

LEGISLATION REGARDING THE ROLE OF THE STATE AND NGOs IN  
ADDRESSING TRAFFICKING IN PERSONS:  
A FOCUS ON SEXUAL EXPLOITATION IN SOUTH AFRICA AND BRAZIL

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## Abstract

Human trafficking is a major global concern and one which requires adequate and appropriate attention of all nations, making it crucial that a better approach to tackling trafficking in persons be determined. Many measures and laws have come into existence which seek to combat trafficking in persons, some of which have been successful. The growing support for Palermo Protocol<sup>1</sup> indicates that trafficking in persons is on the global agenda, however, the success stories are not enough to indicate that the battle is being won against trafficking.

South Africa has now signed into law the *Prevention and Combating of Trafficking in Persons Act*<sup>2</sup>(hereinafter referred to the “TIP Act”). However, to overcome such a complex issue, there is a need for a more legislatively refined role of the various actors, a better understanding of the relationship that exists between the State and nongovernmental organisations (hereinafter referred to as “NGOs”) and a better determination of how far the obligation to combat trafficking in persons extends. Following this, this paper will seek to do the following: highlight just how extensive human trafficking is on a global and national front; determine the obligations of the State and NGOs in tackling trafficking in persons by analysing the legal frameworks of South Africa and Brazil (a country with a similar economic and political terrain and who shares the stage with South Africa for recently hosting mega sporting events which increases the concern for trafficking in persons) as well as considering the legal frameworks of other jurisdictions; and identify appropriate steps for South Africa to take in developing its relationship with its NGOs, in order to more effectively deal with trafficking in South Africa.

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<sup>1</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, Supplementing the United Nations Convention Against Transitional Organized Crime GA Res A/RES/55/25/383, adopted at the fifty-fifth session of the United Nations, entered into force Nov. 15, 2000.

<sup>2</sup> TIP Act, 7 of 2013.

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To those fighting for the freedom of trafficked persons, thank you.

To those trafficked victims, you are not forgotten.

## Declaration

I, Andrea Claire Mellon, declare that:

- (i) The research reported in this dissertation, except where otherwise indicated, is my original work.
- (ii) This dissertation has not been submitted for any degree or examination at any other university.
- (iii) This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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## **Abbreviations**

BCEA	Basic Conditions of Employment Act, 75 of 1997
CPA	Criminal Procedure Act, 51 of 1977
GPAT	Global Programme against Trafficking in Human Beings
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
IOM	International Organisation for Migration
LRA	Labour Relations Act, 66 of 1995
NAP	National Action Plan
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
OHCHR	Office of the High Commissioner for Human Rights
RSA/SA	Republic of South Africa/South Africa
SAPS	South African Police Service
TIP	Trafficking in Persons
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNGC	United Nations Global Compact
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
US TVPA	United States Trafficking Victims Protection Act

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## Definitions<sup>3</sup>

**“Trafficking in persons”** means the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, fraud, of deception, of the abuse of power or of a position of vulnerability or giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.

Exploitation will include, at a minimum, the exploitation or prostitution of others or forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs; where the consent of a victim of trafficking in persons is irrelevant; and which includes the exploitation of a child.<sup>4</sup>

**“Non-governmental organization”** means a not-for-profit, voluntary citizens’ group, which is organized on a local, national or international level to address issues in support of the public good. Task-oriented and made up of people with common interests, NGOs perform a variety of services and humanitarian functions including, bringing citizens’ concerns to governments, monitoring policy and programme implementation.<sup>5</sup>

**“State”** means a political entity that is sovereign and has a government that is said to enjoy exclusive control over a defined territory and population.<sup>6</sup>

**“Sexual exploitation”** means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.<sup>7</sup>

**“Sex”** means the biological and physiological characteristics that define men and women.<sup>8</sup>

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<sup>3</sup> For the purposes of this thesis, these definitions will be applied.

<sup>4</sup> Article 3 of The Palermo Protocol.

<sup>5</sup> United Nations Office on Drugs and Crime (UNODC), 2009, *Anti-Human Trafficking Manual For Criminal Justice Practitioners*.

<sup>6</sup> Mansbach, RW and Rafferty KL., 2008, *‘Introduction to Global Politics’*, New York, Routledge, p792.

<sup>7</sup> United Nations Secretariat, 2003, ‘Secretary-General’s bulletin: Special measures for protection from sexual exploitation and sexual abuse’, viewed 9 September 2014, from <http://cdu.unlb.org/Portals/0/Documents/KeyDoc4.pdf>.

<sup>8</sup> World Health Organisation, n.d., ‘Gender, women and health’, viewed 7 June 2014, from <http://www.who.int/gender/whatisgender/en/>.

**"Gender"** means the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.<sup>9</sup>

**"Exploitation"** means the action or treating someone unfairly in order to benefit from their work, or making use of a situation to gain unfair advantage for oneself.<sup>10</sup>

**"Abuse of a position of vulnerability"** means any situation in which the person involved believes he or she has no real and acceptable alternative but to submit; or means taking advantage of the vulnerable position a person is placed in as a result of:

- (i) Having entered the country illegally or without proper documentation; or
- (ii) Pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance; or
- (iii) Reduced capacity to form judgements by virtue of being a child, illness, infirmity or a physical or mental disability; or
- (iv) Promises or giving sums of money or other advantages to those having authority over a person; or
- (v) Being in a precarious situation from the standpoint of social survival; or
- (vi) Other relevant factors<sup>11</sup>

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<sup>9</sup> Ibid.

<sup>10</sup> Oxford Dictionaries n.d., 'Exploitation', viewed 7 June 2014, from <http://www.oxforddictionaries.com/definition/english/exploitation>.

<sup>11</sup> United Nations Office on Drugs and Crime n.d., *V.09-81990 (E) Model Law against Trafficking in Persons*, p9, viewed 9 June 2014, from [http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf).



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## CHAPTER ONE

### Part I – Overview of the Study

*“Over the past decade, human trafficking has moved from the margins to the mainstream of international concern. During this period we have witnessed the rapid development of a comprehensive legal framework that comprises international and regional treaties, as well as a broad range of soft-law instruments relating to trafficking. These changes confirm that a fundamental shift has taken place in how the international community thinks about human exploitation. It also confirms a change in our expectations of what Governments and others should be doing to deal with trafficking and to prevent it.”<sup>12</sup>*

#### Introduction

Human trafficking is as a major global concern which requires the attention of all nations, where governments are expected to accept that the harsh reality of slavery is to be eradicated. As noted above, there has been a fundamental shift in the minds of the global community where the exploitation of human beings is now considered an atrocious act, however this mind-shift needs to be transformed into proper practice and actions. Whilst the historical sense of ‘formal slavery’ has been eradicated in most parts of the globe, modern forms of slavery have managed to develop and infiltrate our societies and are now more commonly referred to as human trafficking/modern day slavery/trafficking in persons<sup>13</sup>. Because trafficking in persons has become an issue that many believe to be too ominous and intimidating to deal with and far too entrenched within society to be undone,<sup>14</sup> it is crucial that a better approach to tackling trafficking in persons be determined. Many measures, policies, laws and treaties exist which seek to combat trafficking in persons, some of which have seen success in some instances. The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (“the Palermo Protocol”/“the Protocol”/“the Trafficking in Persons Protocol”) has 117 signatories and 169 parties<sup>15</sup> which indicates that trafficking in persons is on the global agenda. However, the success stories are not enough to indicate that the battle is being won against trafficking.

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<sup>12</sup> Pillay, N., UN Commissioner for Human Rights (OHCHR), 2010, *Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking*, HR/PUB/10/2, p3.

<sup>13</sup> This will be defined at length later however they are used interchangeably.

<sup>14</sup> Observations of general public reaction in informal topic discussion, May 2013.

<sup>15</sup> United Nations Treaty Collection n.d., viewed 16 December 2015, from [https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtsg\\_no=XViii-12-a&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtsg_no=XViii-12-a&chapter=18&lang=en).

In an effort to combat human trafficking, and in terms of its national and international obligations, South Africa, after becoming one of the 169 parties to the Palermo Protocol on 20 February 2004, has enacted the *Prevention and Combating of Trafficking in Persons Act* (hereinafter referred to as the “TIP Act”/ “SA TIP Act”). However, being an issue of great magnitude, and stemming from issues that also require extensive attention; the reality is that the eradication of trafficking in persons in South Africa cannot be achieved by the State alone. Other role players, namely non-governmental organisations, are pivotal in realising true freedom for all.

With human trafficking being an international concern, there was a great need for the creation and development of law, for the purposes of providing proper guidance to states to deal with this international trade of human beings. The Palermo Protocol is the leading instrument when determining the definition of human trafficking, and thus sets the standard. States that are party to the Protocol are to apply the legislation and policies therein. Article 3, accordingly, defines Trafficking in Persons as the following:

*“For the purposes of this Protocol:*

*(a) "Trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;*

*(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;*

*(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;*

*(d) "Child" means any person under eighteen years of age”.*<sup>16</sup>

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<sup>16</sup> United Nations n.d, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children Supplementing the United Nations Convention against Transnational Organised Crime*, Article 3, viewed 11 September 2014, from [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf).

This internationally accepted definition has accordingly influenced the existence of three constituent elements to Human Trafficking, based on the definition supplied in the Trafficking in Persons Protocol<sup>17</sup> and according to the United Nations Office on Drugs and Crime:<sup>18</sup>

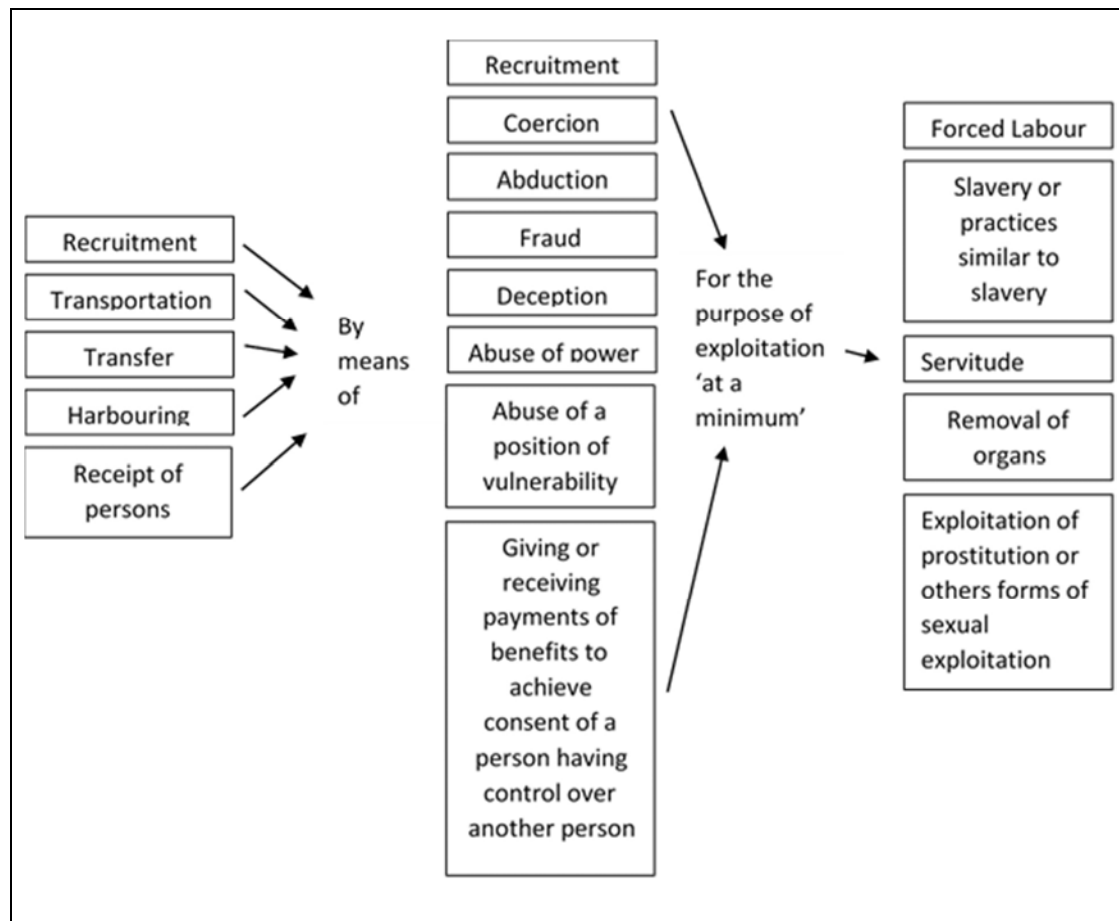
1. The Act: What is done; Persons are recruited, transported, transferred and then harboured or received.
2. The Means: How it is done; Persons are either threatened and/or forced, coerced, abducted, fraudulently advised, deceived, abused with power, or are vulnerable and give in to an opportunity of attention or possible employment, or they are paid or receive benefits for the control of a victim.
3. The Purpose: Why it is done; Human trafficking usually occurs for the purposes of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices, and the removal of organs.

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<sup>17</sup> Ibid.

<sup>18</sup> United Nations Office on Drugs and Crime (UNODC) n.d., *Human Trafficking*, viewed 11 September 2014, from <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>.

Diagram 1: Elements of the Palermo Protocols Definition of Trafficking in terms of Article 3<sup>19</sup>



These provisions are merely a minimum standard, with which all state parties are to ensure that their laws and policies comply, however domestic measures may be put in place which go beyond the Palermo Protocols' provisions, in being "broader or more severe, just as long as the obligations imposed by the Protocol are fulfilled".<sup>20</sup>

This definition is complicated by the fact that whilst it is broken down into its respective elements, the prevention, protection and prosecution of human trafficking can become difficult in that it is only necessary to prove the intent to exploit and not necessarily to show that

<sup>19</sup> Table sourced by International Office for Migration, 2004, 'Trafficking in Persons: An Analysis of Afghanistan', Kabul, found in Pharoah R, 2006, 'Getting to Grips with Trafficking', Institute for Security Studies, Monograph Series, No 123, p8.

<sup>20</sup> United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), 2008, "From Protection to Prosecution – A Strategic Approach", Austria Centre Vienna Background Paper for the Vienna Forum to fight Human Trafficking, Austria Center, Vienna, 13-15 February 2008, p3.

exploitation has occurred. Further complexities may exist where some have suggested that such may only be deemed a crime after the act of trafficking has occurred, i.e. it is a post-facto crime, which complicates the determination of the identity of the victim and the criminal.<sup>21</sup> Jyoti Sanghera points out the following in this respect and illustrates how multifaceted trafficking is:

*Just as trafficking becomes a crime in its final stage, the jobseeker and willing migrant becomes a victim at the destination point. And as the crime of trafficking goes underground into invisibility, the victim of trafficking becomes increasingly inaccessible... if her situation is suffused with illegalities... then she is transformed paradoxically into both a victim and a criminal.*<sup>22</sup>

It is also important to note and recognise that trafficking in persons is a criminal process as opposed to a criminal action, where the elements described above are due to a specific criminal strategy adopted by criminals. This is done by “secur[ing] the physical availability and presence of a victim (recruitment, harbouring, transportation, and receipt of persons); us[ing] illicit means (physical or psychological coercion, threat[ening] or us[ing] force, abduction, abuse of power or abuse of a position of vulnerability); and exploit[ing] the victim (for sexual purpose)”.<sup>23</sup> Again, demonstrating that trafficking is not a simple crime where there is one action with one result. There are various dynamics and different forms of illegalities that co-exist which make up the process of the crime of trafficking in persons.

A key distinction is to be made between that of trafficking and smuggling.<sup>24</sup> Essentially, human trafficking is a human rights violation against an individual, with the underlying purpose being the exploitation of the victim, which may be domestic or international; whereas the smuggling of migrants involves the violation of the State’s sovereignty and must, by definition, involve the crossing of an international border with the deliberate intention to evade immigration laws by both the transporter and the person entering the country.<sup>25</sup>

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<sup>21</sup> Emser, M., 2013, ‘The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance’, PhD thesis, Dept. of Political Science, University of KwaZulu-Natal, p19.

<sup>22</sup> Ibid, p20.

<sup>23</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p21.

<sup>24</sup> , This paper will address only trafficking.

<sup>25</sup> United States Immigration and Customs Enforcement (ICE) n.d., *Fact Sheet: Human Trafficking and Smuggling*, viewed 11 September 2014, from <http://www.ice.gov/news/library/factsheets/human-trafficking.htm>.

In understanding why and how trafficking in persons exists in the way that it does today, various factors are to be considered. ‘Pull-factors’ entice the vulnerable and ‘push-factors’ force the vulnerable into the industry. Factors such as poverty and inequality, lack of educational and employment opportunities, the lack of trained personnel to appropriately deal with trafficking cases, as well as the lack of positive involvement of government officials to prevent exploitation,<sup>26</sup> to name but a few, impact the fight against trafficking. Further, insufficient resources and infrastructure to deal with this issue, a lack of understanding of the law and basic human rights; inadequate means of accountability among police officials and other role players; and a weak relationship between the State and NGOs, are also likely factors which result in the ever-growing lucrative trafficking industry. ‘Push factors’ include the “anticipation of employment and financial gain; the anticipation of material improvement and a better lifestyle; and a belief that migration offers the only available alternative to continued poverty, despite the well-publicised risks about the promises of traffickers”.<sup>27</sup>

Prior to the 2013 TIP Act, no comprehensive legislation existed which recognised trafficking in persons in South Africa. Those laws which addressed specific aspects of trafficking were limited to the Children’s Act,<sup>28</sup> the Sexual Offences Act<sup>29</sup> and the Basic Conditions of Employment Act,<sup>30</sup> among others. Combining the earlier mentioned factors and the fragmented provisions and recognition in South African law, only a limited number of cases of trafficking have been successfully prosecuted in South Africa. The new South African TIP Act now extensively provides for the prosecution of trafficking in persons by providing a comprehensive definition of trafficking, as well as sentencing provisions. It not only criminalises the act, but further creates and supplements the obligations to combat trafficking in persons, such as prevention initiatives and victim support services.

However on a basic reading of the Act, these obligations seem vast and disjointed, with an unclear outline of the role of the NGOs and the State in the provision of services. It is also important to note that the majority of research done globally on TIP has been primarily

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<sup>26</sup> Observation at human trafficking training conducted by National Prosecuting Authority in Durban, November 2013.

<sup>27</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p31.

<sup>28</sup> The Children’s Act 38 of 2005.

<sup>29</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 32 of 2007.

<sup>30</sup> Act 75 of 1997.

conducted in countries other than South Africa or by international organisations. Even though South Africa has engaged in research on trafficking in persons, within its borders and outside, there is a greater need to conduct further domestic research on South Africa's TIP, and the specific challenges faced by the country.

As it stands, there exists an imbalance between the State and the NGOs involved in addressing trafficking in persons, in terms of support structures and cooperation. Furthermore, there exists a 'disconnect' between law, policy and actual lived experience, which can be attributed to a lack of proper consultation between the State and NGOs, thus affecting how best to deal with trafficking instances. In addition, based on the new law, the responsibility attached to combating human trafficking in terms of victim services and support seems too onerous on one party (NGOs) and with the obligations of the State being far less, resulting in a potential conflict between the parties

However the hurdles preventing the appropriate response to combat trafficking in persons can be overcome. This may be achieved by means of the implementation of proper support systems and a clear outline of the obligations of the State and NGOs. Whilst it should be the responsibility of all to fight for the freedom of others, it is crucial to determine each and everyone's role in this fight, in order to achieve a positive response and to adopt effective and efficient measures to eradicate human trafficking.

Recognising that each State party to international treaties has its own unique situation within its borders and government, the determination of the applicability of laws is thus subjective. It is, however, important to compare and contrast with other States. Sharing the experiences of comparable systems, laws, policies and actions taken against trafficking in persons within the states, contributes to determining more relevant mechanisms to combat trafficking in persons, and to what extent the State and/or NGOs should carry the burden. In order to assess the nature of trafficking that exists within South Africa, and the State's and NGO's role in the fight, it is beneficial to compare with a State that shares similar socio-economic challenges. Supplementing this, it is also advantageous to consider the measures adopted, and the approach taken by a more developed jurisdictions that are making significant headway in combatting trafficking in persons - to be viewed from an aspirational perspective. To achieve the objectives of this study, one State's legal framework will be analysed,



specifically Brazil. Other jurisdictions, such as Canada, will however be considered more briefly.

Factors advancing the analysis of Brazil's framework include the following:

1. Both South Africa and Brazil are members of the association of five major emerging national economies: Brazil, Russia, India, China and South Africa, known as BRICS. As developing or newly industrialised countries, both South Africa and Brazil are faced with similar challenges to their economy, with human trafficking significantly contributing to challenges faced by both countries. It is therefore important that appropriate mechanisms are adopted to suit the developing nature of the countries;
2. Based on the 2014 United States Trafficking in Persons Reports ("US TIP Reports"),<sup>31</sup> South Africa and Brazil are ranked as Tier 2 countries - both being a source, transit, and destination for men, women, and children subjected to sex trafficking and forced labour. Both Governments do not fully comply with the minimum standards for the elimination of trafficking; however, they are making significant efforts to do so;
3. Both countries have hosted mega sporting events, such as the FIFA World Cup, during which the threat to the fight against human trafficking is often feared, exposed and compromised, and the fragile relationship between the State and NGOs is highlighted.

Naturally, it is more effective to comparatively analyse instruments between similar States to ensure the appropriate measures are adopted to eradicate these forms of modern day slavery and to determine whether the relationship between State and NGOs is a properly balanced one. However, it is also valuable to draw from developed States where there is significant progress in combatting trafficking. In terms of the 2014 US TIP Reports<sup>32</sup> and considering the international responses to trafficking in persons, the Government of Canada fully complies with the minimum standards for the elimination of trafficking. They are also, like South Africa and Brazil, a source, transit, and destination country for men, women, and children subjected to sex trafficking, and a destination country for men and women subjected to forced labour.

Considering the need for a better understanding of the relationship that exists between the State and NGOs, and a better determination of how far the obligation to combat trafficking in

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<sup>31</sup> U.S Department of State, 2014, *Trafficking in Persons Report*, viewed 11 September 2014, from <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>.

<sup>32</sup> Ibid.

persons extends, this paper will seek to do the following: highlight just how extensive human trafficking is on a global and national front; determine the obligations of the State and NGOs in tackling trafficking in persons by analysing the legal frameworks of South Africa and Brazil as well as considering the legal frameworks of other jurisdictions; and identify appropriate steps for South Africa to take in developing its relationship with its NGOs, in order to more effectively deal with trafficking in South Africa.

It is further hoped that a better understanding of human trafficking will be achieved, as well as a better and more defined role of these actors may be determined. This is to ensure that measures adopted to combat trafficking in persons in South Africa are more collaborative, with better participation from all aspects of society.<sup>33</sup> Finally, this paper hopes to shed light on harsh realities that South Africa still faces and needs to address before they can appropriately contribute to the global eradication of modern day slavery.

### **Problem Statement**

The issue at hand is whether the new South African law adequately recognises and determines the relationship and obligations between NGOs and the State, taking into account the provisions surrounding consultation, with further regard to accountability, training and finance. Upon a reading of the new TIP Act, a disconnection in the relationship seems to exist with a seemingly 'heavy handed' approach by the State *vis-a-vis* NGOs, with unrealistically high expectations placed on the NGOs.

Effective measures to address not only the harsh reality of human trafficking but the relationship between these two actors are required and this study will attempt to determine the most suitable measures to attain an effective and coordinated relationship. Drawing from other States' laws, such as Brazil, the study will analyse other adopted measures in an effort to establish suitable ways forward for South Africa to adopt in achieving as best a relationship with NGOs in their combined efforts to combat trafficking as possible.

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<sup>33</sup> Amir Abdul Kareem Al-Khayon et al, 'Value of Non-Governmental Organizations in Countering Human Trafficking', in *National Association of Attorney General: NAAGazette*, viewed 11 September 2014, from <http://www.naag.org/value-of-non-governmental-organizations-in-countering-human-trafficking.php>.

## **Research Questions**

This study will ask the following questions: Is the current relationship between the State and NGOs a positive one or is there an imbalance between the two in terms of support structures and cooperation, in relation to tackling trafficking in persons issues such as sexual exploitation?

### **Sub Questions**

1. What are the roles of the State and the roles of NGOs in addressing trafficking in persons in South Africa?
2. What does the new South African TIP Act provide for, in terms of the cooperation between States and NGOs?
3. What do other jurisdictions provide for in terms of their States' and NGOs' obligations to trafficking?
4. What lessons can be learnt from other jurisdictions, such as Brazil?
5. What appropriate steps should South Africa take in delineating and clarifying the roles of the State and NGOs in addressing trafficking in persons?

## **Research Objectives**

The aim of this study is to critically analyse the current legal framework and policies relating to the obligations of the State and NGOs, in addressing the issue of trafficking in persons in South Africa. This study will include a comparative analysis of Brazil's practices surrounding their relationships between the NGOs and the State and what the legislation and policies provide for, and will briefly consider those found within the international community. In order to advance in the fight against trafficking, this study aims to determine the extent of the obligations of the two actors, and whether better and more reasonable ways in which the relationship between NGOs and the State can be improved, can be found and how this relationship impacts the progression toward eradicating slavery.

### **Objectives**

1. To analyse the current legal and policy frameworks relating to the obligations of and the relationships between the State and NGOs dealing with trafficking in persons.

2. To recognize, address and understand the roles played and the challenges that exist and that are experienced by NGOs and the State regarding trafficking in persons in terms of the legal provisions.
3. To compare and analyse the international legal framework adopted by Brazil regarding trafficking in persons surrounding the obligations of and the relationship between the State and NGOs.
4. To determine at what point the obligation on the State to combat trafficking ceases, and the burden shifts to NGOs, and to accordingly propose and make recommendations on the extent of obligations imposed on NGOs by the State based on their national and other international responses.

### **Significance of Study**

In order for South Africa to effectively and efficiently deal with the issue of human trafficking, understanding the extent of the obligation on the State to combat trafficking is of utmost importance and thus accounts for the undertaking of this research. The obligation that exists on the State, however, impacts the role of NGOs in tackling the issue of trafficking in South Africa. It affects the relationship between the two actors, as it determines what boundaries are in place, what hurdles exist and which areas need attention before victims of trafficking can be best protected. In the midst of the plight of a ‘re-emergence of slavery’ or at least the high profile nature of the crime at present (now just in modern forms)<sup>34</sup>, it is crucial to establish the tasks and responsibilities of the different role players, in order to make progress in this cause.

Analysing instruments, both on domestic and international levels, guides the direction that is to be taken when attempting to combat human trafficking. Many can mistakenly expect the State to deal wholly with each and every issue that exists within society. Despite its commitment to protect its citizens and residents, the State relies on the assistance of non-political, non-governmental organisations to assist in its battles. It is this reliance, as well as the resistance by NGOs to cooperate with the State, that needs to be called into question and is

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<sup>34</sup> Those who enjoy the right to freedom have a corresponding responsibility to protect the right to freedom and thus it morally obligates those to fight for the freedom of others.

to be assessed by researching, analysing and comparing laws and policies of other relevant actors, specifically focusing on the obligation of the State to combat trafficking.

