

**HUMAN TRAFFICKING IN ASIA:
INCREASING INDIVIDUAL AND STATE
ACCOUNTABILITY THROUGH EXPANDED
VICTIMS’ RIGHTS**

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I. INTRODUCTION

Freedom and justice are sweet dreams for individuals who are forced or tricked into serving others against their will—who are trafficked for the purpose of exploitation.¹ They are sweet dreams because freedom and justice are not guaranteed and often not realized together. Individuals who have suffered as victims of trafficking may be freed only later to find no way of pursuing justice or redress for the wrongs they suffered. Instead, their traffickers go unpunished and continue to profit. Meanwhile, governments often ignore victims' needs and sometimes even punish victims as criminals by quickly deporting them, denying them opportunities for compensation, or holding them accountable for criminal activities they performed under duress. Shipped to and from different states, either against their will or by deception, victims suffer violations and denials of essential rights on account of both traffickers and governments. Yet, neither traffickers nor governments are adequately held accountable for their actions, or the lack thereof, and victims are left without justice.

Although data is inconsistent as to the actual numbers of individuals trafficked each year, even modest estimates indicate that trafficking is a significant problem with many victims who are not receiving justice.² States around the world have agreed to work together to address trafficking; however, not all states have followed through on their commitments, and those that have taken action have failed to adequately deter criminals and protect victims' rights.³ Despite the fact that the United States and various international bodies put political pressure on states to take action, some states do little in response.⁴ Some states attempt to address the problem, but most have primarily done so through a criminal justice approach—establishing laws and increasing law enforcement activities.⁵ As a result, victims' voices are lost. States are not listening to the needs of victims and consequently are not acting to ensure that victims receive adequate protection, remedies, and ultimately

¹ For a more expansive definition of trafficking, see Protocol to Prevent, Suppress, and Punish Trafficking in Persons, *opened for signature* Dec. 12, 2000, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at arts. 3, 5, U.N. Doc. A/45/49 (Vol. I) (2001), (*entered into force* Dec. 25, 2003) [hereinafter Trafficking Protocol] and ANTI-HUMAN TRAFFICKING UNIT, UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE EFFECTIVENESS OF LEGAL FRAMEWORKS AND ANTI-TRAFFICKING LEGISLATION, UN.GIFT B.P.:023 (February 2008).

² See *infra* Part III.

³ See *infra* Parts II-III.

⁴ See *infra* Parts III-IV.A.

⁵ See *infra* Part IV.B.

justice for the wrongs they have suffered. Victims' rights are not being protected, and states are neglecting important opportunities to let victims help hold traffickers monetarily accountable and thereby potentially deter future trafficking.⁶

Many of the states that fail to protect victims' rights are also among the highest ranked origin and destination states for trafficking victims.⁷ This is especially true in Asia where a significant number of victims are transported between states and are denied opportunities to obtain compensation and justice.⁸ Despite existing political pressure on Asian states to make changes, many of these states do not do enough to protect victims' rights and face increasing numbers of trafficking victims.⁹ A new mechanism for holding traffickers and governments accountable must be designed to ensure that victims' voices are heard and their rights are protected.¹⁰ This would be enabled by the creation of an international court where individuals have standing to bring claims for relief against traffickers for causing harm and against states for failing to protect victims' rights.

II. CURRENT STATE ACCOUNTABILITY MECHANISMS

During the past hundred years, states have recognized trafficking in human beings as a problem and have ratified treaties agreeing to address it.¹¹ Generally, these treaties have lacked any comprehensive

⁶ *Id.*

⁷ Compare UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), *TRAFFICKING IN PERSONS: GLOBAL PATTERNS* 43, 44-45 (2006), available at <http://www.unodc.org/documents/human-trafficking/HT-globalpatterns-en.pdf> (last visited Apr. 20, 2009) [hereinafter UNODC GLOBAL PATTERNS] (ranking Cambodia, Thailand, and Vietnam with medium to very high incidences of trafficking), with discussion *infra* Part III.B.

⁸ See *supra* note 6. Because Asian states have been recorded as having some of the highest rates of trafficking as compared to other states, this paper will focus on assessing whether victims in Asian states are receiving adequate protection of their rights. See Kara C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 CASE W. RES. J. INT'L L. 45, 47 (2002) ("Most trafficking victims come from Southeast Asia, the former Soviet Union and Eastern Europe. . . . Nearly one-third of the world's total trafficking originates in Southeast Asia where traffickers lure women and children into Thailand, Hong Kong, Singapore, Japan, Australia, and the United States.").

⁹ See *infra* Part III.A-B.

¹⁰ See *infra* Parts IV-V.

¹¹ See Trafficking Protocol, *supra* note 1; Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature Mar. 21, 1950, 96 U.N.T.S. 271, available at <http://untreaty.un.org/English/TreatyEvent2003/Texts/treaty8E.pdf> (last visited Apr. 20, 2009) [hereinafter UN 1950 Convention] (consolidating other international trafficking treaties that had been in effect since 1904); Elizabeth F. Defeis,

approach to address the problem even though they may have listed specific types of actions that states were required to prohibit.¹² Within the last decade, however, states and various international governmental organizations (IGOs) have begun outlining specific actions (beyond just enacting legislation) that states must take to combat trafficking.¹³ The categorical lists of actions, found in various types of international agreements (e.g., declarations, memorandums of understanding, conventions) and in United States legislation, encompass a more comprehensive approach to trafficking than previously existed, and provide a metric by which a state's success or failure may be judged. Although states are not formally judged by a court of law as to their compliance with trafficking agreements, states are held accountable through political pressure.

The political pressure takes two main forms. First, IGOs, and their member states, strongly encourage states to comply with standards established in international agreements. Failure to join the agreements and comply with the standards therein may result in strained state relations or negative publicity.¹⁴ Second, the United States imposes standards and expectations adopted in its own legislation – the Trafficking in Victims Protection Act. Failure to meet the United States' standards opens a state up to public reprimand or monetary sanctions.¹⁵ In essence, both forms of political pressure attempt to hold states

Protocol to Prevent, Suppress, and Punish Trafficking in Persons—a New Approach, 10 ILSA J. INT'L & COMP. L. 485, 485-86 (2004).

¹² See, e.g., UN 1950 Convention, *supra* note 11. The fact that state accountability has been delayed may be due in part to the fact that most treaties (prior to 1997) reflect an individualist approach to addressing the problem. In 1997, states began signing treaties in which they agreed to work together to combat the problems of trafficking. See, e.g., ASEAN Declaration on Transnational Crime, Manila, signed Dec. 20, 1997, available at <http://www.aseansec.org/5640.htm> (last visited Apr. 20, 2009) [hereinafter ASEAN Declaration].

¹³ See, e.g., Trafficking Victims Protection Act (TVPA), 22 U.S.C. §§ 7101–10; 18 U.S.C. §§ 1590–94 (2000 & Supp. 2004); Trafficking Protocol, *supra* note 1; SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, *opened for signature* Jan. 2002, available at <http://www.december18.net/traffickingconventionsSAARC2002.pdf> (last visited Apr. 20, 2009) [hereinafter SAARC Convention]; see also Emmers et al., *Institutional Arrangements to Counter Human Trafficking in the Asia Pacific*, 28 CONTEMPORARY SOUTHEAST ASIA 490, 494-504 (2006) (showing that there has been increased institutional responses to the problem of trafficking within the last ten years and that these responses set forth more detailed approaches as to how the problem should be addressed).

¹⁴ See *infra* Part II.A.

¹⁵ See *infra* Part II.B.

accountable for taking action and complying with international standards in regard to trafficking.

A. *Pressure via International Agreements*

International agreements represent one of the primary ways that state governments and IGOs attempt to hold states accountable and bring about change.¹⁶ Some states sign agreements without an IGO,¹⁷ but the most internationally publicized agreements, and thus those potentially bringing the most political pressure, are those established through IGOs. There are three main IGOs to which Asian states belong and from which they receive political pressure: the Association of Southeast Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC), and the United Nations. Each of these have agreements addressing trafficking and encouraging or requiring member states to take specific actions, but each of the agreements lack stringent enforcement mechanisms to address violations or non-compliance.

ASEAN, through its ministers and representatives, adopted a Declaration on Transnational Crime that, among other things, encourages member states to take action in regard to trafficking and authorizes ASEAN to assist member states in taking action.¹⁸ Not only does the declaration not require state action, ASEAN lacks the authority to force member states to take action under one of its founding principles—to respect the sovereignty of member states and not interfere in their internal affairs.¹⁹ Consequently, ASEAN's effectiveness lies in its ability to pressure states into action.

¹⁶ See John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 46 (Richard B. Lillich et. al. ed. 2006) (“[I]n the nineteenth and early twentieth centuries an increasing number of treaties were entered into[,] the purpose of which was to protect, if only indirectly, the rights of certain classes of people.”).

¹⁷ See, e.g., Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region, Oct. 29, 2004, *available at* http://www.no-trafficking.org/content/pdf/final_commit_mou.pdf (last visited Apr. 20, 2009).

¹⁸ See ASEAN Declaration, *supra* note 12.

¹⁹ See *id.*; Association of Southeast Asian Nations, Overview, *available at* <http://www.aseansec.org/147.htm> (last visited Apr. 20, 2009) [hereinafter ASEAN Overview]; Pokpong Lawansiri, *Can Asean Learn to Put People First?*, THE IRRAWADDY, Nov. 26, 2008, *available at* http://www.irrawaddy.org/opinion_story.php?art_id=14696 (last visited Apr. 20, 2009) (“Although the charter emphasizes Asean’s commitment to promoting and protecting human rights and espouses many other positive principles, such as social justice, respect for the rule of law, good governance, and respect for the UN Charter and international law, the grouping still insists that its core principles are non-interference and respect for consensus among member states.”).

SAARC provided for its member states the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, which takes a more comprehensive approach to the problem of trafficking than the ASEAN declaration.²⁰ Member states that signed the convention became obligated to comply with its requirements,²¹ but like ASEAN, SAARC lacks the authority to force action. Instead, SAARC merely provides a forum for member states to work together,²² thus leaving the force and effect of the convention in the form of political pressure from other member states.

