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Cover Page Footnote

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LEGAL INSTRUMENT UNDER THE “ASEAN WAY”: THE CASE OF ASEAN CONVENTION AGAINST TRAFFICKING IN PERSONS

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Abstract

This study was mainly raised because of the contradictory situation between ASEAN's informal practices, embodied in the ASEAN Way, and the emergence of the ASEAN Convention against Trafficking in Persons (ACTIP) as a legal instrument for the basis of formal cooperation. Hence, it is important to understand the current situation of the ASEAN Way on a legal instrument by examining how ACTIP conforms with the ASEAN Way principles and influences its compliance. Drawing on the concept of legalization as discussed by Abbott et al. (2000), the research employs a qualitative method and a case study approach to analyze ACTIP's provisions and their alignment with the ASEAN Way. The findings reveal that ACTIP's conformity with the ASEAN Way positions it as a soft law. However, this allows member states to achieve ACTIP's goals while managing uncertainties and preserving their sovereignty. Significantly, this study highlights the adaptation of the ASEAN Way in a legal instrument that uniquely poses no significant problems and instead works to suppress the tradeoffs of international law.

Keywords: *Legalization, Legal Instrument, ASEAN Way, Trafficking in Persons, ASEAN.*

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I. INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) is widely recognized for its less institutionalized and informal approach, due to its diplomatic conventions, norms, and security practices have an institutional design that has long prioritized the “ASEAN Way”.¹ The ASEAN Way refers to a set of diplomatic norms adhered to by ASEAN Member States (AMS) which were established on the principles of sovereignty, decision-making by deliberation and consensus, non-intervention, and peaceful resolution of conflicts.² These

¹ Amitav Acharya, “Democratisation and the Prospects for Participatory Regionalism in South-east Asia,” *Third World Quarterly* 24, no. 2 (2003), <https://doi.org/10.1080/0143659032000074646>.

² Pek Koon Heng, “The ‘ASEAN Way’ and Regional Security Cooperation in the South China Sea” in *Robert Schuman Centre for Advanced Studies Research Paper 2014* (Fiesole: European University Institute, 2014), <https://doi.org/10.2139/ssrn.2540049>.

fundamental characteristics make the ASEAN Way susceptible to being blamed for organizational ineffectiveness, yet it is the superior norm in the ASEAN decision and policy-making process. It makes this principle a controversial one and has garnered a lot of interest from political science and international relations academics.

In 2007, the legal personality of ASEAN received a further boost in the institutional framework with the approval of the ASEAN Charter. The acceptance of this charter is expected to herald the beginning of ASEAN's new path toward diplomatic conventions and new security practices in the region by rendering the ASEAN Way into a rule.³ Under the ASEAN Political-Security Community, one of the ASEAN legal instruments produced is the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP). As a legal instrument, the ACTIP can be seen as a positive response and increase awareness about the importance of regional action in combating Trafficking in Persons (TIP) in the Southeast Asia region.

The ACTIP was signed on 21 November 2015 in Kuala Lumpur, Malaysia. When the Philippines deposited its instrument of ratification in February 2017, the convention went from an emblem of good intention and goodwill to a legally binding regional mechanism.⁴ Even though the ACTIP has been ratified and has come into force, TIP is still a major issue for ASEAN member states. The discovery of 139 mass graves of trafficking victims along the border between Malaysia and Thailand in 2015⁵ can be perceived as strong evidence of transnational crimes that are increasingly borderless and challenging.

At the same time, ASEAN should adapt to these challenges while still adhering to the ASEAN Way's essential norms. Many studies have connected the ineffectiveness of regional cooperation with the principles of the ASEAN Way.⁶ The opponents claim that the ASEAN Way makes ASEAN incapable

³ See Seng Tan, "Not Quite the 'ASEAN Way'? Southeast Asia's Evolution to Rules-Based Management of Intra-ASEAN Differences," in *ASEAN@50 Vol. 4: Building ASEAN Community: Political-Security and Socio-Cultural Reflections*, Aileen Baviera and Larramy Maramis, eds. (Jakarta: Economic Research Institute for ASEAN and East Asia (ERIA), 2017).

⁴ "ASEAN Welcomes Entry into Force of ACTIP", ASEAN, accessed 8 February 2022, <https://asean.org/asean-welcomes-entry-into-force-of-actip/>.

⁵ "Malaysia Migrant Mass Graves: Police Reveal 139 Sites, Some with Multiple Corpses," *The Guardian*, accessed 10 February 2022, <https://www.theguardian.com/world/2015/may/25/malaysia-migrant-mass-graves-police-reveal-139-sites-some-with-multiple-corpses>.

⁶ Geoffrey B. Cockerham, "Regional Integration in ASEAN: Institutional Design and the ASEAN Way," *East Asia* 27 (2010), <https://doi.org/10.1007/s12140-009-9092-1>; Ekaterina Koldunova, "Which 'ASEAN Way' Forward?: Southeast Asian Perspectives on Peace and Institutions" in *The Palgrave Handbook of Global Approaches to Peace*, Aigul Kulnazarova and Vesselin Popovski, eds. (Cham: Palgrave Macmillan, 2019), https://doi.org/10.1007/978-3-319-78905-7_17; Dio Herdiawan Tobing, "The Limits and Possibilities of the ASEAN

of getting its members to act in concert, as it is often used as an excuse for passivity and results in suboptimal ASEAN collaboration.⁷ Koldunova revealed that serious limitations of the principle make it no longer relevant in relations with bigger external powers.⁸ In particular, the principle of non-interference adopted within the ASEAN Way generated issues in the delegation dimension, as the current dispute resolution is made through diplomatic efforts that has led to fruitless outcomes.⁹ As such, the ASEAN Way contrasts with legalistic decision-making procedures.¹⁰ Opponents essentially point out that the implementation of the ASEAN Way is often accused of being a factor in organizational ineffectiveness and lacks tangible results.

