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## **Externalizing the EU's Justice and Home Affairs to Southeast Asia:**

### **Prospects and Limitations**

(first draft, please do not quote)

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### **Introduction**

The transnational dimension ascribed to many phenomena traditionally associated with domestic, or internal, security such as terrorism, drug trafficking, pandemics, or people smuggling has led to increased pressures to increase cooperation across national borders to 'fight' or 'manage' many of the new, transnational security threats. The ESS describes the post-Cold War environment as 'one of increasingly open borders in which the internal and external aspects of security are indissolubly linked' (European Union 2003b, 3). The perceived diffusion between internal and external security has not only accelerated demands for a greater cooperation between the EU and third states and international organizations, but also provided the EU with greater policy-making competencies. Subsequently the EU has over the last decade or so established policies in a number of different policy fields which seek to guide the behavior of its member states within the EU, as well as the EU's external cooperation.<sup>1</sup>

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<sup>1</sup> In the field of human trafficking for example these include the EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016), 2011 Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (2011/36), Directive on Temporary Residence Permits for Victims of Trafficking in Human Beings (2004/81/EC), and Action Oriented Paper (AOP) on strengthening the EU external dimension on combating trafficking in human beings.

With regard to the latter the EU has sought to promote its own norms and ideas, policy preferences and its own model of regional integration in her external affairs. This has most commonly become associated with the EU's so-called rights-based approach in counter terrorism, as well as the EU's human security focus in fighting human trafficking.<sup>2</sup> Against this background, the externalization of the EU's Justice and Home Affairs (JHA) has evolved into an emerging policy arena and a field of study. Whereas the EU's role initially was regarded by various analysts as a "paper tiger" (Bures 2006), a number of recent studies have examined the growing potency of the EU to actively promote ideas and policy preferences in its neighborhood as well as with the U.S. (Kaunert and Léonard 2011; Kaunert 2009; Wolff, Wichmann, and Mounier 2009; Mounier 2007). Scant attention, however, has been paid to the EU's role in other parts of the world. Especially research on the EU's cooperation with what has arguably emerged as the second most successful regional organization after the EU, ASEAN, in policy fields related to JHA is almost non-existent (Chevallier-Govers 2012; Maier-Kapp 2012).

By closely examining the EU's cooperation with ASEAN in two policy fields deemed central within JHA – human trafficking and counter terrorism – seeks not only to broaden the empirical basis of scholarship, but additionally seeks to connect the empirical findings with the wider debates on the EU's ability to externalize its internal security governance to third states and other regional organizations. Both, terrorism and human trafficking, have a strong regional and international dimension to it. The fight against terrorism and human trafficking is therefore not only fought at the national level, but also on the regional and international level (Broadhurst und Le 2013; Abuza 2003; Ramakrishna und Tan 2003; Lee 2013). Given that, with the Lisbon Treaty and the ASEAN Charter, both regional organizations gained legal personality granting them legal capacity and the powers to act in international affairs, EU-

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<sup>2</sup> See for example EU Directive 36/2011 on human trafficking.

ASEAN cooperation in policy fields often associated with so-called non-traditional security also makes for an interesting case study of how the EU conducts inter-regional affairs. The paper builds on earlier research of mine, which found that despite numerous declarations and plan of actions, very little policy transfer has actually taken place between the EU and ASEAN (Heiduk 2014). The earlier research, however, made very little contribution in terms of explaining this observation. It is all the more puzzling as the EU repeatedly has often been ascribed to be a “model” for regional integration processes in other parts of the world. At least, in the words of former ASEAN General Secretary Ong Keng Yong, the EU is viewed as a provider of ideas and best practices: “The very nature of ASEAN as an intergovernmental organization differs from that of the EU. However, we are looking for good ideas and best practices, and the European Union certainly has plenty of these.”<sup>3</sup> More specifically, instances such as the modeling of ASEAN’s Committee of Permanent Representatives (CPR) on the EU’s Committee of Permanent Representatives (Coreper) have thrown up questions on institutional mimesis regarding ASEAN (Murray und Moxon-Browne 2013). Hence this paper poses the question: How can we explain the observation that, despite strong rhetorical impetus for deeper EU-ASEAN cooperation, there has been little to no externalization or policy transfer in the field of JHA?