Therefore this study will add value by analysing the legal framework and provisions surrounding the obligations of and the relationships between the State and NGOs, specifically focusing within the human trafficking industry. Noting how recent South Africa's national law is, and whilst human trafficking is an extensively researched issue as a whole (though perhaps not sufficiently enough within the South African context), a current gap in this research relates to the measures and mechanisms adopted in South Africa in addressing the issue of trafficking, and specifically the extent of the State's responsibility and how it has a symbiotic relationship to the responsibility of NGOs.

Furthermore, the study is significant as the new human trafficking law requires the establishment of a National Framework Policy, which will direct the steps needed to combat trafficking, both by the State and NGOs, separately and then on a collaborative level. This study will highlight existing downfalls of the legislation relating to the obligations and the role of these players, and will attempt to provide some guidance and factors to consider in this development of the framework and recommend appropriate measures going forward.

### **Limitations of Study**

Due to the extensive nature of human trafficking, this paper narrows the focus from all forms of exploitation to the consideration of sexual exploitation. Further, due to time and resources available, the nature of this study will be only to consider the legal frameworks in place in South Africa and Brazil, and will touch on the measures adopted within the international community and the likes of Canada and the United States of America. Whilst there are numerous regional documents and agreements that have contributed in impacting the approaches taken by many, focus will remain primarily within the realm of the international field.

A further limitation will be that of Brazil's legal framework. It will be limited to an overview and what is accessible, considering the time and resources available - as there exists a language barrier: translations of Portuguese texts may not always be available, thus information on the topic will be limited to what is available in English.

## Part II – Scholarly Views and Background

*“A man who reviews the old so as to find out the new is qualified to teach others.”<sup>35</sup>*

In order to ascertain alternative approaches and measures to combat trafficking in persons, it is crucial that previous actions and findings are interrogated so as to ensure approach adopted fits within the context and findings can be advanced. Whilst there is significant literature on NGOs and States in general, there is a gap in the research of the obligations of the State and NGOs and the relationship that exists in terms of human trafficking within South Africa. This is especially evident on a reading of the newly adopted national law and so, this study aims to recommend potential measures to fill this gap. This study will contribute to the development of the literature, by focusing on the obligation of the State to combat trafficking and the amount of reliance placed upon NGOs. It will consider the main legal documents relating to trafficking within South Africa, Brazil and Canada, as well as other relevant literature. The literature is largely based on primary sources such as the legislation and policy directives, secondary sources such as recently published PhDs, journal articles, as well as the official government’s web pages. The limit of the existing literature is illustrated in the statement below:

*“Although there is a vast and growing literature on human trafficking, most research has focused on Europe and Asia. The much smaller body of African research is concerned primarily with West Africa, where the trade in human beings has a long history. Only a few studies have examined trafficking in Southern Africa, and references to the problem in South Africa draw on the experiences of a small number of support organisations, media reports and a handful of studies – most of which have focused on the trafficking of women and children for sexual exploitation. These provide an indication of possible trends and issues, but insufficient data for policy design.”<sup>36</sup>*

### South Africa

The Constitution of the Republic of South Africa, 1996, (“the Constitution”) is extensive in the rights and responsibilities that it affords to all South African citizens. It is the supreme law of the land which invalidates any inconsistent conduct, law or policy<sup>37</sup> and is regarded as the driving force when advancing and implementing laws, policies and actions in the Republic. Being the highest law of the land, the Constitution creates an obligation on the government to

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<sup>35</sup> Confucius in Hofstee, E., 2006, ‘Constructing a Good Dissertation: A Practical Guide to Finishing a Master’s, MBA or PhD on Schedule, Johannesburg, South Africa, EPE, p91.

<sup>36</sup> Pharoah, R., 2006, ‘Getting to Grips with Trafficking’, Institute for Security Studies, Monograph Series, No 123, p23.

<sup>37</sup> Section 2 of the Constitution of the Republic of South Africa, 1996.

ensure every citizen is equally protected by the law and in turn all citizens have the social duty to improve the quality of life for all its citizens and free the potential of each person.<sup>38</sup> It upholds the rights to; equality<sup>39</sup>; human dignity<sup>40</sup>; life<sup>41</sup>; the freedom and security of the person<sup>42</sup>; to be protected from slavery, servitude and forced labour<sup>43</sup>; as well as freedom of movement and residence<sup>44</sup>. The South African Constitution also states that the laws and obligations outlined in international agreements become national law upon the President's signing into power, and are to be enacted through national legislation, provided they are consistent with the Constitution.<sup>45</sup> These agreements and international laws bind South Africa to provisions of international standards, with Section 233 of the Constitution supporting this by obliging the courts to apply international law when interpreting legislation, as well as when making judgements. According to various international agreements which South Africa is party to, such as the *United Nations Convention against Transnational Organised Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, South Africa is under an international obligation to, abide by and uphold the various human rights enshrined in these agreements, by virtue of membership. Much of this study will compare the attitude, the conduct and the policies of governments to this document, which will be referred to throughout this study.

It is following this constitutional obligation to sign into law its international responsibility to combat trafficking in persons, that South Africa officially signed into law in 2013 the new South African Human Trafficking Act, namely the *Prevention and Combating of Trafficking in Persons Act 7 of 2013* ("TIP Act"). This new TIP Act indicates the government's efforts to provide for the establishment of a national framework policy, which is to set out appropriate measures, procedures and facilities for victims of human trafficking, as well as to form a deeper understanding of the context of the crime. Whilst the Act essentially outlines the required responses and procedures, it is evident that government relies heavily on NGOs to direct government's initiative to appropriately provide for mechanisms in combating human trafficking. However, it does not expressly state the extent to which the necessary depths of

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<sup>38</sup> Preamble of the Constitution of the Republic of South Africa, 1996.

<sup>39</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>40</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

<sup>41</sup> Section 11 of the Constitution of the Republic of South Africa, 1996.

<sup>42</sup> Section 12 of the Constitution of the Republic of South Africa, 1996.

<sup>43</sup> Section 13 of the Constitution of the Republic of South Africa, 1996.

<sup>44</sup> Section 21 of the Constitution of the Republic of South Africa, 1996.

<sup>45</sup> Section 231 of the Constitution of the Republic of South Africa, 1996.

consultation and cooperation between State and NGOs should go. The Act is clear on the obligations of organisations but these expectations placed on NGOs by government creates a burdensome relationship and one which implicates the State's autonomy in combating human trafficking. This will form the basis of this study, as it is this piece of legislation that the questions of research derive from. What is significant to note is that whilst the Act is celebrated and correlated to the national obligation to enact combative legislation, there are aspects of the law that have overlooked pertinent factors, such as the responsibilities conferred on NGOs and their role and relationship with the State.

In a recent case study<sup>46</sup>, Emser analyses the actors involved in preventing and combating human trafficking, as well as reviews the impact that politics has on the approach and response to human trafficking in South Africa. By examining the international and South African human trafficking legal and policy frameworks, the author uses the KwaZulu-Natal intersectoral task team as a case study which provides insight into the various roles played. The author suggests that there are great challenges to the implementation of the comprehensive 'victim-centred' legislation, much like other South African legislation. The author posits the need for formalised cooperation and coordination, in order to ensure a united approach to combating human trafficking. It is however highlighted that the implications of a supposed 'holistic' approach adopted by South Africa as being disjointed and reveals potential pitfalls of the Act, recommending that a preventative approach instead of a reactive approach be given more emphasis. Whilst these findings add much value to the purpose of this study in the need for better cooperation between actors, this study will address the reality that we have reached: the relationship between the State and NGOs has existed in a particular way for too long now and has led to the need for a better reaction to the plight, a reaction that requires more appropriate measures to deal with the issue, and which this study will attempt to address.

#### *Obligations of the State and NGOs and their Roles in Trafficking in Persons*

In 'The High Cost of Freedom',<sup>47</sup> Anne Gallagher addresses the assumption that 'the State is always to blame' and indicates the contrary. The authors of this article document the

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<sup>46</sup> Emser, M., 2013, 'The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance', PhD thesis, Dept. of Political Science, University of KwaZulu-Natal.

<sup>47</sup> Gallagher, A., 2010, 'The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking', *Human Rights Quarterly* 32.1, 73-114



phenomenon of the protection of trafficking victims' rights, focusing mainly on the 'imprisonment' and victim detention in public and private facilities, and explore the legal obligations of the provision of shelter, support and protection. The article highlights how the protection of victim's rights, primarily in shelters (often run by NGOs), inadvertently restricts the very freedom that the victims seek. They go on to pose two important questions; whether such detention unlawfully interferes with freedom of movement; and whether the right to freedom of movement conflicts with State obligations, such as to protect victims from harm. What must be highlighted is how the South African Act explicitly states that consent of the (adult) victim is required for the provision of these services, despite the potential drawbacks and conflict of international legal obligations. The authors also assert the questionability of consent. As the article argues for the protection of rights of victims, it adds value to this study by advocating for positive measures to be considered in light of the victim's interests, wishes and rights, where both the State and NGOs are required to cooperate in seeking to protect the victims' rights and where it is to be a consultative and shared responsibility.

In her article,<sup>48</sup>Gallinetti highlights the crucial point of an imbalance of data captured, cases reported and the true situation of trafficking. This imbalance indicates that the deserved attention to human trafficking is disproportionate. This is owing to varying facts and figures from various organisations and entities, which can only result in fighters against trafficking being inadequately prepared and insufficiently understanding the dynamics of the crime, and the extensive laws associated to it. The article describes how international laws and treaties have extensive provisions for trafficking and exploitation, specifically of women and children, and how there is an overlap of rights and obligations throughout the international legal framework. With this, the author states that, human trafficking and child trafficking are expressly provided for and thus do not need the vast amount of attention and recognition that they currently receives, as opposed to other human rights violations. This study take issue with this opinion.

Horne<sup>49</sup> identifies the lack of understanding that many, including investigating officers, have of the crime of human trafficking, and how this has negatively affected the number of

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<sup>48</sup> Gallinetti, J., 2010, 'Don't Shout too Loud: Reflections on the outrage against human and child trafficking', *SA Crime Quarterly*, No. 33, p11–17.

<sup>49</sup> Horne, J., 2011, 'The Investigation of Human Trafficking: An Impossible Mission without Elemental Identification of the Crime', *Southern African Journal of Criminology, Acta Criminologica* 24 (3), p20 – 30.

trafficking cases being adequately dealt with. This article specifically addresses key factors that inhibit the fight against trafficking in persons; it illustrates that when police officers are insufficiently trained and do not have adequate knowledge of the crime, it can lead to the violation of rights of trafficked victims - as these victims are reluctant to seek help and further assist the State in prosecuting the perpetrators. The article contributes to this study by proposing better equipped and trained offices to address trafficking, thus alleviating the burden that the NGOs experience in trying to 'undo any additional damage, to the victim, State, or society in general. The article further substantiates the Act's provision for social context training of all relevant agencies, emphasising that when a country has a better understanding of the crime, government is better positioned to provide appropriate resources and respond accordingly to the combat against trafficking, collaborating with NGOs. Considering that trafficking is of a secretive nature, police officials require a thorough understanding of the elements of the crime in order to properly investigate and prosecute trafficking matters. The article further demonstrates how, previously, the lack of legislation (and understanding of the crime), led to cases being incorrectly categorised and dealt with as abduction, kidnapping or smuggling matters, and not as human trafficking cases. This can alter how the State sees human trafficking, resulting in insufficient attention being paid to this crime.

The NAAGazette<sup>50</sup> extensively deals with the value of nongovernmental organisations in the fight against trafficking, and highlights the importance of ensuring that measures adopted are more collaborative, with better participation by all facets of society. This indicates that addressing the role of NGOs is pertinent in combatting trafficking in persons - this study will greatly rely upon this theory.

Clark<sup>51</sup> excellently investigates the relationship between the State and NGOs, and his work provides an array of considerations for this study. Whilst Clark's paper focuses on the benefits, costs, and ways of enhancing contribution and creating a solid platform for a positive

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<sup>50</sup> Amir Abdul Kareem Al-Khayon et al, 'Value of Non-Governmental Organizations in Countering Human Trafficking', in *National Association of Attorney General: NAAGazette*, viewed 11 September 2014, from <http://www.naag.org/value-of-non-governmental-organizations-in-countering-human-trafficking.php>

<sup>51</sup> Clark, J., 1993, 'The Relationship between the State and the Voluntary Sector', *World Bank*, viewed 23 June 2014, from [http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/1993/10/01/000009265\\_3961005082045/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/1993/10/01/000009265_3961005082045/Rendered/PDF/multi_page.pdf).

relationship, it doesn't deal specifically with addressing trafficking, this paper will supplement his, in this regard.

In the case study of “Confronting or Complementing?”<sup>52</sup> by Bejoy K Thomas, he focuses on the role that NGOs play and how they remain relevant despite having to face constant adjustments and challenges, primarily due to the State. By studying a local NGO in Kerala, India, “this article shows that NGOs exhibit ‘multiple identities’ - selective collaboration, gap-filling and posing alternatives - in the process of engagement with the state”. This article contains a key discussion regarding the challenges faced in the distinction between NGOs, civil society and the State and further attempts to find a balance between these role players, assessing whether the relationships are in fact complementary to or conflicting with one another.

### Brazil

The tri-national study<sup>53</sup> of Brazil, the Dominican Republic and Suriname, focuses on trafficking in women and provides an overview of the legal framework of Brazil, amongst other topics. Brazil ratified the Palermo Protocol in January 2004. The Brazilian Criminal Code makes it a crime for the internal trafficking of people, including men and children, however these provisions limit the scope to cases involving prostitution and are not applied to other forms of human trafficking. Although trafficking in persons laws in Brazil are not consolidated under one law nor included as articles of the Criminal Code, many of the forms of trafficking mentioned in the Palermo Protocol are provided for. The tri-national study outlines the various provisions relating to trafficking in persons as well as includes an overview of the policies in place. This study brings together the experiences and analyses the networks in place in order to ensure a better understanding of how trafficking operates between the chosen countries.

### Other jurisdictions: Canada

Canada is party to the Palermo Protocol, and thus is obligated to prevent and suppress trafficking in persons. The Canadian Criminal Code<sup>54</sup> is the most direct anti-trafficking law

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<sup>52</sup> Bejoy, K et al, ‘Confronting or Complementing? A Case Study on NGO–State Relations from Kerala, India’, *Voluntas*, DOI 10.1007/s11266-010-9129-5.

<sup>53</sup> daConceição Silva LI et al, 2008, ‘A Trinational Study About Trafficking in Women from Brazil and the Dominican Republic to Suriname – A joint intervention’, *Sodireitos*.

<sup>54</sup> R.S.C., 1985, c. C-46 (amended S.C. 2005, c.43).

which has been influenced by the Palermo Protocol. Stemming from this are the approaches taken by Canada to combat trafficking, such as the establishment and development of the National Action Plan of 2012.<sup>55</sup> A publication of the Royal Canadian Mounted Police<sup>56</sup> outlines how trafficking in persons is provided for in the *Criminal Code*, as well as under various other sections of the Code. It further indicates how the Government of Canada works in partnership with other stakeholders, including state, institutional and non-governmental organizations.

In Barnett's 'Trafficking in Persons',<sup>57</sup> he outlines trafficking in the Canadian context and the various influences and developments taken over the years. This study draws together the various international laws and instruments as well as experiences which Canada has looked to in order to combat trafficking effectively.

### Conclusion

Considering the works cited above, this study will address the extent of the obligation of the State and NGOs, focusing on the roles they play separately, and together, in the fight against trafficking. Whilst there is extensive literature regarding the State, NGOs and human trafficking, a gap exists concerning the division of labour between the two in working with prevention, protection and prosecution of this crime.

The literature that exists indicates that the study is relevant and 'topical' and that more research is required.

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<sup>55</sup> National Action Plan to Combat Human Trafficking, viewed on 11 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>.

<sup>56</sup> Canada Department of Justice, 2013, *Criminal Justice: Legislation*, viewed 9 September 2014, from <http://www.justice.gc.ca/eng/cj-jp/tp/legis-loi.html>.

<sup>57</sup> Barnett, L., 2006, 'Trafficking in Persons', PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>.

### Part III – Research Methodology

*“If the map shows a different structure from the territory represented... then the map is worse than useless, as it misinforms and leads astray.”<sup>58</sup>*

#### Theoretical Approach

In order to make sense of the ‘roadmap’ to eliminating human trafficking, six key conceptual approaches are often used in defining human trafficking:

1. “As a modern form of slavery;
2. as an exemplar of the globalisation of crime
3. as a problem of transnational organised crime;
4. as synonymous with prostitution;
5. as a migration problem; and
6. as a human rights challenge.

These approaches may coexist, overlap and change over time, or they may contradict each other “[but basically] trafficking will be approached differently depending on whether it is considered a problem of illegal migration, prostitution, or organised crime” or whether it is a challenge derived from an infringement of global human rights. The current study primarily adopts a human rights based theoretical framework, premised on the theory that all people have rights and thus have a corresponding responsibility to uphold and protect others’ rights, intertwined with how globalisation and its effects can adversely affect the core of human rights and the enjoyment of such rights.

Living in a world which has become ‘human-rights-oriented’, there are countless documents, agreements, conventions and declarations pledging rights to all human beings. For example, the right to freedom is a basic international human right, which is fundamental to the continued existence of society and which should be protected. States and governments play a considerably large role in upholding and protecting their people’s rights, however, their role and responses to various challenges should not be the end-point of the obligation to uphold human rights.

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<sup>58</sup> Alfred Korzybski in Hofstee, E., 2006, ‘Constructing a Good Dissertation: A Practical Guide to Finishing a Master’s, MBA or PhD on Schedule, Johannesburg, South Africa, EPE, p107.

This ‘rights-for-all’ approach has not been attainable up until now, and still faces many challenges. Merely maintaining the obligation to uphold all rights for all people, is in and of itself, a challenge - one which is necessary to explore in order to understand and create ways of overcoming an activity which “violates fundamental human rights which are declared universal and protected by international documents”.<sup>59</sup>

Another perspective of the human rights based approach is the challenge regarding victim protection and support policies. The UN.GIFT states the following in this regard:

*“[M]easures should be available to all identified trafficked persons on an unconditional basis and should be specifically designed to meet their needs. Victim protection and support service providers should have the capacity to accommodate the estimated number of trafficked victims arriving in the country of transit or destination. Providing such services to trafficked victims will give them the confidence and security to cooperate in the prosecution case. In addition other measures should be incorporated in the interests of the trafficked victim and good law enforcement practice. They include identification systems of trafficked victims and national referral mechanisms to victim protection and support services”.*<sup>60</sup>

With trafficking in persons being a complex issue, there exists two components to the human rights based approach. Firstly, trafficking in persons comprises a range of human rights violations, such as the right to dignity, the right to personal autonomy, the right to liberty and security of person, and many others, including the right to life. However, due to the criminal nature and process of trafficking in persons, the second aspect of trafficking in persons existing as a criminal issue. Trafficking in persons is not just a ‘one-time-crime’ but rather is a multifaceted crime involving a range of illegalities:

*“trafficked persons who escape their situation are subject to serious human rights violations at the hands of governments...for offences related to their status, including violation of immigration laws, prostitution or begging, and where often victims are treated as ‘disposable witnesses’ whose sole value is their ability to assist in trafficking prosecutions”.*<sup>61</sup>

The table below illustrates the various human rights infringements perpetuated in trafficking in persons, which violate documents such as the *Universal Declaration of Human*

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<sup>59</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p34.

<sup>60</sup> United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), 2008, “From Protection to Prosecution – A Strategic Approach”, Austria Centre Vienna Background Paper for the Vienna Forum to fight Human Trafficking, Austria Centre, Vienna, 13-15 February 2008, p5-6.

<sup>61</sup> GTZ (Programme for Promoting Gender Equality and Women’s Rights Governance and Democracy Division), 2008, *Trafficking in Persons as a Human Rights Issue*, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH Dag-Hammarskjöld-Weg 1-5 65760 Eschborn / Germany, pl.

*Rights (1948)*<sup>62</sup> (hereinafter referred to as the “UDHR”), and the South African Constitution and demonstrates the multifaceted and complex nature of trafficking in persons:

Table 1:<sup>63</sup>

Rights	Infringements
The right to life, liberty and security	Threat of murder, limitations of liberty and abuse
The right to protection from torture and inhuman, degrading treatment	Physical, psychological, mental, emotional and sexual abuse
The right to protection from slavery and servitude	Complete dependence on perpetrators
The right to protection from coercion and compulsory work	Being forced to work; and providing forced sexual services with no pay
The right to freedom and dignity	Deprivation; limitation of freedom; and humiliation
The right to privacy	Complete absence of personal privacy
The right to freedom of thought, conscience and religion	Limitation; and refusal to associate or limited/suspended interaction
The right to freedom of expression and speech	Complete absence of freedom of expression; and retaliation for its practice
The right to marriage and family	Refusing to marry; and or forcing someone to marry; including being sold into marriage
The right to rest and leisure time	Decreasing to health; and deprivation of basic needs
The right to health	Damage to health; and deprivation of basic needs
The right to freedom of movement and choice of residence	Refusal or prevention of its exercise
The right to communicate	Complete denial or limitation; supervision

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<sup>62</sup> Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

<sup>63</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p35.

The rights to work, to appropriate working conditions, to adequate wages	Complete denial; inhuman conditions; seizing wages or decreasing them to a minimum – work with no pay
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In dealing with these infringements, specific strategies should be adopted that are in line with a rights-based approach, to prevent trafficking, to prosecute traffickers and to protect the human rights of trafficked persons. The German Federal Ministry for Economic Cooperation and Development outlines the primary fields of action:

- *“Preventive measures focusing on the various dimensions of the context where trafficking occurs.*
- *Identification of trafficked persons and traffickers.*
- *Adequate law enforcement responses, including ensuring that efforts to punish traffickers are implemented within a system that respects and safeguards the rights of the victims to privacy, dignity and safety.*
- *Support for all (potentially) trafficked persons despite any irregular immigration status, and along with protection from reprisal and harm.*
- *Special measures for the protection and support of special target groups, such as child victims of trafficking.*
- *Access to adequate medical and psychological care and other social services during the period of temporary residence to ensure the well-being of trafficked persons.*
- *Provision of temporary residence visas (including the right to work) for trafficked persons during any criminal, civil or other legal actions as well as provision of the right to seek asylum.*
- *Participatory research, analysis, evaluation and dissemination”.*<sup>64</sup>

Inasmuch as we have seen a progression of human rights, as well as seen developments in the quest for such protection, the world has also developed in other areas, specifically within the economic and trade sector. Due to this global growth in economics and trade, which has inadvertently further influenced the trade of human beings, it is also pertinent to consider a limited theoretical approach of neoliberalism. The term “neoliberalism” has come to mark an era and which, owing to globalisation and the competitiveness that now exists, essentially encourages the removal of barriers and restrictions. It calls for the ‘privatisation of the marketplace’<sup>65</sup>, but as a result, has created an era of commodification of human beings.

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<sup>64</sup> GTZ (Programme for Promoting Gender Equality and Women’s Rights Governance and Democracy Division), 2008, *Trafficking in Persons as a Human Rights Issue*, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH Dag-Hammarskjöld-Weg 1-5 65760 Eschborn / Germany, p2.

<sup>65</sup> Shah, SP., 2012/2013, ‘Gender Justice and Neoliberal Transformations: Thinking Through “Neoliberalism” in the Twenty-first Century’, *Barnard Centre for Research on Women*, Issue 11.1-11.2, viewed 22 September



Initially, this term described a critique of a set of economic policies that included privatization and lowering tariffs pertaining to imports and exports of raw materials and retail goods.

The approach of neoliberalism can be twofold: firstly, and idealistically in some respects, it can encourage a balanced relationship between NGOs and the State in addressing the sexual exploitation of human beings -because NGOs are free to act without stringent requirements and onerous responsibilities inflicted on them by the State. This can allow NGOs, specifically trafficking NGOs, to focus their attention on addressing the issue without getting into the 'politics' of the State.

However, there are down sides to this removal of barriers as it does not streamline the response taken by all actors. Schmitt and Hersh state that "neoliberal policies are instituted on the idea that for the expansion and maturity of social and economic international relations to occur, countries must prioritize capital gaining endeavours and detract from large social welfare investments."<sup>66</sup>The capitalist notion of 'free-trade' within neoliberalism, "which drove much of the critical literature on neoliberalism throughout the 1990s and into the 2000s"<sup>67</sup>, brings about exploitative practices in which the desire to supply outweighs any desire to ensure fair treatment of those who work under these 'free-trade' agreements. 'Free-trade' removes the restrictions on business practices, and thus, the second aspect of the twofold approach to neoliberalism results in a lack of regulation, which can lead to a somewhat ineffective and piecemeal response to the issue at hand, which only degenerates the long-fought-for rights of human beings.

Ignacio Ramonet raises the crucial point that despite the many international tools and instruments, and despite governmental attempts (albeit political) to condemn the practice of trafficking in persons, the overall "public will" is feeble. He further aptly puts trafficking and neoliberalism into perspective stating the following:

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2014, from <http://sfonline.barnard.edu/gender-justice-and-neoliberal-transformations/thinking-through-neoliberalism-in-the-twenty-first-century/>.

<sup>66</sup> Schmitt, JD &Hersh., 2006, "Neoliberal Globalization: Workfare without Welfare", *Routledge*, Vol. 3, No. 1, p78 in Sanders, A., n.d., 'Sex Trafficking in Southeast Asia - How Neo-liberalism has Bolstered the Global Sex Trade', viewed 22 September 2014, from <http://web.uvic.ca/~onpol/spring2012/One%20-%20Adrienne.pdf>.

<sup>67</sup> Shah, SP., 2012/2013, 'Gender Justice and Neoliberal Transformations: Thinking Through "Neoliberalism" in the Twenty-first Century"', *Barnard Centre for Research on Women*, Issue 11.1-11.2, viewed 22 September 2014, from <http://sfonline.barnard.edu/gender-justice-and-neoliberal-transformations/thinking-through-neoliberalism-in-the-twenty-first-century/>.

*“Responsibility for this expansion of human trafficking lies largely with the current dominant economic model. In effect, the form of neoliberal globalisation than has been imposed over the last three decades through economic shock therapy has devastated the most fragile levels of society and imposed extremely high social costs. It has created a fierce competition between labour and capital. In the name of free trade, the major multinationals manufacture and sell their goods around the world, producing where labour is cheapest and selling where the cost of living is highest. The new capitalism has made competitiveness its primary engine and brought about a commodification of labour and labourers.”<sup>68</sup>*

Rules, regulations, laws and restrictions are necessary for a reason and therefore, as with any theoretical approach, whilst neoliberalism represents theory which seeks to explain the practices of an era, viewing this study under the realm of neoliberalism, and considering trafficking to be a human rights based issue, it emphasizes the globalised nature of trafficking and how it involves economic considerations with ultimate ramifications on the value of human beings.

