trends and patterns for human trafficking in the East Asia region. It singles out that weaknesses in law enforcement remains as one of the main “gaps” in countering human trafficking effectively.

Almost two decades since the adoption of the UN Convention against Transnational Organised Crime (UNTOC), and specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Trafficking Protocol), the debates on addressing human trafficking have not veered far beyond questions of law enforcement efficacy. But, what makes law enforcement against human trafficking so challenging in the East Asia region? Building on the findings of Part 1 of the Human Trafficking Insight, this 2nd part examines the nature of international legal frameworks that address human trafficking and their effectiveness. This report scrutinises the way international legal frameworks have influenced the form and substance of regional and domestic anti-trafficking legislation and their application in the East Asia context. It argues that human trafficking as a crime is often “hidden” from the one-size-fits-all anti-trafficking legal regime that is adopted by national governments. The report argues that drawing the crime of human trafficking out of the shadows is made difficult by (i) the ambiguous definition of human trafficking in persons in international law; and (ii) the disjuncture between human trafficking contexts in East Asia and what international anti-trafficking legal regimes seek to address.

HUMAN TRAFFICKING AND THE LAW

The UNTOC and the Trafficking Protocol

Combating human trafficking was thrust into the “global agenda of high politics” in the last quarter of the 20th century with the adoption of the UNTOC, and the Trafficking Protocol in 2000.² The most significant contribution of the UNTOC and the Trafficking Protocol is turning human trafficking into a crime that can be detected and prosecuted, institutionalising the discourse of “trafficking-as-transnational crime”.³ The Trafficking Protocol breaks the offence of human trafficking into three components – action, means and purpose.⁴ The exploitative purposes include prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁵ The State’s obligation is to criminalise, investigate and punish offenders for human trafficking. Because the Trafficking Protocol must be read with the UNTOC, governments are also obliged to criminalise the laundering of the proceeds of human trafficking, establish a long period for statute of limitations for human trafficking offenses, trace, freeze and confiscate proceeds of human trafficking, provide mutual legal assistance and information sharing with other countries and protect victims and witnesses throughout the prosecution of offenders.⁶

The UNTOC and the Trafficking Protocol is statist in construct.⁷ They require states to “legislatively arm themselves to confront” human trafficking as a serious crime and frame States’ commitments in terms of border protection.⁸ For instance,

² Wong, Diana, “The Rumour of Trafficking”, in William Van Schendel and Itty Abraham, *Illicit Flows and Criminal Things – States, Borders, and the Other Side of Globalisation*, (Indiana: Indiana University Press, 2005), p.69

³ Gallagher, Anne, “The International Law of Human Trafficking”, (Cambridge: Cambridge University Press, 2010), p.1-11

⁴ Article 3 of the Trafficking Protocol

⁵ Article 3 of the Trafficking Protocol

⁶ Articles 6, 11, 12, 13, 14, 18, 26 and 27 of the UNTOC

⁷ See for example, Desyllas, Capous Moushoula, “A Critique of the Global Trafficking Discourse and US Policy”, *Journal of Sociology and Social Welfare*

Article 11 of the Trafficking Protocol obliges states to strengthen “border controls” to prevent and detect human trafficking through immigration laws. Each State Party is expected to pass domestic laws to ensure travelers are in possession of travel documents required for entry into the receiving state and sanction those who fail to comply with this requirement.⁹ Article 12 states that these documents cannot be easily misused, falsified, unlawfully altered, duplicated or issued.¹⁰

As reported in the Part 1 of the NTS Insight on Human Trafficking, protection issues surface when the statist and criminal justice approach is used to address human trafficking. Trafficked persons enter a country using a variety of formal and informal migration networks. Their legal status can be ephemeral, tweaked by circumstance or changed by sudden shifts in national policies. In that sense, labels such as ‘legal’, ‘illegal’, ‘regular’, ‘irregular’ and ‘undocumented’ do not always fit neatly into the modality of the Trafficking Protocol. With border controls as a starting point to tackling human trafficking, trafficked persons are often cast as unwanted ‘Others’ within international law. They are “to be dealt with first and foremost as illegal immigrants who have to be ‘rescued’ and returned home, to where they belong or, better still, immobilised before they arrive”.¹¹

