The Globalisation Paradox and the Implementation of International Human Rights: the Function of Transnational Networks in Combating Human Trafficking in the ASEAN Region

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Abstract

In *A New World Order,* Anne-Marie Slaughter describes the "globalisation paradox" as "the need for global institutions to solve collective problems that can only be addressed on a global scale" juxtaposed with "the infeasibility and undesirability" of world government and its concomitant threat to individual liberty (Slaughter, 2004). Slaughter's solution – and the solution offered by a number of scholars in the neo-liberal tradition – is governance via transnational networks of national government actors. It is both a descriptive and a prescriptive programme for a new world order. Neoliberals envisage the aggregate elements of the state – regulators, legislators, judges – interacting with their foreign counterparts in a decentralized and dispersed way to conduct the business of global governance.

This paper explores the application of global network theory in the field of human rights. In particular, it focuses on the work of a regional network of national human rights institutions, the Asia Pacific Forum of National Human Rights Institutions (APF). Since 1996, the APF has promoted regional cooperation on human rights issues by providing a forum for the region's national human rights institutions (NHRIs) to share expertise and information on best practice, to undertake joint projects and to develop joint positions on issues of common concern. I examine the APF's function in relation to the issue of human trafficking as an example of the interactive dynamic generated by and between network members in their efforts to address this transnational human rights issue.

Introduction

The underbelly of globalization is transnational crime – the cross-border trade in weapons, drugs and humans. The focus of this paper is trafficking in persons, an issue of particular concern to governments and human rights activists in the Asia Pacific region. The issue concerns governments because trafficking is perceived as undermining a state's sovereignty. Trafficking highlights a government's inability to secure its national borders, enforce immigration restrictions or prevent criminal activities within its territory (Gallagher 2001). From a human rights perspective, the rights violations associated with the practice of trafficking are egregious; victims suffer sexual and physical abuse, deprivation of liberty, forced servitude and often death (Wuiling 2006; Bertone 2000). The impact of the current global financial crisis will exacerbate the problem of human trafficking – as the legitimate institutions of capitalism crumble, the trade of the desperate by the debased is likely to flourish.

This paper considers the efforts made by the Association of South East Asian Nations (ASEAN) to combat trafficking in persons. It describes the concerted action taken by the region's leaders and notes that this action has largely been taken *outside* the regime of the United Nations Conventions and Protocols that are designed to address this aspect of transnational crime. Few ASEAN nations are parties to the UN *Trafficking Protocol* and no regional mechanism for the protection of rights currently exists in the Asia Pacific. But human trafficking is patently a transnational problem that requires an orchestrated response from states at a regional level. The solution that has emerged from the ASEAN nations is the formation of trans-governmental networks. Organs within each state – police departments, immigration departments, the military, legislators – have forged transnational networks with the relevant organs in other states. In the words of Anne-Marie Slaughter, the state has "disaggregated" in order that its constituent elements, with their foreign counterparts, can effectively address a transnational problem (2004).

I suggest that transnational networking amongst the ASEAN nations in relation to the issue of human trafficking has had (and will continue to have) both domestic impact and international implications. At the domestic level, networks have encouraged, amongst their most active members, convergence in relation to domestic legislation designed to deal with the issue of trafficking. The advantage of compatible legislation across a region is that it facilitates cooperative efforts in addressing a shared problem. At the international level, networking has encouraged a greater appetite on the part of states for the formal institutions of liberal internationalism, such as regional and international conventions and treaties. Efforts to address trafficking within the ASEAN would seem to support Kal Raustiala's claim that "rather than being competitive architectures of cooperation, transgovernmental cooperation and liberal internationalism are often synergistic" (2002:6).

The Asia Pacific Region: a region of both origin and destination for traffickers
Despite abundant evidence that the practice of trafficking is pervasive in the Asia Pacific region, and despite acknowledgement that the issue is one of shared concern to the region's governments, reliable data about trafficking is difficult to obtain. It appears that although trafficking occurs in all regions of the world, the problem is particularly pervasive in Asia. Figures indicate that "the largest number of children and women trafficked are within or from Asia" (Piper 2005:203). Of the countries within the South East Asian region, Indonesia has emerged as a sending, receiving and transit country for international trafficking. The Philippines has been noted as a trafficking source country "of great significance" (Piper

2005:204). Cambodia has recently become subject to attention for trafficking for the purpose of child sex tourism. Of the ten ASEAN countries, Thailand is regarded "the hub" of trafficking, a "source, transit, and destination country for men, women, and children trafficked for the purposes of commercial sexual exploitation and forced labour" (Piper 2005:204). Laos, Vietnam, Thailand, the Philippines and Indonesia all find themselves listed as "Tier 2" countries in the 2008 United States Trafficking in Persons Report. Malaysia was listed in 2008 as being on the "Tier 2 Watch List;" which is reserved for countries that require additional scrutiny as a consequence of not making efforts to address trafficking over the previous year. Overall, "the emerging picture of South East Asia is as a region of both origin and destination for traffickers … the sub-region seems to combine all phases of the trafficking process" (Kangaspunta 2004:93).