## **Methods**

The approach used to determine the obligations of the State and NGOs in addressing trafficking in persons will primarily be based on desktop research.

Desktop study: Primary sources, including; international law instruments, constitutions, national laws, and reports, will be consulted during this study. Secondary sources, including background papers, books and academic articles as well as a range of internet websites, will also be relied upon

## **Ethical Considerations**

The required ethical measures will be considered at all times when conducting the research for this study.

The next chapter will address the international response to trafficking in persons and will include a brief history of human trafficking, an outline of the legal definitions of human

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<sup>68</sup> Ramonet, I., 2011, ‘Neoliberalism’s Newest Product: The Modern Slave Trade’, Global Research (Centre for Research on Globalisation), viewed 22 September 2014, at <http://www.globalresearch.ca/neoliberalism-s-newest-product-the-modern-slave-trade/25888>.

trafficking and the various measures outlining obligations to combat trafficking in persons. It will look at the various responses and experiences of role players to trafficking, within the greater international community; such as the Palermo Protocol; the role of the United States of America and their Trafficking in Persons Reports; the role of the Canada and their responsive measures; and other initiatives such as the Recommended Principles and Guidelines on Human Rights and Human Trafficking (UN Trafficking Principles and Guidelines)<sup>69</sup> and Commentary.

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<sup>69</sup> United Nations Economic and Social Council (UNESCO), 2002, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, viewed 22 September 2014, from <http://www.refworld.org/docid/3f1fc60f4.html>.

## CHAPTER TWO

### The International Response to Trafficking in Persons

*“It ought to concern every person, because it’s a debasement of our common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I’m talking about the injustice, the outrage, of human trafficking, which must be called by its true name – modern slavery.”<sup>70</sup>*

#### Introduction

Having briefly discussed the concept of trafficking in persons and how this crime developed among and across nations, this section will proceed to contextualise the international response and initiatives taken. It is crucial that the international community respond to and act on the development of slavery into a modern crime, considering its international nature.

Simply put, trafficking in persons is slavery: It is a crime that continues to exist globally, though many thought it had been abolished hundreds of years ago. In the rudimentary sense of the word, slavery is the subjection of a human being to specific conditions, enforced by another human being, where such person is bought and sold and then forced to work against their will (often deprived of their basic human rights), for the purposes of exploitation. It follows that, the basic definition of a slave is ‘a person who is the legal property of another and is forced to obey them’.<sup>71</sup> This can be better understood when remembering specifically the era of the Trans-Atlantic slave trade which took place over the 16<sup>th</sup> to 19<sup>th</sup> centuries, when persons were regarded as ‘things’, as property of another.<sup>72</sup>

Starting in 6800 B.C, slavery was institutionally recognised and practiced throughout the world. It was not until the 1700s that the ‘age of abolition of slavery’ began. Only in the 1900s did the abolition start to spread worldwide.<sup>73</sup> Whilst slavery has been outlawed in most States,

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<sup>70</sup> Barack Obama, President of the United States of America, 2012, ‘The Obama Administration Announces Efforts to Combat Human Trafficking at Home and Abroad’, viewed 11 September 2014, from <http://www.whitehouse.gov/the-press-office/2012/09/25/fact-sheet-obama-administration-announces-efforts-combat-human-trafficking>.

<sup>71</sup> Oxford Dictionaries n.d., ‘Slave’ viewed 24 May 2014, from <http://oxforddictionaries.com/definition/english/slave?q=slave>.

<sup>72</sup> Various Authors, n.d., ‘African Societies, Slavery, And The Slave Trade’, viewed 8 October 2014, from <http://history-world.org/Africa%20in%20the%20age%20of%20the%20slave%20trade.htm>. See also Davis BD., 2006, *Inhuman Bondage: The rise and fall of slavery in the world*, Oxford University Press.

<sup>73</sup> Free the Slaves n.d., *About Slavery: Slavery in History*, viewed 24 May 2014, from <https://www.freethe slaves.net/SSLPage.aspx?pid=303>.

it remains in existence - taking on various other forms and evidenced through various other practices, such as forced labour, sex slavery, organ trafficking, child labour, and the practice of debt bondage,<sup>74</sup> to name a few.

Globally, slavery is illegal in terms of international law and most domestic laws; however, the irony is that there are more slaves today than there were during times such as the Trans-Atlantic slave trade, with the estimate of today's modern day slaves reaching over 35 million people.<sup>75</sup> One wonders why and how this can be so, when we have, not only national basic human rights, but when these rights are internationalised through documents such as the UDHR, the *International Covenant on Civil and Political Rights*<sup>76</sup> (hereinafter referred to as the "ICCPR"), and the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>77</sup> (hereinafter referred to as the "CEDAW"). But the distinction between slaves today and those in "a colonial time is that in the old days slaves were worth a great deal of money and so were taken better care of which contrasts starkly with their seemingly disposable worth today. Humans are cheap to buy and cheap to throw away".<sup>78</sup> Some may argue that the conditions in which some of the 'modern slaves' find themselves are worse than those of previous times, now regarding these people purely as a commodity, amounting to little worth to their owners. Following this, slaves' rights (people's rights) are a rare consideration, which amounts to a grave contravention of national and international law, where "it is not an exaggeration to say that human trafficking represents a 21<sup>st</sup> century version of slavery and that it comprises the most serious abuse of the fundamental human rights of its victims".<sup>79</sup>

Laws surrounding the freedom of all people, which deal with human trafficking, can be found in numerous international documents and agreements which date back to the abolition

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<sup>74</sup> Belser, P., de Cock M & Mehran F, 2005, "ILO Minimum Estimate of Forced Labour in the World", *International Labour Organisation*, viewed 9 October 2014, from [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_081913.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081913.pdf).

<sup>75</sup> Global Slavery Index, 2013, *Global Slavery Index: Home*, viewed 15 September 2014, from <http://www.globalslaveryindex.org/>.

<sup>76</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976.

<sup>77</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).

<sup>78</sup> Kuhl, M., 2011, 'Modern-Day Slavery and Human Trafficking: An Overlooked Issue', BA thesis, Dept. of International Studies, Salve Regina University, p5, quoting Kate Blewett [http://digitalcommons.salve.edu/cgi/viewcontent.cgi?article=1069&context=pell\\_theses](http://digitalcommons.salve.edu/cgi/viewcontent.cgi?article=1069&context=pell_theses).

<sup>79</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, *Resource Manual on Trafficking in Persons for Judicial Officers*, South Africa, p32-33.

of slavery. These documents include the *Slavery Convention (1926)*,<sup>80</sup> and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)*.<sup>81</sup>

The UDHR has been described as the first-most-influential declaration among the official international law, to declare all human beings free and equal,<sup>82</sup> that no one shall be held in slavery or servitude, and prohibits all forms of slavery.<sup>83</sup> 1948 saw the adoption of this non-binding instrument by the United Nations (UN) General Assembly, with the international community vowing that the human rights atrocities of the past shall not repeat themselves.<sup>84</sup> The adoption of this declaration was also a celebration of the establishment of the *United Nations Charter (1945)*, in which provisions are set out for the quest for peace, harmony and equality among nations and its peoples.

Such a declaration has subsequently influenced numerous conventions and treaties pertaining to the rights of people, which have also had effects of determining the relationships between States, with additional tools of international law that include segments against the trafficking in persons such as the ICCPR, the *United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)*<sup>85</sup>, and the *CEDAW*. These instruments laid the foundation for the contemporary conventions and efforts to eliminate trafficking.

One such convention that has created the platform for significant influence in dealing with the crime of trafficking, is the *United Nations Convention against Transnational Organized Crime*<sup>86</sup>. Efforts were made to further advance the fight in prohibiting the enslavement and ensuring the freedom of people, in supplementing the *Convention against Transnational*

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<sup>80</sup> Convention to Suppress the Slave Trade and Slavery, Adopted by the League of Nations No. 1414 on 25 September 1926, entry into force: 9 March 1927.

<sup>81</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, entered into force April 30, 1957.

<sup>82</sup> Article 1, Universal Declaration of Human Rights 1948.

<sup>83</sup> Article 4, Universal Declaration of Human Rights 1948.

<sup>84</sup> United Nations n.d., *The Universal Declaration of Human Rights: History*, viewed 10 September 2014, from <http://www.un.org/en/documents/udhr/history.shtml>.

<sup>85</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Adopted by the UN General Assembly on 2 December 1949, A/RES/317, entered into force 25 July 1951.

<sup>86</sup> United Nations Convention against Transnational Organized Crime, resolution adopted by the General Assembly, 8 January 2001, A/RES/55/25, at the fifty-fifth session.

*Organised Crime* by establishing a further two protocols which form the core of existing mechanisms against the trafficking of persons:

- the *Protocol against Smuggling of Migrants by Land, Sea, and Air*;
- the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.<sup>87</sup>

The trafficking protocol is referred to as the Palermo Protocol, and is the most extensive and appropriate instruments in tackling the crime of trafficking in persons. In association with these conventions, in 2007, the Office of the United Nations on Drugs and Crime formed United Nations Global Initiative to Fight Human Trafficking (UN.GIFT).<sup>88</sup> Whilst there have been numerous initiatives formed to respond to the call to fight trafficking in persons, international cooperation among all stakeholders is at the core of UN.GIFT, which actively works to achieve synchronicity among “governments, business, academia, civil society and the media - to support each other's work, create new partnerships and develop effective tools to fight human trafficking”.<sup>89</sup> The UN.GIFTs’ mission statement<sup>90</sup> reflects the importance of cooperation between state and non-state actors, most notably with NGOs, and this attention given to this partnership is paramount to the fight against trafficking. The principles and objectives of the UN.GIFT should direct how partnerships within each individual state should act.

Over and above the established laws and initiatives taken, one can see from definition found in the *Rome Statute of the International Criminal Court* (“hereinafter referred to as the *ICC Statute*”),<sup>91</sup> which was enforced in 2002, that there is an interlink between crimes against humanity and trafficking in persons. The ICC has considerable global support and thus the

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<sup>87</sup> The focus of this paper will only relate to the former protocol, that being the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.

<sup>88</sup> King L, 2008, ‘International Law and Human Trafficking’, *Topical Research Digest: Human Rights and Human Trafficking*, p88 viewed from <https://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf>.

<sup>89</sup> United Nations Global Initiative to Fight Human Trafficking n.d., About: UN.GIFT, viewed 12 September 2014, from <http://www.ungift.org/knowledgehub/en/about/index.html>.

<sup>90</sup> Mission Statement: *UN.GIFT aims to mobilize state and non-state actors to eradicate human trafficking by reducing both the vulnerability of potential victims and the demand for exploitation in all its forms; ensuring adequate protection and support to those who fall victim; and supporting the efficient prosecution of the criminals involved, while respecting the fundamental human rights of all persons.*

In carrying out its mission, UN.GIFT will increase the knowledge and awareness on human trafficking; promote effective rights-based responses; build capacity of state and non-state actors; and foster partnerships for joint action against human trafficking.

<sup>91</sup> Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, entered into force 1 July 2002.

recognition of the elements of trafficking emphasizes the seriousness of the crime. Article 7 of the ICC Statute evidences how trafficking in persons is part and parcel to being a crime against humanity:

*“Article 7*

*Crimes against humanity*

*1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) Torture;*
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- (i) Enforced disappearance of persons;*
- (j) The crime of apartheid;*
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

*2. For the purpose of paragraph 1:*

*(a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;*

*(b) ‘Extermination’ includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;*

*(c) ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;*

*(d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;*

*(e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;*

*(f) ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;*

*(g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively;*

*(h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;*



*(i) ‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*

*3. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”*

With elements of human trafficking now classified as a crime against humanity, it emphasises just how crucial and urgent this fight is, and also adds to the importance of ensuring states take on the responsibility of combating trafficking in persons.

Membership to most of the conventions and instruments “requires the implementation of laws which can properly respond to trafficking in as nuanced and effective a way as the crime is complex and injurious.”<sup>92</sup> These instruments and initiatives thus inform the member states’ enactment of trafficking in person’s legislation as well as create various obligations for the government to fulfil, which are enforceable in international courts and tribunals with suitable jurisdictions. However, the effectiveness of implementation is not always certain, due to weak measures of accountability within the international law system. Whilst the obligations created in the instruments are enforceable on an international level, it is not always the case for such to be enforceable at a national level. This depends entirely on the domestic laws and provisions of the ratifying state, which can differ from state to state too. Depending on their legislation, either the international instrument is incorporated into domestic law, or they automatically have the status of domestic law. According to the United Nations Office of the High Commission for Human Rights’ Commentary on the Trafficking Principles and Guidelines<sup>93</sup>, the extent of states’ obligations can be found by considering the following:

*“The text of the treaty: what are the obligations? Are there any limits or exceptions? How are States required to implement these obligations?”*

*Interpretations of the treaty: in the case of human rights treaties, usually by a treaty monitoring body but also by national, regional or international decision makers, including courts or tribunals.*

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<sup>92</sup> United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), 2008, “The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation”, Austria Centre Vienna Background Paper for the Vienna Forum to fight Human Trafficking, Austria Center, Vienna, 13-15 February 2008, p2.

<sup>93</sup> United Nations Office of the High Commission for Human Rights (OHCHR), 2010, HR/PUB/10/2 Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary.

*Reservations to the treaty: has the State entered in any reservations to the treaty? If so, to what articles and with what effect?*”<sup>94</sup>

One massive challenge that international law faces is the compliance with the instruments and fulfilment of their obligations by states. Measures have been put in place in an attempt to ensure compliance, such as allocating States UN monitoring groups who also receive input from non-governmental organisations. Further, member states are mandated by the United Nations Human Rights Council to engage with and participate in working groups, special rapporteurs, and country rapporteurs. Universal adherence to such treaties and agreements is paramount to effectively combat trafficking in persons, where stakeholders are to ensure consistency of their national frameworks with international instruments.<sup>95</sup> Such adherence is reliant on not only the State, but on non-state actors too, such as NGOs, who “throughout the world play a crucial role in raising awareness about and monitoring human trafficking”<sup>96</sup>.

Inasmuch as obligations arise out of international legal instruments, corresponding rights exist too, as is the nature of the international law framework which comprises of a body of rules and principles which essentially “governs the relations and dealings of States with each other”.<sup>97</sup> It is also important to note that implementation is not just about political will but the chosen response is economical too, as non-compliance may have economic sanctions imposed where States fail to fulfil their obligations to the relevant treaties and conventions.

It is this international framework of legal instruments, as well as various additional initiatives taken by the international community in attempt to give life to the treaties and conventions, which form the foundation for most national legal frameworks and from which States draw influence. Certain features and the relevant areas of the international framework will now be discussed.

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<sup>94</sup> Ibid p18.

<sup>95</sup> United Nations, 2012, “Improving the coordination of efforts against trafficking in persons”, Background paper of the Secretary-General, p5.

<sup>96</sup> King, L., 2008, ‘International Law and Human Trafficking’, Topical Research Digest: Human Rights and Human Trafficking, p88 viewed from <https://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf>.

<sup>97</sup> United Nations Office of the High Commission for Human Rights (OHCHR), 2010, HR/PUB/10/2 Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary, p17.

## **The Palermo Protocol- The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000**

The Palermo Protocol was the first convention to establish an extensive and internationally agreed upon definition of trafficking,<sup>98</sup> after the United Nations recognised that a more uniformed approach to trafficking in persons was necessary<sup>99</sup>. In an effort to ensure compliance and accountability among member states, and following the need for a better approach, the Protocol has a unique aspect to that of other treaties, in that it was “created as a law enforcement instrument, which, in theory, gives it more influence than aspirational agreements.<sup>100</sup> Thus provisions exist which require states to affect their own legislation which adequately reflects the provisions, requirements and obligations found in the Protocol. There is still some criticism of this effort to obligate ratifying states.

Although there is much criticism of the Palermo Protocol regarding its terminology,<sup>101</sup> the adherence (or even the effort to adhere) to the Protocol’s provisions by member states is a “key component in making headway in combatting trafficking in persons on a global scale”.<sup>102</sup> Not only do these efforts of adherence indicate international cooperation, but they also indicate that cooperation among state and non-state actors remains central in the steps taken to combat trafficking in persons. This was made evident in the contribution made to the Protocol in its drafting and defining stages:

*“Many of the governmental delegates who participated in the negotiations came from a law enforcement background and were primarily interested in the policing and prosecutorial aspects of the protocol. Civil society groups, however, pushed hard for a more victim- and rights-oriented approach. While some advocacy groups felt that the Protocol could have gone further in protecting*

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<sup>98</sup> United Nations Education, Scientific and Cultural Organisation, 2007, ‘Policy Paper No. 14.5(E): Human Trafficking in South Africa: Root Causes and Recommendations’, viewed 14 June 2014, from <http://unesdoc.unesco.org/images/0015/001528/152823e.pdf>, p13.

<sup>99</sup> Brusca, C., 2011, ‘Palermo Protocol: The First Ten Years after Adoption’, Global Security Studies, p8.

<sup>100</sup> King, L., 2008, ‘International Law and Human Trafficking’, Topical Research Digest: Human Rights and Human Trafficking, p88 viewed from <https://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf>.

<sup>101</sup> Emser, M., The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance (PhD thesis, University of KwaZulu-Natal, 2013) p125.

<sup>102</sup> Pharoah, R., 2006, ‘Getting to Grips with Trafficking’, Institute for Security Studies, Monograph Series, No 123, p5.

*and supporting victims, the final document sought to provide a universal tool to address all aspects of human trafficking.*<sup>103</sup>

The Protocol also introduces three significant policy dimensions: (i) prosecution (and the criminalisation, investigation and punishment of traffickers) in terms of Article 5, (ii) protection (of victims) based on Articles 6 to 8, and (iii) prevention (of the crime of human trafficking), found in Articles 9 to 13.<sup>104</sup>

To illustrate the significant policy dimensions, there are various provisions outlined in the Protocol which direct how member states are to respond to trafficking as well as what they are to enact in terms of their own national legislation. The breakdown of provisions and the respective requirements<sup>105</sup> can be seen in the table below which summarizes the key point of each article.

Table 2: Breakdown of the Relevant Palermo Protocol Provisions

Part I: General Provisions
Article 1 contextualises the Palermo Protocol in that it relates to and supplements the <i>United Nations Convention against Transnational Organised Crime, 2000</i> .
Article 2 outlines the statement of purpose which is to prevent trafficking, protect victims of trafficking and promote cooperation against trafficking.
Article 3 provides an extensive definition of trafficking in persons, which constitutes of various elements. The diagram below simplifies the definition that is to be applied by all member states.
Article 4 sets out the scope of application for the Protocol, indicating that the Protocol deals with prevention, investigation and the prosecution of trafficking.

<sup>103</sup> *ibid*, p5.

<sup>104</sup> *Ibid* p134.

<sup>105</sup> Emser, M., *The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance* (PhD thesis, University of KwaZulu-Natal, 2013) p134.

Article 5 criminalizes trafficking in persons and requires state parties to enact their own legislation criminalizing the conduct set out in Article 3, and includes requiring states to adopt anti-trafficking law; adopt child trafficking law; apply other relevant laws; ensure a stringency of penalties and a certain level of law enforcement; and collect crime statistics.

#### Part II: Protection of Victims of Trafficking in Persons

Article 6 deals with the assistance to and the protection of victims of trafficking in persons, with Articles 7 and 8 dealing with the status of victims in receiving states and the repatriation of victims of trafficking respectively.

In these articles, the state is required to: not punish the victim; impose no self-identification proving status of victim; provide assistance for legal proceedings; ensure physical safety of victims within a state's territory; harmonise domestic law to ensure possibility of obtaining compensation; provide residence permits and basic services for housing, medical treatment, job training, and assistance for rehabilitation and repatriation.

#### Part III: Prevention, Cooperation and Other Measures

The provisions in Article 9 – 13 provide that state parties must adopt preventive measures such as the education of relevant role-players (e.g. law enforcement) and awareness-raising programmes. These articles obligate state parties to establish and implement policies, programmes and other measures to prevent trafficking, protect trafficking victims and ensure that the policies remain relevant among society. We see in these articles that cooperation between the relevant stakeholders, namely the State and NGOs, is strongly encouraged, specifically in Article 10 which relates to information exchange and training, with Article 9 specifically providing for the prevention of trafficking in persons.

Articles 11, 12 and 13 pertain to border measures; the security and control of documents; and the legitimacy and validity of documentation.

#### Part IV: Final Provisions

Articles 14 to 20 include provisions surrounding the saving clause; settlement of disputes by means of negotiation, arbitration, and then referral to the International Court of Justice,

unless provided for otherwise; signatory ratification, acceptance, approval and accession; the entry into force; amendments; denunciation; and the depository and languages.

Currently, there are 169 State Parties to the Protocol<sup>106</sup>, however according to the Yury Fedotov, UNODC Executive Director, convictions for trafficking remain alarmingly low<sup>107</sup>, thus showing that despite the number of States joining the global fight, there is a further, more significant, obligation to ensure that convictions and prosecutions follow suit.

In essence, the Palermo Protocol can be seen as an instrument which has constructed a global, harmonised language to respond to trafficking in persons by defining trafficking in persons, assisting victims of trafficking and preventing the crime of trafficking in persons. It further aims to inform and provide for cooperation among national and international stakeholders, which has encouraged national laws<sup>108</sup> to implement appropriate legislation in combatting trafficking in persons, specifically those of South Africa, Brazil (which will be dealt with later) and the likes of the USA and Canada.

### **United States' Response and the Trafficking in Persons Reports**

Just two months prior to the adoption of the Palermo Protocol, on 11 October 2000 the United States of America Congress passed the *Victims of Trafficking and Violence Protection Act* (“the US TVPA”), with an American fear of a ‘tidal wave’ of victims into the United States, as Jerry Markon puts it, being the tipping point for the Americans to pass the Act.<sup>109</sup> Emanating out of the TVPA came minimum standards for the elimination of trafficking, criteria for evaluating performance, as well as requirements of the State Department to issue annual Trafficking in Persons Reports. These standards and criteria were to be applied in assessing

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<sup>106</sup> United Nations Treaty Collection,

[https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=XVIII-12-a&chapter=18&lang=en)

<sup>107</sup> UN.GIFT.HUB, 30 July 2014, *News: Yury Fedotov, UNODC Executive Director, on United Nations World Day against Trafficking in Persons*, viewed 11 September 2014, from <http://www.ungift.org/knowledgehub/en/stories/July2014/yury-fedotov--unodc-executive-director--on-united-nations-world-day-against-trafficking-in-persons.html>.

<sup>108</sup> Raymond JG, n.d., ‘Guide to the New UN Trafficking Protocol’, viewed 19 September 2014, from [http://www.no-trafficking.org/content/pdf/guide\\_to\\_the\\_new\\_un\\_trafficking\\_protocol.pdf](http://www.no-trafficking.org/content/pdf/guide_to_the_new_un_trafficking_protocol.pdf), p1.

<sup>109</sup> Emser, M., *The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance* (PhD thesis, University of KwaZulu-Natal, 2013) p30.

governmental efforts across the world and have subsequently influenced a significant global response.

Following the establishment of the Act, and within the TVPAs provisions, a system was established whereby the efforts of other countries to address trafficking were examined and assessed<sup>110</sup>. This assessment is based on standards and criteria set out by the TVPA:<sup>111</sup>

*“(1) “The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.”*

*“(2) “For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.”*

*“(3) “For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.”*

*“(4) “The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.””*

Annual reports issued by the United States of America began in 2001 after being legislatively required by the US TVPA, which extensively details the intricacies of human trafficking within their own American borders (only since 2010) and beyond. The United States uses these reports, among other things, as a means to push other States to adopt measures to combat human trafficking and fight against all forms of human trafficking, including forced labour, sex trafficking, bonded labour, debt bondage, involuntary domestic servitude, forced child labour, child soldiers, and child sex trafficking.<sup>112</sup> It further sets a minimum standard for combating trafficking and includes criterion for the evaluation of a State’s performance in their eradication of human trafficking in terms of their compliance with the trafficking protocol. Where there is little or non-compliance, the United States are in a position to withdraw

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<sup>110</sup> Gallagher, A., 2010, ‘Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports’, Human Rights Review DOI 10.1007/s12142-010-0183-6, p4.

<sup>111</sup> Dwkcommentaries, 2014, ‘Latest U.S. Report on Global Human Trafficking’, viewed 8 October 2014, from <http://dwkcommentaries.com/tag/u-s-trafficking-victims-protection-act-tvpa/> (For the Minimum Standards and Criteria legislation, see Appendix A).

<sup>112</sup> U.S Department of State, 2014, Trafficking in Persons Report, viewed 11 September 2014, from <http://www.state.gov/j/tip/rls/tiprpt/2015/index.htm>.

humanitarian aid which many states depend on.<sup>113</sup> Based on the TVPA, the State Department used the above compliance levels to create a system of rankings based on three tiers<sup>114</sup>. The standards, criteria and subsequent ranking system is illustrated in the Trafficking in Persons Annual Reports. The Tiers are as follows:

*Tier 1: Countries whose governments fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards.*

*Tier 2: Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards.*

*Tier 2 Watch List: Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards AND:*

*a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;*

*b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or*

*c) The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.*

*Tier 3: Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.<sup>115</sup>*

Many believe these tiers and minimum standards contribute positively to the eradication of global trafficking, as they create a level of accountability of each State Party and encourage positive behaviour in seeing state compliance. However, it must be noted that the American 'self-appointment'<sup>116</sup> has not been warmly welcomed by some activists and governments. Ann Gallagher reminds us how human trafficking remains both 'contested and controversial', thus being a complex matter, but importantly noting, and thus evidencing the importance of the American legislation. She recognizes how...

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<sup>113</sup> "Donor-recipient states receive aid, particularly from the main source of U.S. donor funding – USAID. Conditionalities and restrictions are placed on the aid, and recipient states have to abide by guidelines decreed by the neo-conservative U.S. administration that are in line with U.S. foreign policy (in other words, U.S. interests). Foreign assistance has become a vehicle for advancing 'an extreme social conservative agenda'. (See William A. Smith, 'The Politicization of HIV Prevention: The Cynicism of U.S. Assistance to Africa', *Human Rights*, Volume 35, Number 1, (Winter 2008) ", quoted in Emser, M., 2013, *The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance* (PhD thesis, University of KwaZulu-Natal, p59.

<sup>114</sup> Gallagher, A., 2010, 'Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports', *Human Rights Review* DOI 10.1007/s12142-010-0183-6, p4.

<sup>115</sup> US Department of State 'Trafficking in Persons Report: Tier Placements' (2013) <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm>.