Provisions within the Trafficking Protocol which deals with the protection of trafficked persons have been described as “weak”, “vague”¹² and a “disappointment”.¹³ Article 6 of the Trafficking Protocol provides that States’ victim protection duties are applicable “in appropriate cases” and only “to the extent possible under its domestic law”.¹⁴ The protection afforded to the trafficked person is left solely to the discretion of the states. An example of this cursory nature of states’ duty to protect trafficked persons is found in Article 7 of the Trafficking Protocol which requires that the privilege of remaining in the receiving country ought to be weighed inter alia against “humanitarian and compassionate factors”. If it is determined that the trafficked person should not remain in the receiving country, repatriation is reduced to a government-to-government arrangement. States of origin are obliged to facilitate and accept, without undue and unreasonable delay trafficked nationals or those with the right to permanent residence.¹⁵ There is no requirement that the repatriation be voluntary or is consented to by the trafficked person, only that it is “preferably” voluntary”.¹⁶

The TVPA and the US State Department Trafficking in Persons Report

The Trafficking Victims Protection Act of 2000 (TVPA) is a legal regime that operates independently of the UNCTOC and the Trafficking Protocol. It is a United States domestic law but is considered as part of the international anti-trafficking regime here because of the global reach of its sanctions regime and how it shapes states’ anti-trafficking behaviour. As Catherine Renshaw observes, the “US approach and the UN approach to the issue of trafficking in persons have been conflated, both

34, No.4 (2007):57-79, Wong, Diana, “The Rumour of Trafficking”, in William Van Schendel and Itty Abraham, *Illicit Flows and Criminal Things – States, Borders, and the Other Side of Globalisation*, (Indiana: Indiana University Press, 2005), Lee, Maggy, “Human Trafficking and Border Control in the Global South”, in Aas, Katja Franko and Bosworth, Mary, *The Borders of Punishment: Migration, Citizenship and Social Exclusion*, (Oxford: Oxford University Press, 2013)

⁸ United Nations Global Initiative to Fight Human Trafficking, “023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation”, Background paper Austria Center Vienna, the Vienna Forum to fight Human Trafficking, 13-15 February 2015

⁹ Articles 11(2) and 11(3) of the Trafficking Protocol

¹⁰ Articles 12(a) and 12(b)

¹¹ Lee, Maggy, “Trafficking and Global Crime Control”, (London: Sage Publications Ltd, 2011), p.80

¹² Gomez-Mera, Laura, “The Global Governance of Trafficking in Persons: Toward a Transnational Regime Complex”, *Journal of Human Trafficking* 3, No.4 (2017),p.307

¹³ Gallagher, Anne, “The International Law of Human Trafficking”, (2010),p.2

¹⁴ Article 6(1) of the Trafficking Protocol

¹⁵ Article 8(2) of the Trafficking Protocol

¹⁶ Article 8(2) of the Trafficking Protocol

in perception and in the way that anti-trafficking measures are undertaken by UN agencies and NGOs” over time.¹⁷ Under the TVPA, the US government can withhold non-humanitarian, non-trade related foreign assistance to any government not making efforts to comply with the TVPA’s “minimum standards for eliminating trafficking”.¹⁸ The US State Department conducts an annual assessment on a country’s efforts to comply with the TVPA minimum standards and publishes an annual report known as the Trafficking in Persons Report (TIP Report). Countries’ are assessed based on the three Ps framework and are ranked on four tiers in the TIP Report.

There are “multiple instances in which the open threat of a negative grade in the TIP Report provided the impetus for major reform initiatives, including the criminalisation of trafficking”.¹⁹ Government discourses on new anti-trafficking laws and policies are often framed in terms of a response to the TIP Report rankings.²⁰ For example, Cambodia was placed on the Tier 2 Watch list of the TIP Report in 2006 and 2007 and was at risk of an automatic downgrade to Tier 3 and sanctions under the TVPA. Under pressure, it passed the Law on Suppression of Human Trafficking and Commercial Sexual Exploitation which criminalises all forms of human trafficking and was upgraded to Tier 2 on the TIP Report in 2008.²¹