International Efforts to Address the Problem of Trafficking in Persons
There are several international conventions that apply to the issue of human trafficking,[1] but since 2000, efforts at the international level to combat the problem have centred on the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ("the *Trafficking Protocol*"). The *Trafficking Protocol* is one of three protocols attached to the *Convention against Transnational Organised Crime*. Article 1 of the Convention defines its purpose: "to promote cooperation to prevent and combat transnational organized crime more effectively." Gallagher describes the Convention as "the first serious attempt by the international community to invoke the weapon of international law in its battle against transnational organised crime" (Gallagher 2001:976). It was designed to overcome what was one of "the principal obstacles to effective action against transnational organised crime.....lack of communication and cooperation between national law enforcement authorities" (Gallagher 2001:976).

The *Trafficking Protocol* has three stated purposes: (a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and (c) to promote cooperation among State Parties in order to meet those objectives (*Trafficking Protocol*, Article 2). The protection provisions, detailed in Section II of the *Protocol*, are discretionary. States are encouraged, "in appropriate cases and to the extent possible under its domestic law," to adopt measures such as protecting the privacy and identity of victims of trafficking and implementing measures to provide for the physical safety and psychological and social recovery of victims of trafficking in persons (*Trafficking Protocol*, Article 6).

The Trafficking Protocol aims to be both expressive (of human rights concerns) as well as regulatory (in order to solve the crime problem of trafficking). The principal deficiencies of the Protocol are that it contains few mandatory obligations, provides for no monitoring regime and conflates issues of crime prevention and victim protection. The Protocol does not provide a prescription for concerted state action. Amongst those states that have ratified the *Protocol*, further agreements, memorandum of understanding, bilateral and multilateral frameworks for action have been established. The Protocol has provided an incentive for regulators to cooperate and institutionally facilitate the creation of responsive networks in order to carry out the purpose of the Protocol.

ASEAN's Response to the Issue of Trafficking in Persons
In light of the importance attached by ASEAN nations to the notion of sovereign statehood and the affront that trafficking presents to this notion, the pervasiveness of trafficking in the Asia Pacific region and the patent need for efforts to combat trafficking to be undertaken on a

regional scale, it appears at first blush remarkable that there is such a low level of ratification of the *Trafficking Protocol* amongst the 10 ASEAN countries. Brunei, Malaysia, Singapore, and Vietnam have neither signed nor ratified the Protocol. Indonesia and Thailand have signed but not ratified, while only Myanmar, Cambodia, Laos and the Philippines have both signed and ratified the *Trafficking Protocol*. But despite this lack of engagement at the international level, the countries of South East Asia have for many years pursued joint initiatives to combat trafficking.

The ASEAN Vision 2020, adopted by ASEAN leaders at the Second Informal Summit in 1997, foreshadowed the evolution of agreed rules of behaviour and cooperative measures to deal with problems that can be met only on a regional scale, including drug trafficking, trafficking in women and children and other transnational crimes. The following year, at the 6th ASEAN Summit in December 1998, the leaders of the ASEAN nations adopted the "Hanoi Plan of Action", which began the process of articulating a platform for collaboration in combating trafficking.

After years of declarations and statements concerning the need for concerted action to address transnational problems such as trafficking, in 2002, the ASEAN countries agreed on a Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime. The Plan sets out a detailed range of obligations of ASEAN member states in relation to the 'crime control' aspects of addressing human trafficking, such as requirements for information exchange between member countries, establishment of multilateral or bilateral legal arrangements to facilitate apprehension, investigation, prosecution and extradition of traffickers, exchange of witnesses, sharing of evidence, inquiry, seizure and forfeiture of the proceeds of the crime in order to enhance mutual legal and administrative assistance among ASEAN member countries.

It appears that these informal frameworks for cooperation have generated momentum towards the establishment of an ASEAN Convention on Trafficking in Persons. In their 2007 Joint Communiqué, the ASEAN leaders stated: "we recognised the increasing trend of the offences of trafficking in persons in our region. In this regard, we agreed to explore the possibility of developing an ASEAN Convention on Trafficking in Persons and tasked SOMTC [Senior Officials Meeting on Transnational Crime (SOMTC)] and its Working Group on Trafficking in Persons to further study the possibility of such a convention and whether it will add value" (Official Joint Communique ASEAN, 2007).