<sup>116</sup> Gallagher, A., 2010, 'Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports', p10.



*... ‘the TIP Reports are not displacing a potentially superior alternative or performing a function that could be better discharged by the international community. Without the Reports, our collective knowledge of trafficking-related exploitation would likely be less; individual governments would likely have greater control over the flow of information that properly belongs in the public domain; and even the most egregious failure on the part of a state to deal with trafficking-related exploitation would likely come at little reputational or other cost.’<sup>117</sup>*

Through the release of the Trafficking in Persons Annual Reports, the United States has since encouraged and accordingly threatened with penalties, many countries to comply with the minimum standards of combatting trafficking in persons. But despite their claim of having ‘more than one hundred anti-trafficking laws’, Kuhl points out how these laws have done little in achieving the desired decline in numbers of slaves.<sup>118</sup>

As previously mentioned, the response to trafficking in persons is not merely based on political will, but also consists of economic considerations. This is clear when considering how the annual reports are used as a basis for determining whether, and to what extent, sanctions are to be imposed or assistance provided. Thus, the possibility of not meeting the standards outlaid in the TPVA and the potential consequences of having sanctions imposed has greatly influenced the responses adopted by states and further determines the levels of cooperation between stakeholders.

### **Canada’s Response**

In 1986, the threat of human trafficking in Canada was realised when “152 Sri Lankan migrants were rescued off the coast”<sup>119</sup> and since the early 1990s, it has gained substantial interest within Canada and beyond its borders.<sup>120</sup> As one of the first countries to ratify the Palermo Protocol on 15 December 2000,<sup>121</sup> Canada sought to bring its own legislation into lie

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<sup>117</sup> Gallagher, A., 2010, ‘Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports’, p13.

<sup>118</sup> Kuhl, M., 2011, ‘Modern-Day Slavery and Human Trafficking: An Overlooked Issue’, *Pell Scholars and Senior Theses*, Paper 69, from [http://digitalcommons.salve.edu/pell\\_theses/69](http://digitalcommons.salve.edu/pell_theses/69), p36.

<sup>119</sup> Barnett, L., 2006, ‘Trafficking in Persons’, PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>, p3.

<sup>120</sup> Brucket, C and Parent, C., 2004, ‘Organised Crime and Human Trafficking in Canada: Tracing Perceptions and Discourses’, Research and Evaluation Branch, Royal Canadian Mounted Police, viewed 11 January 2015, from, <http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/oc-co-hum-eng.htm>, p7.

<sup>121</sup> Brucket, C and Parents, C., 2004, ‘Organised Crime and Human Trafficking in Canada: Tracing Perceptions and Discourses’, Research and Evaluation Branch, Royal Canadian Mounted Police, viewed 11 January 2015, from, <http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/oc-co-hum-eng.htm>, p11.

with the Palermo Protocol by amending its Criminal Code. Currently, in terms of the 2014 US TIP Reports,<sup>122</sup> the Government of Canada fully complies with the US minimum standards for the elimination of trafficking. However it is a country that shares the elements of South Africa; being a source, transit, and destination country for men, women, and children subjected to sex trafficking, and a destination country for men and women subjected to forced labour.

The efforts of Canada to combat trafficking in persons have been substantiated by not only their amendments to national legislation and having signed these various international conventions and agreements, but their financial support towards UN.GIFT<sup>123</sup> and “other global research, prevention and protection landscape on human trafficking”.<sup>124</sup> According to the Canadian National Action Plan for 2012, there is also a specific allocation of funds towards states and organisations to “enhance international capacity to prevent and respond to threats posed by international criminal activity”.<sup>125</sup> This active and direct affiliation and support indicates an authentic quest to alleviate modern forms of slavery. Their further recognition of measures involving a joint effort of all role players further indicates an authentic approach in seeking ways to combat trafficking in persons:

*“To effectively combat this issue, we require the involvement of not only the federal government, but of provincial and territorial governments as well. And to be successful, governments must also work closely with law enforcement, civil society and others”.*<sup>126</sup>

However despite their support for the notion of freedom for all and their quest for trafficking to be overcome, Canada is still developing strategies to combat trafficking in persons.

According to the 2015 US TIP report, whilst more convictions have been made under trafficking specific legislation than in previous years, the report found that “some judges and prosecutors demonstrated a limited understanding of human trafficking, including the subtle

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<sup>122</sup> U.S Department of State, 2014, Trafficking in Persons Report, viewed 11 January 2015, from <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>.

<sup>123</sup> UN.GIFT n.d., *About UN.GIFT*, viewed 11 September 2014, from <http://www.ungift.org/knowledgehub/en/about/index.html>.

<sup>124</sup> Government of Canada, 2012, ‘National Action Plan to Combat Human Trafficking’, viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p6.

<sup>125</sup> Government of Canada, 2012, ‘National Action Plan to Combat Human Trafficking’, viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p21

<sup>126</sup> The Honourable Vic Toews, P.C., Q.C., M.P, Minister of Public Safety, Government of Canada, 2012, National Action Plan to Combat Human Trafficking, viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p1.

forms of coercion used by traffickers, leading them to categorize trafficking cases as other crimes, bring civil charges instead of criminal charges, or acquit traffickers”. Police and NGOs reported that “prosecutors are often hesitant to use trafficking statutes due to their belief that proving exploitation to judges is exceedingly difficult”. In addition, law enforcement and other governmental agencies have “emphasized how there have been very little documented cases of trafficking in persons coming to light [and that] evidence is largely anecdotal and often provided by NGOs that provide services to trafficked persons”.

### The Criminal Code of Canada (Criminal Code)

Beyond the international obligation set out in the Palermo Protocol, the Criminal Code of Canada aims to hold traffickers accountable for the crime of trafficking. With the amendment of Bill C-49 coming into force on 25 November 2005, within its provisions, it includes four specific criminal offences to address human trafficking:

- 1) Section 279.01 deals specifically with trafficking in persons and states the following:

*“(1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable*

*(a) to imprisonment for life if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or*

*(b) to imprisonment for a term of not more than fourteen years in any other case.*

*(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.”*

- 2) Section 279.011 pertains to the trafficking of a person under the age of eighteen years by providing the following:

*“(1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person under the age of eighteen years, or exercises control, direction or influence over the movements of a person under the age of eighteen years, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable*

*(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of six years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or*

*(b) to imprisonment for a term of not more than fourteen years and to a minimum punishment of imprisonment for a term of five years, in any other case.*

*(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.”*

3) Section 279.02 deals with material benefit:

*“Every person who receives a financial or other material benefit, knowing that it results from the commission of an offence under subsection 279.01(1) or 279.011(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than ten years.”*

4) And Section 279.03 provides for the withholding or destroying documents:

*“Every person who, for the purpose of committing or facilitating an offence under subsection 279.01(1) or 279.011(1), conceals, removes, withholds or destroys any travel document that belongs to another person or any document that establishes or purports to establish another person’s identity or immigration status is guilty of an indictable offence and liable to imprisonment for a term of not more than five years, whether or not the document is of Canadian origin or is authentic.”*

According to Barnett:<sup>127</sup>

*“the amendments contained in Bill C-49 also ensure that trafficking may form the basis of a warrant to intercept private communications and to take bodily samples for DNA analysis, and permit inclusion of the offender in the sex offender registry. Passage of Bill C-49 expanded the ability to provide restitution to victims who are subjected to bodily or psychological harm”.*

Other Criminal Code offences can also be used to address trafficking including kidnapping, forcible confinement, uttering threats, extortion, assault, sexual assault, prostitution-related offences, and criminal organization offences.

### Immigration and Refugee Protection Act (IRPA)

The Act targets cross-border trafficking in persons. Section 17 distinguished between trafficking and smuggling by specifically defining the offence of smuggling. Section 118 follows this definition by prohibiting the bringing into Canada of persons by means of abduction, fraud, deception or use of threat of force or coercion<sup>128</sup> and defines the offence of

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<sup>127</sup> Barnett, L., 2006, ‘Trafficking in Persons’, PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>, p9.

<sup>128</sup> Government of Canada, 2012, ‘National Action Plan to Combat Human Trafficking’, viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p7-8.

trafficking as “to knowingly organise one or more persons to come into Canada by means of abduction, fraud, deception, or the use of force or coercion”.<sup>129</sup>

### 2012 National Action Plan to Combat Trafficking in Persons

In combatting trafficking in persons, Canada has recognised the importance of consolidating all of the activities taking place into a comprehensive plan and has accordingly pledged their action into fighting this heinous crime.<sup>130</sup> The Canadian 2012 National Action Plan to Combat Trafficking in Persons (hereinafter referred to as “the Canadian National Action Plan”) is the end product of this consolidation and which seeks to encourage a positive and collaborative response to trafficking in persons. Within such plan, several practices were identified and highlighted as ways forward in the fight against trafficking and which can be used to guide the various initiatives responding to trafficking in persons.

One of the practices identified is the development of a national anti-trafficking structure. The table below sets out the three components of such structure in which provides “a comprehensive strategy and tools for understanding a country’s trafficking problem; identifying victims; developing informed policies; organizing government action; and, ultimately delivering coordinated services to victims”.<sup>131</sup>

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<sup>129</sup> Barnett, L., 2006, ‘Trafficking in Persons’, PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>, p9.

<sup>130</sup> The Honourable Vic Toews, P.C., Q.C., M.P, Minister of Public Safety, 2012, ‘National Action Plan to Combat Human Trafficking’, p1, viewed on 11 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>.

<sup>131</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, “An Exploration of Promising Practices in Response to Human Trafficking in Canada”, viewed 24 November 2014, from [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), pI; pii.

Table 7: The Development of a National Anti-Trafficking Structure<sup>132</sup>

A National Action Plan	Assists in articulating a coherent, cohesive and comprehensive strategic and operational plan to counter human trafficking. To be effective, the plan should outline methods of coordination and cooperation among different levels of government, delegate responsibilities between agencies and contain a budget, timelines and deadlines.
A National Rapporteur	An individual mandated to report on the nature and extent of human trafficking and on the effect of the anti-trafficking policies and efforts pursued by the government. A key to the success is its independence from other agencies.
A National Referral Mechanism	Coordinated strategic partnerships between government and nongovernmental organizations that link trafficking victims with services and ensure that victims' rights are protected. Such mechanism would: <ul style="list-style-type: none"> <li>- provide a multidisciplinary and cross-sector approach to combating human trafficking;</li> <li>- build trust between the government sector and the NGO sector;</li> <li>- effectively connect victims to comprehensive services; and</li> <li>- improve policy and procedures on a broad range of victim-related issues.</li> </ul>

Considering that Canada's federalism distinguishes jurisdictions and responsibilities between the federal parliament and the provincial legislative assemblies, "as a general matter, addressing the needs of victims...is an area of shared responsibility between the federal and provincial governments."<sup>133</sup> This shared responsibility is an important part of the fight to combat trafficking as it allows for a more focused response by the state officials to respond to trafficking within their own context but which response is guided by national legislation and the National Action Plan as a yardstick. This setting up of several response teams streamlines

<sup>132</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, "An Exploration of Promising Practices in Response to Human Trafficking in Canada", viewed 24 November 2014, from [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), pI; pii.

<sup>133</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, "An Exploration of Promising Practices in Response to Human Trafficking in Canada", viewed 24 November 2014, from [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), p4.

the approach necessary, and which has begun to yield results as evidenced in the increase in the number of convictions.<sup>134</sup>

Canada's coordinated efforts were guided by the Federal Interdepartmental Working Group on Trafficking in Persons ("IWGTIP"), co-chaired by Public Safety Canada and Justice Canada, who coordinated anti-trafficking efforts of 17 government departments and agencies.<sup>135</sup> The Federal Working Group's mission was to *"coordinate federal efforts to address trafficking in persons and to develop a federal strategy, in keeping with Canada's international commitments. The Working group reviews existing laws, policies and programmes that may have an impact on trafficking"*.<sup>136</sup>

However since the development and implementation of the Canadian National Action Plan, a Human Trafficking Taskforce replaced the Interdepartmental Working Group on Trafficking in Persons.<sup>137</sup> This is now led by Public Safety Canada, in conjunction with various departments, who is responsible for overseeing the implementation of the Canadian National Action Plan. Canada's Royal Canadian Mounted Police established the dedicated Human Trafficking National Coordination Centre ("HTNCC") in 2005 and was a significant partner to the IWGTIP,<sup>138</sup> who continue to work closely with the Human Trafficking Taskforce. In this regard, Canada has stated the following:

*"The Government of Canada will engage stakeholders through online consultations and roundtables, and will invite human trafficking experts and stakeholders to present and discuss issues of concern with the Human Trafficking Taskforce. Other efforts will include federal, provincial and territorial collaboration to develop and disseminate an operational handbook for police and prosecutors in relation to human trafficking cases as well as continuing to develop partnerships through the Royal Canadian Mounted Police's Human Trafficking Awareness Coordinators located across the country."*<sup>139</sup>

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<sup>134</sup> United States Department of State, *Trafficking in Persons Report*, June 2014, Viewed 20 September 2014, from [http://www.state.gov/j/tip/rls/tiprpt/2014/?utm\\_source=NEW+RESOURCE:+Trafficking+in+Persons+R](http://www.state.gov/j/tip/rls/tiprpt/2014/?utm_source=NEW+RESOURCE:+Trafficking+in+Persons+R).

<sup>135</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, "An Exploration of Promising Practices in Response to Human Trafficking in Canada", viewed 24 November 2014, from [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), p4.

<sup>136</sup> Barnett, L., 2006, 'Trafficking in Persons', PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>, p15.

<sup>137</sup> Government of Canada, 2012, 'National Action Plan to Combat Human Trafficking', viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p9.

<sup>138</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, "An Exploration of Promising Practices in Response to Human Trafficking in Canada", viewed 24 November 2014, from [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), p5.

<sup>139</sup> Government of Canada, 2012, 'National Action Plan to Combat Human Trafficking', viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p20.

Additionally, Canada has committed itself to “strengthen its relationships with relevant stakeholders to facilitate the ongoing development of effective policies and tools, and to ensure a comprehensive and coordinated approach; and work to improve its ability to collect, track and report on data related to human trafficking in order to enhance knowledge and adapt our response appropriately, both domestically and on the international stage”.<sup>140</sup> Over and above the shared responsibility between the federal and provincial governments, the government of Canada has recognised the important role of partnerships. Canada was one of the first countries to “explicitly recognise and promote”<sup>141</sup> partnerships, with the Government of Canada working in partnership with both domestic and international stakeholders, including state, institutional and non-governmental organizations. In order to effectively combat trafficking in persons, Canada has acted on the recognition that tackling this challenge “will require the involvement not only of the federal government, but of provincial and territorial governments as well. And to be successful, governments [are to] also work closely with law enforcement, civil society and others.”<sup>142</sup>

This commitment to strengthen its relationship with relevant stakeholders is corroborated in the Canadian National Action Plan.<sup>143</sup>

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<sup>140</sup> Government of Canada, 2012, ‘National Action Plan to Combat Human Trafficking’, viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p19

<sup>141</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, “An Exploration of Promising Practices in Response to Human Trafficking in Canada”, viewed 24 November 2014, from [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), p19.

<sup>142</sup> Government of Canada, 2012, ‘National Action Plan to Combat Human Trafficking’, viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p1.

<sup>143</sup> Government of Canada, 2012, ‘National Action Plan to Combat Human Trafficking’, viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p39.



Chart 1: Action Items - Partnerships and Knowledge (Domestic and International)

Deliverable (and Timing)	Organisation
Promote the Contribution Programme to Combat Child Sexual Exploitation and Human Trafficking to strengthen and engage partnerships with civil society and provinces and territories. (Ongoing)	Public Safety Canada (PS)
Maximise operations of existing Letters of Understanding with provinces and Memoranda of Understanding with Canada Border Services Agency (CBSA)/Citizenship and Immigration Canada (CIC). Complete negotiations and sign new and revised MOUs/LOUs with provinces, territories, Royal Canadian Mounted Police (RCMP), Labour, CIC, and CBSA. (Ongoing)	Human Resources and Skills Development Canada (HRSDC) (Temporary Foreign Worker Program)
Host regional workshops, meetings and/or conference calls with provinces and territories law enforcement and victim services and NGOs to facilitate and maintain the development of networks, collaborative efforts, sharing best practices, ,and support the development of national and international initiatives that address human trafficking. (Ongoing)	RCMP
Explore options to promote and facilitate awareness, information sharing, and cooperation on human trafficking for forced labour through established federal, provincial and territorial mechanisms and forums. (Ongoing)	Human Resources and Skills Development Canada (HRSDC) (Labour Program)
Host a Knowledge Exchange Forum on Trafficking in Persons and Sexual Exploitation of Aboriginal Peoples. A literature review will be conducted, for form the basis of a policy research paper that explores Aboriginal	Aboriginal Affairs and Northern

youth sexual exploitation and domestic trafficking in persons and its relation to the broader legal and policy context. (2011/2012)	Development Canada (AANDC)
With funding from Public Safety, conduct a research project in which current or previous male and female Aboriginal youth sex trade workers will be interviewed in the cities of Vancouver and Winnipeg. (2011/2012)	AANDC PS
Enhance information sharing across federal departments on domestic and international issues related to human trafficking for forced labour. (Ongoing)	HRSDC (Labour Programme)

In support of the collaborative efforts by the various stakeholders, the “federal government also funds non-governmental organizations and cooperates with international bodies on developing promising practices”.<sup>144</sup> Canada’s National Action Plan also explicitly outlines investment allocations for each division of response teams, which includes stakeholder consultation and coordination,<sup>145</sup> indicating a steadfast willingness to cooperate with all role players. However there are conflicting reports that “NGOs do not necessarily receive direct funding from the federal government”.<sup>146</sup> Additionally, due to the varying legislation across the provinces, basic service provisions are not standardised and thus may affect the allocation of funds and in turn affect the victims that need such support. In terms of the Canadian National Action Plan, Canada has committed to investing a substantial amount of money to combatting trafficking in persons. The below table indicates the dedication of support to the varying agencies.

Table 8: Breakdown of Annual Investment for 2012/2013<sup>147</sup>

EFFORT / ACTIVITY (LEAD ORGANISATIONS)	GOVERNMENT OF CANADA INVESTMENT 2012/13
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<sup>144</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, “An Exploration of Promising Practices in Response to Human Trafficking in Canada”, viewed 24 November 2014, from [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), p6.

<sup>145</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, “An Exploration of Promising Practices in Response to Human Trafficking in Canada”, viewed 24 November 2014, from [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), p10.

<sup>146</sup> Barnett, L., 2006, ‘Trafficking in Persons’, PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>, p14.

<sup>147</sup> Government of Canada, 2012, ‘National Action Plan to Combat Human Trafficking’, viewed 12 January 2015, from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>, p10.

Dedicated Enforcement Team (RCMP and CBSA)	\$2,030,000
Human Trafficking National Coordination Centre (RCMP)	\$1,300,000
Border Service Officer Training/Awareness (CBSA)	\$1,600,000
Regional Coordination and Awareness (CBSA)	\$445,000
Training, Legislative Implementation and Policy Development (JUS)	\$140,000
Enhanced Victim Services (JUS)	Up to \$500,000*
Temporary Foreign Work Programme (HRSDC)	\$140,000
Anti-Crime Capacity Building Programme (DFAIT)	\$96,000
Global Peace and Security Fund (DFAIT)	\$1,200,000
Stakeholder Consultation and Coordination (PS)	\$200,000
Awareness and Research (PS)	\$155,000
*Beginning in 2013/2014	

Although the Government of Canada has taken measures to combat trafficking, “non-governmental victim support services have been helping victims of trafficking for decades, particularly victims of sex trafficking before the designation of “trafficking” was in place”.<sup>148</sup> The role of NGOs has been significant and thus illustrates the emphasis placed by the government of Canada to develop and nurture a culture of partnerships and collaboration. Although not perfect in their relationship, an important aspect to this relationship is the recognition afforded to each other and a quest for respect of both roles, especially with the victims in mind. The US TIP report has however recommended there be an increase in specialized care and reintegration services available to trafficking victims, in partnership with civil society and through dedicated funding.<sup>149</sup>

Canada is making positive progress in its fight against trafficking in persons. Their approach to true partnership as well as their cognisance of and respect for each agencies role

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<sup>148</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, 2010, “An Exploration of Promising Practices in Response to Human Trafficking in Canada”, [http://www.gov.mb.ca/msw/publications/human\\_trafficking.pdf](http://www.gov.mb.ca/msw/publications/human_trafficking.pdf), p8.

<sup>149</sup> United States Department of State, *Trafficking in Persons Report*, June 2014, Viewed 20 September 2014, from [http://www.state.gov/j/tip/rls/tiprpt/2014/?utm\\_source=NEW+RESOURCE:+Trafficking+in+Persons+R](http://www.state.gov/j/tip/rls/tiprpt/2014/?utm_source=NEW+RESOURCE:+Trafficking+in+Persons+R).

within the fight is an important aspect to overcoming any problem. Although there is still room for improvement in the number of available victim service oriented services, funding, and in the number of prosecutions and understanding of the law surrounding trafficking in persons, the adopted measures of Canada is something that South Africa could look to in realising their own potential in combatting trafficking in persons. The main criticisms of the approach adopted by Canada include the “lack of law enforcement and gaps in the victim protection scheme”,<sup>150</sup> however these concerns are broad and are hurdles not confined to Canada.

### **Recommended Principles and Guidelines on Human Rights and Human Trafficking (UN Trafficking Principles and Guidelines)<sup>151</sup> and Commentary<sup>152</sup>**

There are various other responses to trafficking in persons and instruments that supplement the Palermo Protocol in the form of regional and policy instruments which contribute to the outlay of greater roles and responsibilities of state parties. One such instrument that has had, and is proving to have, significant influence is that of the UN Trafficking Principles and Guidelines<sup>153</sup> which recognizes human rights as the intrinsic driving factor in the response to trafficking in persons and through which NGOs are able to substantiate their existence by advocating for human rights. This human rights based approach is made evident in the very first guideline outlined in the document as the Promotion and protection of human rights:

*“Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.”<sup>154</sup>*

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<sup>150</sup> Barnett, L., 2006, ‘Trafficking in Persons’, PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>, p16.

<sup>151</sup> United Nations Economic and Social Council (UNESCO), 2002, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, viewed 22 September 2014, from <http://www.refworld.org/docid/3f1fc60f4.html>.

<sup>152</sup> Pillay, N., UN Commissioner for Human Rights (OHCHR), 2010, Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking, HR/PUB/10/2.

<sup>153</sup> Gallagher, A and Holmes P., 2008, ‘Developing an Effective Criminal Justice Response to Human Trafficking: Lessons From the Front Line’, *International Criminal Justice Review*, Volume 18, Number 3, p319.

<sup>154</sup> United Nations Economic and Social Council (UNESCO), 2002, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, viewed 22 September 2014, from <http://www.refworld.org/docid/3f1fc60f4.html>, p5.

Following on from this guideline, the remaining guidelines are as follows:

- Guideline 2: Identification of trafficked persons and traffickers
- Guideline 3: Research, analysis, evaluation and dissemination
- Guideline 4: Ensuring an adequate legal framework
- Guideline 5: Ensuring an adequate law enforcement response
- Guideline 6: Protection and support for trafficked persons
- Guideline 7: Preventing trafficking
- Guideline 8: Special measures for the protection and support of child victims of trafficking
- Guideline 9: Access to remedies
- Guideline 10: Obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel
- Guideline 11: Cooperation and coordination between States and regions

The creation of these UN Trafficking Principles and Guidelines, and its submission to UNESCO by the United Nations High Commissioner for Human Rights in 2002, brings about an awareness of how “on a very practical level, a human rights based approach to trafficking requires an acknowledgement that trafficking is, first and foremost, a violation of human rights [which also demands the acknowledgement of] the responsibility of Governments to protect and promote the rights of all persons within their jurisdiction, including non-citizens”.<sup>155</sup> It further relays the message that all laws and policies created may have an impact on those affected by trafficking (either as victims or as perpetrators) however, those which are in conflict with basic human rights should be prohibited. Essentially the UN Trafficking Principles and Guidelines are to act as a policy guideline in responding to trafficking in persons. Following the Principles and Guidelines, the *Office of the United Nations High Commissioner for Human Rights* (hereinafter referred to as the “OHCHR”). decided to substantiate the guidelines by providing an extensive Commentary on the recommendations, which extensively provides for the global response to trafficking in persons.

Whilst neither the UN Trafficking Principles and Guidelines nor the Commentary on these recommendations give rise to legal obligations, they are heavily based on the already

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<sup>155</sup> Pillay, N., UN Commissioner for Human Rights (OHCHR), 2010, Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking, HR/PUB/10/2, p3.

existing, legally obligating, international framework of laws and policies, which further influence other policies which evolve into documents holding legal standing. The Commentary seeks to provide clarity on all existing framework and sources of law, and acts as a tool in tackling the crime of trafficking as it contributes to the development of legal norms and standards, policies, legal responses, and other documents and initiatives, commonly known as “soft law”.<sup>156</sup>

A further aspect of the Commentary is that it seeks to explore the already existing laws and responses and determines its appropriateness, relevance and whether they are in line with the existing binding legal instruments. Based on this general analysis of laws and policies, and by supplementing the knowledge with academic writings and other texts, the Commentary then bases what it deems to be the most appropriate way of addressing trafficking in persons within the international framework as well as in specific circumstances/regions. Importantly, the Commentary also recognises and discusses the role of the State in trafficking in persons. It identifies how the State is in a position to “shape” demand for all goods and services, as well as being required to investigate, prosecute and punish trafficking<sup>157</sup> and related activity, and ensure protection of its citizens and non-citizens and to further provide assistance to trafficked victims.<sup>158</sup>

Thus being a well-documented, detailed and informative document, which breaks down and explains the respective guidelines, the Commentary on the recommended UN Trafficking Principles and Guidelines is in a position to adequately and confidently inform all states in responding to trafficking in persons with appropriate explanations to measures adopted.

As seen above, the international response to trafficking in persons is wide-reaching and influences various national laws and policies. It is primarily based on this international response that States such as South Africa, Brazil and Canada derive their measures and approaches to tackling trafficking in persons. Whilst there is still room for improvement within the international framework, where efforts are made to determine better accountable measures,

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<sup>156</sup> UN Commission for Human Rights (OHCHR), 2010, Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking, HR/PUB/10/2, p25.

<sup>157</sup> UN Commission for Human Rights (OHCHR), 2010, Commentary on Recommended Principles and Guidelines on Human Rights and Human Trafficking, HR/PUB/10/2, p101.

<sup>158</sup> Ibid, p155.

there is a significant impact that the international framework has had and continues to have in the global response to trafficking in persons.