Established scholarship in the field of EU Studies has traditionally been inward-looking when seeking to explain failure of the EU to externalize its own policy preferences, i.e. by blaming low levels of Europeanization and weak regional institutions in Brussels. Europe’s own inter-governmentalism in most areas related to JHA and the lack of powerful institutions, i.e. a “European FBI”, at the regional level are common explanatory factors. This paper, based on newer approaches in the wider policy transfer literature, argues that we have to turn our

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<sup>3</sup> <http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/forty-years-of-asean-can-the-european-union-be-a-model-for-asia>

analytical focus away from what is assumed to be the ‘policy innovator’ (the EU) and towards the supposed ‘policy taker’ (in our case ASEAN) to be able to give a more rounded answer to the question. With regard to the case under study any potential externalization or transfer of policy from the Europe to Southeast Asia does not take place against some sort of terra nullius. By tracing the development of regional policies in the aforementioned two policy fields within Southeast Asia the paper finds any attempt to externalize or transfer policy is met by long-standing ideas and norms, policy paradigms and an established specific *modus operandi* of regional cooperation. It is the so-called ASEAN-way, which, I argue, will continue to make nigh impossible any externalization of EU policies to Southeast Asia for the foreseeable future. More so, if anything it has been ASEAN, not the EU, which successfully managed to externalize its very own norms and its *modus operandi* into its external relations with the EU in the field of JHA.

### **Policy externalization, transfer and translation**

There has been a burgeoning academic debate during the last decade on the externalization of EU policies, hereby understood as attempts “to transfer the EU’s rules and policies to third countries and international organisations” (Lavenex und Schimmelfennig 2009, 791), in recent years. The available literature draws heavily on historical institutionalism and can be, for the sake of clarity and at the same time at the risk of over-generalization, divided into four broad sets of factors that have been used to explain the externalization of EU norms and policies (or the lack thereof). The first set of factors (‘degree of europeanization’) claims that the modes and the impact of externalization is primarily shaped by the EU’s internal modes of governance. Essentially the argument hereby is that the degree of Europeanization in any given policy field has a strong impact on the scope and depth of the externalization of said policies beyond the EU’s borders (Keohane 2008, 129; Monar 2007). The higher the degree of Europeanization the more the EU is able to externalize its policy preferences in any given

policy field. For example, initial works on EU-U.S. counter terrorism cooperation viewed the low levels of Europeanization in counter terrorism affairs as a hindrance to closer transatlantic cooperation (Rees 2006, 4).

A second strand of research claims that the power resources the EU holds vis-à-vis third states and other actors ('relative distribution of power') are the main explanatory factor when trying to understand externalization processes. Accordingly, it is the ability of the EU to ensure third country compliance with its own rules and policy preferences through the pressuring medium of future accession which has been viewed as the main explanatory factor. This has been framed as the EU's 'governance by conditionality' approach, whereby the EU is able, with respect to its enlargement, to make compliance with its own rules and policies (laid out in the Copenhagen criteria) and adopting the *acquis communautaire* a condition candidate countries have to fulfil to become EU members (Schimmelfennig und Sedelmeier 2004). Similarly, in order to be able to gain market access, firms often need to adopt EU rules and product standards. Hence this second strand of research argues that externalization is most likely to take place when the EU is in possession of superior relative bargaining power which it then uses as a coercive mechanism to transfer its own norms and policies to third states. A third set of factors highlights the degree of institutional similarities between the EU, as well as its member states, and those of third states. Accordingly, the more the domestic structures and practices of other actors resemble those of the EU, the more likely a successful externalization becomes (Shapiro/ Byman 2006).

While the aforementioned sets of factors produce different explanations for the EU's ability to externalize its internal security interests (or the lack thereof), they all conceive of externalization as a hierarchical, coercive mode of governance. Noticing that the EU's dominant modus operandi in the field of security policy is transgovernmental rather than

Europeanized, with Brussels playing largely a coordinating function as security policy is by and large perceived as the *domaine reserve* of the member states (Wong 2011), Lavenex and Wichmann (2009, 85) conceived a different, horizontal mode of externalization – that of externalization through networks. They differentiate between three network types: a) information networks, which are set up to diffuse ideas and policy-relevant knowledge and to identify best practices; b) implementation networks, which focus on enhancing cooperation among institutions to enable the implementation of existing norms and rules – this takes usually place through capacity building measures and technical assistance; and c) regulating networks, which have the strongest impact on third states as they are based on a legislative mandate to enforce rules and standards in a specific policy field. Despite their differences, all network types are similar in that they are non-hierarchical and voluntarily; they are established between formally equal partners (Lavenex und Wichmann 2009, 86).

While the distinction between vertical and horizontal modes of the externalization of EU policies is important to incorporate coercive and voluntary forms, it tells us very little about the process of externalization itself. For example it is not clear whether externalization through governance networks can be assumed to be more successful than externalization through more vertical modes (or vice versa). More so, they conceive of the transfer of policies in a linear fashion as a sequential, quasi-mechanistic process, whereby the externalization starts with policy innovation by the EU and / or its member states and ends with the adoption of certain ideas and policies by a third country. Coming from there the existing literature is rather heavy on the descriptive end in that it describes the transfer of ideas and best practices via different governance modes, ‘but does not analyze and explain the processes involved’ (Dolowitz and Marsh 2000, 7). It furthermore appears to be inward-looking in the sense that policy innovation is assumed to take place in the EU and its subsequently externalized elsewhere. Notwithstanding the (at least theoretical) possibility of such a linear transfer of

ideas or policies actually materializing, it indirectly closes the door (theoretically speaking) on the agency of the policy taker (in our case ASEAN) with regard to his ability to engage in policy translation, interpretation or modification during the process and its effects on the ideas or the policy itself. ‘Factors that are internal to a system such as the power dynamics of political interests and socio-historical make-up of a polity can be a more powerful determinant of what is adopted more so than external factors’ (Stone 2012, 485).