In 2000, the United Nations opened for signature the Convention Against Transnational Organized Crime as well as the supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol).²³ The Trafficking Protocol clearly defines “trafficking” and the types of actions ratifying states must and ought to take in the fight against human trafficking.²⁴ States are generally required to adopt programs and policies “(a) [t]o prevent and combat trafficking in persons; and (b) [t]o protect victims of trafficking.”²⁵ More specifically, states are required to criminalize trafficking, to provide the possibility of compensation for victims, and to appropriately facilitate repatriation, though states are only encouraged to implement many of the specific measures designed to protect victims.²⁶ Despite the requirements, neither the Convention nor the Trafficking Protocol provides any other specific enforcement

²⁰ See SAARC Convention, *supra* note 13.

²¹ The SAARC Convention “requires” specific actions of states that ratify it. See *id.*

²² South Asian Association for Regional Cooperation, available at <http://www.saarc-sec.org/> (last visited Apr. 20, 2009) (“SAARC provides a platform for the peoples of South Asia to work together in a spirit of friendship, trust and understanding. It aims to accelerate the process of economic and social development in Member States.”).

²³ United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, annex I, U.N. Doc. A/RES/55/25 (Nov. 2, 2000); Trafficking Protocol, *supra* note 1.

²⁴ Trafficking Protocol, *supra* note 1. The Trafficking Protocol is the first global agreement to contain a detailed definition of trafficking. The United Nations Convention against Transnational Organized Crime and Its Protocols, available at <http://www.unodc.org/unodc/en/treaties/CTOC/index.html> (last visited Apr. 20, 2009) [hereinafter UN Convention and Protocols]; see also Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 157 (2006).

²⁵ Trafficking Protocol, *supra* note 1, at art. 9.

²⁶ Trafficking Protocol, *supra* note 1, at arts. 5-6, 8. Many human rights groups have criticized the Protocol because “it did not in fact require governments to provide any services to victims of trafficking and it provided no basis for insisting that governments treat victims of trafficking different from undocumented migrants.” Defeis, *supra* note 11, at 490. The groups have more specifically criticized it for failing to protect victims by protecting their identity or ensuring their safe return home. *Id.*

mechanism. States are not fined or otherwise penalized for failing to abide by or implement the called for measures.²⁷ Instead, their force and effect lies in the political pressures of strained state relations and negative publicity.²⁸

B. Pressure by the United States

In contrast to international agreements, the United States took a different approach by assuming the role of an independent monitoring body. In the Trafficking in Victims Protection Act (TVPA), the United States gave itself the authority to require certain minimum actions by other states and then assigned itself the job of holding other states accountable by publicly reporting the activities of each state and threatening sanctions for states taking little or no action to comply with minimum standards.²⁹

Each year, the United States publishes a Trafficking in Persons (TIP) Report that provides factual information and analysis regarding the efforts of more than 150 states to prevent trafficking, protect victims, and prosecute traffickers.³⁰ The report also contains a tiered list of the states, categorized based on the actions they have taken, or the lack thereof.³¹ States that fail to make “significant efforts” to comply with the United States’ minimum standards are essentially publicly reprimanded by being placed in the lowest tier and then subjected to monetary sanctions—the

²⁷ See generally UN Convention and Protocols, *supra* note 24 (noting that these instruments were designed “to foster and enhance close international cooperation in order to tackle [trafficking and other] problems”).

²⁸ This negative publicity may come from member states that have signed and ratified these instruments, or it may come from other sources such as the reporting mechanism in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The CEDAW prohibits trafficking in women but provides no definition of trafficking and provides no other guidance to states on what actions they are expected to take. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46. The Trafficking Protocol, however, provides the standards by which the CEDAW can question the states and make recommendations for actions. See generally CEDAW 34th Session, Initial Reports: Cambodia (2006) (discussing in the Concluding Comments the efforts put forth by Cambodia and the further actions the government needs to take to combat trafficking), available at <http://www.un.org/womenwatch/daw/cedaw/34sess.htm> (last visited Apr. 20, 2009).

²⁹ Trafficking Victims Protection Act (TVPA), 22 U.S.C. §§ 7101–10; 18 U.S.C. §§ 1590–94 (2000 & Supp. 2004).

³⁰ *Id.* § 7107(b); see, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 44, 52–292 (2008) [hereinafter TIP REPORT 2008].

³¹ See, e.g., TIP REPORT 2008, *supra* note 30, at 44.

withholding of “nonhumanitarian, nontrade-related assistance.”³² Together, the TIP Reports, which are widely available,³³ and the use of sanctions place increased pressure on states to take aggressive action against human trafficking.

In sum, the various international agreements and the United States’ legislation provide some means of holding states accountable, but the effectiveness of current mechanisms is questionable. Many states do not comprehensively address the trafficking problem, and the estimated number of people trafficked remains high.³⁴

III. EFFECTIVENESS OF CURRENT ACCOUNTABILITY MECHANISMS

While some Asian states have made progress in anti-trafficking efforts, others are not doing enough. Research and reports suggest that while there has been some measurable increase in effort most states still do not sufficiently protect victims’ rights.³⁵

In addition to the widespread lack of state action, the efforts put forth so far have not lessened the problem. The overall number of trafficking victims has at least stayed the same if not increased over the past eight years, since the enactment of the TVPA and the creation of the United Nations Trafficking Protocol.³⁶ When the TVPA was enacted in 2000, the United States estimated the number of trafficking victims across

³² 22 U.S.C. § 7107(d).

³³ These reports are made available to the public on the internet. See U.S. Dep’t of State, Trafficking in Persons Report, available at <http://www.state.gov/g/tip/rls/tiprpt/> (last visited Apr. 20, 2009).

³⁴ Cf. Mike Dottridge, *Introduction*, in COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 20 (2007) (“It seems that within the US administration there is inadequate awareness of what the real impact has been of either the annual TIP report or other anti-trafficking measures supported by the US. This concerns both the possible contribution they make to reducing the number of people trafficked and their other, more counter-productive effects.”).

³⁵ See discussion *infra* Part III.B.

³⁶ Many people suggest that the amount of trafficking taking place continues to increase. See, e.g., Emmers et al., *supra* note 13, at 491 (“The problem of trafficking has emerged as a key policy issue in the Asia-Pacific as ever larger numbers of people are trafficking from, across, and to regional [Asian] states and beyond for labour and/or sexual exploitation.”); Ryf, *supra* note 8, at 46 (“Trafficking is the world’s fastest growing criminal activity . . .”); Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, MIGRATION INFORMATION SOURCE, March 2005, available at <http://www.migrationinformation.org/Feature/display.cfm?ID=294> (last visited Apr. 20, 2009) (“In recent years, the smuggling of human beings across international borders has grown rapidly.”).

the globe at 700,000.³⁷ By 2006, that number increased to 800,000.³⁸ The United States' numbers, although among the most frequently cited, may not be completely reliable,³⁹ but they are likely conservative estimates, indicating a continued problem.⁴⁰ In the 2008 Trafficking in

³⁷ 22 U.S.C. § 7101(b)(1) (2000) ("At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.").

³⁸ U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 8* (2007) [hereinafter *TIP REPORT 2007*] ("[A]ccording to U.S. Government-sponsored research completed in 2006, approximately 800,000 people are trafficked across national borders, which does not include millions trafficked within their own countries.").

³⁹ The problem with the current estimates is that they are based on data that is full of gaps. Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 *CRIME & JUSTICE* 133, 217-18 (2006) ("Despite widespread political and media publicity, trafficking for prostitution is not among the priorities of everyday crime prevention work in any country. Hence, accurate data are sparse. . . . [The] available data are sporadic and full of gaps..."); June JH Lee, *Human Trafficking in East Asia: Current Trends, Data Collection, and Knowledge Gaps*, 43 *INT'L MIGRATION* 165, 168 (2005) ("Apart from the US Department of State's [TIP] report, our literature review suggests that newspaper articles remain the most frequently cited source of information on trafficking in East Asia. There is neither a comprehensive regional report that examines the trafficking situation in the East Asian region as a whole, nor any reputable national reports that can be reviewed and critically evaluated."); UNODC *GLOBAL PATTERNS*, *supra* note 7, at 43, 44-45 ("Due to its clandestine nature, accurate statistics on the magnitude of the human trafficking problem at any level are elusive and unreliable.").

"Worldwide estimates of the numbers of victims seemingly have not changed much, when cross-border trafficking and trafficking within countries are taken together."

Congressional Report Services, CRS Report of Congress 20 (June 24, 2005), *available at* <http://fpc.state.gov/documents/organization/50256.pdf> (last visited Apr. 20, 2009). *Cf.* UNIAP, FAQ Question 6, *available at* <http://www.no-trafficking.org/content/FAQ/faq.htm> (last visited Apr. 20, 2009) ("There are, in fact, clear indications from the field that there has been a decrease in trafficking in some areas. This is the case for example for domestic trafficking of Thai children. In other areas the problem seems to be growing – as in the case of Lao, Cambodia and Myanmar nationals trafficked into workplaces in Thailand.").

⁴⁰ *See* Lehti & Aromaa, *supra* note 39, at 218-19 (concluding "that current estimates of the absolute volume of prostitute-related trafficking are [probably] underestimated rather than overestimated"). Sources other than the United States provide much higher estimates of the number of victims. *See, e.g.,* DIRECTOR-GENERAL, INT'L LABOUR OFFICE, *A GLOBAL ALLIANCE AGAINST FORCED LABOUR* 46-48 (2005) (finding that "approximately 2.5 million [people] are victims of trafficking at any point in time" and that "only a few countries, such as the United States and the Netherlands, have published their own estimates of the number of persons trafficked into their countries"); UNITED NATIONS GLOBAL INITIATIVE TO FIGHT HUMAN TRAFFICKING (UN.GIFT), *HUMAN TRAFFICKING: THE FACTS* (2008), (citing the International Labour Organization's 2007 *Forced Labour Statistics Factsheet* for the fact that an "estimated 2.5 million people are in forced labour (including sexual exploitation) at any given time as a result of trafficking"). Michele A. Clark, Co-Director, The Protection Project, Johns Hopkins University, Statement before the Congressional Human Rights Caucus (CHRC) and the Congressional Children's Caucus Members' Briefing "The International Issue of Trafficking in Children: Findings of the 2002 Interagency Report on Trafficking in

Persons Report, the United States did not provide a new estimate,⁴¹ but the United Nations recently cited the International Labour Organization for the fact that “an estimated 2.5 million people are in forced labour (including sexual exploitation) at any given time as a result of trafficking.”⁴² These numbers suggest that states are not putting forth enough effort to combat trafficking and that the accountability mechanisms in place are not enough to spur states to take appropriate deterrent action.