Now that trafficking in persons has been contextualised from an international perspective, the following chapter will look at and focus on the current laws and policies in place in South Africa which seek to combat trafficking in persons. It will breakdown the relevant laws and seek to determine the obligations outlined within the legal framework. The responses by the South African government and the NGOs whose mandate it is to combat trafficking will be determined, as well as the relationship between the two actors will be outlined. It will also address any challenges faced as well as any positive factors contributing to the fight.

## CHAPTER THREE

### South Africa's Approach to Trafficking in Persons

*"For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others."*<sup>159</sup>

#### Introduction

South Africa - a country with a history that is infamously remembered for its dark days in the struggle for freedom; a country that overcame the oppressive laws of Apartheid and formed a Constitution, which holds human rights, and the freedom of all people, at its core; a country that broke its chains of oppression to form a nation based on freedom and true democracy. In its twenty years of democracy, South Africa has committed itself not only to its own people, but to the world, in ensuring freedom for all. However, as long as trafficking in persons continues to exist, South Africa's quest for freedom continues. Whilst South Africa's response to trafficking in persons has been influenced by various factors, and although it has been slow, it has nonetheless been a positive one. However, it still has room for improvement.

Many factors have both influenced and motivated the South African response to human trafficking. As South Africa is one of the many member states that have ratified various international instruments aimed at combatting, suppressing and punishing trafficking in persons, this commitment has brought about certain obligations, including; effecting national law to fulfil their international responsibility. International pressure, particularly that created by the TIP reports of the United States of America, and the ever growing discourse surrounding human trafficking led by civil society, the media and some political agendas, have encouraged South Africa to take an active stand against trafficking and raise its voice in the global fight, as well as better its approach to realising freedom for such victims and adopting appropriate measures for the perpetrators.

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<sup>159</sup> Nelson Mandela, Former President of the Republic of South Africa, n.d, 'Nelson Mandela Reflects on Working Toward Peace', Santa Clara University, viewed 17 January 2015, from <http://www.scu.edu/ethics/architects-of-peace/Mandela/essay.html>.  
King, L., 2008, 'International Law and Human Trafficking' viewed 20 August 2014, from <http://www.scu.edu/ethics/architects-of-peace/Mandela/essay.html>.



However, whilst South Africa's global obligations and general societal pressure have called for and evoked a more relevant response, other factors have also affected its approach. 2004 was the year South Africa ratified the Palermo Protocol,<sup>160</sup> however it was only in 2010 that a bill was introduced to Parliament which aimed to prevent and combat trafficking. It took 3 years before the bill was signed into law, allowing the crime, the criminals and the victims of trafficking to continue operating under South Africa's unclear provisions.

The slow and fragmented response can be attributed to various factors. South Africa's socio-economic conditions including extreme poverty and inequality, a lack of educational and employment opportunities, as well as cultural differences which influence individual biases, create barriers in adequately dealing with the crime. Contributing to the global nature of trafficking, the poor security at South Africa's national borders perpetuates transnational crime<sup>161</sup> including the deficiency of trained personnel to appropriately deal with trafficking cases. The lack of positive involvement of government officials to prevent exploitation, and societal beliefs that tolerate violence, gender-discrimination<sup>162</sup> and exploitation, can only encourage the maintenance of this lucrative industry. Further, due to the illicit nature of the crime of human trafficking, and given South Africa's somewhat limited resources and insufficient infrastructure to adequately deal with the combating of the crime, its response to the crime is frustrated. We see these factors reflected in the research conducted in 2007 by the United Nations Educational, Scientific and Cultural Organisation, culminating in a policy paper,<sup>163</sup> which identified various push and pull factors for trafficking in persons in South Africa. Factors contributing to demand include: poverty; HIV AIDS; gender and age imbalances; discriminatory cultural practices and beliefs; lack of knowledge and information; and absence of effective laws. Factors contributing to supply appear to be the need for low-

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<sup>160</sup> South Africa holds a reservation against the Palermo Protocol and which reads as follows: "*AND WHEREAS pending a decision by the Government of the Republic of South Africa on the compulsory jurisdiction of the International Court of Justice, the Government of the Republic does not consider itself bound by the terms of Article 15 (2) of the Protocol which provides for the compulsory jurisdiction of the International Court of Justice in differences arising out of the interpretation or application of the Protocol. The Republic will adhere to the position that, for the submission of a particular dispute for settlement by the International Court, the consent of all the parties to the dispute is required in every individual case*".

<sup>161</sup> Nsereko D., 1999, 'Crime prevention in Southern Africa: a legal perspective', *Comparative and International Law Journal of South Africa*, p248.

<sup>162</sup> U.N. Education., Scientific & Cultural Org. [UNESCO], 2007, 'Policy Paper No. 14.5(E): Human Trafficking in South Africa: Root Causes and Recommendations', viewed from <http://unesdoc.unesco.org/images/0015/001528/152823e.pdf>, p11.

<sup>163</sup> U.N. Education., Scientific & Cultural Org. [UNESCO], 2007, 'Policy Paper No. 14.5(E): Human Trafficking in South Africa: Root Causes and Recommendations', viewed from <http://unesdoc.unesco.org/images/0015/001528/152823e.pdf>, p32.

skilled and cheap labour; cultural beliefs; sex tourism and industry; adoption trade; and demand for organs and body-parts.

Although not enough research has been done, the United Nations conducted a ‘Global Report on Trafficking in Persons’ in 2009. It found that “sexual exploitation is by far the most common reason for trafficking in persons, accounting for 79 percent of victims, while forced labour accounts for 18 percent...with South Africa reflecting similar trends, including that women form a disproportionate number of people involved in trafficking as both victims and perpetrators”.<sup>164</sup>

Whilst there are various challenges that South Africa faces in combatting trafficking, it is important to understand the influences and context of the legal framework, so as to ensure the most effective approach can be adopted. As outlined in the previous chapter, the international responses taken by the United Nations, the United States of America, as well as the Recommendations and Guidelines provided by UNESCO, are significant contributors to the approach taken by South Africa. As seen in the tables below, South Africa has ratified numerous international treaties relating to trafficking in persons, with the most notable instrument being the *Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children Supplementing the UN Convention Against Transnational Organised Crime, 2000*.

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<sup>164</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p44.

Table 3:<sup>165</sup>

INTERNATIONAL LEGAL FRAMEWORK		
International Human Rights Law	International Labour Law	Transnational Criminal Law
International Convention for the Suppression of White Slave Traffic (1910)	International Labour Organisation Convention against Forced Labour No. 29 (1930)	United Nations Convention Against Transnational Organised Crime (2000)
International Convention for the Suppression of Women and Children (1922)	International Labour Convention No. 105 on the Abolition of Forced Labour (1957)	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000)
Slavery, Servitude, Forced Labour and Similar Institutions Convention (1926)	Convention Concerning the Prohibition and Immediate Action for the Eliminations of the Worst Forms of Child Labour No. 182 (2000)	
United Nations Convention for the Suppression of the Traffic in Persons and the Exploitations of the Prostitution of Others (1949)		
Universal Declaration of Human Rights (1948)		
United Nations Supplementary Convention on the Abolition of Slavery (1956)		
United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979)		
United Nations Convention on the Rights of the Child (1989)		
Optional Protocol on the rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)		

<sup>165</sup> Emser, M., The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance (PhD thesis, University of KwaZulu-Natal, 2013) 163.

Table 4:<sup>166</sup>

REGIONAL INSTRUMENTS		
<b>European Human Rights System</b> EU Framework Decision on Combating Trafficking (2002)  Council of Europe Convention on Action against Trafficking in Human Beings (2005)	<b>African Human Rights System</b> African Charter on Human and Peoples' Rights (1981)  African Charter on the Rights and Welfare of the Child (1990)  Protocol on the Human and People's Rights on the Rights of Women in Africa (2003)  African Youth Charter (2005)	<b>Other Regional Instruments</b> South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002)
<b>Inter-American Human Rights System</b> American Convention on Human Rights (1969)  Inter-American Convention on International Traffic in Minors (1994)		
REGIONAL INITIATIVES		
<b>South African Development Community</b> SADC Declaration on Gender and Development (1997)  SADC Protocol on Gender and Development (2008)  The 10 Year SADC Plan of Action on Combating Trafficking in Persons, Especially Women and Children (2009-2019)	<b>Economic Community of West African States</b> Declaration on the Fight against Trafficking in Persons (2001)	<b>African Union</b> Solemn Declaration on Gender Equality in Africa (2004)  Ouagadougou Action Plan to Combat Trafficking in Persons, Especially Women and Children (2006)

<sup>166</sup> Emser, M., The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance (PhD thesis, University of KwaZulu-Natal, 2013) p164.

According to the United States TIP Reports, South Africa is a source, transit and destination country for trafficking and is ranked in Tier 2.<sup>167</sup> This means that greater strides need be taken in the fight against human trafficking, notwithstanding the fact that South Africa has taken progressive measures to do so. Research was undertaken by the International Organisation for Migration (IOM) in 2008, which also showed South Africa as a source, destination and transit country. Recruitment from regions of lower socio-economic status were most often transported to commercial hubs<sup>168</sup> within and outside of South Africa, but South Africa also receives victims from numerous countries. Furthermore, there have been some documented cases evidencing how South Africa is a transit point for trafficking.<sup>169</sup>

South Africa thus faces many obstacles before being able to appropriately focus its efforts on the combatting of trafficking. These obstacles, however, should not be a deterrent nor be used as delaying tactics, as some would believe is the case. Due to the onerous task of tackling trafficking, strategic measures should be adopted and implemented as effectively and efficiently as possible. Another important factor preventing the appropriate response includes the current relationship that exists between NGOs and the State, where the roles and responsibility of either are not clear enough for such partners to work together in harmony.

As an important aspect to determine these roles, it is crucial to keep in mind that long gone are the days when reliance for social change was placed on the government alone, where they were seen as the sole problem solver for issues impacting communities.<sup>170</sup> Nowadays, there is less reliance on the government to act wholly in response to particular matters, and there is now a steady platform for NGOs and other actors, even corporate organisations, to make a significant change, but also to assist government in seeing that the needs of people are met. This shift from pure State-reliance driven by the process of Globalization is reflected in the following statement:

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<sup>167</sup> US Department of State, 2013, 'Trafficking in Persons Report: Tier Placements' viewed on 20 August 2014, from <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm>.

<sup>168</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p42.

<sup>169</sup> Ibid, p43.

<sup>170</sup> CMIBrief 2007, <http://www.cmi.no/publications/file/2575-corporate-social-responsibility-of-multinational.pdf>.

*“Globalization has considerably weakened traditional governance processes. Increasing global economic integration has reduced the power of national governments while granting other economic and political actors access to the world stage”.<sup>171</sup>*

This global integration is also a significant aspect of the nature of trafficking, allowing human trafficking to become a “complex, multi-faceted phenomenon involving multiple stakeholders”.<sup>172</sup> This makes it all the more pertinent for the State and non-state actors to work together in ensuring all angles are covered in combatting trafficking, which has also advanced the concept of international justice. Adding to how central cooperation among stakeholders has become, the United Nations has also recognised the critical role in service delivery and implementation that civil society plays, and has thus viewed them as “partners” of the UN system.<sup>173</sup>

In order for all actors to play an effective role in confronting the issues of society, they need to be sure of their role in the fight and how far each role extends. Clearly outlining the various responsibilities attached in fighting human trafficking and working together to share the load between these actors, would boost the South African response as a whole and generate better results. Unfortunately, the South African law is not explicit in this regard. As an attempt to address this relationship between State and NGOs, task teams, at both national and provincial level, have been established with the aim of combatting trafficking, yet there still exists a large disparity in each player’s role.

Further to this, the poor implementation of the existing policies and laws, often arising out of mere misunderstanding and/or lack of ownership in appropriately dealing with human trafficking instances, are also main contributors to the slow response to the global issue, and consequently frustrate the relationships that exist between the State and its NGOs.

Following their international commitment, South Africa has pledged to take these positive strides in preventing, punishing and combatting trafficking in persons within, and outside of, its borders. Its commitment is evidenced not only within international law, but within their own

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<sup>171</sup> Gemmill, B and Bamidele-Izu, A., 2002, ‘The Role of NGOs and Civil Society in Global Environmental Governance’, Global Environmental Governance Options & Opportunities, p2.

<sup>172</sup> U.N. Education., Scientific & Cultural Org. [UNESCO], ‘Policy Paper No. 14.5(E): Human Trafficking in South Africa: Root Causes and Recommendations’, 2007, 7 Available at <http://unesdoc.unesco.org/images/0015/001528/152823e.pdf>.

<sup>173</sup> Gemmill, B and Bamidele-Izu A., 2002, ‘The Role of NGOs and Civil Society in Global Environmental Governance’, Global Environmental Governance Options & Opportunities, p5.

national law too, and with the recent enactment of the *Prevention and Combating of Trafficking in Persons Act*,<sup>174</sup> it is a clear sign that South Africa is serious in following up on their obligations. However, part of their progress is assessing how appropriate and realistic such laws are to their battle. A difficulty in this assessment is that the South African government has not been collecting statistics on human trafficking cases, but this should change following the operation of the new TIP Act.<sup>175</sup>

### **General Trafficking Provisions of South African Legislative Framework**

As a party to the Palermo Protocol, the definition applied nationally of trafficking in persons must be in line with that which is outlined in the Protocol.<sup>176</sup> As previously mentioned, prior to the TIP Act, no specific law relating to trafficking in persons existed within South Africa. There were only a few limited provisions found in other related pieces of legislation that provided for certain instances of trafficking, however these provisions were completely insufficient to fulfil their international obligations to eliminate trafficking. It was thus from the global pressure for a clearer understanding and better measures surrounding trafficking, that South Africa's response was derived.

Other than South Africa's TIP Act (and before it came into operation), there are a range of laws which were/could be used to prosecute suspected trafficking in persons. These include but are not limited to:

- The Constitution of the Republic of South Africa, 1996, 1996;
- Children's Act, 38 of 2005
- Criminal Law (Sexual Offences and Related Matters Amendment Act, 22 of 2007 also known as the Sexual Offences Act);
- Criminal Procedure Act, 51 of 1977;
- Basic Conditions of Employment Act, 75 of 1997 (BCEA)
- Labour Relations Act, 66 of 1995 (LRA)
- Prevention of Organised Crimes Act, 121 of 1998 (POCA)

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<sup>174</sup> South African Government, Act 7 of 2013.

<sup>175</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p40.

<sup>176</sup> UN.GIFT, The Vienna Forum to fight Human Trafficking, 2008, "The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation", Austria Center Vienna Background Paper, p4.

- Human Tissues Act, 65 of 1983
- Child Justice Act, 75 of 2008
- Prevention and Combating of Corrupt Activities Act, 12 of 2004
- Refugee Act, 130 of 1998
- Films and Publications Act, 65 of 1998
- Electronic Communications and Transactions Act, 25 of 2002
- Immigration Act, 13 of 2002
- Extradition Act, 67 of 1962
- Regulation of Interception of Communications and Provision of Communication-Related Information Act, 70 of 2002
- The Mine Health and Safety Act, 29 of 1996
- Mental Health Care Act, 17 of 2002
- Riotous Assemblies Act, 17 of 1956

#### The Constitution of the Republic of South Africa, 1996

Besides their international commitment, South Africa has a constitutional commitment to ensure freedom for all, which in turn influences all laws and policies created. The Constitution of the Republic of South Africa, 1996, 1996 (hereinafter referred to as “the Constitution”) is extensive in the rights and responsibilities that it affords to all South African citizens. It is the supreme law of the land which invalidates any inconsistent conduct, law or policy<sup>177</sup> and is regarded as the driving force for all behaviour within the Republic. Being the highest law of the land, the Constitution creates an obligation on the government to ensure every citizen is equally protected by the law, and that all citizens have the social duty to improve the quality of life for all and free the potential of each person.<sup>178</sup> The Constitution upholds the following rights: equality;<sup>179</sup> human dignity;<sup>180</sup> life<sup>181</sup>; the freedom and security of the person;<sup>182</sup> to be protected from slavery, servitude and forced labour;<sup>183</sup> as well as freedom of movement and

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<sup>177</sup> Section 2 of the Constitution of the Republic of South Africa, 1996.

<sup>178</sup> Preamble of the Constitution of the Republic of South Africa, 1996.

<sup>179</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>180</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

<sup>181</sup> Section 11 of the Constitution of the Republic of South Africa, 1996.

<sup>182</sup> Section 12 of the Constitution of the Republic of South Africa, 1996.

<sup>183</sup> Section 13 of the Constitution of the Republic of South Africa, 1996.



residence.<sup>184</sup> All such rights are easily violated through the exploitative measures seen within human trafficking.

The South African Constitution also states that the laws and obligations outlined in international agreements become national law upon the President's signing into power, and are to be enacted through national legislation, provided they are consistent with the Constitution.<sup>185</sup> These agreements and international laws bind South Africa to provisions of international standards, with Section 233 of the Constitution supporting this, by obliging the courts to apply international law when interpreting legislation, as well as when making judgements. According to various international agreements which South Africa is party to, such as the Palermo Protocol, South Africa is under an international obligation to, inter alia, abide by and uphold the various human rights' enshrined in these agreements, by virtue of membership. It is following this constitutional obligation to sign into law their international responsibility to combat trafficking in persons, that South Africa officially made law the new South African Human Trafficking Act, namely the *Prevention and Combating of Trafficking in Persons Act 7 of 2013* ("TIP Act").

Other noteworthy Constitutional provisions include Section 23 and 24. These provisions pertain to labour relations and the right to environment, respectively. The very nature of human trafficking is by all means not 'fair', being a direct violation of any fair labour practice, thus violating this constitutionally protected right. Further, everyone is entitled to an environment that is not harmful to their health or wellbeing. Whilst it is not the case for all victims of trafficking, often trafficked victims are subjected to poor living conditions which, not by their own volition, are infiltrated by drugs, alcohol, and abuse. In a 2003 report by the IOM, the following was found:

*"[T]hat the working conditions of women trafficked into the industry are extremely exploitative and include debt bondage, long working hours, a limited right to refuse clients, and removal of their freedom of movement. These are violations of human rights".<sup>186</sup>*

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<sup>184</sup> Section 21 of the Constitution of the Republic of South Africa, 1996.

<sup>185</sup> Section 231 of the Constitution of the Republic of South Africa, 1996.

<sup>186</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p43.

Furthermore, Section 28 of Constitution makes provision for protection of rights of children. This allows for the enforcement of the protection of victims of child trafficking where the “child’s best interests are of paramount importance in every matter concerning the child”. The appropriate provisions of this section state:

*“(1) Every child has the right –*

*...*

*(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;*

*(c) to basic nutrition, shelter, basic health care services and social services;*

*(d) to be protected from maltreatment, neglect, abuse or degradation;*

*(e) to be protected from exploitative labour practices;*

*(f) not to be required or permitted to perform work or provide services that –*

*(i) are inappropriate for a person of that child’s age; or*

*(ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;*

*(g) not to be detained except as a measure of last resort ...*

*(h) to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result... ”.<sup>187</sup>*

The Constitution is the most reformatory document to emanate from the struggle into the new South Africa. As the highest law of the land to which all other laws and policies are subject,<sup>188</sup> these constitutional provisions are to be respected, protected, promoted and fulfilled by the State.<sup>189</sup> However, the scope of application of the Constitutional applies to all laws and further provides that the provision of the Constitution’s Bill of Rights binds natural and juristic persons, taking into account the nature of the right as well as any duty imposed by the right.<sup>190</sup> Thus, these constitutional provisions extend the responsibility to respect and protect the rights of people to all, indicating that the struggle against trafficking in persons is a joint one, between the State and members of the Republic of South Africa, whether it be in an individual capacity or from an organisational/communal perspective.

The Constitution directs the approach taken when implementing laws and policies, but cannot provide to the fullest extent for each right and the responsibilities attached, including definitions, procedures surrounding various laws. Thus specific legislation is drafted and implemented to provide further guidance when responding to matters. The following pieces of legislation thus provide for certain instances of human trafficking:

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<sup>187</sup> Section 28 of the Constitution of the Republic of South Africa, 1996.

<sup>188</sup> Section 2 of the Constitution of the Republic of South Africa, 1996.

<sup>189</sup> Section 7 of the Constitution of the Republic of South Africa, 1996.

<sup>190</sup> Section 8 of the Constitution of the Republic of South Africa, 1996.

## The Children's Act 38 of 2005

Repealing the *Child Care Act 74 of 1983*, the *Children's Act 38 of 2005* (hereinafter referred to as the “Children's Act”) is one of the most appropriate pieces of legislation used when dealing with trafficking matters, which came into operation in 2010. In terms of the Children's Act, a child is a person under the age of 18 years.<sup>191</sup> Among its extensive provisions exists an entire chapter.<sup>192</sup> dedicated to dealing with trafficking in children, which was enacted to, in the interim, give effect to the Palermo Protocol and to combat trafficking in children.<sup>193</sup> Accordingly, the Children's Act provides a comprehensive definition of trafficking of children:

“[T]rafficking, in relation to a child –  
(a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –  
    (i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or  
    (ii) due to a position of vulnerability,  
for the purpose of exploitation; and  
(b) includes the adoption of a child facilitated or secured through illegal means.”<sup>194</sup>

The Act further defines exploitation as the following:

“[E]xploitation, in relation to a child, includes –  
(a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriages,  
(b) sexual exploitation  
(c) servitudes  
(d) forced labour or services  
(e) child labour prohibited in terms of section 141; and  
(f) the removal of body parts.”<sup>195</sup>

The Children's Act broadens the definition found in the Palermo Protocol<sup>196</sup> by adding the provision relating to the adoption of a child through illegal means, as well as adding the “terms

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<sup>191</sup> Section 1 of the Children's Act 38 of 2005.

<sup>192</sup> South African Government, Chapter 18 of the Children's Act 38 of 2005.

<sup>193</sup> Section 281 of the Children's Act 38 of 2005.

<sup>194</sup> Section 1 of the Children's Act 38 of 2005.

<sup>195</sup> Ibid.

<sup>196</sup> Najemy LB., 2010, 'South Africa's Approach to the Global Human Trafficking Crisis: An Analysis of the Proposed Legislation and the Prospects of Implementation', Washington University Global Studies Law Review, Vol. 9, Issue 1, p180.

‘sale’ and ‘supply’ as prohibited actions”<sup>197</sup>. However it still only complies with one aspect of the Palermo Protocol’s definition on trafficking. Furthermore, the Children’s Act adds that the scope of application is not limited to offences that are transnational in nature and involve an organised criminal group, as Article 4 of the Palermo Protocol requires, but it broadens the scope to include trafficking instances that occur within the borders of the Republic. Anyone convicted of such crime may be liable for a fine and/or imprisonment of up to 20 years. Although it was a welcomed (and interim) attempt to remedy the lack of trafficking provisions, the Children’s Act is not nearly enough to effectively address the extent of the issue of trafficking in persons. Despite this seemingly major difference, the Palermo Protocol requires states to domesticate the adopted legislation and thus the Children’s Act complies with the Palermo Protocol.

The Children’s Act specifically targets areas of “increased prevention of human trafficking, prosecution of traffickers, and protection of victims”<sup>198</sup> and gives law enforcement agencies the necessary power to criminalise the trafficking of children.<sup>199</sup> The following is an outline of the relevant provisions found in the Children’s Act:

- Section 283: International co-operation
- Section 284: Prohibition of trafficking in children
- Section 285: Prohibition of behaviour facilitating trafficking in children
- Section 286: Providing assistance to children who are victims of trafficking
- Section 287: Parental trafficking of children
- Section 288: Protocols for reporting instances of child
- Section 289-290: Victimization
- Section 291: Treatment and repatriation of victims of human trafficking.

An important aspect of the Children’s Act is that it not only recognises the need for international co-operation between South Africa and other state parties to the Palermo Protocol, but also those countries that have not ratified the agreement yet. The role of the government is duly recognised, ensuring that respective departments play their part in protecting child victims

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<sup>197</sup> Kruger, B., 2012, ‘In the Firing Line: the South African Legislative Response designed to Combat Human Trafficking’, South African Journal of Criminal Justice, Volume2, p259.

<sup>198</sup> Ibid, p181.

<sup>199</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p43.

of trafficking. This recognition of roles and cooperation is tantamount in addressing the issue of trafficking, however, it should be further supplemented by including the role of non-state actors.

### The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 32 of 2007

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act of 32 of 2007* (hereinafter referred to as the “Sexual Offences Act”) also includes interim counter-trafficking provisions and amends the *Sexual Offences Act 23 of 1957* as well as the common law relating to sexual offences. Among creating new statutory offences, defining and categorising sexual offences, setting out ages of consent to sexual activity and detailing the procedures around prosecution, the Sexual Offences Act also criminalises trafficking in persons.<sup>200</sup> However, the limitations of these provisions are that it relates only to the purposes of sexual exploitation, affecting both children and adults, with certain sections which relate only to children. A sentence of life imprisonment may be imposed on a person convicted of the offence of trafficking in persons.<sup>201</sup>

In order to ‘fill the gap’ on trafficking in persons, pending the operation of the new TIP Act, the Sexual Offences Act dealt with trafficking in sections 70 – 71 and is outlined in the following:

*“Section 70. Application and interpretation  
(1) Pending the adoption of legislation in compliance with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Trans-National Organized Crime (signed on 14 December 2000) and the repeal of this Part, the transitional provisions in this Part relating to the trafficking in persons for sexual purposes are provisionally provided for in partial compliance of our international obligations and to deal with this rapidly growing phenomena globally...”*

#### The Act

*“...(2) For purposes of this Part -  
(a) "commercial carrier" includes a company, or the owner, operator or master of any means of transport, that engages in the transportation of goods or people for commercial gain; and*

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<sup>200</sup> Ibid, p68.

<sup>201</sup> The offence of trafficking in persons is included in Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997.