On the other hand, the proponents argued that the principle is a positive impetus for regional peace and its strong contribution has fulfilled ASEAN's original goals as a regional organization.¹¹ Some even consider ASEAN as the most successful multilateral organization in the Asian region, especially in maintaining regional security and peace,¹² specifically how the principle of non-interference in the ASEAN Way has protected AMS from interfering in the internal affairs of other member states.¹³ Regarding the human security perspective, the ASEAN Way embraces it to an unprecedented level that can

Way: The Case of Rohingya as Humanitarian Issue in Southeast Asia" in *The 1st International Conference on South East Asia Studies, 2016* (KnE Social Sciences, 2018): 3, https://doi.org/10.1007/978-3-319-78905-7_17; Rendi Prayuda, Tulus Warsito, and Surwandono, "Problems Faced by ASEAN in Dealing with Transnational Drug Smuggling in Southeast Asia Region," *Foresight*, no. 3 (2020): 23, <https://doi.org/10.1108/FS-12-2019-0106>.

⁷ Tobing, "The Limits and Possibilities of the ASEAN Way,"; Prayuda, Warsito, and Surwandono, "Problems Faced by ASEAN."

⁸ Koldunova, "Which 'ASEAN Way' Forward?"

⁹ Fikri Muhammad, "Environmental Agreement under the Non-Interference Principle: The Case of ASEAN Agreement on Transboundary Haze Pollution," *International Environmental Agreements: Politics, Law and Economics* 22 (2021), <https://doi.org/10.1007/s10784-021-09545-4>.

¹⁰ David Martin Jones and Michael Lawrence Smith, "Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order," *International Security* 32, no. 1 (2007): 32, <https://doi.org/10.1162/isec.2007.32.1.148>.

¹¹ Arief Bakhtiar Darmawan and Hestutomo Restu Kuncoro, "Penggunaan ASEAN Way Dalam Upaya Penyelesaian Sengketa Laut Tiongkok Selatan: Sebuah Catatan Keberhasilan? [The Usage of ASEAN Way as an Effort to Resolve the South China Sea Dispute; A Record of Success?]" *Andalas Journal of International Studies* 8, no. 1 (2019): 8, <https://doi.org/10.25077/ajis.8.1.43-61.2019>; Kishore Mahbubani and Jeffery Sng, *The ASEAN Miracle: A Catalyst for Peace* (Singapore: NUS Press, 2017); Timo Kivimäki, *The Long Peace of East Asia* (Abingdon: Routledge, 2016).

¹² Susy Tekunan, "The ASEAN Way: The Way To Regional Peace?" *Jurnal Hubungan Internasional* 3, no. 2 (2015): 143, <https://doi.org/10.18196/hi.2014.0056.142-147>; Hans C. Blomqvist, "ASEAN as a Model for Third World Regional Economic Co-Operation?" *ASEAN Economic Bulletin* 10, no. 1 (1993).

¹³ Tekunan, "The ASEAN Way."

be integrated into strategies to make the public more responsive to ASEAN policy implementation.¹⁴ This basically illustrates the point that the ASEAN Way is very helpful in maintaining cooperation and good relations among AMS.

As an empirical study, this article does not intend to explicitly examine the effect of the ASEAN Way as a case for a causal analysis study because many studies have explored that perspective. On the other hand, the authors understand the significance of examining its impact on institutional design as only a few studies have done so. Cockerham studied the institutional design that developed within the ASEAN framework and found that many agreements exhibit low levels of transparency and delegation.¹⁵ Sundrijo examined the ASEAN Intergovernmental Commission on Human Rights (AICHR) as an institutional design and found that the ASEAN Way, with its consensus principle, is one of the weakening factors of the toothless AICHR.¹⁶ Such studies give significant contributions to understanding the cooperative framework of ASEAN and further research on other institutional designs becomes impertinent. There has been no research in particular on the impact of the ASEAN Way on the regional mechanism of human trafficking and this article aims to fill that gap.

As such, it is important to understand the implementation of the ASEAN Way as a factor causing the problem of effective regional mechanism, which is often addressed by scholars. Hence, the authors are interested in examining how the ACTIP conformed to the ASEAN Way principle and influenced its compliance. This study utilizes the legalization concept developed by Abbott et al. to uncover its obligation, precision, and delegation, standing to define the position of ACTIP on the soft-hard law continuum. Qualitative research is conducted to collect, analyze, and interpret non-numeric data to give meaning to social reality. Secondary source documents were used to get data, and archival and document-based research was conducted on official documents, reports, journals, and books.

This article is organized as follows. The ASEAN Way principle, the concepts of legalization, and the soft-hard law continuum will be briefly discussed after this section. The authors will then examine the ACTIP's structure in terms of legalization aspects, situate it on the hard-soft law continuum, and

¹⁴ Brendan M. Howe and Min Joung Park, "The Evolution of the 'ASEAN Way': Embracing Human Security Perspectives," *Asia-Pacific Social Science Review* 16, no. 3 (2017): 6.

¹⁵ Cockerham, "Regional Integration in ASEAN."

¹⁶ Dwi Ardhanariswari Sundrijo, "Regionalisation of Global Norms on Human Rights in Southeast Asia: Issues and Problems" in *Regionalizing Global Human Rights Norms in Southeast Asia* (Cham: Palgrave Macmillan, 2021).

uncover its theoretical compliance implications. The article will also examine the compliance of AMS to ACTIP and analyze the sovereignty cost and uncertainty. Finally, the conclusion will discuss the findings and implications for revisiting the ASEAN Way principles in the agreement and some broad resolutions.

II. ASEAN WAY, LEGALIZATION, AND SOFT-HARD LAW CONTINUUM

A. THE ASEAN WAY

The term “ASEAN Way” describes ideas about a unique method of resolving conflicts and fostering regional collaboration that ASEAN countries have created to maintain peace and stability throughout the region. This is a result of the difficulties this regional organization has faced since its founding in 1967, such as the dispute between Malaysia and the Philippines over Sabah; the invasion and occupation of Cambodia by Vietnam; external intervention by Soviet, Chinese, and American in regional affairs; and the difficulties associated with regional economic cooperation.¹⁷ Hence, it consists of a code of ethical behavior between countries that gives a unique way to be operationalized within the framework of regional interaction.