Despite the TIP Report’s “power of shame”, many are critical about the way it is used to impose the United States’ domestic priorities and interests on other countries.²² The TVPA was motivated by the desire to abolish trafficking of women and children into the sex industry in the US.²³ This domestic preference is transferred to other states through the TIP Report’s sanctions regime. In the 2004 TIP Report, the US government said it would take a “firm stand against proposals to legalise prostitution because prostitution directly contributes to the modern day slave trade”.²⁴ It added that the US would deny funds to foreign non-governmental organisations that support legal prostitution and prohibit US funds for programs that promote, support or advocate for the legalisation or practice of prostitution and for organisations that do not work toward abolishing prostitution.²⁵ One example of the impact of US domestic preference on the laws of other countries is Cambodia’s Suppression of Human Trafficking and Sexual Exploitation 2007, drafted with the help of the US and adopted under the threat of economic and other sanctions.²⁶ The law’s expressed objective is to “suppress the acts of human trafficking and sexual exploitation in order to protect the rights and dignity of human beings”. It criminalises activities seen as linked to human trafficking, including child and adult prostitution, pornography, indecency against minors, and the management of prostitution. Keo observes that although voluntary prostitution was not specifically targeted, the law created conditions that made lawful prostitution virtually impossible.²⁷

¹⁷ Renshaw, C., “Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance”, *Michigan Journal of International Law* 37, No.4 (2006),p.626

¹⁸ Trafficking Victims Protection Act of 2000

¹⁹ Gallagher, Anne, “The International Law of Human Trafficking”, (2010),p.485

²⁰ Renshaw, C., “Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance”, *Michigan Journal of International Law* 37, No.4 (2006), p.637-638

²¹ Keo, C. et.al, “Human Trafficking and Moral Panic in Cambodia”, *The Annals* 653, No.1(2014),p.207

²² Chuang, J., “The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking”, *Michigan Journal of International Law* 37, No.4 (2016):611-659

²³ Chuang, J., “Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy”, *University of Pennsylvania Law Review* 158, (2010),p.1678

²⁴ US Department of State, “Trafficking in Persons Report”, June 14, 2004, Available at: <https://www.state.gov/j/tip/rls/tiprpt/2004/34021.htm>

²⁵ Ibid

²⁶ Sandy, Larissa, “International politics, anti-trafficking measure and sex work in Cambodia”, in Van Schendel, W., Lyon, and Ford, Michele, “Labour Migration and Human Trafficking in Southeast Asia: Critical Perspectives”, (New York: Routledge, 2012),p.41

²⁷ Keo, Chenda, “Hard life for a legal work: The 2008 anti-trafficking law and sex work”, (Phnom Penh: Cambodian Alliance for Combatting HIV/AIDS, 2009)

Regional anti-trafficking frameworks in Asia

In the decade after the introduction of the Trafficking Protocol and the TVPA, there was a sharp increase in the number of treaty and non-treaty instruments relating directly and indirectly to countering human trafficking adopted by states.²⁸ In Asia, a regime of legal frameworks to criminalise human trafficking developed alongside international ones.

The extent to which regional and bilateral anti-trafficking frameworks and processes in Asia are consistent with the UNCTOC and Trafficking Protocol varies. Some, like the ASEAN Convention against Trafficking in Persons Especially Women and Children (ACTIP), are substantially similar to the UNCTOC and the Trafficking Protocol. ACTIP's main purpose is to institutionalise coordinated enforcement and collaborative action to prevent human trafficking and to protect trafficked persons. ACTIP adopts the Trafficking Protocol's definition of human trafficking as well as the general prevention and victim protection measures.²⁹ It also adopts the UNCTOC's provisions on criminalisation of human trafficking, laundering of proceeds of human trafficking, corruption, obstruction of justice, and jurisdiction in their entirety. The ACTIP is the culmination of various non-binding instruments in the region since the 1990s that deals with human trafficking.³⁰ Because the ACTIP is legally binding, it compels even ASEAN member states which did not ratify the UNCTOC or the Trafficking Protocol to develop anti-trafficking legislation that are consistent with international law.

At the subregional level, countries within the Greater Mekong Region (GMS) have combined through the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT), a multilateral memorandum of understanding (MoU) to enhance cooperation between governments and other stakeholders to close all avenues of exploitation.³¹ COMMIT adopts the Trafficking Protocol's definition of human trafficking. As a process, COMMIT promotes compliance with the UNCTOC and the Trafficking Protocol;³² it facilitates GMS states with the formulation and strengthening of National Plans of Action and bilateral partnerships to reduce vulnerabilities to human trafficking, strengthen victim identification guidelines and mechanisms, a migration policy that combats human trafficking, and labour laws and regulating recruitment practices.