*(b) "trafficking" includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of -..."*

## The Means

*"...(i) a threat of harm;  
(ii) the threat or use of force, intimidation or other forms of coercion;  
(iii) abduction;  
(iv) fraud;  
(v) deception or false pretences;  
(vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or  
(vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage..."*

## The Purpose

*"... for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic, and "trafficks" and "trafficked" have a corresponding meaning."*

## Trafficking Offences

*"Section 71. Trafficking in persons for sexual purposes  
(1) A person ("A") who trafficks any person ("B"), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes..."*

**Involvement in trafficking in persons for sexual purposes.**

*"...(2) A person who -  
(a) orders, commands, organises, supervises, controls or directs trafficking;  
(b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or  
(c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking, is guilty of an offence of involvement in trafficking in persons for sexual purposes.  
(3) For the purpose of subsection (1), "consent" means voluntary or uncoerced agreement.  
(4) Circumstances in which B does not voluntarily or without coercion agree to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following -  
(a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs (i) to (vii) of the definition of trafficking having been used or being present; or  
(b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such act -  
(i) asleep;*

- (ii) unconscious;
  - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
  - (iv) a child below the age of 12 years; or
  - (v) a person who is mentally disabled.
- (5) *A person who has been trafficked is not liable to stand trial for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked...*"

#### Unlawful entry or departure of persons in or from RSA by commercial carrier

"...(6)

- (a) *A commercial carrier commits an offence if the carrier brings a person into or removes a person from the Republic and, upon entry into or departure from the Republic, the person does not have the travel documents required for lawful entry into or departure from the Republic.*
- (b) *A commercial carrier is not guilty of an offence under paragraph (a) if -*
  - (i) *the carrier had reasonable grounds to believe that the documents that the person has are the travel documents required for lawful entry into or departure from the Republic by that person;*
  - (ii) *the person possessed the travel documents required for lawful entry into or departure from the Republic when that person boarded, or last boarded, the means of transport to travel to or from the Republic; or*
  - (iii) *entry into the Republic occurred only because of illness of or injury to a child or adult on board, stress of weather or other circumstances beyond the control of the commercial carrier.*
- (c) *A commercial carrier is, in addition to any offence under this section, liable to pay the costs of the trafficked person's care and safekeeping and return from, the Republic.*
- (d) *A court must, when convicting a commercial carrier of an offence under this section, in addition order the commercial carrier concerned to pay the costs contemplated in paragraph (c)".<sup>202</sup>*

Whilst the Sexual Offences Act does well to align itself with the Palermo Protocol in defining the action and the means of trafficking, it fails to fully comply with the Protocol by only making provision for exploitation of a sexual nature. Further, the Sexual Offences Act does not eliminate the means component in the instance of child trafficking, nor does it deem consent irrelevant<sup>203</sup>, which is consistent with the Palermo Protocol.

As a further interim measure to curb human trafficking, offences of trafficking in persons for sexual purposes by a person as contemplated in the Sexual Offences Act, are listed in Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and are accordingly dealt

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<sup>202</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p44.

<sup>203</sup> The Act however does provide that consent has to be 'voluntary or uncoerced agreement' and proceeds to list, although not exhaustive, a number of circumstances negating valid consent.

with in a very serious manner. These types of offences are to receive a minimum sentence of imprisonment for life, unless there are exceptional circumstances, which the court believes to be substantial and compelling and justify a lesser sentence.<sup>204</sup>

Adding to this, the Sexual Offences Act develops the provision found in the Palermo Protocol by including the criminalising of the types of involvement in human trafficking, such as commanding, supervising or controlling of the trafficking crime,<sup>205</sup> as well as participating as an accomplice.<sup>206</sup>

There are also general provisions of the Sexual Offences Act which are non-specific to trafficking but may be used in the prosecution of the crime. These include rape; compelled rape; sexual assault; compelled sexual assault; and the child pornography and grooming sections.<sup>207</sup>

It is important to keep in mind that various provisions relating to trafficking contained in the Sexual Offences Act and the Children's Act were replaced by the TIP Act.

### Common Law

In further supplementing the existing laws, according to the South African Law Commission Report of 2008, several common law provisions exist which could be used to prosecute persons who are suspected of being involved in the trafficking of persons. These laws, however, do not deal with trafficking in persons as such. Depending on the circumstances of each particular case,<sup>208</sup> there are a number of options available to the prosecution in terms of which crime a suspected "trafficker" may be charged. These include<sup>209</sup> abduction (the unlawful and intentional removal of an unmarried minor from the control of her/his parents or guardian with the intention of having sexual intercourse with the minor); kidnapping (the unlawful and intentional deprivation of a person of her/his freedom of movement); indecent

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<sup>204</sup> Section 51 of the Criminal Law Amendment Act 105 of 1997.

<sup>205</sup> Section 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 32 of 2007.

<sup>206</sup> The Palermo Protocols extent of involvement is not specifically complied with by the Children's Act.

<sup>207</sup> South African Law Commission, 2008, 'Trafficking in Persons Report', p13.

<sup>208</sup> Swart DN, 2011, "Problems surrounding the combatting of women and child trafficking in Southern and South Africa", *Child Abuse Research, A South African Journal*, 12(1), p29.

<sup>209</sup> South African Police Services, 'Common Law Offences-Definitions', <http://www.saps.gov.za/faqdetail.php?fid=9>



assault (unlawful and intentional assault with the object of committing indecency); assault (unlawful and intentional application of force to another person);<sup>210</sup> and others. We see such application of the common law in the case of *S v Mellors 1990 (1) SACR 347 (W)*, where the court found that the physical removal of the victim from one place to another, is not a requirement, as long as the victim is being held against her will. Therefore, the victim can be kidnapped in his own house or office.

#### Other Noteworthy Laws Relating to Trafficking in Persons

It is also possible to institute prosecution under any of the following legislation where trafficking may have also taken place.

#### Basic Conditions of Employment Act 75 of 1997

Whilst it is not as comprehensive as the Children's Act and Sexual Offences Act, the *Basic Conditions of Employment Act*<sup>211</sup> (hereinafter referred to as "the Employment Act"), makes provisions for fair labour practices, regulates basic labour terms, as well as prohibits forced labour and child labour. Section 48 prohibits all forms of forced labour and provides that no person may for his/her own benefit or for the benefit of someone else, cause, demand or impose forced labour. The Employment Act establishes "minimum employment standards and regulations for all possible contracts of employment, which includes, amongst others, maximum working hours,<sup>212</sup> overtime,<sup>213</sup> meal intervals,<sup>214</sup> daily and weekly rest periods,<sup>215</sup> annual leave,<sup>216</sup> as well as sick and maternity leave.<sup>217</sup> These directives are commonly violated in cases of trafficking for labour exploitation" but also in the instances of sexual exploitation.<sup>218</sup>

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<sup>210</sup> Kenny, M., 2006, "Trafficking in Persons for the Purpose of Exploitation: Relevant Case Studies and Practical Application of the Current Legal Framework", PowerPoint presentation, p6.

<sup>211</sup> 75 of 1997

<sup>212</sup> Maximum working hours are 9 hours a day per 5 day week or 8 hours per day per 6 day week, Section 9 of the Basic Conditions of Employment Act 75 of 1997.

<sup>213</sup> Section 10, 12 of the Basic Conditions of Employment Act 75 of 1997.

<sup>214</sup> Any employee who works continuously for more than 5 hours must have a meal interval of at least one continuous hour, Section 14 of the Basic Conditions of Employment Act 75 of 1997.

<sup>215</sup> Section 15 of the Basic Conditions of Employment Act 75 of 1997.

<sup>216</sup> Section 20 of the Basic Conditions of Employment Act 75 of 1997.

<sup>217</sup> Section 22 of the Basic Conditions of Employment Act 75 of 1997.

<sup>218</sup> Mollema, N., 2013, "Combating Human Trafficking in South Africa: A Comparative Legal Study", PhD thesis, UNISA, p454.

The Employment Act supplements the existing laws regarding trafficking in children in the following provisions:

- “Section 43. Prohibition of Employment of Children*
- (1) No person may employ a child—*
    - (a) who is under 15 years of age; or*
    - (b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.<sup>9</sup>*
  - (2) No person may employ a child in employment—*
    - (a) that is inappropriate for a person of that age;*
    - (b) that places at risk the child’s well-being, education, physical or mental health, or spiritual, moral or social development.*
  - (3) A person who employs a child in contravention of subsection (1) or (2) commits an offence.”*

An aspect of the BCEA which is entirely insufficient is that the maximum penalty for forced labour offences is three years’ imprisonment. Sexual exploitation is a less obvious example of forced labour practices however very seriously engages in labour exploitation. As a further example surrounding the complexities of exploitation and combatting trafficking in persons, there is currently an ongoing debate surrounding sex workers right’s which is linked to the practice of sexual exploitation owing to the unfair labour practices and conditions in which many victims are subject to, specifically in the brothels.

#### The Criminal Procedure Act 51 of 1977

The Criminal Procedure Act 51 of 1977 (hereinafter referred to as the “CPA ”) addresses the procedural elements of prosecution. Among discussing “search warrants, entering of premises, seizure, forfeiture and disposal of property, as well as methods for securing the attendance of the accused in court, the conduct of court proceedings, evidence and the protection of witnesses”,<sup>219</sup> it provides for the prescription of specific offences, most notable the offence of trafficking in persons. The CPA provides the following:

- “Section 18. Prescription of right to institute prosecution*
- The right to institute a prosecution for any offence, other than the offences of -*
- ...
- (h) trafficking in persons for sexual purposes by a person as contemplated in section 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or*

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<sup>219</sup> South African Chapter of the International Association of Women Judges (SAC-IAWJ), 2014, Resource Manual on Trafficking in Persons for Judicial Officers, South Africa, p74.

*(i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20 (1) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.”*

This means that the right to institute a prosecution for trafficking in persons for sexual purposes as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, will not prescribe.

### The Prevention of Organised Crime Act 121 of 1998

Within the provisions of this Act, it is largely possible to institute prosecution against someone for trafficking in persons. Chapters Two (Offences relating to racketeering activities), Three (Offences relating to proceeds of unlawful activities) and Four (Offences relating to criminal gang activities) provide a basis for such prosecution, and which can be duly applied to offences involved sexual exploitation. Offences relating to gang activity is pertinent in addressing the various syndicates involved in

According to Najemy,<sup>220</sup> there are many matters and incidents of trafficking in persons that go unreported or undiscovered. She states the following in this regard:

*“[U]nder the current legislative regime in South Africa, there are disincentives for victims of human trafficking to turn themselves in, as they may be prosecuted for prostitution or other crimes. Additionally, South Africa’s current witness protection program fails to provide complete support and protection for victims and, thus, may also deter human trafficking victims from stepping forward. Researchers also contend that access to victims is difficult as they are hard to identify “may speak a language that is not native to the country in which they end up, and may be involved in hidden criminal activity””.*

“Fragmented and limited laws contribute to confusion regarding the definition of trafficking.”<sup>221</sup> It is following this disjointed response and partial compliance with the Palermo Protocol by the Children’s Act and the Sexual Offences Act, with limitations of child exploitation and sexual exploitation respectively, and the other abovementioned laws, that there

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<sup>220</sup> Najemy, LB., 2010, ‘South Africa’s Approach to the Global Human Trafficking Crisis: An Analysis of the Proposed Legislation and the Prospects of Implementation’, Washington University Global Studies Law Review, Vol. 9, Issue 1, p177-178.

<sup>221</sup> Allias, C., 2012, “Human Trafficking: some research challenges for South Africa”, Acta Academia 2013:45(3), p285.

was a great need for South Africa to enact comprehensive legislation regarding trafficking in persons. With this need, the aim to prevent and combat trafficking, and in compliance with their obligation to make national law their international agreements, South Africa signed into law new legislation which will be addressed hereunder.

### **New Trafficking Provisions of South African Legislative Framework: The Prevention and Combating of Trafficking in Persons Act 7 of 2013**

As previously mentioned, South Africa has signed and ratified the Palermo Protocol. Although this international agreement is binding, section 231(2) of the Constitution limits the government from utilizing the provisions of the Protocol in prosecuting human trafficking, without first enacting legislation which represents the agreement. Following this limitation, and in terms of section 239 of the Constitution,<sup>222</sup> South Africa acted in terms of this constitutional obligation to make national law in line with their international obligations, and in 2013, parliament passed, and the President signed, the new *Prevention and Combating of Trafficking in Persons Act* (the “TIP Act”).<sup>223</sup> “The Act was published in the government gazette and once all departments complete their implementing regulations, the president will promulgate the legislation”.<sup>224</sup> Coinciding with the launch of the first assessment by the Human Sciences Research Council<sup>225</sup> of human trafficking in South Africa entitled ‘Tsireledzani’, was the introduction to Parliament of the TIP Bill in March 2010. Prior to this date, no South African law existed which extensively dealt with the act of human trafficking, hence the need for the State to follow their international obligations of implementing national legislation pertaining to this crime. Whilst indicated to, but insufficiently dealt with, in other pieces of legislation, such as the abovementioned Sexual Offences Act and the Children’s Act, provisions relating to human trafficking lacked application and only took effect in 2010.<sup>226</sup> This impacted on South Africa’s proper regulation of laws on human trafficking and limited the prevention and prosecution of instances of human trafficking.

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<sup>222</sup> The Constitution of the Republic of South Africa, 1996.

<sup>223</sup> Act 7 of 2013.

<sup>224</sup> United States TIP Report SA 2014.

<sup>225</sup> Emser, M., 2013, ‘The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance’, PhD thesis, Dept. of Political Science, University of KwaZulu-Natal, p44.

<sup>226</sup> Emser, M., 2013, ‘The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance’, PhD thesis, Dept. of Political Science, University of KwaZulu-Natal p165.

The new South African TIP Act now extensively provides for trafficking in persons and the various elements and means of the crime. It has achieved this by allowing the Palermo Protocol to provide the foundation of the TIP Act's framework. It further creates and supplements the obligations to combat trafficking in persons. As outlined in the objectives of the Act before stating the Preamble, these include, *inter alia*; to affect their international obligations concerning trafficking of persons; provide for the prosecution of persons involved in trafficking; prevent trafficking and protect and assist victims of trafficking; to make provision for enforcement measures; and to co-ordinate, implement and administer policies that seek to combat trafficking in persons.

For some, it was a cause for celebration when the Act was finally signed and became law in mid-2013 and they believe that “[the Act] places a positive obligation on other functioning members of the State to be more involved, and establishes a more cohesive approach to South Africa’s fight against trafficking”.<sup>227</sup>

A matter of concern, however, is the lack of proper engagement between the State and NGOs, who are significantly affected by the provisions of the Act. Despite having ‘ticked the boxes’ in terms of issuing papers for comment and submissions, the relatively speedy enactment of the legislation without addressing material issues appropriately, can materially affect the proper implementation of these laws and provisions. This can also taint the world’s view on the progress made by South Africa in furtherance of the goal to eradicate human trafficking, and thus stunt the much needed progress and recognition:

*“The [official] enactment of the [TIP Act], combined with proper implementation devices, should be enough to remove South Africa from its current placement on the Tier 2 List, ideally bringing the country up to full compliance with U.S. and international standards for human trafficking.”*<sup>228</sup>

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<sup>227</sup>Najemy, LB., 2010, ‘South Africa's Approach to the Global Human Trafficking Crisis: An Analysis of the Proposed Legislation and the Prospects of Implementation’, Washington University Global Studies Law Review, Vol. 9, Issue 1, p187.

<sup>228</sup>Najemy, LB., 2010, ‘South Africa's Approach to the Global Human Trafficking Crisis: An Analysis of the Proposed Legislation and the Prospects of Implementation’, Washington University Global Studies Law Review, Vol. 9, Issue 1, p174.

### The TIP Act's Provisions

The TIP Act provides extensive provisions relating to trafficking in persons. They are broken down into the following chapters, after which, only the relevant chapters for this study will be addressed.

- Chapter 1: Definitions, Interpretation and Objects of the Act
- Chapter 2: Offences, Penalties and Extra-Territorial Jurisdiction
- Chapter 3: Status of Foreign Victims of Trafficking required to assist in Investigations and Prosecutions
- Chapter 4: Identification and Protection of Victims of Trafficking
- Chapter 5: Accreditation of Organisations to provide services Adult Victims of Trafficking
- Chapter 6: Compensation
- Chapter 7: Return and Repatriation of Victims of Trafficking
- Chapter 8: General Provisions
- Chapter 9: Administration of Act
- Chapter 10: Miscellaneous Matters

Chapter 3 of the TIP Act sets out South Africa's first official definition of trafficking in persons, ensuring compliance with the Palermo Protocol, as well as adding to the internationally accepted definition. The new Act provides an extensive definition of the act of trafficking in persons in the following:

*"Section 4.*

*(1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of—*

- (a) a threat of harm;*
- (b) the threat or use of force or other forms of coercion;*
- (c) the abuse of vulnerability;*
- (d) fraud;*
- (e) deception;*

(f) abduction;  
 (g) kidnapping;  
 (h) the abuse of power;  
 (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or  
 (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.

(2) Any person who—

(a) adopts a child, facilitated or secured through legal or illegal means; or  
 (b) concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence.”

Debt bondage;<sup>229</sup> possession, destruction, confiscation, concealment of or tampering with documents;<sup>230</sup><sup>231</sup> liability of carriers;<sup>232</sup> and involvement in any trafficking and such related offences<sup>233</sup> are also provided for within the TIP Act. It further makes provision for the instance where a person intentionally benefits from the exploitation of a person, and does so knowingly or where he ought to reasonably have known of such exploitation - he too is guilty of an offence.<sup>234</sup> Another important development in the law is that it states that those whose conduct facilitates involved in the trafficking in persons, specifically those electronic service providers, are too guilty of an offence.

Following these provisions, the Act creates an obligation to reasonably prevent and report any activity giving rise to the exploitative measures of human trafficking.<sup>235</sup> There is some question around this obligation to report; whether it is too wide a responsibility and whether it is a realistic endeavour to prove that one intentionally benefited from trafficking instances. Another question is whether the enquiry into customers’ communication (in the

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<sup>229</sup> Section 5 of the TIP Act 7 of 2013.

<sup>230</sup> Section 6 of the TIP Act 7 of 2013.

<sup>231</sup> Section 8 of the TIP Act 7 of 2013.

<sup>232</sup> Section 9 of the TIP Act 7 of 2013.

<sup>233</sup> Section 10 of the TIP Act 7 of 2013.

<sup>234</sup> Section 7 and 8 of the TIP Act 7 of 2013.

<sup>235</sup> Section 8 of the TIP Act 7 of 2013.

instance of electronic service providers) constitutes an invasion of privacy. These questions could, however, be resolved with a balancing of rights, and specifically, whether the communications provider was acting in good faith. But having to report every ‘reasonable suspicion’ not only creates a burden on the provider, but contributes significantly to the already crippled and over-burdened prosecuting authorities. The obligation to report and deal with trafficking in persons is again made evident under Chapter 4, with section 18 specifically dealing with the reporting of and dealing with child victim[s] of trafficking, and section 19 addressing the reporting and assistance of adult victim[s] of trafficking. These provisions include the obligation to report any reasonable suspicion of trafficking.<sup>236</sup>

As it stands, South Africa already experiences difficulty with the reporting and addressing of criminal activities, where those who are “supposed to implement the laws are either ill-informed or not trained... [M]oreover, it has been noted that due to lack of capacity and financial restraints and a general lack of resources, many individuals who deal with victims of such cases do not do so appropriately”.<sup>237</sup> If those who are supposed to carry out these responsibilities, by nature of their job description, cannot effectively do so, it shows far too high an expectation on others to do so. It is exceptionally worrisome when officials cannot adequately implement the criminal provisions, or appropriately identify cases of human trafficking, affecting not just the yearly statistics, but the livelihoods of those affected.

Adding to this, “front line law enforcement officials, such as police, labour inspectors, immigration, and border guards, play the single most critical role in identifying trafficked persons and perpetrators, ensuring victim safety, and referring victims to appropriate support services.”<sup>238</sup> Be that as it may, in the 2015 United States TIP Report for South Africa, it was noted that there is “[a] serious lack of capacity and widespread corruption among the police force [and which hinders] progress in anti-trafficking law enforcement efforts”.<sup>239</sup> 375

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<sup>236</sup> Section 19(2) of the TIP Act 7 of 2013.

<sup>237</sup>Emser, M., 2013, ‘The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance’, PhD thesis, Dept. of Political Science, University of KwaZulu-Natal, p166.

<sup>238</sup> United Nations, 2012, “Improving the coordination of efforts against trafficking in persons”, Background paper of the Secretary-General, p8.

<sup>239</sup> United States Department of State, *Trafficking in Persons Report*, June 2014, Viewed 20 September 2014, from [http://www.state.gov/j/tip/rls/tiprpt/2014/?utm\\_source=NEW+RESOURCE:+Trafficking+in+Persons+R](http://www.state.gov/j/tip/rls/tiprpt/2014/?utm_source=NEW+RESOURCE:+Trafficking+in+Persons+R).



Trafficking cases, where public officials are induced or enticed by the trafficker, constitute a contravention of section 4 of the Corrupt Activities Act.<sup>240</sup>

Despite only having the limited provisions of the Sexual Offences Act and the Children's Act, the 2014 Report further found the following, indicating poor reporting and investigating of trafficking in persons by State officials:

*"Many stakeholders report the failure of police to proactively identify sex trafficking victims or pursue investigations; police regularly removed alleged victims of sex trafficking from brothels without opening investigations against the perpetrators. NGOs report that police officers solicited commercial sex acts from trafficking victims."*<sup>241</sup>

Although such challenges are not specific to matters of human trafficking but are problems that South Africa faces on a whole, it is imperative that such difficulties are kept in mind when creating the National Framework Policy. An advantage that the South African government has in this regard, is the many willing non-state role players there to assist in this struggle. Organisations that are set up to primarily assist victims of trafficking, or whose objective it is to combat trafficking, should be given the appropriate platform to assist the State in this struggle.. Whilst recognition of the role of organisations is made within the TIP Act, the recognition fails to constitute a constructive partnership. We see how the State, within the TIP Act, has put in place stringent requirements for the accreditation of such organisations. It is explicitly stated that these organisations are to provide services and assist victims of trafficking, and are to abide by the following in order to be recognised and to receive financial assistance:<sup>242</sup>

#### Accreditation of organisations to provide services

*"Section 24.*

- (1) Subject to section 49(2), an adult victim of trafficking may only be referred in terms of section 19(5)(b) to an organisation that has been accredited in terms of this section and has a valid certificate of accreditation, referred to in subsection (4)(a).*
- (2) The Minister of Social Development must prescribe—*
  - (a) a system for the accreditation of organisations which will provide services to adult victims of trafficking; and*
  - (b) the circumstances in which accredited organisations qualify for financial assistance, within available resources.*
- (3) The system for accreditation referred to in subsection (2) must contain—*

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<sup>240</sup> Mollema, N., 2013, "'Combatting Human Trafficking in South Africa: A Comparative Legal Study'", PhD thesis, UNISA, p448.

<sup>241</sup> United States Department of State, *Trafficking in Persons Report*, June 2014, Viewed 20 September 2014, from [http://www.state.gov/j/tip/rls/tiprpt/2014/?utm\\_source=NEW+RESOURCE:+Trafficking+in+Persons+R](http://www.state.gov/j/tip/rls/tiprpt/2014/?utm_source=NEW+RESOURCE:+Trafficking+in+Persons+R).

<sup>242</sup> Section 24 of the TIP Act.

- (a) criteria for the evaluation of the programmes offered by organisations to ensure that they comply with the norms and minimum standards referred to in section 25;
  - (b) mechanisms to monitor the programmes in question; and
  - (c) measures for the removal of organisations from the system, where appropriate.
- (4) (a) The Director-General: Social Development must, in the manner prescribed by the Minister of Social Development and within the time limits set out in the system of accreditation, consider all applications by organisations for accreditation and issue a certificate prescribed by the Minister of Social
- (b) A certificate of accreditation referred to in paragraph (a) is valid for a maximum of four years from the date of accreditation.
- (5) A developmental quality assurance process must be conducted in the manner prescribed by the Minister of Social Development in respect of each accredited organisation.
- (6) (a) The Director-General: Social Development must compile and maintain a list containing the particulars of each accredited organisation or organisation placed on or removed from the system within 30 days of accreditation or removal.
- (b) The Director-General: Social Development must, without undue delay, provide a copy of the list referred to in paragraph (a) when it is compiled and every time it is amended in accordance with paragraph (a) to—
- (i) the relevant role players in his or her Department who are involved in the administration of this Act;
  - (ii) the National Director of Public Prosecutions who must distribute the list to all prosecutors; and
  - (iii) the National Commissioner of the South African Police Service, who must distribute the list to all relevant role players in the South African Police Service.”

Once accredited, the organisations are to comply with the minimum norms and standards:

“Section 25.

- (1) The Minister of Social Development must prescribe norms and minimum standards for accredited organisations.
- (2) The norms and minimum standards referred to in subsection (1) must deal with—
- (a) the safety of victims of trafficking, especially those at risk of harm;
  - (b) access to and provision of adequate health care;
  - (c) the provision of separate facilities for male and female victims of trafficking;
  - (d) hygienic and adequate toilet facilities;
  - (e) access to refuse disposal services or other adequate means of disposal of refuse generated at the facility;
  - (f) the drawing up of action plans for emergencies; and
  - (g) the manner in which information—
    - (i) referred to in subsection (4) is to be collected and collated; and
    - (ii) relating to a victim of trafficking’s particulars must be kept confidential.
- (3) An accredited organisation that provides services to adult victims of trafficking who have children in their care must, in addition to the norms and minimum standards referred to in subsection (1), provide—
- (a) a safe environment for children;
  - (b) proper care for sick children; and
  - (c) safe storage of anything that may be harmful to children.
- (4) (a) An accredited organisation must, in the prescribed manner, collect information on victims of trafficking relating to—
- (i) the number of foreign victims of trafficking who have accessed a programme referred to in section 26;

- (ii) the number of South African citizens or permanent residents who are victims of trafficking and who have accessed a programme referred to in section 26;
  - (iii) the number of victims who have accessed a programme referred to in section 26 and who have not been reported to the South African Police Service;
  - (iv) the countries from which foreign victims have been trafficked;
  - (v) the countries to which South African citizens or permanent residents have been trafficked;
  - (vi) the areas in the Republic to and from which victims have been trafficked;
  - (vii) the purposes for which the victims have been trafficked;
  - (viii) the methods used to recruit and transport the victims;
  - (ix) the methods and routes used for trafficking the victims to and from and within the Republic;
  - (x) methods used to keep victims of trafficking in exploitative situations; and
  - (xi) the types of travel documents that victims have used or attempted to use to cross the borders of the Republic and how these documents were obtained.
- (b) An accredited organisation must provide an annual report on the information referred to in paragraph (a) to the Director-General: Social Development on a date determined by him or her.
- (c) The Director-General: Social Development must provide an annual report on the information referred to in paragraph (b) to the Director-General: Justice and Constitutional Development, as determined by him or her.”

On the surface, the above provisions indicate that thorough consideration was given in adopting an active response, which attempts to reflect a transparent process. However, the appropriate consideration was not afforded to organisations, as these provisions not only create many obstacles before an organisation may be accredited, but are onerous and burdensome on the organisations. Accreditation is also limited to those who are in a position to provide for all measures relating to the rescue, assistance and protection of a victim. This means that the many organisations that have made (and continue to make) positive strides in the fight against trafficking, by focusing on a particular section of the assistance stage, are excluded from official state recognition and support afforded by the TIP Act.

*“The [Act] specifies that organizations providing accommodation, health, counselling and other services to victims of trafficking will have to secure government approval. It is possible that many of the organizations currently working in the field, such as various church communities, might be unable to comply with all the accreditation requirements as they may provide only two or three of these services. For example, some organizations provide essential, but very basic accommodation for victims of trafficking. These facilities might not satisfy the [Act’s] requirements for accreditation. Similarly, such organizations might not be able to fulfil the requirements relating to reporting, counselling and other specialist services, even though they have established themselves as trusted shelters for victims.”<sup>243</sup>*

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<sup>243</sup> Mollema, N., 2013, “‘Combating Human Trafficking in South Africa: A Comparative Legal Study’”, PhD thesis, UNISA, p480.