The ASEAN Way contains several core elements to carry out a process of interaction and cooperation based on non-intervention, informality, consensus decision-making, and non-confrontational behavior.¹⁸ The most prominent element in the discussion of the ASEAN Way is the principle of non-interference. The term “non-interference” typically refers to actions performed on purpose by a state, an intra-state group, or an international organization to intervene in the internal affairs of another sovereign state. It includes a wide range of acts, such as refraining from criticizing the actions of member state governments towards their own people; not using a country’s domestic political system and the political style of its government as the basis for deciding on its membership in ASEAN; refuse recognition, protection, or other forms of support to rebel groups that seek to destabilize or overthrow the government of a neighboring country; or even providing political support and material assistance to member states in campaigns against subversive and

¹⁷ Amitav Acharya, “Ideas, Identity, and Institution-building: From the ‘ASEAN Way’ to the ‘Asia-Pacific Way’?” *The Pacific Review* 10, no. 3 (1997), <https://doi.org/10.1080/09512749708719226>.

¹⁸ Darmawan and Kuncoro, “Penggunaan ASEAN Way Dalam Upaya Penyelesaian Sengketa Laut Tiongkok Selatan.”

destabilizing activities.¹⁹ Therefore, it appears that ASEAN's non-interference principle is imposing extremely stringent restrictions on state activity, outlawing even verbal comments on domestic matters to prevent upsetting regional stability.²⁰

The non-interference principle is argued as an integral part of the ASEAN Way, which has been embedded within ASEAN practices since its founding.²¹ ASEAN's non-interference principle persists because of the mixture of political regimes in ASEAN, less demand for intrusive rules, and concerns related to the loss of state autonomy.²² It forces AMS to refrain from meddling in any matters that might be viewed as domestic affairs belonging to other members.²³ This trait makes it difficult for ASEAN to deal with conflicting issues that cross borders smoothly²⁴ and it is identified as the organization's inaction on some significant crises, including the Asian financial crisis and the situation in Myanmar.²⁵

Concerning conflict management, the ASEAN Way refers to a series of established guidelines and norms including the principles of non-interference in internal affairs, peaceful resolution of conflicts, and the non-use of force.²⁶ It functions as a dispute-resolution mechanism that allows the member states to negotiate and come to a consensus position on issues.²⁷ The ASEAN Way is the organization's approach to handling conflict situations since it serves as a standard of behavior, particularly concerning the principles of collective decision-making and non-intervention.

¹⁹ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (London: Routledge, 2014).

²⁰ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Basingstoke: Palgrave Macmillan, 2012).

²¹ Tram-Anh Nguyen, "Norm or Necessity? The Non-Interference Principle in ASEAN," *Cornell International Affairs Review* 9, no. 1 (2016): 9.

²² Sanae Suzuki, "Why Is ASEAN Not Intrusive? Non-Interference Meets State Strength," *Journal of Contemporary East Asia Studies* 8, no. 2 (2019): 8, <https://doi.org/10.1080/24761028.2019.1681652>.

²³ Hiro Katsumata, "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 25, no. 1 (2003).

²⁴ Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," *The Pacific Review* 31, no. 3 (2018), <https://doi.org/10.1080/09512748.2017.1371211>.

²⁵ Jones and Smith, "Making Process, Not Progress."

²⁶ ASEAN, "Treaty of Amity and Cooperation in Southeast Asia," <https://asean.org/our-communities/asean-political-security-community/outward-looking-community/treaty-of-amity-and-cooperation-in-southeast-asia-tac/>.

²⁷ Noel M. Morada, "Southeast Asian Regionalism, Norm Promotion and Capacity Building for Human Protection: An Overview," *Global Responsibility to Protect* 8, no. 2–3 (2016): 117.

At a practical level, the ASEAN Way applies the principle of non-use of force or peaceful dispute resolution as a code of conduct. This element encourages members to prevent the escalation of the conflict by gradually increasing mutual trust in the long term.²⁸ The ASEAN Way also applies a non-legalistic bargaining procedure, namely informality. This informality pushes ASEAN to prefer pragmatism, which implies seeking practical and minimum solutions that all parties can live with.²⁹ Under this informality, collective goals are achieved by relying on a process of consultation and consensus building. Discussions are carried out through a process in which each party articulates its point of view before a final decision is made. Decisions are not made by voting, but by consensus.³⁰ This often has positive results because ASEAN's collective decisions tend to reflect the lowest common interests.³¹

In essence, the ASEAN Way is recognized as a "norm network" that creates a "regional identity", in which member countries have been "socialized" to alter their identities, interests, and conduct.³² As a term, the ASEAN Way refers to the main set of rules in ASEAN³³ and it can be viewed as a collective norm that is institutionalized through laws, formal rules, procedures, other formal documents.³⁴ The ACTIP as one of the results of this institutionalization will be examined in the next section.

B. LEGALIZATION CONCEPT

Understanding that the ASEAN Way is institutionalized through laws, formal rules, procedures other formal documents, the concept of legalization is utilized to understand how the adoption of this principle affects the ACTIP. This concept is critical when analyzing international agreements because it assists in determining the position of agreements and treaties on the hard-soft law continuum. Legalization is a group of characteristics in an institution that includes three factors considered critical to international institutions:

²⁸ Katsumata, "Reconstruction of Diplomatic Norms in Southeast Asia."

²⁹ Jurgen Haacke, *ASEAN's Diplomatic and Security Culture: Origins, Development and Prospects* (London: Routledge, 2002).

³⁰ Ralf Emmers, "ASEAN Minus X: Should This Formula Be Extended?" *RSIS Commentary, No. 199* (Singapore: Nanyang Technological University, 2017).

³¹ Vinod K. Aggarwal and Jonathan T. Chow, "The Perils of Consensus: How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation," *Review of International Political Economy* 17, no. 2 (2010), <https://doi.org/10.1080/09692290903192962>.

³² Lee Jones, "ASEAN's Unchanged Melody? The Theory and Practice of 'Non-Interference' in Southeast Asia," *The Pacific Review* 23, no. 4 (2010): 480.

³³ Yukawa, "The ASEAN Way as a Symbol."