A byproduct of COMMIT is the number of bilateral agreements that emerged in the GMS aimed at facilitating cooperation between states. Cambodia entered into a number of MoU with countries in GMS³³ that adopted the definition of human trafficking used in the Trafficking Protocol but restricted their application to women and children. Meanwhile, Vietnam entered into the Memorandum of Understanding on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking with Thailand in 2008. The agreement made no mention of the Trafficking Protocol but used the Trafficking Protocol's definition of human trafficking. Recognising the role of poverty, Myanmar and Thailand signed a MoU in 2008 to take preventative measures such as provision of educational and vocational training, improve social services and income generation to prevent human trafficking.³⁴ In 2005, Lao People's

²⁸ Lloyd, Paulette and Simmons, Beth A., "Framing for a New Transnational Legal Order: The case of human trafficking", *Public Law and Legal Theory Research Paper Series*, Research Paper No.16-43

²⁹ Article 2 of the ACTIP

³⁰ For example, in 1997, ASEAN adopted the Declaration on Transnational Crime and established the AMMTC to facilitate cooperation for fighting transnational crime. In 2004, ASEAN adopted the ASEAN Declaration against Trafficking in Persons Particularly in Women and Children and the Treaty on Mutual Legal Assistance in Criminal Matters. The latter provided the basis for cooperation in criminal investigations and prosecutions among member states.

³¹ Countries in the Greater Mekong Subregion are Cambodia, China, Laos, Myanmar, Vietnam and Thailand.

³² Kneebone, Susan and Debeljak, Julie, "Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion", (New York: Routledge, 2012), p.209-211

³³ Memorandum of Understanding between Cambodia and Thailand on Bilateral Cooperation in eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003), Agreement between the Royal Government of Cambodia and the Socialist Republic of Vietnam and Bilateral Cooperation for Eliminating in Women and Children and Assisting Victims of Trafficking (2005)

³⁴ Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation to

Democratic Republic and Thailand entered into a MoU with similar terms to address human trafficking as a transnational crime in accordance with the Trafficking Protocol.³⁵

Human Trafficking in East Asia – Hidden from the Law

The above survey is not intended to provide an exhaustive list of regional anti-trafficking frameworks but to highlight a dense regional regime that has embraced the UNCTOC, the Trafficking Protocol and the TVPA's sanctions regime. It is the norm for regional anti-trafficking frameworks and processes in Asia to view human trafficking through the lens of transnational crime and migration control. National anti-trafficking laws draw heavily on the text of the UNCTOC and the Trafficking Protocol. Anne Gallagher is correct to point out that only a transnational crime framework would have led to an international legal instrument with “detailed obligations for tackling corruption, exchanging evidence across national borders and seizing of assets of offenders” and so enthusiastically seized by governments within so short a time.³⁶

But, as Part 1 of the NTS Human Trafficking Insight points out, even a comprehensive legal framework has failed to yield the conviction rates, one measure of successful law enforcement. So much of human trafficking operate in the shadows of the law. Jo Goodey writes that accurate data on human trafficking “does not exist” because the crime is under-reported, under-detected and therefore under-prosecuted.³⁷ Laczko, too, points to its “clandestine” nature, adding that underreporting occurs because victims are usually reluctant to report to authorities for fear of intimidation and reprisals.³⁸ For this, Jessie Brunner calls human trafficking a “hidden crime” where statistics reflect only those who have been identified as victims or perpetrators.³⁹ Though neither Brunner nor Laczko were speaking specifically about Asia, their observations raise pertinent points about the way international anti-trafficking instruments are applied to local trafficking contexts.

The next section highlights the challenges of applying international anti-trafficking legal regimes in East Asia. Two aspects are explored:- (a) the ambiguities in the legal definition of human trafficking; and (b) the disjuncture between what international law defines as human trafficking and how it is practiced in East Asia.

a) The ambiguities in definitions

The great promise of the UNCTOC and the Trafficking Protocol is the standardisation of what human trafficking means for all states. A common definition of human trafficking is critical to consistent enforcement of anti-trafficking laws and promoting transnational cooperation. However, different iterations of the Trafficking Protocol (or parts of it) have materialised when regional and national frameworks model anti-trafficking laws on the Trafficking Protocol.⁴⁰ In ASEAN, for example, where ACTIP adopts Article 3 of the Trafficking Protocol without modification, each of its Member States still has different