ASEAN's concern about the issue of trafficking appears authentic, in light of the threat that trafficking presents to the authority of the nation-state. Trafficking represents criminality and a consequent threat to state security. Trafficking undermines orderly, legal migration. Clandestine immigration, carried out under the auspices of criminal networks, has the potential to undermine relations between states and threaten the cherished "peace and security" that legitimises ASEAN. It is entirely comprehensible that ASEAN states should place the issue of trafficking high on its agenda and frame the issue within the parameters of "crime control".

Human Rights and Trafficking in the Asia Pacific
In 1996, a nascent regional human rights organisation, the Asia Pacific Forum of National Human Rights Institutions (APF), held its first meeting in Darwin, Australia. The meeting was attended by representatives of the national human rights commissions of Australia, India,

Indonesia and New Zealand, as well as by representatives of the United Nations Office of the High Commissioner for Human Rights (OHCHR), non-governmental organisations and government representatives of countries that had yet to establish human rights commissions. The participants at this meeting recognized that regional cooperation was essential to ensure the effective promotion and protection of human rights. They also recognized that national institutions were an essential part of the architecture of human rights implementation in the Asia Pacific region, which possessed no regional human rights commission or court. Since 1996, APF's membership has grown to seventeen.[2] Of the ASEAN countries, Thailand, Philippines, Indonesia and Malaysia have established NHRIs and the governments of Cambodia and Vietnam have made commitments to do so.

Despite the existence of international institutions and the many human rights mechanisms of the United Nations, the state remains primarily responsible for the protection and promotion of human rights. Within the state, national human rights institutions (NHRIs) play a central role in encouraging states to meet their responsibilities. NHRIs are Janus-faced, bodies created by the state, with a mandate to promote and protect the human rights of the populace, but also international actors with a mandate to engage with the United Nations and to promote its treaties and policies.

The potential strengths of a national institution, vis-a-vis a non-governmental organisation or a United Nations body, are the result of a national commission's unique status within the state. NHRIs are permanent bodies, established by statute or constitution, with a mandate that requires them to educate the public about human rights, advise the government of its obligations and responsibilities in relation to intentional human rights and protect the human rights of citizens. They should also be able to hold the government accountable for any failure to adequately protect the rights of those within its territory. NHRIs are themselves accountable to civil society, to the government, to their regional and international membership associations and to the international community.

At the 1999 meeting of the International Coordinating Committee of National Human Rights Institutions, the High Commissioner for Human Rights noted that national human rights institutions are "an underutilized resource in the fight against trafficking" (Robinson, 1999). That same year, at the Fourth Annual Meeting of the APF, Anne Gallagher, Adviser to the High Commissioner on Trafficking, addressed the APF's members on the subject of "The Role of National Institutions in Advancing the Human Rights of Women; a Case Study on Trafficking in the Asia-Pacific region." The APF's Advisory Council of Jurists was asked to prepare a reference on trafficking, regional workshops on the issue were held and a Trafficking Focal Point Network was established between member institutions and the APF. The APF recognized that the issue of human trafficking required a multi-faceted response; a domestic legal framework within the state and a multi-lateral approach at the regional level. The network structure of APF was well suited to this purpose. The mandate of national human rights institutions; to promote and protect human rights; generated a response to the issue of human trafficking that placed the protection of human rights at the centre of any measures taken to prevent or respond to trafficking.

The networking activities of the four ASEAN NHRIs on the issue of trafficking have been notable. In 2004, the "ASEAN Four" decided to hold regular consultation meetings among themselves, build closer cooperation, and develop practical and feasible plans to promote and protect the human rights of trafficked persons at the regional level. In June 2007, the

"ASEAN Four" agreed to carry out a series of programs and activities in relation to five human rights issues of common concern: (a) suppression of terrorism while respecting human rights, (2) human rights aspects of trafficking in persons; (3) protection of the human rights of migrants and migrant workers (4) implementation of economic, social and cultural rights and the right to development and (e) enhancement of human rights education. The ASEAN Four also agreed to encourage other ASEAN countries to establish NHRIs, so that the cross-border dialogue on key issues of concern could engage other nations in the region as well.