³⁴ Ronald L. Jepperson, Alexander Wendt, and Peter J. Katzenstein, "Norms, Identity, and Culture in National Security" in *The Culture of National Security: Norms and Identity in World Politics*, Peter J. Katzenstein, ed. (New York: Columbia University Press, 1996).

obligation (being bound by rules or commitments), precision (clear rules), and delegation (giving authority to the third party).³⁵

The growth of international cooperation institutions that rely on the rule of law to establish ground rules for relations between countries within the institution that has been previously agreed upon by the state or parties concerned inspired the concept of legalization.³⁶ This demonstrates that legalization is viewed as a normative value, with the amount of legalization in a contract indicating the strength of the collaboration's ties. Legalization is frequently regarded as a component of or an indicator of institutionalization,³⁷ but it is unclear how distinct the dimensions of legalization are from those of institutionalization.³⁸

By taking a systematic evaluation of the legalization concept and further creating an alternative measure of international legalization. The results are shown in Table 1, whereby the obligation, precision, and delegation are classified as high or low and it generates eight possible combinations. They developed the classification of legalization by radically differentiating the weight of the obligation dimension from others, to be able to act as a partially necessary condition with the consequence of reducing the weight of delegation and precision.

Bélanger and Fontaine-Skronski³⁹ give all "High" scores a numerical value of 2, and all "Low" scores a numerical value of 1. They use the coefficient of 2 points for obligation; for delegation 0.8 points; and precision 0.6 points. By giving 2 points for obligation, it occupies the most important aspect of legalization with the heaviest weight, followed by the next delegation, and precision which has the lightest weight. It means that they consider the obligation dimension as a somewhat necessary condition for legalization to occur. Table 1 shows the classification of various sets of dimension degrees in the concept of legalization.

³⁵ Kenneth W. Abbott, *et al.*, "The Concept of Legalization," *International Organization* 54, no. 3 (2000), <https://doi.org/10.1162/002081800551271>.

³⁶ Nanang Pamuji Mugasejati, "Konsep Legalisasi Dalam Politik Kerjasama Internasional [The Concept of Legalization in International Cooperation Politics]," *Jurnal Ilmu Sosial Dan Ilmu Politik* 10, no. 2 (2006): 121, <https://doi.org/10.22146/jsp.11015>.

³⁷ Judith Goldstein, *et al.*, "Introduction: Legalization and World Politics," *International Organization* 54, no. 3 (2000): 386, https://doi.org/10.1007/978-981-10-8730-1_47.

³⁸ Louis Bélanger and Kim Fontaine-Skronski, "Legalization in International Relations: A Conceptual Analysis," *Social Science Information* 51, no. 2 (2012): 241, <https://doi.org/10.1177/0539018412437110>.

³⁹ *Ibid.*

Table 1: An alternative measure of international legalization⁴⁰

Type	Obligation $\alpha = 2.0$	Precision $\chi = 0.6$	Delegation $\beta = 0.8$	Legalization O + min (O, D+P)	Types Of Legalization
I	High $2 \times 2.0 = 4.0$	High $2 \times 0.6 = 1.2$	High $2 \times 0.8 = 1.6$	6.8	Very high
II	High $2 \times 2.0 = 4.0$	Low $1 \times 0.6 = 0.6$	High $2 \times 0.8 = 1.6$	6.2	High
III	High $2 \times 2.0 = 4.0$	High $2 \times 0.6 = 1.2$	Low $1 \times 0.8 = 0.8$	6	High
IV	Low $1 \times 2.0 = 2.0$	High $2 \times 0.6 = 1.2$	High $2 \times 0.8 = 1.6$	4.0	Low
V	High $2 \times 2.0 = 4.0$	Low $1 \times 0.6 = 0.6$	Low $1 \times 0.8 = 0.8$	5.4	Moderate
VI	Low $1 \times 2.0 = 2.0$	Low $1 \times 0.6 = 0.6$	High $2 \times 0.8 = 1.6$	4.0	Low
VII	Low $1 \times 2.0 = 2.0$	High $2 \times 0.6 = 1.2$	Low $1 \times 0.8 = 0.8$	4.0	Low
VIII	Low $1 \times 2.0 = 2.0$	Low $1 \times 0.6 = 0.6$	Low $1 \times 0.8 = 0.8$	3.4	Very Low

The “obligation” is defined as the dimension that compels the states or other actors to act according to the commitments they make, which specifically means that they are legally bound by their agreements.⁴¹ Obligation consist of four indicators: the formal nature of the institution, the language used to describe the obligation, the presence or absence of certain provisions (reservations, escape clauses), and the domestic means of ratification or adoption.⁴² Obligation seems to be the most influential dimension and others cannot contribute to legalization more than the limit set by the obligation. It means that the obligation has the heaviest value than the other dimensions.

⁴⁰ *Ibid.*

⁴¹ Abbott, *et al.*, “The Concept of Legalization.”

⁴² Bélanger and Fontaine-Skronski, “‘Legalization’ in International Relations.”

The “precision” is defined as a rule that clearly pictures the behavior of actors regarding what is allowed, required, and prohibited.⁴³ This dimension should be able to determine the clarity of the rules that are unambiguous and in accordance with the intended purpose. In other words, precision will narrow the opportunity for the parties to interpret themselves regarding the rules of the game in the agreement which also can be adapted to their respective interests. Precision is also about how a rule is related to one another, so that it does not overlap and create a framework within an interpretation that can be carried out coherently. However, among the three dimensions of legalization, precision carries the least amount of weight in the aggregate concept.⁴⁴

The “delegation” is defined as the granting authority to a third party in interpreting the rules, resolving disputes, and even making further rules.⁴⁵ This dimension is related to the extent state as a party bound by the agreement costs its sovereignty to international organizations or institutions to determine state policy actions and choices. There are two different kinds of delegation. The first is referred to as “dispute-resolution delegation” and is the delegation of rule interpretation or adjudication to third parties (courts, arbitration panels, administrative or political bodies). The second delegation is known as “rule-making and implementation” and combines the delegation of authority to amend or create new rules (regulatory and legislative functions) with the delegation of authority to enforce and implement rules through bureaucratic operations, information dissemination, and training programs, for example (executive functions).