Combat Trafficking in Persons, Especially Women and Children (2009)

³⁵ Memorandum of Understanding between the Government of Lao People's and the Government of the Kingdom of Thailand on Labour Co-Operation

³⁶ Gallagher, Anne, “The International Law of Human Trafficking”, (2010), p.4

³⁷ Goodey, Jo, “Human trafficking: Sketchy data and policy responses”, *Criminology and Criminal Justice* 8, No.4 (2008), p.424-425

³⁸ Laczko, Frank, “Enhancing Data Collection and Research on Trafficking in Persons” in Savona, Ernesto U. and Stefanizzi, Sonia (eds), (New York: Springer, 2007), p.40. See also Dang Nguyen Anh, “Cross-Border migration and Sexuality in Vietnam: Reality and Policy Responses” in Blair, Thomas E. (ed.) “Living on the Edges: Cross-Border Mobility and Sexual Exploitation in the Greater Southeast Asia Sub-Region”, (Bangkok: Southeast Asian consortium on Gender, Sexuality and Health, 2006)

³⁹ Jessie Brunner, “Inaccurate Numbers, Inadequate Policies: Enhancing Data to Evaluate the Prevalence of Human Trafficking In ASEAN”, (Hawaii: East West Center, 2015)

“Trafficked and Exploited: The Urgent Need for Coherence in International Law”, in Prabha Kotiswaran (ed.), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, (Cambridge: Cambridge University, 2017),p.59–82

definitions of human trafficking within its national laws that diverges from Article 3 to different degrees.⁴¹ Article 3 of the Trafficking Protocol was the result of negotiations between states with different legal traditions and interests. Their compromises led to an Article 3 that is “challenging for national legislatures to meaningfully formulate in legislation and difficult for law enforcement to prove in court”.⁴²

The law constructs human trafficking as a crime based on three elements (act-means-purpose) and views human trafficking independently of the social dynamics linked to it such as forced migration, labour issues and human rights. In reality, human trafficking is a fluid process and people in the region are driven by varied circumstances to move – development, modernisation, poverty.⁴³ The law is insensitive to these nuances and their enforcers are compelled to compartmentalise trafficking-related activities into Article 3’s act-means-purpose mold. But, as an operational definition for a crime that needs to be detected and prevented, the parameters of Article 3 are blurry. Key terms within Article 3 such as “exploitation”, “sexual exploitation”, “forced labour”, “slavery”, “practices similar to slavery” and “servitude” are undefined. Substantive understandings of these terms vary between jurisdictions. The lines that make them prohibitive can also shift because of culture and national contexts. In some countries, low wages, poor working conditions and deception are elements of forced labour or trafficking. In others, they may be labour law violations. The demarcation of human trafficking from other forms of exploitation is further complicated by what Chuang calls the “exploitation creep” where trafficking is discursively conflated with forced labour and slavery.⁴⁴ For Chuang, “recasting all forced labour as trafficking and all trafficking as slavery, exploitation creep re-labels abuses as more extreme than is legally accurate”.⁴⁵ This increases support for their eradication but produces laws that lack legal and operational nuance.

Further, there is lack of agreement on what exploitative practices other than those specified in Article 3 should be identified as an element of human trafficking. Production of pornography, child sex tourism, commercial surrogacy and sale of children for purposes of adoption rife in East Asia, for instance, would fulfil Article 3’s act-means-purpose criteria. Clarity is needed on whether these practices should be treated as a crime on its own or as part of the process of human trafficking. To expand the definition of human trafficking is to widen the potential pool of victims and perpetrators. But, it could also weaken the underlying legal prohibition and “undermine broader goals related to international cooperation and standardisation of concepts that requires shared understanding of the nature of the problem to be addressed”.⁴⁶

The danger in definitional ambiguities surfaces when frontline law enforcement agencies who do not have sufficient knowledge or substantive understanding of human trafficking are left to interrogate the scope and the limitations of Article 3. Studies show that frontline law enforcement officers do not always understand the nature of human trafficking or have the ability to define human trafficking,⁴⁷ may focus only on certain types of human trafficking due to the lack of experience, and

⁴¹ ASEAN, “Regional Review on Laws, Policies and Practices within ASEAN relating to the identification, Management and Treatment of victims of Trafficking, especially Women and Children”, (Jakarta: ASEAN Secretariat, 2016),p.17-28