A. *Measurable Results: Legislation & Law Enforcement*

The United States’ TIP Reports provide state-specific information and statistics on states’ collective efforts.⁴³ While recent data generally shows increased action by some governments, overall this does not necessarily reflect an increasingly aggressive approach by all governments and their officials to fight human trafficking.

According to the United States’ 2008 TIP Report, a significant number of states have passed or amended legislation over the past five years to more effectively target human trafficking.⁴⁴ Between 2003 and 2007, governments enacted 152 new or amending pieces of legislation.⁴⁵ But, passing laws does not necessarily mean a state will enforce those laws even though a basis exists for more aggressive action against traffickers. Some Asian states lack systems to enforce the laws⁴⁶ and yet

Persons” (June 6, 2002) (stating that the Protection Project estimates between two and four million children are trafficked each year), *available at* <http://www.protectionproject.org/commentary/sta.htm> (last visited Apr. 20, 2009). The United States claims to publish the “most comprehensive worldwide report on the efforts of governments to combat severe forms of trafficking in persons.”

⁴¹ See TIP REPORT 2008, *supra* note 30, at 7.

⁴² Human Trafficking: The Facts (2008), *available at*

http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf (last visited Apr. 20, 2009). *But see* TIP REPORT 2008, *supra* note 30, at 7 (reporting that the International Labour Organization “estimates that there 12.3 million people in forced labor, bonded labor, forced child labor, and sexual servitude at any given time”).

⁴³ See, e.g., TIP REPORT 2008, *supra* note 30.

⁴⁴ See *id.* at 38.

⁴⁵ *Id.*

⁴⁶ See Defeis, *supra* note 11, at 490 (“Although many nations have adopted legislation that addresses human trafficking, these laws often do not have the bureaucratic support system to implement the laws.”); Emily E. Schuckman, *Antitrafficking Policies in Asia and the Russian Far East: A Comparative Perspective*, 14 DEMOKRATIZATSIYA 85, 87 (Winter 2006) (“A top-down legislative approach is not viable by itself, as it assumes an effective governmental framework, a strong legal system, and the reliable local enforcement of national laws. Legislation also fails to address the issue of police complicity in aiding traffickers.”); The

have not focused on developing better internal government operations. The problem is that in many Asian states, some government officials are actually complicit with trafficking, and so work to facilitate it and hamper efforts to end it.

The statistics on law enforcement activities show that globally the number of prosecutions steadily decreased between 2003 and 2007 while the number of convictions rose during this same time period.⁴⁷ The problem with this data is that the increases in convictions may be due to more aggressive efforts in a few states rather than the whole, and the numbers may not be comprised of information provided by the same states each year.⁴⁸ Even if the numbers representing an increase in convictions are reliable, the numbers do not show a significant increase in trafficking law enforcement activities by all states.⁴⁹ Individual state statistics show that some states have had significant increases, reflecting a higher priority given to trafficking, while other states lack significant increases, suggesting that they have not put forth significant or enough effort to effectively combat trafficking.

Vietnam provides a good example of a state with a significant increase in law enforcement activities. In 2005, the government reported “182 prosecutions and 161 convictions specifically related to sex trafficking in women and children.”⁵⁰ In 2006, the government reported

Vienna Forum to Fight Human Trafficking, *available at* <http://www.ungift.org/ungift/en/vf/index.html> (last visited Apr. 20, 2009) (“[S]ome common themes emerged at the Forum In many countries . . . necessary laws are not in place or are not properly enforced. Technical capacity is also lacking.”).

⁴⁷ The number of prosecutions continually decreased from 7,992 in 2003 to 5,682 in 2007. TIP REPORT 2008, *supra* note 30, at 37. Alternatively, the number of convictions rose from 2,815 in 2003 to 4,379 in 2005 and rose from 3,160 in 2006 to 3,427 in 2007. *Id.*

⁴⁸ For example, the People’s Republic of China did not provide any information for the year 2006. TIP REPORT 2007, *supra* note 38, at 80-81. Considering that it had reported a high number of trafficking cases for the year 2005 (1,949 cases), the lack of information arguably had a significant impact in throwing off any statistical comparison between the overall numbers for 2005 and 2006. Compare U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 92 (2006) [hereinafter TIP REPORT 2006], with TIP REPORT 2007, *supra* note 38, at 44.

⁴⁹ For example, the United States has been steadily increasing the number of defendants charged and convicted of trafficking over the past five years. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2006, at 17 (2007). In 2004, 47 defendants were charged and 33 were convicted. *Id.* These numbers rose to 111 charges and 98 convictions in 2006. *Id.* However, the numbers are relatively small compared to estimates of people actually trafficked into the states. Jayne Huckerby, *United States of America*, in COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 239-40 (2007).

⁵⁰ TIP REPORT 2006, *supra* note 48, at 259.

700 trafficking cases and 500 convictions.⁵¹ The government cited a 60% increase in trafficking cases it handled between 2002 and 2006,⁵² indicating increased law enforcement efforts to address the trafficking problem.

Cambodia's statistics, on the other hand, show until recently a lack of action. The Cambodian government has a reputation for corruption, and many of its government officials facilitate or participate in trafficking.⁵³ Consequently, any efforts to combat trafficking in Cambodia, at least prior to 2007, have been primarily the work of nongovernmental organizations (NGOs).⁵⁴ For example, 21 of the arrests by Cambodian officers in 2006 were due to efforts by Action Pour Les Enfants.⁵⁵ Likewise, the cases against perpetrators in 2005, "for the most part, were generated by the efforts of NGOs."⁵⁶ Although there were approximately 53 convictions in 2006 as opposed to 45 the previous year, much of the effort to punish traffickers was the work of NGOs, not the government.⁵⁷ In 2007, however, Cambodia enacted a new Law on the Suppression of Human Trafficking and Commercial Exploitation, created

⁵¹ TIP REPORT 2007, *supra* note 38, at 208.

⁵² *Id.*

⁵³ See TIP REPORT 2008, *supra* note 30, at 83 (stating that "[c]orruption is pervasive in Cambodia"); TIP REPORT 2007, *supra* note 38, at 73-74 (noting that public officials' "complicity in trafficking limited the government's success in combating trafficking"); Human Rights Watch, Human Rights Overview: Cambodia, available at <http://hrw.org/english/docs/2006/01/18/cambod12269.htm> (last visited Apr. 20, 2009) (stating that the Cambodian "courts—widely viewed as corrupt, incompetent, and biased—continue to be used to advance political agendas, silence critics, and strip people of their land.").

⁵⁴ TIP REPORT 2007, *supra* note 38, at 74; TIP REPORT 2006, *supra* note 48, at 84.

⁵⁵ TIP REPORT 2007, *supra* note 38, at 39.

⁵⁶ TIP REPORT 2006, *supra* note 48, at 84.

⁵⁷ TIP REPORT 2007, *supra* note 38, at 39, 74; TIP REPORT 2006, *supra* note 48, at 84; see also UNIAP Cambodia, available at http://www.no-trafficking.org/cambodia_action.html (last visited Apr. 20, 2009). But see, CAMBODIA, RESPONSES TO THE LIST OF ISSUES AND QUESTIONS FOR CONSIDERATION OF THE COMBINED INITIAL, SECOND AND THIRD PERIODIC REPORT 15 (CEDAW 34th Sess. 2006), available at <http://www.un.org/womenwatch/daw/cedaw/34sess.htm> (last visited Apr. 20, 2009) ("Within two years (2004-2005), police received complaints both online and by the people up to 812 cases in total, 773 of which were carefully investigated and cracked down. The police rescued 1,381 victims in total (aged 18 and above, 890; under 18 years old, 491) and arrested 832 perpetrators in total and sent to the court for punishment according to the laws in force."). In response to Cambodia's report, the CEDAW committee expressed "concern about the lack of enforcement of legislation, the impunity of traffickers and the absence of accurate data on trafficking." COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CONCLUDING COMMENTS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN: CAMBODIA 4 (CEDAW 34th Sess. 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/517/23/PDF/N0651723.pdf> (last visited Apr. 20, 2009) [hereinafter COMMITTEE COMMENTS].

a national task force to improve its response to trafficking, and “increased law enforcement action against traffickers and complicit officials.”⁵⁸ In addition, several police and judicial officials were removed from office as a signal that complicity would no longer be tolerated within the government.⁵⁹ Nevertheless, there has yet to be a significant increase in prosecutions and convictions, and it remains to be seen whether Cambodia will follow through on purging itself of corrupt government officials and increasing its efforts to prosecute traffickers.

Thailand’s government has seemingly taken a more aggressive role than Cambodia’s, but significant corruption remains, which prevents a concerted government effort. For the past two years, the TIP report has stated that “corruption is still sometimes a problem, with local police or immigration officials protecting brothels, fishing and sweatshop facilities from raids and occasionally facilitating the movement of Burmese, Cambodian, Lao, and P.R.C. women and children into or through Thailand.”⁶⁰ This corruption may help explain why there were only 88 arrests made between September 2005 and February 2007 though there had been 352 arrests in 2003 and 2004.⁶¹ Viewed together, the corruption and decrease in arrests reveal problems in government anti-trafficking efforts.