C. SOFT-HARD LAW CONTINUUM

By giving legal instruments a “harder” or “softer” legal character, the legalization concept by Abbott et al.⁴⁶ has contributed to providing a useful tool for understanding an organization’s choices regarding hard and soft law. Hard law refers to the obligation that is legally binding and precise. There is also a third-party delegating authority to interpret and implement the law.⁴⁷ Implementing the hard law in an agreement will help international actors reduce transaction costs, strengthen the credibility of their commitments, and resolve incomplete contractual issues. However, this also entails significant costs in restriction of the behavior or even sovereignty that can cause states to

⁴³ Abbott, *et al.*, “The Concept of Legalization.”

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Abbott, *et al.*, “The Concept of Legalization.”

⁴⁷ Kenneth W. Abbott and Duncan Snidal, “Hard and Soft Law in International Governance,” *International Organization* 54, no. 3 (2000): 421, <https://doi.org/10.1162/002081800551280>.

negotiate fiercely and at length, over legally binding commitments.⁴⁸

Contrary to this ideal type of hard law, Abbott and Snidal defined soft law as a legal instrument that contains defects in one or more of the dimensions of obligation, precision, and delegation.⁴⁹ As soft law is indicated by soft legalization, this will allow countries to adapt their commitments to their situation or interests and provides flexibility in implementation, therefore helping countries deal with the domestic political and economic consequences of an agreement and increases the efficiency of its implementation.⁵⁰ Furthermore, Dupuy argued that soft law could define and promote acceptable behavior standards without necessarily forcing binding obligation.⁵¹ Hence, soft law also has certain independent advantages by avoiding some of the costs of hard law.

Hard law has a strong commitment that can reduce transaction and operational costs. On the other hand, soft law may not provide all these benefits, but it can reduce contract costs and protect state sovereignty. Hard and soft law has its respective tradeoffs which in this paper will take two variables, namely the cost of sovereignty and uncertainty.

III. LEGALIZATION OF ACTIP

In determining the degree of the ACTIP's obligation, it is important to look at the four indicators of obligation by Bélanger and Fontaine-Skronski.⁵² The first is regarding the formal nature of institutions. The use term "Convention", according to the FindLaw Legal Dictionary, is an agreement between nations for regulation of matters affecting all of them and enforceable in law. As a convention is something before signing a legally binding agreement or contract, it means the formal nature of ACTIP has a sufficient level of legal engagement, which is indeed intended to provide a framework for cooperation in law enforcement and enhance the capacity of government institutions.

⁴⁸ Gregory Shaffer and Mark A. Pollack, "Hard and Soft Law: What Have We Learned?" in *International Law and International Relations: Insights from Interdisciplinary Scholarship*, Jeffrey L. Dunoff and Mark A. Pollack, eds. (New York: Cambridge University Press, 2012), doi: <http://dx.doi.org/10.2139/ssrn.2044800>.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment," *Michigan Journal of International Law* 12, no. 2 (1990): 434.

⁵² Bélanger and Fontaine-Skronski, "'Legalization' in International Relations."

Secondly, provisions that often use the word “shall” and the use of the term “enter into force” in Article 29 are signs of the high attachment of ACTIP in terms of language. According to the Law Dictionary, the word “shall” is used in statutes and similar instruments, which indicates that they are generally imperative or mandatory; but it may be construed as merely permissive or directory. Almost equal to the word “must”, the word “shall” has a mandatory phrase, which means it is a binding obligation on the parties.⁵³ However, in several chapters (Chapter II Criminalization and Chapter V Law Enforcement), it is indicated that the degree of obligation is reduced by the use of language such as “Each party shall adopt such measures as may be necessary...” and also the use of “shall” is changed to “may” several times. Therefore, the reduction of this high-obligation language indicates that the ACTIP does not fully allow this convention to bind in some sensitive respects.

Lastly, the presence of signatures by ASEAN leaders at the 27th ASEAN Summit is a clear sign that the ACTIP is supported by domestic means of adoption as the last indicator of obligation. This indicator is also reflected in article 28 concerning ratification, approval, and depositary, which regulates the obligation of AMS to approve ratification through the internal procedures of the Parties. It means that this instrument is subject to ratification in the domestic legal system.

If there is a violation of this legal instrument, the absence of sanctions is the only minor defect in terms of the obligation. However, the ACTIP is still dominated by characteristics as a convention that is meant to be legally bound. The characteristics are as follows: the formal nature as a convention; supported by domestic means for adoption; and frequently employing the word “shall” and the use of “enter into force”. These characteristics make the ACTIP indicate that the agreement is intended to be legally binding and can be categorized as a high obligation.

In terms of precision, the ACTIP displays a relatively high degree of precision with clear rules that are not ambiguous and are in accordance with the intended purpose. This is reflected in Article 2, where there is a detailed explanation of the use of the terms to avoid a broad interpretation. Article 3 further explains the scope of application that applies to prevention, investigation, and prosecution. Meanwhile, to avoid ambiguity and describe what is permitted and prohibited, most ACTIP articles explain in detail the procedures, conditions of use, and other various provisions.

⁵³ Lavanya Rajamani, “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations.” *Journal of Environmental Law* 28, no. 2 (2016): 343. doi: <https://doi.org/10.1093/jel/eqw015>.

The ACTIP also regulates how this convention relates to other rules to avoid overlapping and create a framework within which interpretations can be carried out coherently. This is regulated in Article 26 regarding relations with other international instruments, which provides for the necessity of this convention not to prejudice the existing obligations between the parties under other international agreements. This Convention also shall not prevent parties from providing mutual assistance by other international agreements or respective domestic legal provisions. Additionally, the member states convert their political will into concrete actions by adopting the ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children. This Action Plan can provide a clear overview of the plans to achieve the objectives of this convention.