In an effort to at least partially amend these blind spots discovered in the externalization literature, we turn to the rather big and multidisciplinary chunk of literature on “policy transfer” and “policy translation” which has benefitted from contributions from diverse fields of study such as Public Policy, Geography and Health. A widely used definition defines “policy transfer” as “a process by which knowledge of policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system’ (Dolowitz and Marsh 2000, 5). In an attempt to unpack the process, the ‘act of transfer’ (Benson und Jordan 2011, 373), special attention was given to questions revolving around the main actors engaged in the transfer of policies; their motivations; the main elements of the transfer (ideas, policy goals, institutions, personnel or regulatory instruments) (Beeson and Stone 2013); the timing of the transfer (i.e. during a time of crisis); institutional constraints; as well as the wider contextual factors (socio-historic, political, economic) (Dolowitz and Marsh 2000).

Studies also attempted to link modes of transfer with the specific transfer processes: Whereas policy emulation or the copying of a policy typically occurs under coercive transfer modes (i.e. as part of Europeanisation processes), softer, voluntary transfer modes typically lend themselves to ‘softer’ processes of policy imitation or policy inspiration (Benson and Jordan

2011, 371). On the basis of empirical observations which suggest that policy transfer outside the EU rarely, if ever, result in complete (in the affirmative sense: “successful”) transfer of a policy, we can also find an intensive discussion of the factors constraining policy transfer in the literature. In relation to the transfer process four broad types of constraints have been identified: demand side constraints (unwillingness to move beyond the status quo, policy resistance by entrenched interests); programmatic constraints (uniqueness of policies and their jurisdiction); contextual constraints (ideological, institutional or cultural incompatibilities); and application constraints (high transaction costs of policy modifications and institutional adjustments) (Benson und Jordan 2011, 372). Coming from there policy transfers more often than not do not lead to convergence. While convergence with regard to broad policy objectives is often the case, divergence frequently occurs with regard to the instruments adopted for policy implementation. ‘The route by which polities seek such objectives can differ dramatically’ (Stone 2012, 485). While, with regard to our study, the long term goals between the EU and its member states and ASEAN and its member states might be similar with regard to counter terrorism or transnational organized crime, the selection and implementation of specific policies is largely contingent on domestic factors. That said even when policies are transferred successfully exogenously, policy implementation is essentially a contested process. Hence the domestic pushing and shoving which is part of any ‘indigenization’ of the transfer of policy tends to alter its original goals and content. Thus, ‘policies, models and ideas are not moved around like gifts at a birthday party or like jars on shelves, where the mobilization does not change the character and content of the mobilized objects’ (McCann 2011, 120).

More so, the ‘demand side’ or the ‘norm taker’ (Acharya 2004) matters not only as a site of contestation during the implementation process of a particular policy, but as an agent who translates, interprets and ascribes meaning to policy models and policy ideas in the first place.

Coming from there, recent scholarship began to take issue with the (often implicit) positivist / rationalist assumptions underlying much of the previous scholarship on policy transfer, which have come to conceptualize ‘policy transfer’ as the practices of political elites to look for innovative policy elsewhere (coerced or voluntarily) and afterwards import those policies based on the assumption that they will provide for similar (successful) results in a different place (and often time) (Stone 1999; Dolowitz und Marsh 2000). Specifically it took issue with the implicit assumption, which also implicitly prevails in much of the literature on the externalization of EU policies (c.f. Heiduk 2014; Heiduk 2009; Kaunert und Léonard 2011; Chevallier-Govers 2012; Joffé 2008), that policy transfer or policy externalization is essentially undertaken by rational agents skimming policy innovations around the world for the objectively ‘best’, most successful policy to export, or, from the view of the demand side or the ‘policy taker’, to import.