Nepal also has problems with corrupt government officials that hamper its progress. In 2006, 393 sex trafficking cases were filed at the district court, appellate court, and supreme court, but it is not clear how many of those were the work of NGOs.⁶² In 2007, the government filed 111 cases in district court whereas NGOs filed 262 criminal cases.⁶³ Although Nepal passed comprehensive anti-trafficking laws this past year, complicit government officials reportedly facilitate trafficking in exchange for bribes, and there are no reports that complicit officials are being investigated or prosecuted.⁶⁴

Burma, which has remained on the Tier 3 list since the inception of the “list” in 2001, has a criminal law prohibiting sex and labor trafficking which was enacted in 2005.⁶⁵ However, there is no independent evidence that Burma has been prosecuting traffickers under

⁵⁸ TIP REPORT 2008, *supra* note 30, at 83.

⁵⁹ *Id.*

⁶⁰ TIP REPORT 2007, *supra* note 38, at 198; *see also* TIP REPORT 2008, *supra* note 30, at 244.

⁶¹ TIP REPORT 2007, *supra* note 38, at 198.; TIP REPORT 2006, *supra* note 48, at 244.

⁶² TIP REPORT 2007, *supra* note 38, at 155.

⁶³ TIP REPORT 2008, *supra* note 30, at 190.

⁶⁴ *Id.* at 189-90.

⁶⁵ *Id.* at 80.

this law despite claims that it has.⁶⁶ Instead, victims may have been prosecuted for trying to leave the country without permission.⁶⁷ Furthermore, there are reports that the Burmese “[m]ilitary and civilian officials remained directly involved in significant acts of forced labor and unlawful conscription of child soldiers” despite the law against trafficking.⁶⁸ Not only are Burmese people trafficked within their own country, but “Burmese border officials reportedly accept bribes to enable the smuggling of women and girls into Thailand.”⁶⁹

These statistics, even if they show an increase in the number of investigations, prosecutions, or convictions, do not necessarily indicate that trafficking is decreasing or that governments are doing enough in other areas to adequately address the problem.⁷⁰ For example, Vietnam has had one of the largest increases in law enforcement activities, but research suggests that trafficking in that state is still on the rise.⁷¹ Thus, despite existing laws and law enforcement measures, these alone are not enough to curb trafficking. In part, this is because governments need to address internal corruption, government officials need to be held

⁶⁶ *Id.*

⁶⁷ *Id.* at 80 (“In the past, data claimed to represent trafficking in persons issues often included individuals caught trying to leave Burma without permission.”); Human Trafficking, *available at* <http://www.voicesforburma.org/about/human-trafficking> (last visited Apr. 20, 2009) [hereinafter Human Trafficking] (“While legislation to stop trafficking does exist in Burma, these laws . . . are all too often direct towards the victims of trafficking, instead of the perpetrators.”).

⁶⁸ TIP REPORT 2008, *supra* note 30, at 80.

⁶⁹ Human Trafficking, *supra* note 67.

⁷⁰ See, e.g., UNIAP Cambodia, *supra* note 57 (suggesting that “due to a range of factors including the increased mobility of the world’s population and the effects of globalization, the problem of trafficking in persons is increasing at an alarming rate” in Cambodia and that the government in that country still has work to do in addressing the problem).

⁷¹ See Zheng E, *Human Trafficking on the Rise in Mekong Countries*, CHINA VIEW, Nov. 6, 2008, *available at* http://news.xinhuanet.com/english/2008-11/06/content_10317352.htm (last visited Apr. 20, 2009) (according to Kiengkham Inphengthavong, Secretariat Head of the Anti-human Trafficking Committee, “Human trafficking in the six Mekong countries [including Vietnam] is expected to increase due to growing migration within the sub-region”); Ngan Le, *Legal Framework on Human Trafficking to Be Perfected* (2006), *available at* http://news.vnnet.vn/vietnamlaw/Reports.asp?CATEGORY_ID=3&NEWS_ID=1095&SUBCATEGORY_ID=8 (last visited Apr. 20, 2009) (“Trafficking in women and children has been an extremely complex and serious problem for recent years and is on the rise in Vietnam.”); Humantrafficking.org, *Human Trafficking of Vietnamese on the Rise*, NEWS & UPDATES, Apr. 7, 2007, *available at* <http://www.humantrafficking.org/updates/597> (last visited Apr. 20, 2009) (“The trafficking of Vietnamese women and children, mainly across borders with China and Cambodia, has continued increasingly as perpetrators have come to disguise their trade more cleverly.”).

accountable, efforts beyond law enforcement are needed, and efforts in other areas are not being fully addressed.⁷²

B. Remaining Problems: Protection for Victims

Although legislation and other law enforcement activities are a good beginning in the fight against trafficking, trafficking victims need laws offering them protection, and they need governments willing to take the steps necessary to protect them. Some governments are taking steps to protect victims, but some are not. The scope and success of government protective efforts may be harder to measure than law enforcement efforts, yet measuring improvements in this area is just as important. Of greater concern, however, is the fact that there are governments who are not taking any action or are failing to provide specific forms of protection and remedies. Government protection efforts are reported in TIP reports, reports to the Committee on the Elimination of Discrimination Against Women, and documents published by NGOs. These sources indicate that some governments are failing to effectively protect victims and their rights, especially with regard to legal redress.

Nepal, where many victims originate and where many victims return, lacks sufficient government action to ensure victims have opportunities for the legal protection and redress upon their return.⁷³ According to the 2006 TIP reports, Nepal offered legal aid to approximately 700 victims,⁷⁴ but the 2007 TIP report clarified that the Nepalese government does not provide direct legal aid.⁷⁵ Instead, limited funding is given to NGOs who then provide “victims assistance with

⁷² But see UNODC GLOBAL PATTERNS, *supra* note 7, at 45 (suggesting that the statistical numbers or evidence of severity are not necessary to justify a response to the crime of human trafficking). Preventative efforts are important in decreasing trafficking, however, that topic is beyond the scope of this paper. See Chuang, *supra* note 24, at 139 (arguing that “counter-trafficking strategies must also target the underlying conditions that impel people to accept dangerous labor migration assignments in the first place”). This paper will argue that increased efforts in the area of victim protection, in addition to preventative and prosecutorial efforts, can play an important role in potentially decreasing trafficking. See MINISTRY OF LABOUR AND SOCIAL WELFARE, UNIAP, UNICEF, LESSONS LEARNT THROUGH TRACE: HUMAN TRAFFICKING FROM LAOS TO THAILAND 5 (2004) (“Impact . . . is hard to achieve without the active pursuit, arrest, and punishment of traffickers, exploiters, and perpetrators, and without avenues for justice and redress available to victims.”).

⁷³ TIP REPORT 2007, *supra* note 38, at 155-56 (noting that “Nepal is a source country” that “does not provide victim protection services for men and women trafficked abroad for involuntary servitude”).

⁷⁴ TIP REPORT 2006, *supra* note 48, at 186.

⁷⁵ TIP REPORT 2007, *supra* note 38, at 156.

rehabilitation, medical care, and other services.”⁷⁶ The problem is that even if NGOs do provide some aid, the government does not offer victims safety in return for assisting law enforcement, and victims are actually discouraged from seeking legal recourse.⁷⁷ In addition, victims are sometimes “arrested and fined for acts committed as a result of being trafficked,” and foreign victims are not given any legal alternative to deportation.⁷⁸

Laos has started to make victim protection a priority but still has problems with internal corruption that prevent all victims from obtaining redress. Though Laos is not a major transit or destination state, many victims originate there and need protection when they return.⁷⁹ In 2005, according to the TIP report, the government provided “severely inadequate protection for victims.”⁸⁰ Between 2005 and 2006, there were improvements in that no victims were reported as having been incarcerated upon their return to Laos,⁸¹ and in 2007, the government began using victims to help with investigations and prosecutions.⁸² Nevertheless, civil redress may not be without reach for some victims even though the state’s constitution has recently been amended to allow Lao citizens to file civil complaints.⁸³ “[S]ome local officials are believed to be protecting the perpetrators,”⁸⁴ and citizens are not likely to achieve anything by complaining because the “usual Lao government response . . . is simply to deny that any such [government] abuses take place.”⁸⁵ In sum, there is a gap “between the letter of the law and the reality of human rights”⁸⁶ because the government is held accountable to the prime minister rather than the constitution, and the prime minister is not holding government officials accountable for violating human rights.⁸⁷

⁷⁶ *Id.*

⁷⁷ *Id.*; see also TIP REPORT 2008, *supra* note 30, at 190.

⁷⁸ TIP REPORT 2008, *supra* note 30, at 190.

⁷⁹ TIP REPORT 2007, *supra* note 38, at 132; UNODC GLOBAL PATTERNS, *supra* note 7, at 18.

⁸⁰ TIP REPORT 2006, *supra* note 48, at 160.

⁸¹ TIP REPORT 2007, *supra* note 38, at 133.

⁸² TIP REPORT 2008, *supra* note 30, at 161.

⁸³ See FREEDOM HOUSE, COUNTRIES AT THE CROSSROADS: LAOS 13 (2007), available at <http://www.freedomhouse.org/uploads/ccr/country-7211-8.pdf> (last visited Apr. 20, 2009).

⁸⁴ *Id.*

⁸⁵ *Id.* at 10.

⁸⁶ *Id.* at 8.

⁸⁷ *Id.* at 5, 8; see also TIP REPORT 2008, *supra* note 30, at 160 (“Corruption remained a problem with government officials susceptible to involvement or collusion in trafficking in persons No government or law enforcement officials have been disciplined or punished for involvement in trafficking in persons.”).