As such, victims are to be treated and taken to an appropriate place of safety.<sup>244</sup> Such places are to offer particular programmes aimed at the provision of accommodation, counselling, re-integration and in some instances provide for the rehabilitation and education and skill development training. This expectation, without proper consultation with existing organisations and ‘safe houses’, also places an onerous burden on the organisations when victims are brought and delivered to their property as there are financial, logistical, social, practical and emotional factors that come into play when determining the intake of victims. NGOs can only do so much, as can the State. But the outlined provisions, essentially requiring the organisations to take on a large portion of the responsibility, are seemingly too onerous on the organisations. Unless a proper structured plan, which includes access to facilities, resources, and training, is established- the expectation on the NGOs to ensure the maintenance of effective assistance is too high. Moreover, these laws create a legal responsibility on those involved in the victim’s protection and assistance, which then relinquishes the State from their active role with the victims. This the main contention of this study. Again, whilst lack of resources and adequate structural support is not just an issue related to trafficking in persons, it does not mean that these new provisions and requirements are to be accepted so willingly. Better engagement on how to effectively deal with issues, such as the financial and structural implications of allowing only accredited organisations to respond as non-state actors, needs to be interrogated otherwise it hinders the assistance given to victims.

As already suggested, the above worrisome factors of unskilled or corrupt officials, do not just exist among the criminal provisions but extend to the protection and assistance of the victims. Lack of skill, training, and resources extends to healthcare practitioners and social workers dealing with these cases too. Whilst noble and at times necessary, ‘people with a passion’ who start up NGOs with the objective of combatting trafficking are often simply not skilled to do so. This is where the stringent requirements of accreditation of an organisation do well to attempt to ensure transparency in the response that is taken, however consultation with NGOs and the various response teams should be central in providing mechanisms to combat trafficking. Within the TIP Act, there exists a blanket responsibility to deal with cases of human trafficking appropriately, whether it is a police official, healthcare practitioner, social worker, accredited organisation, or in fact, any person. Various provisions addressing the reporting of, and dealing with, child and adult victims of trafficking, outline particular procedures to be

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<sup>244</sup> Section 18 and 19 of the TIP Act 7 of 2013.

followed and are also to be accorded in terms of the Criminal Procedure Act. However, the required procedures for the adopted response to trafficking in persons is not just extensive and long-winded, (and thus may create complications) but all those who choose to assist the victim are to have adequate training and knowledge of the laws surrounding such procedures. Should this not be the case, there could be adverse legal implications when it comes to the prosecution of the case, which cripples the furtherance of seeking justice for those trafficked.

Addressing these matters is pertinent to ensuring the protection of the victim as well as the credibility and faith in our criminal justice system.

*“Victims need physical and emotional security, as their testimony is essential in establishing a case against a trafficker. South Africa has a weak witness protection programme, which means that victims are less likely to come forward and testify against their sexual exploiters. Many victims are deterred from agreeing to give oral evidence for fear of facing their traffickers in court, unsympathetic cross-examination by the defence counsel, and reprisals from their abusers. Many women, if trafficked, will not seek help or even report the incident to the authorities because their situation exposes them to potential harassment by the police and officials and possibly to the threat of deportation.”<sup>245</sup>*

Additionally, due to the extreme nature and conditions of human trafficking, victims often engage in behaviour and activity that is regarded as ‘immoral’ or unlawful- such as drug abuse, sex work, or possess illegal and fraudulent identification documentations. When it comes to reporting and seeking assistance, victims experience ‘secondary victimization’ from those whom they seek refuge and assistance from, arising out of individual biases and again, a misunderstanding of the situation and the relevant law. A lack of understanding, inadequate means of accountability, a poor environment and experiences of societal beliefs and convictions, deter victims from coming forward. These factors indicate how crucial it is for the State and non-state actors (specifically NGOs) to work together as each role taken on by each actor contributes significantly in the fight against trafficking in persons.

We have seen from the criminal and victim protection and assistance provisions, how the State has imposed particular standards on persons attempting to deal with human trafficking cases, but specifically on organisations whose sole purpose is to assist the trafficked victim. The provisions are ambitious in their expectations on organisations to make provision for

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<sup>245</sup> Emser, M., 2013, ‘The Politics of Human Trafficking in South Africa: A Case Study of the KwaZulu-Natal Intersectoral Task Team and South African Counter-Trafficking Governance’, PhD thesis, Dept. of Political Science, University of KwaZulu-Natal, p166.

accommodation, counselling, re-integration, and in some cases the development of those individuals. On the surface, the assistance offered to the victims is good, and the TIP Act indicates how the State has prioritised assisting the victim. However, what these provisions really show is a lack of adequate cooperation with civil society and organisations that are dependent on external funding and external support, and thus, do not have the capacity to take on such an onerous task. It does not sufficiently seek to “combat trafficking in a coordinated manner” as outlined in the TIP Act’s objectives.

The lack of priority to engage with NGOs is made evident in numerous provisions of the TIP Act. Before a decision can be made regarding matters such as the National Policy Framework,<sup>246</sup> the coordination of responsibilities, functions and duties relating to implementation of the TIP Act,<sup>247</sup> reporting to Parliament,<sup>248</sup> the national instructions and directives,<sup>249</sup> and others, the Director-General: Justice and Constitutional Development must consult with selected State officials and departments, including:

- The Presidency
- the National Commissioner of the South African Police Service
- the National Director of Public Prosecutions,
- the Chief Executive Officer of the Government Communication and Information System,
- the Commissioner of the South African Revenue Service
- the Directors-General and/or Minister of Health, Home Affairs, International Relations and Cooperation, Labour, Social Development, State Security Agency and Women, Children and People with Disabilities

The explicit omission of ‘consultation with organisations’ in these matters is concerning and needs to be re-explored to ascertain the appropriate measures to include organisation in these decisions.

As a result of the above-mentioned omissions, the State has taken on the official international responsibility to combat trafficking, and correctly so, however the expectation for organisations to absorb the laborious task in fulfilling their own mandate is unfair. Despite

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<sup>246</sup> Section 40 of the TIP Act.

<sup>247</sup> Section 41 of the TIP Act.

<sup>248</sup> Section 42 of the TIP Act.

<sup>249</sup> Section 44 of the TIP Act.

there being State establishments set up to focus on various factors -such as the SAPS and NPA to focus on prosecution; the IOM to focus on vulnerable migrants; the Department of Social Development to ensure the social means of a victim, including housing and counselling, are provided for, it is evident from the expectations placed on organisations that the State is not sufficiently equipped to combat trafficking and thus relies on the assistance of these organisations. It is often these civil society members and organisations who understand the depths of the issue of human trafficking more so than law and policy makers as a result of being 'on the ground', and who, had they been consulted, would have directed the lawmakers otherwise in terms of the extensive provisions.

Whilst the objectives of the TIP Act are far more comprehensive than those of the Palermo Protocol, and whilst it acknowledges the vital role of the partnering of States and organisations, in terms of the TIP Act; a national policy framework is to be implemented, taking ownership of the dealings of these anti-human trafficking measures. What the Act fails to define is whether the policy will take into account different situations and factors, which will ensure tailor-made responses which prevents a disconnection between policy and lived experience of those who may or may not be categorised as trafficked.

Whilst the TIP Act basically outlines the required responses and procedures, it is evident that government relies heavily on NGOs to direct government's initiative to appropriately provide for mechanisms in combating human trafficking, as it does not expressly state the extent of consultation and cooperation between State and NGOs. The TIP Act is clear on the extent of obligations of organisations, but these expectations placed on NGOs by government, creates a burdensome relationship and one which implicates the State's autonomy in combatting human trafficking. As the State cannot be expected to combat trafficking alone, organisations cannot be expected to carry the load alone either, as they are not involved in decision making and are significantly affected by the provisions put in place. Organisations are pivotal in creating measures and mechanisms in order to realise true freedom for all and should be able to do so without being restricted to the extent that the TIP Act does.

Lastly, as alluded to above, there are economic dynamics that affect human trafficking, or rather, the combatting of human trafficking. South Africa, a developing nation, faces the same realities as many other States, realities that are a distant or unbelievable to developed countries. Realistically speaking, South Africa is in no position to deal with the torments of human

trafficking in the ways a better resourced country can. Thus whilst there are laws and provisions pertaining to human trafficking eradication, they still do not address the real core of the issues, issues that can be dealt with only if there is adequate co-operation between state and non-state actors.

## **Conclusion**

As we have seen, South Africa previously addressed the issue of trafficking in persons by relying on insufficient laws, such as the Sexual Offences Act and the Children's Act, but has finally brought about new legislation which specifically deals with trafficking in persons. Whilst it is a victory for South Africa to have brought about this new legislation, the attempt to fulfil its constitutional and international obligation to enact national law in order to combat trafficking in persons, still needs improvement. The provisions, whilst vast and extensive, portray a top-heavy (pressurised) approach by the government on to nongovernmental organisations, and do so without due regard for the positions the organisations are in or challenges they face (and are yet to face). A better relationship between both sectors needs to be established in order for each aspect of the struggle against trafficking to succeed.

Flowing from the analysis of South Africa's existing legislation, there are three main areas that were not adequately envisioned or understood by the drafters of the legislation:

- budgetary constraints in which the legislation's (or implementing regulations) failure to provide for the proper funding of NGOs will result in a lack of quality services, and potentially be in violation of the new legislation;
- the need for accreditation under the new law. The provisions fail to recognise that not all NGOs can offer the complete package of services required by the legislation. By failing to understand and consult with existing NGOs who perhaps offer only 1 or 2 services out of the complete array now demanded by the law, those NGOs may be forced out of providing their more limited, but still important, services to victims;
- and how the State relinquishes its role in dealing with victims directly. It is in the best interest of the State's criminal justice sector and also their security sector to protect and assist victims, in that a cooperative victim drastically increases the likelihood of a conviction. As criminal justice and victim services overlap in the case of TIP, State support and involvement in victim services is critical to the State performing its task as both the protector of the individual and also as the protector of society as a whole.



In seeking another perspective on addressing trafficking in persons within a similar socio-economic and political terrain, the next chapter will outline the Brazilian laws surrounding trafficking, and the provisions made by their legal framework, in terms of the relationship between the State and its NGOs in combatting trafficking in persons.

## CHAPTER FOUR

### Brazil's Approach to Trafficking in Persons – A Socio-Economic Comparison

*“Every country experiences the crime of trafficking in persons, and every government has a responsibility to fight it - both directly, through investigations and prosecutions, and in the deeper sense of serious and sustained efforts at prevention, which aim to safeguard future generations from such ordeals. To assist them, there are a number of international legal frameworks in place that address various aspects of trafficking, trying to ensure that such grave crimes are met with thorough investigations and appropriate punishment.”<sup>250</sup>*

#### Introduction

To put into context the struggle that South Africa faces in combatting trafficking in persons, it is important to ascertain how a similar country to South Africa, is faring in overcoming the various challenges. A country with significant similarities with the RSA would be Brazil, which not only shares a US TIP Tier 2 ranking, but, like South Africa, is a source, transit and destination country. South Africa and Brazil have also hosted one of the world's mega sporting events, the FIFA 2010 and 2014 Soccer World Cups respectively, during which the threat of human trafficking is often highlighted, especially with trafficking being transnational in nature. Similarly, Brazil is a democratic state<sup>251</sup> having gone through a transitional process into constitutional democracy. Their governance is also divided into the executive branch, the legislative branch and the judicial branch.<sup>252</sup> Furthermore, with both South Africa and Brazil being active members of the association of five major emerging national economies known as BRICS,<sup>253</sup> and “as Brazil develops as an emerging economic power, it is attracting more migrants from neighbouring countries in South America and further afield, who may also be deceived or coerced into situations of exploitation within Brazil.”<sup>254</sup>

In order to understand the background of Brazil's response to combat trafficking in persons, it is important to consider how Brazil came to the decision of taking a stand against

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<sup>250</sup> UNGIFT, 30 July 2014, ‘World Day against Trafficking in Persons’, Pillay, N, UN High Commissioner for Human Rights, viewed 11 September 2014, from <http://www.ungift.org/knowledgehub/en/stories/July2014/un-high-commissioner-for-human-rights--navi-pillay--on-the-first-ever-world-day-against-trafficking-in-persons.html>.

<sup>251</sup> Article 1 of the Constitution of the Federative Republic of Brazil.

<sup>252</sup> Brazil, n.d. “Brazil Politics – Intro”, viewed 24 October 2014, from [www.brazil.org.za/politics-intro.html#VEosJSIBvqA](http://www.brazil.org.za/politics-intro.html#VEosJSIBvqA).

<sup>253</sup> Brazil, Russia, India, China, South Africa.

<sup>254</sup> International Centre for Migration Policy Development, n.d., ‘Leading the Fight against Human Trafficking in Brazil’, viewed 6 November 2014, from <http://www.icmpd.org/index.php?id=2374>.

the then slavery and the now modern day slavery and how the old Brazilian saying “for the English to see”<sup>255</sup> came about.<sup>256</sup> This is explained aptly in the following:

*“When Brazil declared its independence from Portugal in 1822, its main trading partner was Great Britain. While the British offered various forms of support and friendship in return for access to Brazilian ports and the right to trade in Brazil, Great Britain had already declared the importation of African slaves into its colonies to be illegal and was encouraging other countries to do the same. Moral arguments played a role, but Brazil – economically highly dependent on cheap slave labour on the sugar, coffee and cotton plantations – was also considered an unfair competitor by Britain and its colonies, which were producing many of the same goods and where slavery was abolished in the 1830s. As a result, under British pressure a number of Brazilian laws were passed, aimed formally at the abolition of slave trade, while actually having little or no impact. These initiatives were para inglês ver (for the English to see). One of these laws, the Lei Euzébio de Queiroz, which prohibited slave trafficking in 1831, did not have even the slightest effect – after this prohibition, the nominally illegal slave trade even increased significantly.”<sup>257</sup>*

Following this initial response by the Brazilian government to merely adopt laws for foreign satisfaction, and the subsequent expansive global response to trafficking in persons, Brazil’s approach needed reform. In recent years, Brazil has actively sought membership to international and regional agreements relating to trafficking in persons. These include the Palermo Protocol, CEDAW,<sup>258</sup> the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*,<sup>259</sup> the *Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography*,<sup>260</sup> as well as the UDHR, the ICCPR. Brazil has also ratified *ILO Abolition of Forced Labour Convention*; the *ILO Convention on the Worst Forms of Child Labour*; and the *Inter-American Convention on International Traffic in Minors*.<sup>261</sup> Despite these agreements, “[these conventions and agreements] do not have the power to modify [Brazil’s] domestic legal code, which can only be accomplished by the legislative process”.<sup>262</sup> Whilst Brazil’s own

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<sup>255</sup> Nderstigt, F and Almeida, LCR, 2006, “Collateral Damage – Brazil”, p87.

<sup>256</sup> Meaning that it is enough to give the appearance of having good intentions.

<sup>257</sup> Bethell, 1989, 40, 62, 95; Militão, 2005, in Nderstigt F and Almeida LCR, 2006, “Collateral Damage – Brazil”, p87.

<sup>258</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).

<sup>259</sup> Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (“Convention of Belem do Para”). It entered into force 9 June 1994.

<sup>260</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* of 16 March 2001, A/RES/54/263. It entered into force on 18 January 2002.

<sup>261</sup> Organization of American States (OAS), *Inter-American Convention on International Traffic in Minors* of 18 March 1994, OAS, Treaty Series, No. 79. It entered into force on 15 August 1997.

<sup>262</sup> Richelson, S., 2008, “Trafficking and Trade: How Regional Trade Agreements can combat the Trafficking of Persons in Brazil”, *Arizona Journal of International & Comparative Law Journal*, p6.

national legislation does make provision for the combatting of trafficking in persons, “a major concern is that laws, in general, often go unenforced”<sup>263</sup> but also that these trafficking laws are not extensive enough to adequately respond to the trafficking in persons.

According to the regional report conducted by UN.GIFT,<sup>264</sup> in order to appropriately address the challenge of trafficking in persons within Brazil, it is important to recognise and confront the ‘push’ factors such as “low employment opportunities, social and economic vulnerabilities of women and female children as well as urbanization and migration”.<sup>265</sup> These ‘push’ factors are experienced by South Africa too. The report noted that “when individuals feel that they have limited or no options in situations of poverty or inequality”,<sup>266</sup> the vulnerability of the person increases and thus the chances of exploitation increase, forcing the necessity of providing “more equal opportunities for education, health, jobs and social mobility.”<sup>267</sup> These are globally recognized starting points in dealing with the supply side of this problem. Despite there being a number of challenges that need to be overcome in order to appropriately combat trafficking in persons, one of the ways to do so is to ensure there is a sufficient legal framework supporting this combatting and prevention, which will affect various areas of the problem and influence the approach taken when responding to instances of trafficking.

### **Trafficking Provisions of Brazilian Legislative Framework**

As a member of the Palermo Protocol, in signing the agreement on 12 December 2000 and ratifying it 29 January 2004,<sup>268</sup> Brazil is under the same international obligation as South Africa to take sufficient measures to prevent, suppress and combat trafficking in persons but to also domesticate these international agreements. Whilst Brazil has not necessarily taken strides to adopt one comprehensive piece of legislation extensively relating to trafficking in persons, as South Africa has, there are numerous provisions within their laws that deal with the approach

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<sup>263</sup> Nederstigt, F and Almeida, LCR, 2006, “Collateral Damage – Brazil”, p87.

<sup>264</sup> United Nations Global Initiative to Fight Human Trafficking (UNGIFT), 2007, *Brazil National Conference: Challenges to the Implementation of the National Plan of Action Against Trafficking in Persons*, viewed 4 November 2014, from [http://www.ungift.org/docs/ungift/Regional\\_meetings\\_reports.pdf](http://www.ungift.org/docs/ungift/Regional_meetings_reports.pdf).

<sup>265</sup> Ibid, p10.

<sup>266</sup> Ibid, p10.

<sup>267</sup> Ibid, p10.

<sup>268</sup> United Nations Treaty Collection n.d., viewed 11 September 2014, from [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en).

they are taking to advance the fight within their political and economic terrain, as well as plans and initiatives taken by the government and its agencies.

## General Provisions relating to Combatting Trafficking in Persons and Cooperation

### The Constitution of the Federative Republic of Brazil

Throughout the Constitution of the Federative Republic of Brazil<sup>269</sup> (hereinafter referred to as “the Federal Constitution”), it is evident that human rights, most notably the right to freedom, dignity and equality, are at the core of Brazil’s legislation. We see this reflected at the very start in the preamble of the Federal Constitution of Brazil:

*“We the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil.”*

Article 5 of the Federal Constitution states that “all persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property”. Having been outlined in the Federal Constitution, the supreme law of the land, all other legislation is to ensure it upholds these constitutional imperatives.

Article 226 of the Federal Constitution pertains to the family, children, adolescents and the elderly in which it recognises the family as the “foundation of society [and] will enjoy special protection from the state”. Article 227 further supplements the importance of protection by regarding the following:

*“the “duty of the family, the society and the State to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.”*

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<sup>269</sup> Constitution of the Federative Republic of Brazil, 3rd Edition, 2010, Constitutional Text of October 5, 1998, with the alterations introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994.

Paragraph 1 of Article 227 adds to this duty by stating that “the State shall promote full health assistance programmes for children and adolescents, the participation of nongovernmental entities being allowed”. This approach shows a government willing to take constitutional responsibility of ensuring its people are healthy but also welcoming the support and participation of nongovernmental organisations which reflects collaborative and cooperative effort. Further paragraph 3 states that “the law shall severely punish abuse, violence and sexual exploitation of children and adolescents”.

Whilst the above general constitutional provisions can be used to combat trafficking, according to the principle of legality in Article 39 of the Federal Constitution, defendants can only be charged under laws that have been fully elaborated and deemed constitutional, making enforcement more difficult.<sup>270</sup> This can be a major setback for many matters, specifically that of trafficking. Despite the protection of freedom under the Federal Constitution, the government and nongovernmental organisation may be hampered by insufficient laws concerning the emancipation of persons, and thus an inadequate approach may be adopted, curbing the fight against trafficking.

#### Specific Provisions, Policies and Plans relating to Combatting Trafficking in Persons in Brazil

Following an agreement made between the UNODC and Brazil in 2001 to implement the Global Programme against Trafficking (GPAT) in Human Beings, the Federal Government in 2002 set up committees to deal with trafficking in persons in five states,<sup>271</sup> enlisting the support of NGOs for backup and networking facilities.<sup>272</sup> The attempts by the State to fulfil the actions outlined in the GPAT were feeble and instead the research was undertaken jointly by NGOs and universities. However, after President Luiz Inacio Lula da Silva (President Lula) was elected, he chose to revive the GPAT and narrowed the scope of the focus to the states of Ceará, Goiás, Rio de Janeiro and São Paulo. During his term, the government also began implementing conventions by passing new legislation, most notably ratifying the Palermo

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<sup>270</sup> Richelson, S., 2008, “Trafficking and Trade: How Regional Trade Agreements can combat the Trafficking of Persons in Brazil”, *Arizona Journal of International & Comparative Law Journal*, p6.

<sup>271</sup> Bahia, Ceará, Pará, Pernambuco and Rio de Janeiro.

<sup>272</sup> Richelson, S., 2008, “Trafficking and Trade: How Regional Trade Agreements can combat the Trafficking of Persons in Brazil”, *Arizona Journal of International & Comparative Law Journal*, p7.

Protocol in 2004 into Brazilian law by Decree No. 5,017.<sup>273</sup> The following provisions deal with domestic trafficking in Brazil and is covered in Brazil's domestic legislation by Decree No. 11,106.

### The Brazilian Penal Code

The Brazilian Penal Code<sup>274</sup> criminalizes two types of trafficking with the intention of sexual exploitation, domestic and international.<sup>275</sup> Articles 231 and 231-A of the penal code prohibit sex trafficking involving movement, with violence, threats, or fraud as aggravating elements.”<sup>276</sup> According the United Nations Office on Drugs and Crime Case Law Database, the unofficial translations of the relevant provisions in Brazil’s Penal Code are the following:

#### *“Article 228*

*To mislead or to attract someone to prostitution or other form of sexual exploitation, to facilitate it, to prevent or to hinder someone to leave it:*

*Penalty: imprisonment of two to five years, and fine.*

*S1 - if the agent is ascendant, stepfather, stepmother, brother, stepson, spouse, companion, tutor or curator, preceptor or employer of the victim, or if he assumed, by law or otherwise, obligation of care, protection or surveillance:*

*Penalty: imprisonment of 3 (three) to 8 (eight) years.*

*S2 - if the crime is committed with the use of violence, serious threat or fraud:*

*Penalty - imprisonment, four to ten years, in addition to the penalty corresponding to the violence*

*S3 - if the crime is committed with the end of profit, a fine is also applied*

#### *Article 231*

*International Trafficking of Persons (amended by Law No. 11,106-2005)*

*Promoting, serving as an intermediary, or facilitating the entry, into national territory, of a person with the intention to practice prostitution, or the exit of a person with the intention to practice prostitution on foreign soil.*

*Penalty: Imprisonment of three to eight years*

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<sup>273</sup> Ibid.

<sup>274</sup> Decree-Law No. 2.848 of December 7, 1940.

<sup>275</sup> International Models Project on Women’s Rights (IMPOWR), 2013, ‘Current Legal Framework: Trafficking in Brazil’, viewed 4 November 2014, from <http://www.impowr.org/content/current-legal-framework-trafficking-brazil>.

<sup>276</sup> U.S Department of State, 2014, Trafficking in Persons Report, viewed 11 September 2014, from <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>.

*S1 - The penalty is also applied for those which recruit, entice or buy the trafficked person, as well as, those which having knowledge of this condition, transport, transfer or host the trafficked person.*

*S2 - The penalty is increased by half if:*

*I - the victim is a minor of 18 (eighteen) years;*

*II - the victim, by illness or mental disability, does not have the necessary discernment for the practice of the act;*

*III - if the agent is ascendant, stepfather, stepmother, brother, stepson, spouse, companion, tutor or curator, preceptor or employer of the victim, or if he assumed, by law or otherwise, obligation of care, protection or surveillance; or*

*IV - there are employment of violence, serious threat or fraud.*

*S3 - If the crime is committed in order to obtain economic benefit, a fine is also applied.*

#### *Article 231-A*

##### *Internal Trafficking of Persons*

*Promoting, serving as an intermediary, or facilitating, within national territory, the recruitment, transport, transfer, harbouring or receipt of a person with the intention to practice prostitution (Included by Law No. 11,106-2005)*

*Penalty – imprisonment from 3 to 8 years and fine.”<sup>277</sup>*

We see from this legislation that the Penal Code does not include the other forms of exploitation that are mentioned in the Palermo Protocol, such as forced labour or services, slavery or similar practices, servitude, unlawful organ removal, or even other forms of sexual exploitation in the definition of human trafficking. Thus, Articles 231 and 231-A do not comply with international standards as these articles require movement as a necessary element of trafficking, as well as prohibit moving a person for the purposes of prostitution, of which international law does not.

Other pieces of legislation comprising of trafficking in persons provisions include: the Heinous Crimes Act (Articles 1 and 6); the Torture Act (Articles 1 and 4); and the Statute of the Child and Adolescent (Articles 5; 82 to 85; 149, 238 and 243; 250 and 255). Also, “forced labour<sup>278</sup> is criminalized under anti-slavery statutes, which, according to the US TIP report, are not sufficiently stringent.”<sup>279</sup>

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<sup>277</sup> UNODC Regional Office for Brazil and the Southern Cone, Human Trafficking Case Law Database, [http://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/bra/2010/processo\\_n\\_2007.05.00.088769-6.html?tmpl=old](http://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/bra/2010/processo_n_2007.05.00.088769-6.html?tmpl=old).

<sup>278</sup> According to the US TIP Report for Brazil 2014, under Brazilian law, the term *trabalhoescravo*, or slave labour, is defined as forced labour or labour performed during exhausting work days or in degrading working conditions.

<sup>279</sup> Richelson, S., 2008, “Trafficking and Trade: How Regional Trade Agreements can combat the Trafficking of Persons in Brazil”, *Arizona Journal of International & Comparative Law Journal*, p8.