Influenced by Constructivism and Post-Structuralism, newer approaches have moved towards a research agenda which heavily focuses on the inter-subjective constitution of (policy) ideas, meanings, and knowledge. Freeman (2009) for example speaks of ‘translations’ rather than ‘transfers’ of policies, during which series of interpretations and disruptions occur. From such a conceptual starting point “constraints” are not simply to be found with regard to different institutional set-ups, the high transaction costs of policy alteration, or resistance of entrenched elites, but social factors such as world views, identities, and cultural backgrounds all impact on the ‘translation’ of a policy on the side of the policy taker. As does an actor’s embeddedness in particular institutional contexts. To avoid the ‘literalist trap’ of assuming that ‘little happens to policies ‘along the way’, or ‘in the telling’” (McCann 2011, 125), recent studies have paid increased attention to the process through which policies are translated, and successively re-embedded, in different social, economic and political contexts. In a similar vein the traditional approaches to policy transfer have been criticized as too

‘methodologically nationalist’ and state-centric due to their focus on policy transfers between nation-states. ‘Policy transfer and translation is just as likely to be achieved by mechanisms embedded in markets and networks as in the hierarchies of the state’ (Stone 2012, 490). Especially the concept of ‘policy translation’ lends itself well to elucidate the role of regional and international organizations as ‘policy intermediaries’, which add a further layer to the process in which ideas, meanings and interpretations of policies take and policies are subsequently modified and transformed (Stubbs und Lendvai 2007, 175). Hence not only resources and practices of the ‘policy innovator’ must be taken into consideration, but the ‘policy taker’ must be acknowledged, too – not simply as the object of the policy transfer but as a subject that conditions the translation of policy. The conceptual point of departure of this paper is to view the externalization / transfer of policy not simply as the acts of rational actors freely skimming the world for the objectively best policy, but to take serious the crucial role of the policy taker as interpreter / translator of policy and its embeddedness in particular institutional legacies, norms, and established policy paradigms.

### **Examining the policy taker: Policy making in ASEAN**

Examining the political rhetoric and terminology currently used by ASEAN certainly revokes connotations to the EU way of regional integration: ASEAN documents repeatedly speak of “regional integration” and the organization has, as part of the Bali Concord II in 2003, committed itself to build a “single market” as well as a “single production base” by the end of 2015. Furthermore, a number of ASEAN institutions such as the ASEAN Human Rights Declaration or the Committee of Permanent Representatives have been modelled after similar EU institutions (Jetschke and Murray 2012; Murray and Moxon-Browne 2013). The ostensible convergence in political rhetoric and institutional design notwithstanding, ASEAN and the EU have traditionally pursued different paths of regional integration (Acharya 2000). The adoption of EU-coined rhetoric and institutions has not led to a convergence on a

common path towards regional integration. Whereas the EU's integration process has been characterized by the pooling (of some degree) of national sovereignty, its institutionalization, and its legalistic character, the ASEAN integration process has been exclusively intergovernmental and characterized by the "ASEAN-way" as a set of ideas and norms dissimilar to that inherent to the EU's integration process. Central to the so-called ASEAN-way are the notions of sovereignty, equality, territorial integrity and non-interference among member states and to preserve regional autonomy. Article 2 of the ASEAN Treaty of Amity and Co-operation (TAC) states that it aims to espouse the independence and sovereignty of its members; the right of its members to exist without external interference; and non-interference in the internal affairs. In addition, article 13 calls for the resolution of conflicts between member states through non-violent, non-confrontational, friendly means. The roots of ASEAN's informal, consensual, non-legalistic style of decision-making lie in the organizations' initial focus on regional security. Against the backdrop of the Cold War and increasing tensions between neighboring states in the region,<sup>4</sup> ASEAN's primary *raison d'être* was to ensure regional peace and stability, build trust between its members, minimize the influence of external powers and provide for regional solutions to regional problems.

As Acharya has pointed out, the ASEAN-way as such "incorporates a set of well-known principles, e.g. non-interference in the domestic affairs of each other, non-use of force, pacific settlement of disputes, respect for the sovereignty and territorial integrity of member states, that can be found in the Charter of the United Nations as well as regional political and security organizations elsewhere in the world" (Acharya 1997, 329). Hence its code of conduct converges with international norms rather than to diverge away from them. Where

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<sup>4</sup> This relates specifically to the armed confrontations ("konfrontasi") between Indonesia and Malaysia, but also tensions between Malaysia and the Philippines during the 1960s.

the ASEAN way actually diverges is with regard to the ‘operationalization’ of its code of conduct (Acharya 1997, 330). In order to preserve the member states’ sovereignty and to ensure non-intervention, ASEAN decision making rests on the principles of discussion and consultancy (*musyawarah*), consensus (*mufakat*), as well as a sense of community (*gotong royong*). Consensus is aimed for through consultation. Whilst this does not necessarily always have to entail unanimity, it certainly involves a consultation process which specifically focusses on the amalgamation of the basic interests of all members. The heterogeneity of the ten member states in terms of their political systems, levels of economic development and their socio-cultural systems tends to draw out decision-making processes and often results in the lowest common denominator. ASEAN’s primary mode of activity hereby is inter-governmental meetings among the representatives of the ten member states. Hence the organization disposes of a sense of shared purpose based around a set of core norms (the “ASEAN way”). As such these norms are more than mere talking points; they have developed into uniformly held norms which socialized the member states into a specific *modus operandi* of policy-making at the regional level for over 40 years.