One of the major functions of a NHRI is to review prospective government legislation to ensure that laws comply with a state's international human rights obligations. Where no formal obligations exist, NHRIs encourage states to draft laws that nonetheless meet the expectations of the international community in relation to human rights standards. Each of the "ASEAN Four" nations that possess an NHRI has recently passed anti-trafficking legislation, as has Cambodia. In June 2008, Thailand introduced new legislation, the *Ant-Trafficking in Persons Act,* which replaced the *Measures in Prevention and Suppression of Trafficking in Women and Children Act*, B.E 2540 (1997). The new Act extends protection to male victims of trafficking, and significantly strengthens the protection for victims of trafficking. In 2003, the Philippines passed the Republic Act 9208 or the *Anti-Trafficking in Persons Law of the Philippines*. This Act sets the issue of trafficking within a human rights framework and also provides a broad definition of "trafficking," deeming the issues of "consent" irrelevant. In April 2007, Indonesia's president signed into law a comprehensive anti-trafficking bill that defines the act of human trafficking in consonance with the Trafficking Protocol. The Malaysian House of Representatives passed the *Anti-Trafficking in Persons Act* in May 2007. This Act also provides an expansive definition of trafficking, deems consent irrelevant and provides some measures for the care and protection of trafficked persons (*Anti-Trafficking in Persons Act, Malaysia,* 2007, Part V)

Amongst the "ASEAN Four" that have NHRIs and are members of the APF, there is evidence of a "policy convergence" in relation to the issue of trafficking that has ultimately generated domestic legislation which is compatible with that of other states within the "NHRI network" and which largely conforms to international standards. A shared understanding of the problems of international trafficking and shared approach to addressing them, through similar legislative measures, is the basis for effective cooperation in addressing transnational problems. These measures and this effect has been largely outside the orbit of international law (Alvarez 2007) reflected in the United Nations *Trafficking Protocol*.

Some commentators have stated that such "softer" forms of cooperation are indicative of ASEAN's aversion to "legalisation" (Kahler 2000:549). Rather than an "aversion" to legalisation, I suggest that implementation of human rights through networks might suggest an organic approach to engagement with international law; a gradual understanding and acceptance of international standards, followed by a process of building domestic and regional capacity to meet those standards, leading to participation in formal international treaties, if there is a perception that there is "value added" in taking that final step. It is a frugal approach to engagement with the structures of international law, rather than an aversion to engagement. Efforts to address trafficking in ASEAN would seem to support Alvarez' argument that:

> "international law and their institutions, in all their increasing diversity, can
> no longer – if they ever were – be confined to top-down, precise, forms of

obligation that either emerge from international law makers with expressly-delegated law-making authority or stem from judges authorised to interpret and enforce the law through binding judgments. International legal sources are no longer confined to treaty, custom or general principles but include a welter of "soft law" whose content and legal effects very much involve the discourse of law." (2007:26)

Conclusion: Whither human rights?

International law has traditionally held the state to be the sole relevant actor in international affairs (Garcia 2005). States behaved according to their perceived self-interest and a rational calculation of their relative power (Hurd 2007). The United States unilateral assessment and grading of other states' efforts to combat trafficking, published in its yearly "Trafficking in Persons Report", with the consequence for funding and aid cuts to those countries which the United States considers are not improving their performance, is based on a rationalist conception of state action.

Globalization challenges the primacy of the state as the principal unitary independent actor. The interdependence and interconnectendness of systems of trade, finance, security and environmental protection, have given birth to powerful new actors on the international stage. Among the most significant of these are transgovernmental networks. The language of these actors is not longer the "carrot or the stick" of the rationalist, but the language of socialization, influence and persuasion.

The work of the ASEAN nations that possess human rights institutions, the "ASEAN Four," in acting to combat trafficking, has been notable. The norms of international human rights have, to a certain extent, been translated into their indigenous context with the assistance of a national body that subscribes to international standards upheld through the operation of a regional network of national human rights commissions. Through an incremental process that engages many domestic and international actors, the parameters of the problem of human trafficking are being redefined from a human rights perspective.

The international legal system functions largely upon a system of voluntary adherence to norms. Understanding and acceptance of norms are a prerequisite to voluntary adherence. I suggest that more attention should be paid to the processes that produce concordance, to domestic institutions, to their regional networks, and to the interactions between them, from which shared understandings are generated.

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[1] For example, ILO Convention 182, Elimination of Worst Forms of Child Labour, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Optional protocol to the Convention on the Rights of the Child in Armed Conflict, ILO Convention 29, Forced Labour, ILO Convention 105, Abolition of Forced Labour

[2] Full members of the Asia Pacific Forum of National Human Rights Institutions are: Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Korea, Sri Lanka, Thailand, Timor Leste. Palestine, Qatar and the Maldives are Associate members.

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