In terms of delegation, the ACTIP appears to have a flaw in the lack of third-party authorization, especially in the dispute resolution mechanism. The ACTIP does not meet the requirements as a legal instrument with strong delegation, due to the lack of delegation of authority to third parties in dispute resolution that assist in the interpretation of rules or adjudication such as courts, arbitration panels, and administrative or political bodies. Furthermore, any conflict that arises over interpretation and application would be addressed internally among countries, as Article 27 regarding the settlement of disputes states: “Any difference or dispute between the Parties arising from the interpretation or application of the provisions of this Convention shall be settled amicably through consultation and negotiation between the parties through diplomatic channels or any other peaceful means for the settlement of disputes as agreed upon between the parties.”⁵⁴ It means that the ACTIP’s degree of delegation is categorized as the weakest, with pure political bargaining among AMS.

In regulatory and legislative functions, the ACTIP also does not delegate the authority to change or make new rules to third parties. The ACTIP in Article 24 only gives the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) the authority to monitor, review, and report periodically to the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) on the effective implementation of this Convention. Apart from this given delegation, the SOMTC can play a minimal role considering the lack of authority to enforce and implement regulations through bureaucratic operations. Thus, the delegation is still very limited as the SOMTC only reflects the functions of recommendations and confidential monitoring. Furthermore, the ACTIP is also silent on the role of the AMMTC, apart from receiving reports on

⁵⁴ ASEAN Convention Against Trafficking in Persons, Especially Women and Children, opened for signature 21 November 2015 (entered into force 21 November 2015).

implementation from the SOMTC or more specifically. It is not clear whether the AMMTC can play a role in inducing compliance or in acting in cases of non-compliance.⁵⁵

The absence of delegation dimension in terms of regulatory or legislative functions and also conflict resolution characterizes ACTIP as having a low degree of delegation. The lack of delegation dimension is consistent with the ASEAN Way's ideals of non-interference, consultation, and peaceful settlement principle. In terms of non-interference, there is no party, especially third parties from ASEAN institutions, who can ensure compliance of the ACTIP by AMS. The monitoring, reviewing, and reporting power of the SOMTC do not violate the principle of non-interference, since it does not have direct power to influence the internal affairs of AMS. Regarding the peaceful settlement and consultation principle, it is clearly contained in article 27, which regulates no third party can mediate the reaction of member states to a conflict. Hence, through the non-use of force or any other peaceful means, consultation becomes the viable option.

Table 3 briefly shows the characteristics of the provisions previously mentioned as having high obligation and precision, but the delegation is still low. Table 4 shows the measurement and classification of ACTIP legalization degree. It should be noted that each dimensions has their coefficient, Obligation ($\alpha = 2.0$), Precision ($\chi = 0.6$), and Delegation ($\beta = 0.8$). Based on the legalization concept, it gives all "High" scores a numerical value of 2, and all "Low" scores a numerical value of 1. The authors give obligation and precision 2 points and delegation with 1 point, and it can be determined that the Obligation ($O=4$), Precision ($P=1.2$), and Delegation ($D=0.8$). In order to get the total value of ACTIP legalization, the authors implement the formula " $O + \min(O, D+P)$ " and it results in " $2 + \min(2, (0.8+1.2))$ " and the result is 6 points of legalization. Based on the legalization classification, the ACTIP has 6 points in total and can be categorized as a "High" legalization.

⁵⁵ Ranyta Yusran, "The ASEAN Convention Against Trafficking in Persons: A Preliminary Assessment," *Asian Journal of International Law* 8, no. 1 (2018): 28. doi:<https://doi.org/10.1017/S2044251317000108>.

Table 2: Summary of ACTIP’s legalization

Dimensions	The provisions' characteristics	Type of provisions
Obligation	Formal nature as a convention has a sufficient level of engagement Frequently employing the words "shall" and the use of “enter into force” Supported by domestic means for adoption No-sanction	High
Precision	Many articles provide procedures, conditions of use, and various other detailed provisions Unambiguous and in accordance with the intended purpose The existence of provisions for alignment with other regulations Convert their political will into a plan of action.	High
Delegation	The lack of authority in regulatory and legislative functions The lack of third-party authorization in the dispute settlement	Low

Source: Authors

Table 3: Type of ACTIP’s legalization degree

Obligation	Precision	Delegation	Value of legalization	Type	Type of Legalization
High	High	Low	6	III	High
$2 \times 2.0 = 4.0$	$2 \times 0.6 = 1.2$	$1 \times 0.8 = 0.8$			

Source: Authors

Regardless of the measurement of the ACTIP that shows it has high legalization, it should be noted that the lack of delegation is a key weakness of the ACTIP. By not delegating authority to third parties in interpreting or enforcing its implementation, the agreement can be weak. The lack of a delegation dimension makes this legal instrument unable to be categorized

as hard law, which Abbott & Snidal stated must simultaneously entail high obligation, precision, and delegation. As such, the ACTIP is classified as a “soft law”.⁵⁶

IV. COMPLIANCE OF ACTIP

As the ACTIP is categorized as soft law, it is important to look at the implementation of this legal instrument for solving problems by AMS. This part will discuss what Malaysia, Vietnam, and Indonesia have done in solving the Kim Jong-nam murder case. This case may not represent the entirety of what AMS has achieved in the human trafficking case, but it is sufficient to reflect the fulfillment of the ACTIP’s provisions so far.

On 13 February 2017, Kim Jong-nam, the half-brother of North Korean leader Kim Jong-un, was killed at Kuala Lumpur International Airport, where Siti Aisyah, an Indonesian citizen, and a Vietnamese woman named Duan Thi Huong were accused of being the killers. They were named as defendants in the case by the Malaysian government. They were also charged with murder under section 302 of the Malaysian penal code for conducting the premeditated murder of Kim Jong-nam, which warrants the death penalty under Malaysian law.⁵⁷

A statement released by Siti Aisyah indicated that she was volunteering for a prank TV show that rewarded her with 400 Malaysian Ringgit and she had no idea it was a murder scenario.⁵⁸ The Indonesian Minister of Law and Human Rights, Yasonna H. Laoly, stated that Siti had no idea that North Korea was using her as an intelligence tool and that she was deceived and exploited without receiving any benefits.⁵⁹ The Indonesian Vice President at the time, Jusuf Kalla, similarly argued that Siti Aisyah was a victim who had been deceived by North Korean intelligence.⁶⁰ Therefore, the Indonesian

⁵⁶ Abbott and Snidal, “Hard and Soft Law in International Governance.”