Fast forward to 2015, more than 40 years after the signing of the Bangkok Declaration which led to the founding of ASEAN, and the ASEAN-way remains central to ASEAN’s internal *modus operandi*. More so, its genuine sense of a regional political identity also manifests itself in ASEAN’s relations with the rest of the world. ASEAN has been active, much like the EU, in promoting its very own *modus operandi* in its external affairs. It has been successful to socialize its many of its neighbors, including China, Japan and Australia, into ASEAN-led multilateral dialogue forums such as the ARF (ASEAN Regional Forum) or the East-Asia Summit. The ASEAN hereby provides the normative foundations for these multilateral dialogue forums and has left a mark on operational procedures in that they attain to

consensual decision-making, high levels of informality and a rejection of institutionalized forms of cooperation (Dosch 2012).

### **EU-ASEAN cooperation in the area of Non-Traditional Security (NTS)**

The EU's relations with ASEAN from ASEAN foundation in 1967 until the 1990s were marked by the absence of an institutional framework, consisting of informal contact between European and Southeast Asian states. Hence the relations between the two regions have traditionally been characterized as almost exclusively dominated by economic concerns with little concerns for security cooperation (Robles Jr. 2006; Umbach 2008; Wong 2012; Holmes 2013). A beginning formalization of the relations between the EU and ASEAN only commenced after the end of the Cold War. The 1994's EU's Asia Strategy ('Toward a new Asia Strategy') defined Asia as a strategically important region and identified a number of policy areas for closer cooperation, i.e. poverty reduction and environmental protection, but was still mainly dominated by economic aspects (European Commission 2003). The beginning institutionalization of the EU's relations with Asia also led to the establishment of ASEM (Asia Europe Meetings) in 1996 – an informal forum for ad hoc dialogues on the ministerial level which also holds bi-annual meetings of the heads of states.

It wasn't until the 2002 Bali bombings, which cost the lives of 49 EU citizens, that security concerns, specifically transnational terrorism, made it on to the EU-ASEAN agenda. This resulted in an EU-ASEAN "Joint Declaration to Combat Terrorism" in 2003 which called for closer cooperation between Europe and Southeast Asia (European Union 2003a). 2003 also saw the publication of the EU's first ASEAN strategy paper ("A new partnership with Southeast Asia"), which listed "the fight against terrorism" and "mainstreaming JHA" as strategic priorities of the EU (European Commission 2003). It is hereby stated that human rights aspects and democratic governance "should be promoted in all aspects of policy

dialogue and development cooperation, through building constructive partnerships with ASEAN and national governments based on dialogue, encouragement and effective support” (European Commission 2003, 3).

The broadening of the EU’s agenda with regard to ASEAN also touched upon more general strategic documents, such as the EU’s “A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice” published in 2005. The document explicitly refers to the Bali bombings as its point of reference for calling for an intensification of international counter terrorism cooperation (Council of the European Union 2005). The aforementioned documents, however, while formalizing EU-ASEAN relations, did not venture beyond non-binding, very general letters of intent with regard to closer cooperation between the EU and ASEAN.

2007’s “Nuremberg Declaration” refined the strategic priorities laid out in the “New partnership with Southeast Asia” and established “political and security cooperation“ as one of its five inter-regional areas for closer co-operation. The section on “political and security cooperation” states that EU and ASEAN aim for “... closer cooperation in addressing and combating terrorism, trafficking in human beings, drug trafficking, sea piracy, arms smuggling, money laundering, cyber-crime and related trans-national crime...” (European Commission 2007a, 3). Besides this, its relevance with regard to the focus of this paper lies with the accompanying “Plan of Action” (PoA) intent to implement the “Nuremberg Declaration” between 2007 – 2012 (European Commission 2007b). For the first time the non-binding letters of intent to be found in previous were to be accompanied by a PoA which lists concrete policy measures to be implemented. Upon its expiry in 2012, the EU-ASEAN Ministerial Meeting in Brunei released a new PoA for the years 2013-2017 (European Commission 2012).

Both PoA's consist of stated objectives and planned activities, which by and large draw on facilitating (and deepening) political dialogue, the exchange of best practices and, to a lesser extent, capacity building. While a range of workshops, seminars and visits to EU institutions is listed in the annex of the 2007-2012 PoA, none of these activities are directly linked to issues such as counter terrorism or human trafficking. Instead the listed activities in the annexes include, amongst others, a seminar on anti-personnel landmines and a workshop on small arms and light weapons. More so, with regard to the political dialogues mentioned in the PoA's, the PoA's do not foresee the creation of new interregional dialogue forums, but refer to previously established forums in the context of the EU-ASEAN Ministerial meetings, forums at UN level and the ASEAN Regional Forum (ARF). For example with regard to human trafficking the 2007-2012 PoA calls for the support of "ASEAN's efforts, where practicable, in combating trafficking in persons through existing programmes, projects or activities and intensify cooperation between ASEAN and EU with regard to supporting the ASEAN Declaration against Trafficking in Persons particularly Women and Children, recommendations of SOMTC Work Programme on Trafficking in Persons, the ASEAN Plan of Action for Cooperation on Immigration Matters and, when appropriate, the Palermo Convention and its protocols" (European Commission 2007b, 3). Similarly, the document calls for "support the implementation of the ASEAN Convention on Counter Terrorism and promote the full and effective implementation of the UN Security Council's Resolutions related to terrorism as well as ratification or accession, as the case may be, and implementation of the international conventions relating to counter terrorism and relevant resolutions of the United Nations on measures aimed at countering international terrorism, including assisting ASEAN Member Countries in capacity building" (European Commission 2007b, 2).