Cambodia, which ranks high as an origin and destination state for trafficking,⁸⁸ is another state that has remedial legislation in place for victims but has failed to ensure that victims receive protection or access to a trustworthy judiciary.⁸⁹ The Cambodian government has made little effort to prosecute traffickers and has similarly provided little protection or assistance to victims.⁹⁰ Instead, the government has relied primarily upon NGOs to provide for victims.⁹¹ Consequently, the protection of a victim's right for redress is practically non-existent because that right can only be acted upon if the government actively protects this right, and Cambodia's government has failed to provide an independent and trustworthy judiciary to do so.⁹² Cambodia's judiciary is not independent from the executive's control,⁹³ and has been used "to advance political agendas, silence critics, and strip people of their land."⁹⁴ This control of the judiciary has encouraged the perception that the judiciary is "corrupt, incompetent, and biased"⁹⁵ such that people do not believe remedies may be found in the legal system even though they have rights to bring civil claims.⁹⁶ In fact, this executive control of the judiciary diminishes victims' rights to seek legal remedies because the judiciary does not prioritize the rights of the people.⁹⁷

China, which also that ranks high as a destination country,⁹⁸ has taken some steps to protect victims but also fails to ensure that victims

⁸⁸ UNODC GLOBAL PATTERNS, *supra* note 7, at 18, 24.

⁸⁹ See Human Rights Watch, *supra* note 53 (stating that the Cambodian "courts—widely viewed as corrupt, incompetent, and biased—continue to be used to advance political agendas, silence critics, and strip people of their land"). But see TIP REPORT 2008, *supra* note 30, at 160 ("In an important move that sent a signal that corruption will not be tolerated by senior government officials, an investigation into the Chhay Hour II brothel case resulted in the removal of the President of the Appeals Court for trafficking related corruption.").

⁹⁰ See *supra* notes 53-59 and accompanying text; TIP REPORT 2007, *supra* note 38, at 74; COMMITTEE COMMENTS, *supra* note 55, at 5 (listing actions the government of Cambodia needs to take to protect victims).

⁹¹ TIP REPORT 2007, *supra* note 38, at 74; see also UNIAP Cambodia, *supra* note 57 (listing numerous NGOs that provide assistance to victims in Cambodia).

⁹² See ASIAN HUMAN RIGHTS COMM'N, HUMAN RIGHTS REPORT 64 (2006), available at <http://material.ahrchk.net/hrreport/2006/AHRC2006HRReport.pdf> (last visited Apr. 20, 2009) [hereinafter AHRC REPORT].

⁹³ *Id.*

⁹⁴ Human Rights Watch, *supra* note 53.

⁹⁵ *Id.*

⁹⁶ See TIP REPORT 2007, *supra* note 38, at 74 (recognizing that Cambodians may file civil claims).

⁹⁷ See AHRC REPORT, *supra* note 92, at 64.

⁹⁸ UNODC GLOBAL PATTERNS, *supra* note 7, at 18, 20; see also TIP REPORT 2007, *supra* note 38, at 80.

receive adequate protection.⁹⁹ Many victims are quickly deported to their country of origin, thereby receiving no protection, and others are only given temporary 30-day services before being sent home.¹⁰⁰ Some trafficking victims who have been exploited for the purpose of prostitution are criminally punished rather than given legal protection.¹⁰¹

Malaysia is an originating, transitioning, and destination country¹⁰² that not only fails to protect victims, but also prosecutes them, holds them in prisons or deports them to places where they are subject to further trafficking.¹⁰³ Although Malaysian civil law permits victims to file suit, victims, especially those from other states, as a practical matter, lack this opportunity.¹⁰⁴ Part of the problem stems from Malaysia's unwillingness to recognize people from other states without proper paperwork as anything but illegal immigrants although they may be refugees or victims of trafficking.¹⁰⁵ Illegal immigrants may be charged with a crime, held in overcrowded detention facilities with other detainees and criminals or deported to border-crossing points.¹⁰⁶ At these border-crossing points (the Malay-Indonesia border and the Malay-Thailand border), these people are often "picked up by smugglers and traffickers."¹⁰⁷ NGOs blame the trafficking problems in Malaysia on official corruption.¹⁰⁸ But though border officials bear much blame for fueling the problem, the government as a whole has not demonstrated its willingness to rescue or protect victims.¹⁰⁹

⁹⁹ TIP REPORT 2007, *supra* note 38, at 81.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² UNODC GLOBAL PATTERNS, *supra* note 7, at 18-20.

¹⁰³ TIP REPORT 2008, *supra* note 30, at 175.

¹⁰⁴ *Id.*

¹⁰⁵ Camilla Olson & Kavita Shukla, *Malaysia: Government Must Stop Abuse of Burmese Refugees and Asylum Seekers*, BULLETIN (Refugees International, Washington, D.C.), May 23, 2007, available at <http://www.refugeesinternational.org/policy/field-report/malaysia-government-must-stop-abuse-burmese-refugees-and-asylum-seekers> (last visited Apr. 20, 2009).

¹⁰⁶ *See id.*; TIP REPORT 2008, *supra* note 30, at 175.

¹⁰⁷ Olson & Shukla, *supra* note 105; TIP REPORT 2008, *supra* note 30, at 175; Human Traffickers Get Free Rein with Burmese Migrants in Malaysia, available at http://www.david-kilgour.com/2008/Feb_09_2008_11.htm (last visited Apr. 20, 2009) ("Burmese migrant workers in Malaysia live at the mercy of international human-trafficking gangs who sell them back and forth as slave labor with the full knowledge of Malaysian and Thai immigration officials, FRA's Burmese service reports.").

¹⁰⁸ Baradan Kuppusamy, *Rights-Malaysia: Human Trafficking Charges Stick - Activists*, INTER PRESS SERVICE NEWS AGENCY, June 14, 2007, available at <http://ipsnews.net/news.asp?idnews=38180> (last visited Apr. 20, 2009).

¹⁰⁹ *See id.*; TIP REPORT 2008, *supra* note 30, at 174-75.

Burma ranks high as a county of origin and transit for trafficking victims but has continually remained in Tier 3 in the TIP Reports for failing to put forth significant efforts in combating trafficking.¹¹⁰ The problem is not just that the government is not fighting trafficking but that the government as a whole appears to be actively engaged in trafficking.¹¹¹ Because the government itself traffics Burmese people, it should come as no surprise that the government does not offer legal assistance to its victims or that victims may be penalized for accusing government officials.¹¹²

In reality, many victims still do not receive adequate protection from Asian states even though a significant number of victims still need protection. States are failing to provide victims with realistic avenues for redress, and the increase in prosecution in some states does not ensure justice for all victims, fully protect victims' rights, or adequately deter traffickers.

IV. THE NEED FOR OTHER FORMS OF ACCOUNTABILITY & SYSTEMS TO PROTECT VICTIMS

Many explanations exist for the continuing problem of trafficking. However, changing two significant problems with the current approach could ultimately help reduce the amount of trafficking and, at a minimum, ensure that victims receive protection and have avenues for obtaining justice. First, current accountability mechanisms are insufficient to stimulate aggressive state action against trafficking.¹¹³ Second, current accountability mechanisms place too much emphasis on using a criminal approach rather than a human rights approach.¹¹⁴ Instead, what is needed is an accountability mechanism that will use a human rights approach to encourage and allow victims to bring claims against traffickers or against states for failing to pursue traffickers or provide legal remedies.¹¹⁵

A. *The Inadequacies of Current Accountability Mechanisms*

The United Nations and the United States are putting political pressure on states to adopt and enforce legislation and other programs

¹¹⁰ UNODC GLOBAL PATTERNS, *supra* note 7, at 18-19; TIP REPORT 2008, *supra* note 30, at 80.

¹¹¹ TIP REPORT 2008, *supra* note 30, at 80;

¹¹² TIP REPORT 2008, *supra* note 30, at 81.

¹¹³ See *infra* Part IV.A.

¹¹⁴ See *infra* Part IV.B.

¹¹⁵ See *infra* Part V.

geared towards combating trafficking, but not all states respond to this political pressure.¹¹⁶ Even with the threat of strained state relations or sanctions, some states still choose to take little or no action.

In regard to international agreements facilitated and encouraged by the United Nations, some states defy the pressure to sign and ratify a binding agreement just because other states do, and some who do submit to the pressure may sign and ratify for appearance's sake only. For example, China has thus far found it unnecessary to sign or ratify the United Nations Trafficking Protocol.¹¹⁷ Burma has taken no aggressive action and continues to take advantage of its people although it joined ASEAN in 1997.¹¹⁸ China's failure to sign or ratify an agreement or Burma's failure to aggressively fight trafficking may be viewed negatively and may even contribute to strained state relations, but it does not necessarily motivate these states to action.

In response to the United States' TIP Reports and its use of sanctions, some states have taken positive actions while others seem not to care. "According to US officials, the threat of sanctions has induced some governments to do more to curb trafficking. In other cases, sanctions have not proven an effective tool. The disinterest and even complicity of some governments in trafficking remains a problem."¹¹⁹ Some states simply do not respond to the United States' self-imposed role as police,¹²⁰ and for these states who do not respond, the use of sanctions may actually harm rather than help the fight against trafficking by limiting the resources available for governments to implement changes.¹²¹

Even if a state is motivated to take action by adopting legislation, the state may not spend its limited resources on actual enforcement; prosecutors may decide not to take action; or officials within the country may actually encourage or aid violations of the statutes rather than seek

¹¹⁶ But see Ethan B. Kapstein, *The New Global Slave Trade*, 85 FOREIGN AFFAIRS 103, 113 (2006) (pointing out that Myanmar has responded to ASEAN's diplomatic pressure and efforts to draw public attention to a "dismal human rights record").

¹¹⁷ See UNODC, Signatories to the CTOC Trafficking Protocol, *available at* <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (last visited Apr. 20, 2009).

¹¹⁸ See Lawansiri, *supra* note 19; TIP REPORT 2008, *supra* note 30, at 79-81.

¹¹⁹ CONGRESSIONAL REPORT SERVICES, CRS REPORT OF CONGRESS 20 (June 24, 2005), *available at* <http://fpc.state.gov/documents/organization/50256.pdf> (last visited Apr. 20, 2009).

¹²⁰ See Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 439 (2006) (arguing that "the United States has proclaimed itself global sheriff on trafficking.").