⁵⁷ “Kim Jong-Nam Death: Two Women to Face Murder Charges,” BBC, accessed 11 February 2022, <https://www.bbc.com/news/world-asia-39112640>.

⁵⁸ Ben Westcott and King Chai Woon, “Alleged Kim Jong Nam Killer Was Hired for ‘Japanese Prank Show,’” CNN, accessed 11 February 2022, <https://edition.cnn.com/2018/01/30/asia/kim-jong-nam-murder-trial-prank-show-intl/index.html>.

⁵⁹ Rozanna Latiff, “Malaysia Frees Indonesian Woman Accused of Kim Jong Nam’s Poisoning Accessed,” Reuters, accessed 11 February 2022, <https://www.reuters.com/article/us-north-korea-malaysia-kim-court-idUSKBN1QS05X>.

⁶⁰ “Kim Jong Nam Murder Suspect Siti Aisyah a ‘Victim’, Says Indonesian Vice-President Jusuf Kalla,” The Straits Times, accessed 11 February 2022, <https://www.straitstimes.com/asia/se-asia/kim-jong-nam-murder-suspect-siti-aishah-a-victim-says-indonesian-vice-president-jusuf>.

government saw this case as trafficking in persons in accordance with the definition contained in ACTIP, which states that trafficking in persons refers to the recruitment and transfer of persons, including deception or fraud as a means to achieve the consent of a person who has control over other people.

Indonesia, who saw the case as trafficking in persons, had a different view compared to Malaysia, who saw this case as a murder. The differences in perspective regarding the status of Duan and Aisyah reflected the difficulty of AMS in viewing the case from the same perspective apart from the definition stated in the ACTIP article. Additionally, the absence of a mechanism in the ACTIP to mediate different interpretations of a case creates confusion. There was no credible third party that could provide clarity on whether this case included murder or trafficking in persons. Therefore, the case demonstrates how the lack of a delegation dimension can have implications for solving precision and obligation problems that cannot be handled effectively.

This case also shows the problem of the delegation dimension, as it is the main weakness of the ACTIP legalization. This can be seen from the lack of credible third parties that can coordinate between Indonesia, Vietnam, and Malaysia, especially during the investigation process. The investigation carried out by the Malaysian government was very uninformative and continuously rejected Indonesia's intervention in the investigation. As such, Indonesia did not meddle in Malaysia's investigation and only ensured the availability of legal assistance from the embassy.⁶¹ This demonstrates the tendency to revert to national policies among ASEAN countries, which means that institutional progress seems meaningless to members as they are not utilized optimally.⁶²

Despite the problems caused by the weakness of delegation, Siti Aisyah's release was completed through the Mutual Legal Assistance (MLA) mechanism in 2019, in which the Minister of Law and Human Rights served as the Central Authority.⁶³ The acceptance of MLA demonstrates a positive response towards the obligation contained in the ACTIP provisions in article 6, which requires each party to be consistent with the domestic laws of the sending and the receiving Parties through informal cooperation or mutual

⁶¹ Hannah Ellis-Petersen, "Kim Jong-nam death: suspect Siti Aisyah released after charge dropped," *The Guardian*, accessed 2 January 2024, <https://www.theguardian.com/world/2019/mar/11/kim-jong-nam-trial-siti-aisyah-released-after-charge-dropped>.

⁶² Nur Iman Subono and Meidi Kosandi, "The Regionalism Paradox in the Fight against Human Trafficking: Indonesia and the Limits of Regional Cooperation in ASEAN," *Journal of Leadership, Accountability and Ethics* 16, no. 2 (2019): 95, <https://doi.org/10.33423/jlae.v16i2.2025>.

⁶³ Nur Aini, "Proses Panjang Pembebasan Siti Aisyah di Malaysia [*The Long Process of Freeing Siti Aisyah in Malaysia*]," *Republika*, accessed 11 February 2022, <https://www.republika.co.id/berita/po73ii382/proses-panjang-pembebasan-siti-aisyah-di-malaysia>.

legal assistance, with due regard to the safety of victims of human trafficking. This also demonstrates compliance of article 18, which requires each party to provide mutual legal assistance in criminal proceedings.

The resolution of this case is recognized by Indonesia as a result of high-level lobbying, which is constantly brought up in every Indonesia-Malaysia bilateral meeting.⁶⁴ The ASEAN Way's consultation principle is reflected in this process of settling conflicts through consultation, which produced a meaningful solution in only two years after the issue was first raised. The ACTIP's objective of promoting cooperation among the Parties is achieved by using ASEAN's unique way of solving problems. In addition, Malaysia, with full respect for human rights, also fulfills its protection of Siti and Duan who can be seen as victims of trafficking in persons in this case. On the other hand, it should also be noted that pertaining to the fulfillment of the objectives in Article 1, this case illustrates the failure of the ACTIP to provide a common understanding of the concept of human trafficking for better identification and response. The objective of providing a framework for cooperation in law enforcement is not achieved due to the lack of this delegation dimension.

This case actually shows how compliance with the ACTIP can be considered flawed due to a lack of delegation, resulting in a lack of a cooperative mechanism framework. However, without this delegation dimension, the ASEAN Way emerged as the answer by becoming ASEAN's unique way of dealing with problems in a consultative manner and promoting cooperation, thus still demonstrating good achievement of the ACTIP's goals. Overall, the degree of legalization does create shortcomings as an ideal hard law for ACTIP, but this strategy has so far demonstrated good fulfillment of its objectives.

V. SOVEREIGNTY COST AND UNCERTAINTY

Ratification of a legal instrument typically entails giving authority to a supranational organization, yet it will suffer the sovereignty of the states.⁶⁵ Therefore, there are significant correlations between the degree of legalization and sovereignty costs. The term "sovereignty costs" is adopted to describe the

⁶⁴ Elizabeth Llorente, "Indonesian woman accused of killing Kim Jong Un's brother reiterates her innocence, says dropped charges shocked her," Fox News, accessed 11 February 2022, <https://www.foxnews.com/world/indonesian-woman-accused-of-killing-kim-jong-uns-brother-reiterates-her-innocence-says-dropped-charges-shocked-her>.