⁴² See Obokata, Tom, “The Value of International Law in Combatting Transnational Organised Crime in the Asia Pacific”, *Asian Journal of international law*, No.7 (2017):39-60, Inter-Agency Coordination Group Against Trafficking in Persons, “The International Legal Frameworks concerning Trafficking in Persons”, Vienna, October 2012, Available at:

https://www.unodc.org/documents/human-trafficking/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf

⁴³ Danailova-Trainor, Gergana and Laczko, Frank, “Trafficking in Persons and Development: towards Greater Policy Coherence”, *International Migration* 48, No.4(2010),p.65

⁴⁴ Chuang, Janie, “Exploitation Creep and the Unmaking of Human Trafficking Law” *The Journal of International Law* 108, No.4 (2014),p.611

⁴⁵ Ibid

⁴⁶ Gallagher, Anne, “The International Law of Human Trafficking”, (2010),p.51

⁴⁷ Mapp, Susan et.al, “Local Law Enforcement Officers’ Knowledge of Human Trafficking: Ability to Define, Identify and Assist”, *Journal of Human Trafficking* 2, No.4 (2016):329-342

may conflate human trafficking with undocumented migration and prostitution.⁴⁸ In a study of 14 countries, UNODC found that anti-trafficking practitioners were generally unclear on the distinction between key terms like slavery, practices similar to slavery and forced labour.⁴⁹

The corollary to this is the failure of the criminal justice system to consistently and correctly identify instances of human trafficking, prosecute perpetrators and most importantly, identify victims who need assistance, support and protection.⁵⁰ A process for predictable and systematic identification of trafficked persons is imperative because under existing international anti-trafficking legal frameworks and many national ones, only individuals who have been identified as “victims” or trafficked persons are accorded with certain rights. Other frameworks such as those dealing with human rights, humanitarian, refugee and labour laws which offer alternative protection mechanisms have generally been underutilised.⁵¹ Trafficked persons who are misidentified as irregular migrants are routinely arrested, detained, charged, prosecuted and deported for offences such as entering illegally, working illegally, possession of false documents, and non-possession of documents. In this sense, misidentification is tantamount to criminalisation of trafficked persons.

b) Differing contexts: local human trafficking trends and international legal regimes

The anti-trafficking legal framework assumes that human trafficking involves the movement of people across national borders.⁵² But, border control measures in anti-trafficking legal frameworks can be counterproductive in Asia; borders in the region are not only porous but also situated in ‘frontier areas’ where people have historically crossed for trade and employment without restriction.⁵³ In many places, people have continued to navigate informal border crossings and anti-trafficking regulations are blind to the complexity of the region’s histories.⁵⁴ In the Sino-Vietnamese border, for example, there has been a long history of undocumented Sino-Vietnamese ethnic marriages. Viewed through the transnational crime lens, Chinese authorities have investigated Vietnamese women living with Chinese men as cases of human trafficking and repatriated them for “illegal entry, illegal residence, and illegal cohabitation”. But, it was common for women who were “sent back in the morning to come back in the evening”.⁵⁵ Similarly, the border that separates Malaysia’s Sarawak from Indonesia’s Kalimantan on the Borneo Island are crossed daily through remote forest tracks known as “*jalan tikus*” [illegal routes] by people seeking employment, conducting trade and looking for access to social services, mostly without valid documentation.⁵⁶

⁴⁸ See for example Ferrell, Amy and Pfeffer, Rebecca, “Policing Human Trafficking: Cultural Blinders and Organisational Barriers”, *The Annals of the American Academy of Political and Social Science* 653, No.1(2014):46-64, Farrell, Amy, Jack McDevitt, and Stephanie Fahy, “Understanding and Improving Law Enforcement Responses to Human Trafficking: Final Report” (Boston: Northeastern University Institute on Race and Justice, 2008), Farrell, Amy, Colleen Owens, and Jack McDevitt, “New Laws but Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases”, *Crime, Law and Social Change* 61, No.2 (2013):139–68

⁴⁹ UNODC, “The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol”, (2015),p.110, Available at: https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf

⁵⁰ See for example Gallagher, Anne and Holmes, Paul, “Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line”, *International Criminal Justice Review* 18, No.3 (2008),p.236

⁵¹ Inter-Agency Coordination Group Against Trafficking in Persons, “The International Legal Frameworks concerning Trafficking in Persons”, Vienna, October 2012