The PoA for the years 2013 – 2017 is for the most part extending measures and activities listed in the first PoA. The main focus is again on dialogue forums and the exchange of best practices through formats such as seminars and workshops. Hereby it is again the ARF that is deemed the central forum for security affairs. In the 2013 – 2017 PoA technical assistance takes up more room as the EU aims to support newly created ASEAN institutions such as the Jakarta Centre for Law Enforcement Cooperation (JCLEC), the Southeast Asia Regional Centre for Counter-Terrorism (SEARCCT) and the International Law Enforcement Academy (ILEA). The PoA also sets out the implementation of an ASEAN-EU Comprehensive Border Management Programme with the aim of improving border management in ASEAN member states. Additionally the document, in contrast with its predecessor aims to explore “...the establishment of a regular policy dialogue on counter terrorism” (European Commission 2012, 2).

To be sure, the aforementioned declarations and plan of actions have established a range of new forums for soft forms of policy transfer through information exchange, sharing of best practices, and capacity building, such as various dialogue fora (Senior Official Meetings, Joint Committees), partnership agreements, joint action plans and strategy papers. More so, the Bandar Seri Begawan Plan of Action to strengthen the ASEAN-EU Enhanced Partnership (2013-2017) integrated fighting terrorism as well as human trafficking amongst its priorities. However, while the newly established forums theoretically open up space for the transfer of ideas, best practices and policies, they do not fall on some sort of terra nullius. The following examination of the assumed policy taker (ASEAN) shows that ASEAN had various intra-regional agreements and policy guidelines established in the respective policy fields which pre-date the Nuremberg declaration from 2007 by a decade.

### **ASEAN and the fight against transnational organized crime**

A 2006 report by ASEAN summarizes ASEAN's response to human trafficking as, broadly speaking, driven by the respective national criminal justice systems. It also states that: "This focus is not meant to detract from other important responses to trafficking, such as prevention activities and the reintegration of victims. It does, however, reflect a growing acceptance of the key role that criminal justice agencies must play, at both the national and regional levels, in the fight against trafficking." The measures listed on the report to implement such a criminal justice response effectively within Southeast Asia are the sharing of expertise and experience by the respective national agencies bilaterally and at the regional level; the development of mutual legal assistance and extradition treaties; ensuring coherence of the individual member states' approaches to human trafficking with international norms established by the UN Trafficking Protocol; and the harmonization of donor efforts at the national level amongst others (ASEAN 2006, 86). Thus intergovernmental policy harmonization, rather than regional integration, can be deduced as the modus operandi in ASEAN's fight against transnational crime and human trafficking. Thus it incorporates key tenets of the ASEAN way such as non-intervention and absolute respect for the national sovereignty of the other member states.

It is the outcome of more than ten year old policy process which dates back to the mid-1990s. At that time human trafficking and terrorism were, amongst other areas of concern, bundled together under the umbrella term "Transnational Organized Crime (TOC)" before evolving into single areas of concern in the 2000s (ASEAN 1997a). In 1997 the member states signed the "ASEAN Declaration on Transnational Crime" in Manila, including a section on human trafficking, in which the member states agreed to 'strengthen cooperation at the regional level'; 'to convene an ASEAN Ministerial Meeting on Transnational Crime', and to 'hold discussion (...) about bilateral and regional agreements on issues such as mutual legal

assistance' (ASEAN 1997b). At the ASEAN level cooperation at senior level takes place through the ASEAN Ministerial Meeting on Transnational Crime while senior officials cooperate through the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC). At ensuing AMMTC's (ASEAN Ministerial Meeting on Transnational Crime) awareness of transnational crime grew and it was decidedly regarded as an issue of concern for the stability of the states in the region and for economic prosperity (ASEAN 1999). All of this, however, was clad into a non-binding language in line with ASEAN's key norms of non-intervention and national sovereignty. The aforementioned "Manila declaration" for example stressed "regional action" by, amongst other measures, "harmonizing, as appropriate, existing laws" (ASEAN 1997b). Activities listed in the "ASEAN Plan of Action to Combat Transnational Crime" include: information exchange; the harmonization of national policies; best practice exchanges between national law enforcement agencies; strengthening regional capabilities to fight transnational criminal activities; and the establishment of the ASEAN Center for Combating Transnational Crime (ASEAN 1998).