¹²¹ Ryf, *supra* note 8, at 63 (arguing that "Sanctions Are Counterproductive to Fighting Trafficking" because they only lessen economic opportunities available for trafficking victims).

their enforcement. For example, as discussed above, government officials in Burma, Cambodia, Malaysia, and Nepal continue to facilitate and profit from trafficking.¹²² Some of these states, “also neglect to provide the basic financial and other resources for the proper functioning of law enforcement agencies and even the judicial system (courts).”¹²³

Basically, the main form of holding states accountable for taking action is through political pressure. This political pressure, however, is not a sufficient means of holding some states accountable, and even if it does spur some state action, the actions taken are primarily in the area of law enforcement against civilians, not against complicit government officials.

B. *The Failings of Focusing on a Criminal Approach*

Most international agreements, and in turn most state actions, focus on using a criminal justice rather than a humans rights approach in fighting trafficking. Although states are encouraged to implement programs that prevent trafficking and protect victims,¹²⁴ the main focus by states and state organizations has been “on effectuating a strong criminal justice response to the problem” of trafficking.¹²⁵ Despite the “growing awareness of a need for stronger protection of trafficked persons’ human rights, current models of protection continue ‘to prioritise the needs of law enforcement over the rights of trafficked persons.’”¹²⁶ This emphasis on a criminal approach may be due to the fact that (1) the United Nations’ Protocol requires state action related to criminal prosecution but only encourages state action in regard to most forms of victim protection,¹²⁷ (2) the United States’ TVPA, in its minimum standards for other states, primarily describes the types of law

¹²² Human Rights Watch, *supra* note 74.

¹²³ ASIAN HUMAN RIGHTS COMM’N, RULE OF LAW AND HUMAN RIGHTS IN ASIA 3 (2006) [hereinafter AHRC RULE OF LAW].

¹²⁴ See, e.g., Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 7106 (2000); Trafficking Protocol, *supra* note 1.

¹²⁵ Chuang, *supra* note 24, at 150, 154 (arguing that protection is a secondary concern and that prevention is “an afterthought” though it should be primary).

¹²⁶ *Id.* at 151 (quoting ELAINE PERSON, ANTI-SLAVERY INT’L, HUMAN TRAFFIC, HUMANS RIGHTS: REDEFINING VICTIM PROTECTION 4 (2002)). During the 2008 Vienna Forum, it was suggested there needs to be a partnership between agencies as well as authorities and civil society organizations, and it was suggested the relationship between these “should be based on the promotion of a victim-centered and human rights approach to dealing with human trafficking.” The United Nations Global Initiative To Fight Human Trafficking, Vienna, Austria, Feb. 13-15, 2008, *The Vienna Forum Report: A Way Forward To Combat Human Trafficking*, ¶137(a)-(c).

¹²⁷ Trafficking Protocol, *supra* note 1, arts. 5-6.

enforcement activities each state must take,¹²⁸ or (3) the various international agreements generally tend to view trafficked persons as victims and not rights holders.¹²⁹ Regardless, the fact remains that the criminal focus dominates governmental concerns, such that only 25% of the 164 states discussed in the 2007 TIP Report actually had comprehensive legislation in place—legislation that attempted to prevent trafficking and/or extend protection to victims in addition to criminalizing trafficking.¹³⁰ Furthermore, even if comprehensive legislation is in place, the practical reality is that in the attempt to stop human trafficking, “the priority for governments around the world . . . has been to arrest, prosecute and punish traffickers, rather than to protect the human rights of people who have been trafficked.”¹³¹ Instead of using a human rights approach that focuses on considering what legislation and actions are needed to best protect victims and their rights, governments generally respond to trafficking solely by focusing their efforts on criminal measures—an approach that fails to reduce trafficking or protect victims’ human rights.

In failing to incorporate a human rights approach,¹³² governments do not ensure victims an opportunity to an effective remedy in courts of law and, therefore, fail to both protect victims’ rights and allow victims to play a role in deterring traffickers by holding them accountable monetarily. Although the United Nations’ Trafficking Protocol requires countries to provide victims with an opportunity to receive compensation, it does not actually require that victims be provided compensation or opportunities for civil remedies.¹³³ Victims are only given the possibility

¹²⁸ TVPA, 22 U.S.C. § 7106.

¹²⁹ Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 39 (2004) (“Despite this primacy of victimization, the existing frameworks provide inadequate protections for victims or mechanisms for redress—‘victims,’ who are the justification and the purported beneficiaries of international action, ultimately benefit very little.”).

¹³⁰ Mohamed Y. Mattar, *The Protection Project Report: A Periodical on the Current Status of Anti-trafficking Legislation* (Protection Project, Washington, D.C.) July 17, 2007, at 2, available at http://www.protectionproject.org/docs/staus_anti-trafficking_legislation.doc (last visited Apr. 20, 2009). But see TIP REPORT 2008, *supra* note 30, at 83, 173 (noting that Cambodia and Malaysia, among others, passed comprehensive legislation during the last reporting year). Most states either have no legislation or only have criminal legislation. See Mattar, *supra*.

¹³¹ Mike Dottridge, *Introduction*, in COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 1, 1 (2007).

¹³² The human rights approach involves analyzing “who is accountable for protecting [trafficked persons] and recommending what measures are required to ensure that their human rights will be upheld and protected more effectively.” *Id.* at 7.

¹³³ Trafficking Protocol, *supra* note 1, art. 6, § 6.

of compensation, a possibility that does not have to be granted through a right to bring a civil claim.¹³⁴ The United States' TVPA does not help push state action in this area because it does not specifically mention anything about compensation or civil claims.¹³⁵ This is problematic because victims' rights are not protected if victims lack the opportunity to pursue a remedy in a court of law.¹³⁶ The Universal Declaration of Human Rights sets forth that people have a fundamental right to be free from slavery and that people have a right to "an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."¹³⁷ In other words, governments must give people the right to be free from trafficking, a form of enslavement, and they must give victims a right to an effective remedy for violations of this law. However, some governments do not allow victims to bring civil claims,¹³⁸ and of those that allow for civil claims or provide some possibility of compensation, many practically deny victims an effective remedy because the possibility of bringing a claim or obtaining compensation is so remote.¹³⁹

For example, some governments allow for civil claims but only after criminal prosecutions have been completed;¹⁴⁰ other governments only allow victims to bring civil claims that are attached to criminal prosecutions.¹⁴¹ Nevertheless, these systems present many potential

¹³⁴ For example, states can, in compliance with the Trafficking Protocol, pass legislation that provides a right of compensation through mandatory restitution, civil suits, punitive damages, or a special fund. See Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357, 392-95 (2006).

¹³⁵ See Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 7106 (2000).

¹³⁶ The ability of victims to bring civil claims for monetary compensation is often inextricably linked to the rights (protections) afforded to victims, such as the right to stay in a state for such a purpose. See Defeis, *supra* note 11, at 489.

¹³⁷ Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, arts. 4, 8, U.N. Doc. A/810 (Dec. 12, 1948).

¹³⁸ See, e.g., GAATW (Global Alliance Against Traffic in Women), AtJ E-Bulletin Issue 4 (2007), available at http://www.gaatw.org/e-bulletin/AtJ/AtJ_9_E_bulletin_4_Dec_FINAL.pdf (last visited Apr. 20, 2009) (noting that Japan allows victims to receive compensation through criminal cases but that Japan does not have measures in place for victims to seek compensation through civil claims).

¹³⁹ See, e.g., TIP REPORT 2007, *supra* note 38, at 74, 209 (noting that Cambodia and Vietnam, among others, allow for civil claims).

¹⁴⁰ See, e.g., GAATW, *supra* note 138 (noting that a "criminal case must be concluded before a civil claim" can be commenced in Mongolia).

¹⁴¹ See *id.* (noting that victims in Japan may have claims to compensation in a criminal trial if they can show property damage, which generally does not include damage to a person); Gail H. Yamauchi, *Claiming Compensation and Unpaid Wages in Thailand*, ALLIANCE NEWS:

barriers that effectively deny victims their right to a remedy. First, if the trafficker is not prosecuted, then the victim loses any chance of bringing a claim. Second, even if the trafficker is prosecuted, many victims are repatriated before the criminal prosecution is completed and thereby, in most instances, lose the opportunity of receiving any compensation.¹⁴² Once a victim is repatriated to the country of origin, criminal or civil claims brought in the destination country will often be dropped, and the victim will generally not be given standing to initiate a claim in the country of origin.¹⁴³ Third, even if the trafficker is prosecuted and the prosecutor is allowed to seek compensation, most prosecutors focus on conviction and penal punishment, not monetary fines or compensatory damages.¹⁴⁴ Furthermore, if the prosecutor does seek compensation by

MATERIAL JUSTICE: SEEKING COMPENSATION IN TRAFFICKING CASES (GAATW, Bangkok, Thailand) July 2007, at 25 (noting that victims in Thailand are limited to attaching claims in criminal cases unless they have a claim that can be brought in the labor court).

¹⁴² See Cathleen Caron, *Using Portable Justice to Achieve Additional Remedies for Trafficked Persons*, ALLIANCE NEWS: MATERIAL JUSTICE: SEEKING COMPENSATION IN TRAFFICKING CASES (GAATW, Bangkok, Thailand) July 2007, at 14 (“If the trafficked person leaves the country of destination, however, the trafficking claim and other remedies are often dismissed, leaving the victim with no remedy for the violations suffered.”). Note that the United Nations Trafficking Protocol requires states to provide the possibility of compensation but does not require legislation that permits victims to remain in its territory for the purpose of bringing claims. Compare Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 6, § 6, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3(a), Dec. 12, 2000, G.A. Res. 55/25, U.N. Doc. A/55/383 (2000) (“Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”), with *id.* art. 7, § 1 (“[E]ach State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.”).

¹⁴³ Caron, *supra* note 142, at 14 (“Most criminal or civil systems for redressing violations are limited to covering acts that occurred within the jurisdiction.”); see also Resolution of the Pre Forum NGO Consultation on Trafficking and National Institution ¶ 10, (facilitated by Asia Pacific Human Rights Network) (2002), available at <http://www.aphrn.org/Activities/Trafficking/resolution2002.htm> (last visited Apr. 20, 2009) (recognizing that, in regard to trafficked victims who are exploited for their labor, “premature expulsion from the host State may jeopardize victims’ access to civil redress for loss of income and other entitlements owed to them in return for their labour”).