⁶⁵ Oona A. Hathaway, "International Delegation and State Sovereignty," *Law and Contemporary Problems* 71, no. 1 (2008): 115.

possibility of poor outcomes, a loss of authority, and a loss of sovereignty.⁶⁶ These three types of costs highlight the substantial stakes that states face when accepting international treaties. They typically deter states from implementing complex legalization, especially if it requires a significant amount of delegation.

The ACTIP can be considered to incur a relatively higher sovereign cost to member states than other treaties. The use of language mostly has legally binding connotations and burdens AMS in carrying out a series of actions through the Action Plan to deal with cases of trafficking in persons. Strong obligation and precision make this legal instrument incur higher contract costs.

However, based on the analysis of the legalization of the ACTIP, several characteristics indicate that the convention has a low sovereignty cost. Firstly, the language that the ACTIP implements does not fully use binding phrases. In several chapters (Chapter II Criminalization and Chapter V Law Enforcement), it is indicated that the degree of obligation is reduced by the use of language such as “Each party shall adopt such measures as may be necessary...” and also the use of “shall” is changed to “may” several times. Therefore, the reduction of this high-obligation language indicates that the ACTIP does not fully allow this convention to bind in some sensitive respects. It shows that the ACTIP can still be classified as having low sovereignty costs, which greater sovereignty costs emerge when states accept external authority over significant fields.⁶⁷

Second, this agreement does not oblige AMS to delegate its sovereignty to any parties. This primarily limits the agreement to breach the sovereignty of individual AMS and it allows member states to maintain a minimum amount of sovereignty cost in this agreement. The absence of delegation in the form of legislative or dispute settlement mechanisms shows that the ACTIP incurs a low amount of sovereignty costs, as the delegation dimension provides the largest source of unforeseen sovereign costs.⁶⁸ It also shows that the reflection of ASEAN Way norms in ASEAN legal instruments helps member states to maintain their sovereignty. Additionally, article 4 concerning the protection of sovereignty requires AMS to comply with the concept of sovereign equality and territorial integrity of countries, as well as the principle of non-interference in the internal affairs of other countries. Therefore, regarding these characteristics and added with the provision, the ACTIP can still be classified as having relatively low sovereignty costs.

⁶⁶ Abbott, *et al.*, “The Concept of Legalization.”

⁶⁷ Abbott and Snidal, “Hard and Soft Law in International Governance.”

⁶⁸ *Ibid.*

Delegating authority to third parties in ensuring the implementation of the agreement is a crucial dimension to avoid uncertainty. In other words, the absence of the delegation dimension unavoidably becomes the main defect that may create high uncertainty in this agreement. However, the ACTIP as a soft law provides a unique way to solve it. The provision regarding recognition by one country of a victim status determination made by another country can be perceived as crucial in this circumstance. This is a good provision for avoiding potential conflicts if member states meet disagreements or uncertainties within the adoption of the ACTIP. The way shown to reduce uncertainty by parties was by applying the principles of consultation and non-interference in accordance with the ASEAN Way. Furthermore, the commitment to ratification by AMS has so far shown good compliance in reducing uncertainty.

VI. CONCLUSION

This study was mainly raised because of the indication that ASEAN's strong adherence to the principles of the ASEAN Way within its legal framework frequently results in informal practices. On the other hand, it is recognized that the increasingly complex and borderless problem of TIP requires the creation of regional actions that can become an effective framework for formal cooperation by AMS. This creates confusion about the ASEAN Way's effects on the legal instruments, especially in overcoming the problem of trafficking. Hence, this study is intended to examine how the ACTIP conforms to the ASEAN Way principle and influences its compliance. The authors use the concept of legalization by Abbott et al. to examine the structure of existing provisions and how they affect compliance with each AMS' domestic law. Although this study cannot represent the entirety of what ASEAN has achieved in handling trafficking problems, it is sufficient to show the success of ASEAN from a legislative perspective.

Referring to an effective agreement based on the legalization concept, this study points out the major flaw in ASEAN's legal instrument. Having 6.0 points in legalization value and classified as type 3, the ACTIP's degree of legalization is still categorized as high due to high obligation and precision. However, the low delegation dimension does not classify the ACTIP as a hard law, which requires to simultaneously contain high obligation, precision, and delegation.⁶⁹ It means that the weaknesses of the delegation dimension categorizes the ACTIP as a "soft law" instead. It can be understood that the flaw in the legalization of the ACTIP relates to the provisions that adhere to the principles of the ASEAN Way. This is indicated by the absence of a

⁶⁹ Abbott and Snidal, "Hard and Soft Law in International Governance."

delegation dimension in ensuring the behavior of member states and managing any conflicts between them, as reflected in the principle of non-interference, non-force, and consultation of the ASEAN Way.

However, the case study of the different perspectives of Indonesia, Vietnam, and Malaysia regarding the status of Duan and Aisyah shows the creation of the ACTIP by ignoring the delegation dimension and becoming a soft law uniquely puts the ASEAN Way as the answer by dealing with problems in a consultative manner and promoting cooperation, demonstrating good achievement of the ACTIP's goals. Furthermore, the convention also can suppress the cost of sovereignty to a minimum level while also trying to address uncertainty with these characteristics.

This study limits the focus to examining ASEAN efforts from a legislative perspective. The increasingly complex and challenging cases of TIP have been accompanied by good legislative efforts by ASEAN and AMS. Therefore, the failure to handle TIP cases may be caused by other factors, such as the application of regulations or various other factors considering TIP is also a multidimensional problem. Eventually, this research is expected to provide empirical evidence and a new perspective on how to see the principle of the ASEAN Way within a legal instrument, especially in the case of TIP. Further studies and research at the domestic level are needed to explain how the national laws related to ACTIP are applied in the practices to determine its effectiveness.

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