This is not to say that attempts towards a more formalized approach, including legally binding regional agreements, were not made. Former Secretary-Generals, as well as certain member states such as Thailand or the Philippines, have at various time called for more regional integration. Within the inherent tension between ASEAN's sacrosanct norms on the one hand (the "ASEAN-way"), and the need for increased regional cooperation if not integration when faced with transnational issues on the other, the pendulum constantly swung in the direction of the ASEAN way. The 2004 "ASEAN Declaration Against Trafficking in Persons" reaffirmed the inter-governmental approach inherent to the preceding declarations and agreements. It states that ASEAN member states will fight human trafficking "to the extent permitted by their respective domestic laws and policies" (ASEAN 2004) thus reiterating ASEAN's sacrosanct norms of non-intervention and absolute national sovereignty. This

approach is reaffirmed in the ASEAN Handbook on international legal cooperation in cases of human trafficking, too (ASEAN 2010). It has also become the dominant modus operandi in ASEAN-driven multilateral cooperation such as ASEAN+3 (China, S. Korea, and Japan), ASEAN+6 (India, Australia and New Zealand), the ARF (ASEAN Regional Forum), the East Asia Summit and the Bali Process on People Smuggling, Trafficking in Persons and related Transnational Crime.

A similar picture emerges when one examines ASEAN's counter terrorism efforts. Article 3 of ASEAN's convention on counter terrorism launched in 2007 states that: "The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-interference in the internal affairs of other Parties". Article 4 reiterates the "ASEAN-way" further by stating that: "Nothing in this Convention entitles a Party to undertake, in the territory of another Party, the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other Party by its domestic laws" (ASEAN 2007). The measures to implement ASEAN's counter terrorism conventions include the promotion of capacity building through regional meetings; cross-border cooperation; intelligence and information sharing; and to overall strengthen the capabilities and the readiness of the respective member state agencies to deal with all forms of terrorism (ASEAN 2007). Regional counter terrorism thus has rested predominantly on enhancing national capabilities rather than building up institutions at the regional level. Like the ASEAN Center for Combating Transnational Crime, a regional body on counter terrorism has not progressed beyond the "talk-shop" mode. Hence ASEAN's approach has been aptly described in a report as: 'Cooperation in fighting terrorism in Southeast Asia has largely been limited to bilateral or trilateral efforts, involving only a few of the ten ASEAN countries. As an organization, ASEAN has made numerous statements and adopted many declarations about its intentions to prevent and combat terrorism. Its members

have a mixed record, however, in incorporating these decisions or commitments into their respective national legislation or practice' (Center on Global Counter-Terrorism Cooperation 2007, 7).

ASEAN's approach to counter terrorism is the outcome of a more than decade old policy process which goes back to the aforementioned Manila Declaration on Transnational Crime in 1997, which name terrorism as one of the transnational crime issues Southeast Asian states should be most concerned with. The areas laid out for intensified regional cooperation were intelligence sharing, extradition, law enforcement cooperation, airport security and the creation of national anti-terrorism units. However, cooperation essentially remained at the level of declarations of the willingness of member states to work together to combat terrorism. The necessity to adopt a regional approach to counter terrorism gained new impetus after 9/11 when ASEAN leaders issued the ASEAN Declaration on Joint Action to Counter Terrorism in late 2001. In a move to formulate a specific regional position towards to U.S.-led "Global War on Terror", which was at the time well underway with a military operation against the Taliban, the declaration defines ASEAN's approach by rejecting any attempts to link terrorism with any race or religion as well as by stressing the importance of the UN charter and associated norms: '...efforts to counter terrorism must be conducted in accordance with the Charter of the United Nations, and all of its relevant resolutions'. The latter signifies the centrality of the UN multilateral framework on counter terrorism as ASEAN's primary point of reference for regional as well as international counter terrorism cooperation. The declaration also calls for the 'strengthening of national mechanisms to combat terrorism' and to 'deepen cooperation among our front-line law enforcement agencies in combatting terrorism and sharing best practices' (ASEAN 2001). It did not, however, mark a break with the Association's well established principles of non-intervention and absolute respect for national sovereignty. Subsequent declarations adopted after the terror attacks in Bali 2002 and

Jakarta 2005, as well as communiqués by the AMMTC on counter terrorism, have mainly echoed established positions without introducing any deeper cooperative, or even integrationist, measures (Emmers 2009).