¹⁴⁴ See Kathleen Kim & Kusia Hreshchysyn, *Human Trafficking Private Right of Action: Civil Right for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1 (2004) (discussing pros and cons of civil litigation in regard to trafficking). In America, “a restitution award [in a criminal case] depends largely on the aggressiveness of the prosecutor and the court to inform the criminal defendant that restitution may be an element of the sentence.” *Id.* at 16. In some countries, “police and prosecutors are not aware that trafficked persons have a right to receive compensation.” Nerea Bilbatúa, *Overview of the Discussions on the Right to Compensation During the GAATW Access to Justice Global and National Consultations in Nepal and Nigeria*, ALLIANCE NEWS: MATERIAL JUSTICE: SEEKING COMPENSATION IN

way of a fine, the money collected may be deposited into a state fund, and victims may only be given a right to a portion of the fine.¹⁴⁵ Fourth, if the victim is allowed to attach a civil claim to criminal proceedings, victims need timely legal assistance to be made aware of this opportunity and to effectively pursue it,¹⁴⁶ but many victims do not have access to lawyers and are not told of their rights by lawyers or law enforcement.¹⁴⁷ Finally, the trafficker must actually be convicted.¹⁴⁸ If the government is not diligent in prosecuting trafficking violations, then the victim loses an opportunity to bring a civil claim or recover on the claim in the criminal proceeding, and if the claim must be attached to a criminal proceeding, then higher standards of evidence may mean that traffickers will not be as easily convicted of wrongdoing as they could be in a civil case.¹⁴⁹

Other countries may allow separate civil claims, but victims still face barriers that effectively deny them an opportunity to obtain compensation.¹⁵⁰ Again, victims may be immediately classified as “undocumented migrants” and then “charged with illegal entry and deported as soon as possible.”¹⁵¹ Or, victims may be effectively denied their right to pursue their claims due to corrupt judiciaries and states’

TRAFFICKING CASES (GAATW, Bangkok, Thailand) July 2007, at 7. In some instances, prosecutors do not see “gather[ing] evidence of loss . . . as their main role.” GAATW, *supra* note 138.

¹⁴⁵ See Bilbatúa, *supra* note 144, at 9 (discussing Nepal’s draft legislation).

¹⁴⁶ See UNITED NATIONS OFFICE ON DRUG AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 143 (2006), available at http://www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf (last visited Apr. 20, 2009) (“Victims are often deterred from participating in various legal proceedings because simple, accessible and timely legal advice is not available to them when they seek assistance and support.”); Yamauchi, *supra* note 141, at 25 (“Navigating the laws that are relevant to trafficking requires specialised knowledge. In a criminal case, redress for trafficking victims can be sought under a range of recent laws In labour cases, the codes and procedures are also complex.”).

¹⁴⁷ ELAINE PEARSON, HUMAN TRAFFIC, HUMAN RIGHTS: REDEFINING VICTIM PROTECTION 57 (2002).

¹⁴⁸ See Bilbatúa, *supra* note 144, at 7, 11 (finding that “criminal compensation orders depend on the conviction of the trafficker” and implying that claims in a criminal proceeding can prejudice the right to bring a separate civil claim for damages).

¹⁴⁹ See GAATW, *supra* note 138 (explaining that in criminal cases, where civil claims for compensation have been attached, the court “requires a higher standard of proof than civil cases, and if the offender is found not guilty, the right to compensation will be lost”).

¹⁵⁰ See, e.g., TIP REPORT 2007, *supra* note 38, at 73-74 (noting that Cambodia’s victims may file civil claims but that “there are reports that public officials’ complicity in trafficking limit[] the government’s success in combating trafficking”); AHRC REPORT, *supra* note 92, at 64-65 (explaining that Cambodia does not have an independent judicial system and that “courts have failed in their constitutional obligations to protect the rights and freedoms of the Cambodian people”).

¹⁵¹ Yamauchi, *supra* note 141, at 23.

disrespect for the rule of law.¹⁵² If the judiciary is not trustworthy, victims may not consider it worthwhile to bring a claim in the first place, and a victim who does bring a claim may face a seemingly inexplicable dismissal of the claim, especially if complicit government actors are involved.

Even if victims are able to overcome these barriers such that they are able to pursue a claim and be awarded compensation, most victims never receive any of the money awarded them.¹⁵³ Often, by the time a trial is complete, assets have been hidden or lie beyond the reach of the government because they are in foreign bank accounts.¹⁵⁴

These barriers to obtaining compensation are apparent in many of the countries discussed above. For example, China has a record of quickly deporting people without determining their status.¹⁵⁵ Once deported, many lose the opportunity to seek redress. In Nepal, the government discourages victims from using the judicial system to seek recourse,¹⁵⁶ and in Malaysia, government officials facilitate the trafficking of people who may have already been trafficking victims.¹⁵⁷ Similar barriers also exist in Cambodia where the government has not,

¹⁵² See AHRC RULE OF LAW, *supra* note 123, at 113 (2006) (“When the judiciary itself ignores human rights and participates in the abuse of power—as is common in many parts of Asia—it becomes a serious impediment to citizens and an obstacle to the effective implementation of human rights in the region. . . . Without the rule of law, there can be no realization of human rights . . .”). “Many of the constitutions of Asian countries are not a product of the tradition of constitutionalism that creates safeguards and limits on state power. Instead, rulers give themselves unlimited powers . . .” and judiciaries are marked by “subjugation to executive control, on the one hand, and an increase of corruption, on the other.” AHRC REPORT, *supra* note 92, at 4.

¹⁵³ Bilbatúa, *supra* note 144, at 6. See generally Lehti & Aromaa, *supra* note 39, at 182-83.

¹⁵⁴ See Bilbatúa, *supra* note 144, at 8 (quoting a victim who had been awarded compensation as testifying that she had “not been able to find [the trafficker’s] foreign accounts, so [she] ha[d] received nothing.”); Yamauchi, *supra* note 141, at 24 (illustrating that assets disappear when the government does not have the power to freeze the assets while a case is pending); Jorene Soto, Comment, *Show Me the Money: The Application of the Asset Forfeiture Provisions of the Trafficking Victims Protection Act and Suggestions for the Future*, 23 PENN ST. INT’L L. REV. 365, 379 (2004) (explaining that a state may only seize assets located in a foreign state if it is party to a mutual legal assistance treaty with that state).

¹⁵⁵ TIP REPORT 2007, *supra* note 38, at 81.

¹⁵⁶ *Id.* at 156.

¹⁵⁷ TIP REPORT 2008, *supra* note 30, at 175-76 (reporting that “[d]espite indications of a sizable number of migrant laborers trafficked to Malaysia,” the government did not take action against the employers or the people who forced these workers into involuntary servitude and that “trafficking victims were vulnerable to being re-trafficked by traffickers” at land borders upon deportation); see also Olson & Shukla, *supra* note 105 (reporting that “immigration officers who deport the refugees to the border witness the trafficking that takes place and may benefit from the fees . . . paid by the refugees to the traffickers”).

until recently, taken the steps necessary to provide a trustworthy judiciary or to ensure that government officials are not guilty of complicity with traffickers.¹⁵⁸

In essence, governments have too many barriers in place that deny victims effective remedies. As a result, victims are not only denied compensation, they are also denied the opportunity to hold traffickers accountable monetarily. Although effective civil claims alone will probably not decrease the amount of trafficking taking place, an increase in successful civil claims—whereby traffickers must forfeit trafficking assets and pay substantial damages¹⁵⁹—has the potential to affect the amount of trafficking taking place. Because “[t]he threat of punishment is clearly not enough” to deter trafficking,¹⁶⁰ effective law enforcement measures must be combined with effective civil claims or other avenues for victims to seek redress. The criminal approach by itself not only fails to hold traffickers monetarily accountable and thereby provide compensation for victims, it also fails to significantly deter traffickers or decrease the number of individuals trafficked. Increasing the cost and risk associated with trafficking may increase deterrence.¹⁶¹ If traffickers are deprived of their trafficking assets and forced to pay damages, those considering engaging in trafficking may reconsider based on the activity’s risks and costs. Giving victims effective avenues for seeking a remedy, before state or international judiciaries, may help ensure that traffickers are made to pay.

¹⁵⁸ See *supra* notes 89-97 and accompanying text; TIP REPORT 2008, *supra* note 30, at 83.

¹⁵⁹ Note that accounts must be frozen at the start of trial before the money has an opportunity to disappear. In addition to having effective asset forfeitures policies, states must be parties to mutual legal assistance treaties that allow the government to seize assets outside of the state. See generally Soto, *supra* note 154 (arguing for the United States to implement effective asset forfeiture policies and to join mutual legal assistance treaties).

¹⁶⁰ Dagmar Oberlies, *The Role and Limitations of National Legislation Against Trafficking in Human Beings* 3 (presented at the Prevention of International Trafficking & Promotion of Awareness Campaign in Seoul, Korea on Sept. 22-23, 2003) (suggesting that states should not only confiscate profits but should also freeze accounts), available at <http://www.no-trafficking.org/content/pdf/trafficking%20legislation%20roles%20and%20limitations%20-%202003.pdf> (last visited Apr. 20, 2009).

¹⁶¹ *Id.* at 5. Traffickers must be faced with the “risk that probable losses [will] surpass possible gains.” *Id.*

V. A PROPOSED SOLUTION: RIGHTS FOR VICTIMS TO BRING CLAIMS BEFORE STATE AND INTERNATIONAL COURTS

Victims' rights and state accountability must receive higher priority in the fight against trafficking. This means that victims must be given opportunities to seek redress in their countries of origin as well as in destination countries where they have been victimized.¹⁶² In other words, Asian states must put forth greater effort to protect victims' rights and provide nationals and foreigners greater access to the judiciary. This need for state action, however, does not mean that the current accountability mechanisms are sufficient. Many Asian states have been slow to respond to the problem of trafficking and many still have too many barriers denying victims access to effective judicial remedies. There is thus a need for new accountability mechanisms and new avenues for victims to seek redress. Victims in Asia should be given standing before an international court to seek redress against traffickers and states.