⁵² See UNCTOC Article 3(2)

⁵³ Renshaw, C., “Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance”, *Michigan Journal of International Law* 37, No.4 (2006), p.631

⁵⁴ Grillot, Caroline, “The Fringes of Conjuality: On Fantasies, Tactics and Representations of Sino-Vietnamese Encounters in borderlands”, Unpublished Doctoral Dissertation, *Vrije Universiteit Amsterdam* (2006)

⁵⁵ Barabantseva, Elena, “When Borders Lie Within: Ethnic Marriages and illegality on the Sino-Vietnamese Border”, *International Political Sociology*, No.9 (015), p.363

⁵⁶ Sulehan, Junaenah (et.al), “Development at the Margins: Livelihood and Sustainability of Communities at Malaysia-Indonesia Borders”, *Sociology & Space* 51, No.3 (2013), p.549, Sibon, Peter, “State losing control over border crossing”, *Borneo Post Online*, March 13, 2015, Available at: <http://www.theborneopost.com/2015/03/13/state-losing-control-over-border-crossing/>

Furthermore, the international anti-trafficking legal regime presupposes that human trafficking is committed by transnational criminal groups.⁵⁷ Governments that model their anti-trafficking laws on international frameworks design laws to target the criminal elements of organised crime. This is at odds with what occurs on the ground in Asia. Studying the Southeast Asian landscape, Renshaw says that there is little evidence to show that human trafficking is practiced as a systematic, patterned and organised form of crime.⁵⁸ Instead, people on the move in the region are often linked to exploitative situations by intimate social networks of friends and relatives. A study by Human Rights Watch into forced labour in Thailand's fishing industry found that local brokers were a mainstay in the labour recruitment process but they were "typically flexible and lack central coordination" common in organised criminal groups.⁵⁹ The main path to Thai fishing boats were recommendations from friends, relatives or acquaintances about employment opportunities, who provide information on specific companies, advice of ports, and contact details for a broker or boatswain looking to hire.⁶⁰ In Vidyamali Samarasinghe's work on sex trafficking in Cambodia, she notes that recruitment into the trade is done by those one would call "ordinary people" – friends, boyfriends and family members.⁶¹

A blind spot in the legal justice system exists when there is mismatch between what is regarded as human trafficking internationally and how and why it actually happens in domestic contexts. Human trafficking in Asia is often made possible because individual access to resources is restricted by imperfections in the labour and financial markets. The studies above show that traffickers who are familiar with local systems, power networks and social structures are able to mask TIP with the appearance of routine transactions in an imperfect market and navigate around anti-trafficking laws. This partly explains low prosecution and conviction rates for human trafficking cases and points to the need for locally-relevant governance frameworks and partnerships that engage stakeholders outside the criminal justice system. They include the academia, private sector, trade unions, media, healthcare providers, financial institutions, industrial standard boards and associations.

CONCLUSION

The legacy of the UNCTOC and the Trafficking Protocol is the regional and national anti-trafficking legal frameworks molded in their image. As the discussion in this NTS Insight shows, this is inadequate for tackling human trafficking in East Asia. The design of the UNCTOC and the Trafficking Protocol is the result of negotiations and compromises of their time. They view human trafficking predominantly through the lens of transnational crime, nebulously define the boundaries of human trafficking and are generally insensitive to regional and national human trafficking practices. This leaves much of human trafficking in East Asia hidden in the shadows of the law. If the law is to be the bedrock of counter-trafficking measures in the region, human trafficking terminologies and definitions must be clearly defined, understood by law enforcers and responsive to the region's human trafficking context and emerging trends. The challenge for regional and national governments now is to bridge the gap between what the law aspires to achieve and law enforcement realities on the ground.

⁵⁷ See UN General Assembly Resolution 55/25 of 15 November 2000, Available at:

https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf.

⁵⁸ Renshaw, C., "Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance", (2006),p.628

⁵⁹ Human Rights Watch, "Hidden Chains: Rights Abuses and Forced Labour in Thailand's Fishing Industry", (Human Rights Watch, 2018),p.30, Available at: https://www.hrw.org/sites/default/files/report_pdf/thailand0118_report_web.pdf

⁶⁰ Ibid

⁶¹ Samarasinghe, Vidyamali, "Female Sex Trafficking in Asia: The Resilience of Patriarchy in a Changing World", (New York: Routledge, 2008),p.95

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