In efforts to deepen regional collaboration, military intelligence directors of Malaysia, Singapore, Indonesia, Thailand and Brunei have held a number of informal meetings to discuss intelligence sharing to counter Southeast Asia's main transnational terrorist network Jemaah Islamiyah (JI). Under the guise of Interpol the police chiefs of numerous ASEAN member states have exchanged best practices and experiences in counter terrorism measures. And ASEAN foreign ministers also discussed regional collaboration efforts against terrorism at a number of meetings. Nonetheless, the implementation of counter terrorism measures highlighted by ASEAN such as intelligence sharing has taken place bilaterally and trilaterally between various member states. An example is the Anti-Terrorism Pact signed by Malaysia, Indonesia and the Philippines in an effort to bolster cooperation in the fight against terrorism. Thailand, Brunei and Cambodia later joined the pact (Ramakrishna 2006).

ASEAN's collective emphases on inter-governmental approaches to counter terrorism is also discernible in the ASEAN Security Community (ASC) endorsed at the Bali Summit 2003, where a proposal for a plan of action on counter terrorism calling for the establishment of a ASEAN peacekeeping force, a counter terrorism center and the promotion of democracy and human rights by Indonesia was rejected. The proposal had included measures such as the promotion of human rights, which in the eyes of member states like Vietnam and Myanmar would have related to their own domestic affairs and thus infringed on their national sovereignty. This non-binding agreement, like its predecessors, gives national laws precedence over the numerous regional provisions mentioned in the ASC agreement. This resulted in a what was described as a 'watered down version' of the plan of action, which 'no

longer included the idea of introducing more flexible application of the non-interference principle' (Emmers 2009, 172). Likewise the key principles of the ASEAN way, which date back to the 1970s, have been introduced into ASEAN's counter terrorism cooperation with external actors such as the joint declarations on counter terrorism with the U.S., Australia or the EU. ASEAN's role as the norm exporter into multilateral forums is exemplified in the ARF "Statement on Strengthening Transport Security against International Terrorism" which stresses 'the need to respect independence, sovereign equality and territorial integrity of states, the principles of non-interference in the internal affairs of states and non-use of force or threat of force' (ASEAN Regional Forum 2004).

Hence the ASEAN policy processes on human trafficking and counter terrorism, consisting of a reoccurring circle of pledges and meetings as well as non-binding declarations and communiques, underline the much-derided ASEAN way as the organizations modus operandi. Regional institutions are noticeably weak or absent, as the failure to establish the planned ASEAN Center for Combating Transnational Crime indicates. Instead, ASEAN's efforts are focused on policy harmonization across its members, thereby prioritizing the responsibility of the individual member states and resulting in closer inter-state bilateral and trilateral cooperation to tackle issues related to human trafficking and terrorism.

## **Conclusion**

This paper's conceptual starting point was to understand any externalization or transfer of policy as not simply as a choice made by rational actors browsing for the 'best' policy, but pay attention to the embeddedness, especially of the proposed policy taker, within sets of particular norms, institutional legacies and long-held policy paradigms. In contrast to much of the existing literature on policy externalization by the EU we have diverted our analytical focus away from Brussels and towards the norms and modus operandi of ASEAN to answer

the question why, despite rhetorical commitments to greater cooperation between the two regional organizations and the EU being often considered a model and source of inspiration for ASEAN, cooperation in the field of non-traditional security remains very much in its infancy.

On the basis of tracing the policy development in ASEAN in the respective policy fields, the paper argues that any attempts by external actors such as the EU to externalize their policy to ASEAN is subsequently confronted by long-standing norms, policy paradigms and a specific modus operandi (often summarized under the label “ASEAN way”), which make nigh impossible any externalization of EU policies to Southeast Asia for the foreseeable future. Hence even where we find a (gradual) adoption of EU coined political rhetoric or similarities in institutional design this is not to be equated with policy convergence.

The ASEAN way, with its focus on sovereignty, equality, territorial integrity, regional autonomy and non-interference among member states has socialized the member states into a an strictly intergovernmental, non-legalistic, informal modus operandi which diverges strongly from the pooling of national sovereignty, the institutionalization and the legally-binding character of European integration.

To be sure, the relations between the EU and ASEAN have developed from an almost exclusively economic focus to the incorporation of new forums (Senior Official Meetings, Joint Committees) as well as joint declarations and joint plans of actions. And issues such as counter terrorism or human trafficking have been integrated into the inter-regional agenda. However, while these forums certainly open up space for the transfer of ideas, best practices and policies, any such transfer from the EU to ASEAN has been heavily constrained by ASEAN’s particular modus operandi. Coming from there, we can furthermore assume that changes on the institutional level of the EU’s cooperation with ASEAN, such as the recent

appointment of an EU Ambassador dedicated to ASEAN, will not significantly alter our findings for the foreseeable future. Moreover, we can tacitly assume on the basis of our findings that it has been ASEAN, rather than the EU, who has been successful in transferring its norms and specific modus operandi into its external relations with Europe (amongst others) as the ASEAN-way provides the fundament of a number of multilateral dialogue forums, amongst them ASEM (Asia-Europe Meeting), in which ASEAN, at least formally, sits in the driver's seat (Sukma 2010).

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