Of the international bodies designed to help protect victims' rights, none serve the function of a judiciary where individuals have standing to bring claims for violations of rights that occur in any of the Asian states. Although there is a regional Human Rights Commission in Asia,¹⁶³ there is no corresponding Court of Human Rights such as exists in the Inter-American or European systems, and none of the IGOs—the United Nations, ASEAN, or SAARC—offer any opportunities for individuals to seek remedies.¹⁶⁴ The one international court that does

¹⁶² "Making justice portable will enable many more trafficked persons to achieve redress and begin the path to recovery." Caron, *supra* note 142, at 15.

¹⁶³ See Asian Human Rights Commission, available at <http://www.ahrchk.net/index.php> (last visited Apr. 20, 2009).

¹⁶⁴ The UN allows individuals to file complaints of alleged, gross human rights violations committed by states under ECOSOC Resolution 1503. RICHARD B. LILICH ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 562 (4th ed. 2006) (noting that "the 1503 procedure is not available when a single or isolated violation occurs"). However, 1503 does not provide complainants any possibility of obtaining direct remedies for harms that they have suffered. Instead, a UN Commission reviews the complaints and determines whether investigations are necessary. Nigel S. Rodley & David Weissbrodt, *United Nations Nontreaty Procedures for Dealing with Human Rights Violations*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 45, 69-71 (Hurst Hannum ed., 4th ed. 2004). If it decides to investigate an alleged violation, the Commission announces the situation being studied to the public but generally does not provide its reports, conclusions, or any other information to the public or the individual who filed the complaint. *Id.*; LILICH ET AL., *supra* at 553 (noting that it is rare for the Commission to publicly release a report). The reports and findings may be used by the Commission to put pressure on governments, but this pressure impliedly does not have the same effect as other forms of political pressure because it

potentially have jurisdiction over traffickers in Asia, the International Criminal Court ("ICC"), does not provide individuals with opportunities to file claims or otherwise seek remedies. Instead, the ICC only hears claims brought by a special prosecutor, and though states may refer situations to the prosecutor, individuals do not have this right.¹⁶⁵ Even if individuals could bring a claim, the ICC only has jurisdiction over claims alleging widespread or systematic attacks,¹⁶⁶ and many individuals may struggle to present evidence that the crime of which he or she was a victim meets the high threshold required by the Rome Statute—that the crime was “of extreme gravity, of mass scale, and constitute(s) an attack on humanity.”¹⁶⁷ In addition, the crime must have taken place in a state that has accepted the jurisdiction of the ICC, and to date many Asian states have not done so.¹⁶⁸ Thus, many victims in Asia lack avenues to enforce their rights before any international tribunal, even when there are no realistic avenues to pursue redress and justice in their state judiciaries.

This lack of available remedial systems for individuals only emphasizes the need for an Asian Human Rights Court or a variation of the ICC that allows for individuals to bring civil claims against traffickers and states for violating their rights.¹⁶⁹ Although some people in Asia may

is done in secrecy. LILICH ET AL., *supra* at 564 (explaining that the confidential nature of these proceedings often make them an inappropriate means of obtaining a remedy).

In addition, neither ASEAN nor SAARC provide any remedial systems for individuals. See ASEAN Overview, *supra* note 19; SAARC, Areas of Cooperation, available at <http://www.saarc-sec.org/> (last visited Apr. 20, 2009) [hereinafter SAARC Areas of Cooperation]. ASEAN essentially serves as “an umbrella institution with few enforcement mechanisms to require compliance” with its declarations or other agreements. Emmers et al., *supra* note 13, at 498. SAARC seems to also fit this description of being an umbrella institution designed more to further cooperation than to force action. See SAARC Areas of Cooperation, *supra*.

¹⁶⁵ Rome Statute of the International Criminal Court, opened for signature July 17, 1998, 2187 U.N.T.S. 90, arts. 13, 14 (entered into force July 1, 2002).

¹⁶⁶ *Id.* arts. 5, 7, 13.

¹⁶⁷ Andreas Schloenhardt, *Transnational Organized Crime and the International Criminal Court—Developments and Debates*, 24 UNIV. OF QUEENSLAND L.J. 93 (2005), available at <http://www.austlii.edu.au/au/journals/UQLJ/2005/4.html> (last visited Apr. 20, 2009).

¹⁶⁸ International Criminal Court, Assembly of States Parties, available at <http://www.icc-cpi.int/Menu/ASP/> (last visited Apr. 20, 2009) (listing states which are parties to the Rome statute and not including China, Laos, Nepal, or Thailand).

¹⁶⁹ But see Sir Arthur Watts KCMG QC, *The Importance of International Law*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 13 (2000) (“[T]he enforcement of humanitarian standards . . . remain beyond the realistic scope of forceful enforcement action. . . . Although considerations of reciprocity, and the interdependence of States, render such measures more effective than they might otherwise be if considered in isolation, they remain poor substitutes for what most

not view legal systems as a viable solution for pursuing compensation and policy goals¹⁷⁰ because they have been taught not to make use of the legal system to redress harm,¹⁷¹ many victims want compensation and justice,¹⁷² and civil claims are an important way that victims can pursue them. By allowing victims to serve as “private attorneys general” and bring civil claims, these victims help protect their own rights,¹⁷³ and they help hold others accountable for violating their rights.¹⁷⁴ What is needed, therefore, is a forum that will allow victims to bring civil claims and renew their trust in legal systems as a means of obtaining justice. Establishing an international court is a potential solution because it may increase the possibility that victims will find redress and justice and that internal state systems will be changed.

The Inter-American and European Courts of Human Rights have increased the number of victims receiving compensation from states for violating their rights and have further spurred some states to change their internal systems.¹⁷⁵ Although states do not always respond favorably to orders by international courts, some positive changes have come from

societies accept as the normal mechanism for enforcing the law and settling disputes, namely an effective and comprehensive judicial system.”).

¹⁷⁰ David M. Engel, *Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand*, 30 LAW & SOC. INQUIRY 469, 511 (2005).

¹⁷¹ Engel, *supra* note 170, at 511. Buddhism counsels harmed individuals “to absorb the harm that has been done to them without any aggressive attempt to obtain compensation.” *Id.* at 504. It teaches people to believe that “[t]he cycle of injury and suffering can be brought to an end only by forgiveness and not by the ‘selfish’ pursuit of money damages.” *Id.* at 510. In essence, this idea has been incorporated into Asian culture such that individuals have been taught to “not view mishaps in terms of potential rights claims.” *Id.* at 511.

¹⁷² See, e.g., Bilbatúa, *supra* note 144, at 7-8. Individuals who in Cambodia have expressed an interest in civil sanctions in other contexts—in regard to national crimes committed by the Communist Party of Kampuchea. Laura McGrew, *Alternatives: Transitional Justice Approaches in Cambodia*, available at http://www.justiceinitiative.org/db/resource2/fs/?file_id=16990 (last visited Apr. 20, 2009) (“Civil sanctions, though incompletely explored in surveys, were found to be highly desirable.”). This interest indicates that others who have had rights violated may be open to civil litigation as a means of ending the slave-like abuse of trafficking. In America, “[t]he trafficking civil action illustrates that expression of our moral condemnation would be incomplete without the trafficked person’s assertion of an expressive remedy.” Kim & Hreshchyn, *supra* note 144, at 36.

¹⁷³ Beth Stephens, *Export/Import: American Civil Justice in a Global Context*, 52 DEPAUL L. REV. 433, 435 (2002).

¹⁷⁴ Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2585 (2006) (“Beyond facilitating access to resources, civil suits also serve as a vehicle for empowering victims and allowing them to vindicate their rights by holding perpetrators personally accountable.”).

¹⁷⁵ JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 331-340 (2003); Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT’L L. 121, 132 (2001).

these courts and their complaint mechanisms.¹⁷⁶ These two courts thus exemplify the principle that there must be more than one means of accountability for protecting human rights.¹⁷⁷ They also illustrate that pressure brought about by individual claims can play an important role in motivating states to change.¹⁷⁸

Asian states need the pressure and accountability that an international court could bring, and victims need the avenues for redress it could provide. An Asian Human Rights Court could help hold states accountable for the wrongs they have committed or failed to address and to ensure the cooperation of states in bringing traffickers to justice and making sure that victims have an opportunity to obtain compensation and redress.

VI. CONCLUSION

Victims face many barriers that prevent them from pursuing or obtaining redress for the wrongs they have suffered.¹⁷⁹ Because victims lack the opportunity to seek redress by bringing civil claims, victims' rights are not protected and traffickers and governments are not adequately held accountable. The current accountability mechanisms in place are not sufficient to spur Asian states to aggressively and comprehensively address the trafficking problem and thereby adequately protect victims' rights. Consequently, a need remains for a new accountability mechanism and a new forum where victims' voices will be heard—an international court where victims can bring claims for relief against traffickers and states alike. Such a solution is critical in further protecting victims rights and ensuring that victims have an opportunity to help bring about justice and resolution to their lives.

¹⁷⁶ James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 234-35 (2004).

¹⁷⁷ Cassel, *supra* note 175, at 123 ("Where rights have been strengthened the cause is usually not so much individual factors acting independently--whether in law, politics, technology, economics, or consciousness--but a complex interweaving of mutually reinforcing processes."). International courts are one of many processes that work together to enforce rights. *Id.* at 131-34.

¹⁷⁸ *See id.* at 126; *cf.* Cavallaro & Schaffer, *supra* note 176, at 219 (2004) ("A review of the degree of compliance with the determinations of the Inter-American system, as well as our experience as activists in the international arena, has convinced us that the impact of international litigation is significantly enhanced when cases are accompanied by social pressure on domestic authorities through a variety of other means.").

¹⁷⁹ Engel, *supra* note 170, at 498, 502.