## National Policy to Combat Trafficking in Persons

Whilst the Penal Code does not mention the other forms of exploitation and trafficking outlined in the Palermo Protocol, from October 2006 Decree No. 5,084 officially recognised these other forms, which sought to make up for the shortfall within the Penal Code as well as strengthen Brazil's National Policy to Combat Human Trafficking.<sup>280</sup> Although the definition of trafficking in persons in the adopted National Policy is the exact same as the Palermo Protocol, a notable difference is that the National Policy does not consider, at any point, the 'consent' of the victim as a relevant factor.<sup>281</sup>

A coordinated decision to draft and approve the National Policy to Combat Trafficking in Persons was made by the National Secretariat of Justice, Ministry of Justice, the Department of Human Rights and the Secretariat of Policies for Women, in terms of Decree No. 5948 of October 26, 2006<sup>282</sup>. Together with the National Plan, they “attempt[ed] to integrate human rights policies such as social assistance, health, education, labour, protection of children, adolescents, and women, and strategies to fight social exclusion.”<sup>283</sup> This Policy did the following:

*“established principles, guidelines and actions of prevention, enforcement and accountability of the [trafficking in persons] as well as attend[ed] to victims, implementing not only actions in the area of justice and public safety, but also in the area of foreign affairs, education, health, social welfare, racial equality, labour and employment, agricultural development, human rights protection and promotion of women's rights, tourism and culture. ... However none of this would have been possible if not for the effort and commitment of all those involved in the construction of this policy, whether in the Federal Government, the Legislature and Judiciary, prosecution, State, County and Civil Society, thus enabling the effectiveness of this policy”.*<sup>284</sup>

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<sup>280</sup> Richelson, S., 2008, “Trafficking and Trade: How Regional Trade Agreements can combat the Trafficking of Persons in Brazil”, *Arizona Journal of International & Comparative Law Journal*, p8.

<sup>281</sup> daConceição Silva LI et al, 2008, ‘A Trinational Study About Trafficking in Women from Brazil and the Dominican Republic to Suriname – A joint intervention’, Sodireitos, p54.

<sup>282</sup> Ministry of Justice, Brazil, n.d., “Brazil Legal Framework and Brazilian Politics”, viewed on 26 June 2014, from <http://portal.mj.gov.br/main.asp?View={E8833249-5827-4772-BDC6-D7F1D880AD41}&BrowserType=NN&LangID=pt-br&params=itemID%3D%7BBDDBD03F-6C67-4F1D-9519-3A7E7A0ED937%7D%3B&UIPartUID=%7B2868BA3C-1C72-4347-BE11-A26F70F4CB26%7D>.

<sup>283</sup> Richelson, S., 2008, “Trafficking and Trade: How Regional Trade Agreements can combat the Trafficking of Persons in Brazil”, *Arizona Journal of International & Comparative Law Journal*, p1.

<sup>284</sup> Ministry of Justice, Brazil, n.d., “Brazil Legal Framework and Brazilian Politics”, viewed on 26 June 2014, from <http://portal.mj.gov.br/main.asp?View={E8833249-5827-4772-BDC6-D7F1D880AD41}&BrowserType=NN&LangID=pt-br&params=itemID%3D%7BBDDBD03F-6C67-4F1D-9519-3A7E7A0ED937%7D%3B&UIPartUID=%7B2868BA3C-1C72-4347-BE11-A26F70F4CB26%7D>.

Additionally, in order to ensure the response to trafficking in persons and organised crime is appropriate and clear, Brazil has accordingly set up structures so as to be certain on the jurisdictions of each department.<sup>285</sup>

The tables below outline the various main responses taken by Brazil regarding their institutional framework surrounding the Policy to Combat Trafficking in persons and who is responsible for certain tasks and instances:

Table 5:<sup>286</sup> Breakdown of the National Policy to Combat Trafficking in Persons

<b>Context</b>	<b>National Policy</b>
Decree No. 5017, of March 12, 2004 - ratified the Protocol	Approves the principles and guidelines for the actions of the Brazilian State on the three axes to Prevent, Suppress and Punish Trafficking in Persons;  Policy and Plans built with social participation, governmental and non-governmental actors;  Guidelines and actions taken by agencies and various government sectors and the three levels of federal institutions.
Decree No. 5,948, of October 26, 2006 - approves the National Policy;	
Decree No. 6,347, of January 8, 2008 - approves the First National Plan to Combat Trafficking in Persons;	
Decree No. 7,901, of February 4, 2013 - approves the Second National Plan to Combat Trafficking in Persons.	

Table 6:<sup>287</sup> Governance Model of National Policy – Actors Involved

<b>Instances</b>	<b>Main Assignments of Actors</b>
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<sup>285</sup> See Appendix B.

<sup>286</sup> Ministry of Justice, Brazil, n.d., “Institutional Framework - Brazilian Policy to Combat Trafficking in Persons”, viewed on 6 November 2014, off downloaded PowerPoint presentation, Slide 3.

<sup>287</sup> Ministry of Justice, Brazil, n.d., “Institutional Framework - Brazilian Policy to Combat Trafficking in Persons”, viewed on 6 November 2014, off downloaded PowerPoint presentation, Slides 5 – 7.

National Committee to Combat Trafficking in Persons - CONATRAP	<p>National body of social control of national policy</p> <p>Composed of governmental and non-governmental representatives and 10 national councils of public policies</p> <p>National elections for NGOs</p> <p>26 members, equally composed</p> <p>Propose strategies for management and implementation of activities of the National Policy to Combat Trafficking in Persons</p> <p>Monitor the implementation of national plans</p>
Interministerial Group on Monitoring and Evaluation	<p>Established under the Ministry of Justice, coordinated by the Tripartite Coordination, with representation from 17 ministries</p> <p>Established and approved the monitoring and evaluation system of the II Plan and monitor the implementation</p> <p>Prepare the monitoring report and review of the II Plan</p>
Tripartite Coordination – National Policy	<p>Composed by the Ministry of Justice, the Secretariat of Policies for Women and the Secretariat of Human Rights</p> <p>Coordinates the strategic and integrated management of the National Policy and National Plans</p> <p>Meets monthly for discussion and decision making on relevant issues</p>
National Coordination to Combat Trafficking in Persons - Ministry of Justice	<p>Leads the architecture of actors organized around the integrated management</p> <p>Monitor the progress of the strategic agenda and generate actions required</p> <p>Management information to support decision-making and transparency</p>

	Serves as executive secretary of all instances
Macro National Network for Combat Trafficking in Persons	More than 300 governmental and nongovernmental institutions which prepare, approve and evaluate national plans in the national network meeting
Federative Integration - Network of Centres, Posts and Local Committees	<p>Local Officers to Combat Trafficking in persons</p> <p>Centres - Executive coordination's in the States</p> <p>Posts - Support structure and service. Are situated on the main points of entry and exit from Brazil for receipt of persons and prevention actions</p> <p>16 Centres for Combating Trafficking in Persons;</p> <p>13 Posts of Humanized Care for Migrants;</p> <p>11 State Committees to Combat Trafficking in Persons;</p>

The above table reflects a framework in which NGOs are required to comply with and ensure a more coordinated response to trafficking in persons.

According to the Trinational study, the importance of cooperation between the State and nongovernmental organisations is made evident by the policy:

*“[t]he National policy to deal with the traffic in people acknowledges that traffic in Brazil people is a problem with many different facets that requires concerted action and, for the first time, brings together different actors and government agencies ...[and where] ...Civil society also has a very important role in monitoring the implementation of the national policy and plan made public by the government in Decree 6,347 as of January 9th, 2008.”<sup>288</sup>*

Whilst this model may not be perfect in implementation, nor may the actors always act appropriately, the emphasis of this cooperation goes a long way in ensuring the appropriate measures are adopted and that the challenges can be adequately responded to. With this, in the aforementioned regional report “[p]articipants agreed that Brazil’s highly praised HIV

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<sup>288</sup> daConceição Silva LI et al, 2008, ‘A Trinational Study About Trafficking in Women from Brazil and the Dominican Republic to Suriname – A joint intervention’, Sodireitos, p55.

programme's experience in prevention efforts, which involves different segments of civil society in the designing of public policy, could be used as a model for prevention efforts related to trafficking in persons."<sup>289</sup> However, as mentioned earlier, a major limitation to the law is the enforcement element. In this regard, Richelson suggests the following in her article:

*"...the law only penalizes individual offenders, rather than addressing the role of state or government officials in committing or tolerating trafficking. At times, "[t]he very institutions charged with preventing and fighting corruption are too weak to do so, or compromised by the influence of the transgressors themselves." The law enforcement approach does not contemplate holding the state responsible, either domestically or internationally."*<sup>290</sup>

In line with this limitation, the US TIP report for Brazil for 2014 found a notable lack of cooperation of law enforcement even among State departments:

*"The lack of a unified approach led to disjointed law enforcement efforts. Many law enforcement units, including those investigating crimes against women or children, reported they needed more funding, expertise, or staff to investigate potential trafficking cases. Some officials reported bureaucratic hurdles in conducting trafficking investigations, including the inability to investigate businesses for sex trafficking without the registration of an official complaint."*

Additionally, "due to corruption and poorly-trained officers, legislation and penal consequences have failed to protect trafficked persons."<sup>291</sup>

However, in terms of prevention, the report found a coordinated response by both the State and NGOs (even in instances where the extent of resources varied).

Therefore, based on the international standard put forward by the Palermo Protocol and the minimum standards and criteria set out for the US TIP reporting, the Government of Brazil does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so and thus remains at Tier 2. A significant factor is that "Brazilian law defines trafficking as a movement-based crime and statutes prohibiting

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<sup>289</sup> United Nations Global Initiative to Fight Human Trafficking (UNGIFT), 2007, Brazil National Conference: Challenges to the Implementation of the National Plan of Action Against Trafficking in Persons, viewed 4 November 2014, from [http://www.ungift.org/docs/ungift/Regional\\_meetings\\_reports.pdf](http://www.ungift.org/docs/ungift/Regional_meetings_reports.pdf).

<sup>290</sup> Richelson, S., 2008, "Trafficking and Trade: How Regional Trade Agreements can combat the Trafficking of Persons in Brazil", *Arizona Journal of International & Comparative Law Journal*, p9.

<sup>291</sup> *Ibid*, p18.

trafficking do not align with international law, making it difficult to assess fully government efforts.”<sup>292</sup>

## **Conclusion**

Significant strides have been taken by the Brazilian government and nongovernmental organisations to curb trafficking in persons. With the government initiating human rights efforts to assist victims with health, shelter, and legal services (even though they may be uncoordinated, underfunded, and do not yet address the underlying social issues), this indicates adopted cooperative measures between the two role players, and which South Africa could learn from. However, the Brazilian law itself needs revision in order to be in line with the Palermo Protocol, and whilst there is great institutional mobilization by the Brazilian government and its NGOs, the country has not yet reached a level effective on a national scale for guiding these institutions’ responses. Notable however, is the provision for the cooperation between the State and NGOs and how both role players see it their responsibility to deal with trafficking in persons.

The next chapter will draw to a close the study and look at the findings and make the necessary recommendations based on the findings thereof.

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<sup>292</sup> U.S Department of State, 2014, Trafficking in Persons Report, viewed 11 September 2014, from <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>.

## CHAPTER FIVE

### Conclusion, Findings and Recommendation

*'No country can yet lay claim to genuine, extensive experience in dealing with trafficking as a criminal phenomenon. Most are developing and adapting their responses on the run, often under strong political pressure, and principally through trial and error.'*<sup>293</sup>

With trafficking in persons being an issue comprising of great complexity, there is no 'perfect' response to the matter. Due to the ever-changing nature of trafficking in persons, parties wishing to combat trafficking need to ensure the most appropriate response is adopted. Whilst many may believe that it should be the responsibility of all to fight for the freedom of others, it is crucial to determine each and everyone's role in this fight, in order to achieve a positive response and to adopt effective measures to address human trafficking. As an important aspect to determine these roles, it should be borne in mind that reliance on one agent (for instance the State) to deal with combatting trafficking in persons creates within itself hurdles and limitations. No longer are the days when reliance for social change was placed on the government alone and where they were seen as the sole problem solver for issues impacting communities.<sup>294</sup> Nowadays, there is less reliance on the government to act wholly in response to particular matters and there is now a steady platform for NGOs and other actors, even corporate organisations, to make a significant change but also to assist government in seeing that the needs of people are met.

It is now crucial that the appropriate laws are explored and then adopted to ensure that the most suitable response is taken in addressing trafficking in persons. Governmental and nongovernmental initiatives should be analysed in order to assess if they address the needs of trafficked persons adequately, or merely serve other agendas, as well as other international cooperative initiatives.

As seen from considering the various legal frameworks and responses by the different States, there is a global recognition of the importance of cooperation of role players in combatting trafficking persons. But recognition is not enough to overcome the challenge of

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<sup>293</sup> Gallagher, A and Holmes, P., 2008, 'Developing an effective criminal justice response to human trafficking – lessons from the front line', *International Criminal Justice Review*, p318.

<sup>294</sup> CMIBrief, 2007, Corporate Responsibility of Multinational Corporations, viewed 24 November 2014, from <http://www.cmi.no/publications/file/2575-corporate-social-responsibility-of-multinational.pdf>

addressing trafficking in persons. Flowing from the analyses of the above frameworks, whilst there are positive attributes about the relationship that exists between the State and NGOs, it is not a balanced one whereby the relevant stakeholders are on the same page regarding their respective roles and responsibilities with the necessary budgetary and personnel support structures in place. As it stands, across most jurisdictions, there exists an imbalance between the State and the NGOs involved in addressing trafficking in persons in terms of support structures and cooperation.

South Africa has relied on inadequate legislation and policies to deal with trafficking in persons. Finally however, it has brought its law in line with international standards as well as in line with their international obligations. Although the introduction of this human-trafficking-specific law is to be celebrated, caution is to be taken regarding how the State plans on truly addressing the issue. Within this new law, it is evident that the State relies heavily on the work of NGOs and has accordingly legislated their expectations on NGOs in order to ensure their fulfilment of these duties. Although notable in recognising the significant role that NGOs play, and realising the 'prime position' they are in when it comes to understanding the best way to address the matter at hand, the State, within the Act, has created burdensome duties without due support afforded to the NGOs, both financially and structurally. The provisions, whilst vast and extensive, portray a top-heavy approach by the government to nongovernmental organisations, and do so without due regard for the positions the organisations are in or challenges they face (and are yet to face). A better defined and delineated relationship between both sectors needs to be established in order for each aspect of the struggle against trafficking to succeed as well as a more defined understanding of the various responsibilities attached in combatting trafficking in persons.

In terms of the Brazilian response to trafficking in persons, the Brazilian law has identified various components in addressing the matter of human trafficking, such as initiating human rights efforts to assist victims in the rehabilitation and reintegration back into society. There is however significant room for improvement in this regard, also in terms of the financial support accorded to the relevant stakeholders. However South Africa could learn from the direct intention of partnership and collaboration between the State and NGOs regarding trafficking in persons. Although ranked a Tier 2 in terms of the US TIP reports, it still requires an amendment of the Brazilian law itself, firstly, in order to be in line with the Palermo Protocol, and secondly, to appropriately respond to trafficking in persons within its confines.



Whilst there is great institutional mobilization and intention by the Brazilian government and its NGOs, the country has not yet reached a level effective on a national scale for guiding these institutions' responses. What is to be noted though is the clear provision and platform for the cooperation between States and NGOs and how both Stakeholders have an interest in addressing this matter vigorously.

Though briefly considered, Canada's response to addressing trafficking is still notable. Although not perfect, their approach to combatting trafficking in persons is such that it endeavours to be as inclusive as possible, within reason and practicality, to include NGOs and other relevant stakeholders and agencies. Whilst the law does not specifically outline NGOs' responsibilities, outlined in their 2012 National Action Plan are clear indicators of their initiative to work together with NGOs and to try ascertain the best ways forward. Canada is explicit in its recognition of the important role NGOs play. Whilst there are still areas of development for Canada's response to trafficking in persons, on a whole there is a positive perception of their response to combat trafficking. Areas needing attention include the provision of available victim services, funding for NGOs, and general prosecutions. Despite the few areas needing attention, South Africa would do well to learn from the measures adopted by Canada and the relationship that is encouraged between the State and its NGOs.

According to the Secretary General Report,<sup>295</sup> the following findings were made in respect of the relationship between relevant stakeholders in combatting trafficking in persons and which supports the notion of active cooperation between the stakeholders:

*“There are practical difficulties in national coordination of action against trafficking in persons at many levels: coordination is often lacking among various law enforcement agencies...this results in agencies working at cross-purposes....Governmental agencies must be better informed of the important contribution victim service providers make to law enforcement efforts. The respective roles and responsibilities of governmental agencies and NGOs should be clarified through memoranda of understanding. Priority should be given to State financial support for NGO service providers, and national referral mechanisms should be established.”*

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<sup>295</sup> United Nations, Background paper of the Secretary General, n.d., 'Improving the coordination of efforts against trafficking in persons', viewed on 17 September 2014, from [http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/SG\\_back\\_groundpaper.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/SG_back_groundpaper.pdf), (For full report, see CTOC/COP/WG.4/2009/2, Conference of the Parties to the United Nations Convention against Transnational Organized Crime), p12.

A common thread throughout the States is the strong presence of NGOs in relation to trafficking in persons. In this regard, the Secretary General found in his report that “with the emergence of trafficking in persons as a high-profile issue, the number of intergovernmental and non-governmental organizations, as well as bilateral aid programmes involved in this area, has dramatically increased. This has led to overlaps and duplications.”<sup>296</sup> Strategies and working plans need to be drafted and implemented jointly by all relevant agencies. This is to ensure the coordination of assistance provided for victims of trafficking and would go a long way in the quest for combatting trafficking in persons. The sharing of experiences, knowledge and data among the stakeholders adds to the efforts and which should be encouraged.

The trafficking protocol is an important model for national legislation, indicating conduct that should be sanctioned, the appropriate severity of punishment, and effective measures to combat and prevent trafficking.”<sup>297</sup> Such a protocol outlines the obligations of a state, requiring them to appropriately account for the offence of trafficking within their own domestic national legislation. The setting out of these obligations is to ensure compliance but also to streamline the approach adopted in combatting trafficking in persons. Usually, law enforcement agencies are mandated to respond to the challenges of this organized crime however the crime of trafficking in persons has many complexities and thus a “synergy of efforts is therefore indispensable”<sup>298</sup> among various stakeholders. “The anti-human trafficking response cannot be exclusively left to the domain of a police official at the police station. What is appropriate is an integrated and holistic response by a host of agencies including law enforcement officials, agencies concerned with justice delivery, social welfare and development, as well as civil society organisations, the media, academicians, [and others].”<sup>299</sup>

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<sup>296</sup> United Nations, Background paper of the Secretary General, n.d., ‘Improving the coordination of efforts against trafficking in persons’, viewed on 17 September 2014, from [http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/SG\\_back\\_groundpaper.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/SG_back_groundpaper.pdf), (For full report, see CTOC/COP/WG.4/2009/2, Conference of the Parties to the United Nations Convention against Transnational Organized Crime), p17.

<sup>297</sup> Barnett, L., 2006, ‘Trafficking in Persons’, PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>, p6.

<sup>298</sup> United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) n.d., Multi-stakeholder response to Human Trafficking, viewed 12 September 2014, from <http://www.ungift.org/knowledgehub/en/about/multi-stakeholder-response-to-human-trafficking.html>

<sup>299</sup> United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) n.d., Multi-stakeholder response to Human Trafficking, viewed 12 September 2014, from <http://www.ungift.org/knowledgehub/en/about/multi-stakeholder-response-to-human-trafficking.html>

It is evident that for trafficking in persons to truly be overcome, it will require the combined endeavours of NGOs and the State, working together and in support of each other. “Inter-agency coordination at a national level is paramount to a successful criminal investigation. Coordination of the roles of each agency involved in the human trafficking investigation can be defined under such instruments as National Referral Mechanisms, a Memorandum of Understanding or a National Action Plan. Agencies that are likely to be involved in human trafficking prosecution cases include police, immigration authorities, specialised NGOs, social services, interpreters and translators, judges, defence and prosecution lawyers.

Regarding South Africa’s approach to trafficking in persons and the various measures adopted by Brazil and Canada, it is evident that South Africa should adopt less stringent and more inclusive avenues should be explored to create better cooperation between the State and NGOs so that the response to trafficking in persons as a whole is a more realistic and appropriate. Support systems provided for in legislation between such role players with clear outlined roles and responsibilities would do well to ensure the successful prosecution of trafficking in persons. At the end of the day, however, “any policy is only as good as its implementation”.<sup>300</sup>

In conclusion, this study has shown how there exists a ‘disconnect’ between law, policy and actual lived experience, which can be attributed to a lack of proper regard for the relationship between the State and NGOs, thus affecting how best to deal with trafficking. Adequate financial consideration, definitive provisions on roles and responsibilities, and an attitude of true partnering and cooperation between States and NGOs, will go a long way in curbing trafficking in persons, nationally and globally. Whilst acknowledging that there has been positive steps taken by means of the creation of a ‘specialised’ and significant Act, it is not enough. The responsibilities enshrined in the Act overwhelm those players who are required to comply with its provisions and thus a more practical and subjective approach should be considered. The objectives of essentially freeing those enslaved should truly be core of the legislation, and not a shifting of responsibility, as has been created in the TIP Act.

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<sup>300</sup> Raymond JG., 2003, ‘The Ongoing Tragedy of International Slavery and Human Trafficking: An Overview – Testimony’, Hearings before the Subcommittee on Human Rights and Wellness of the Committee on Government Reform, House of Representatives, 108<sup>th</sup> Congress, University of Massachusetts, Amherst.

Policies reflecting the true status of NGOs, their various and differing experiences, and provisions permitting a more cooperative relationship between NGOs and the State should be included, especially considering the complex nature of the crime itself. There is no clear cut solution to the intricate operation of exploiting human beings, and thus a legislatively dictation by the State to NGOs to follow a stringent protocol is merely a superficial response. A genuine commitment to the freedom of people should be everyone's responsibility, however the law should be amenable to determining the roles played by various actors and make provision for the complete support and dedication in aiding and enabling wherever possible.

We have seen the fruits of this kind of commitment of partnership in Canada, which has been able to achieve and maintain a US Tier ranking 1. It is upon reflection of the various laws that the stringent provisions found in the new South African law for human trafficking should be revised in order to facilitate a strong working relationship between the State and NGOs. After all, "listening to the voice of those who work with individuals who are exploited for their labour and services across the country may be the next step in finding an effective solution for dealing with trafficking in persons".<sup>301</sup>

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<sup>301</sup> Barnett, L., 2006, 'Trafficking in Persons', PRB 06-24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, viewed 11 January 2015, from <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>, p20.

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## APPENDICIES

### Appendix A

#### TPVA Minimum Standards and Criteria<sup>302</sup>

##### (A) Minimum standards

For purposes of this chapter, the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination for victims of severe forms of trafficking are the following:

(1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.

(2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.

(3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.

(4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

##### (B) Criteria

In determinations under subsection (a)(4) of this section, the following factors should be considered as indicia of serious and sustained efforts to eliminate severe forms of trafficking in persons:

(1) Whether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking in persons, and convicts and sentences persons responsible for such acts, that take place wholly or partly within the territory of the country, including, as appropriate, requiring incarceration of individuals convicted of such acts. For purposes of the preceding sentence, suspended or significantly reduced sentences for

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<sup>302</sup> US Department of State, n.d., ‘Trafficking Victims Protection Act of 2000, Div. A of Pub. L. No. 106-386, s108, as amended’, viewed 19 September 2014, from <http://www.state.gov/j/tip/rls/tiprpt/2011/164236.htm>.

convictions of principal actors in cases of severe forms of trafficking in persons will be considered, on a case-by-case basis, whether to be considered as an indicator of serious and sustained efforts to eliminate severe forms of trafficking in persons. After reasonable requests from the Department of State for data regarding investigations, prosecutions, convictions, and sentences, a government which does not provide such data, consistent with the capacity of such government to obtain such data, will be presumed not to have vigorously investigated, prosecuted, convicted or sentenced such acts. During the periods prior to the annual report submitted on June 1, 2004, and on June 1, 2005, and the periods afterwards until September 30 of each such year, the Secretary of State may disregard the presumption contained in the preceding sentence if the government has provided some data to the Department of State regarding such acts and the Secretary has determined that the government is making a good faith effort to collect such data.

(2) Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by providing training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims.

(3) Whether the government of the country has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, about the causes and consequences of severe forms of trafficking in persons, measures to establish the identity of local populations, including birth registration, citizenship, and nationality, measures to ensure that its nationals who are deployed abroad as part of a peacekeeping or other similar mission do not engage in or facilitate severe forms of trafficking in persons or exploit victims of such trafficking, and measures to prevent the use of forced labor or child labour in violation of international standards.

(4) Whether the government of the country cooperates with other governments in the investigation and prosecution of severe forms of trafficking in persons.

(5) Whether the government of the country extradites persons charged with acts of severe forms of trafficking in persons on substantially the same terms and to substantially the same extent as persons charged with other serious crimes (or, to the extent such



extradition would be inconsistent with the laws of such country or with international agreements to which the country is a party, whether the government is taking all appropriate measures to modify or replace such laws and treaties so as to permit such extradition).

(6) Whether the government of the country monitors immigration and emigration patterns for evidence of severe forms of trafficking in persons and whether law enforcement agencies of the country respond to any such evidence in a manner that is consistent with the vigorous investigation and prosecution of acts of such trafficking, as well as with the protection of human rights of victims and the internationally recognized human right to leave any country, including one's own, and to return to one's own country.

(7) Whether the government of the country vigorously investigates, prosecutes, convicts, and sentences public officials who participate in or facilitate severe forms of trafficking in persons, including nationals of the country who are deployed abroad as part of a peacekeeping or other similar mission who engage in or facilitate severe forms of trafficking in persons or exploit victims of such trafficking, and takes all appropriate measures against officials who condone such trafficking. After reasonable requests from the Department of State for data regarding such investigations, prosecutions, convictions, and sentences, a government which does not provide such data consistent with its resources will be presumed not to have vigorously investigated, prosecuted, convicted, or sentenced such acts. During the periods prior to the annual report submitted on June 1, 2004, and on June 1, 2005, and the periods afterwards until September 30 of each such year, the Secretary of State may disregard the presumption contained in the preceding sentence if the government has provided some data to the Department of State regarding such acts and the Secretary has determined that the government is making a good faith effort to collect such data.

(8) Whether the percentage of victims of severe forms of trafficking in the country that are non-citizens of such countries is insignificant.

(9) Whether the government of the country, consistent with the capacity of such government, systematically monitors its efforts to satisfy the criteria described in paragraphs (1) through (8) and makes available publicly a periodic assessment of such efforts.

(10) Whether the government of the country achieves appreciable progress in eliminating severe forms of trafficking when compared to the assessment in the previous year.

(11) Whether the government of the country has made serious and sustained efforts to reduce the demand for

(A) commercial sex acts; and

(B) participation in international sex tourism by nationals of the country.

## Appendix B

### Jurisdictions of Departments <sup>303</sup>

#### National Secretariat of Justice Jurisdiction:

I - coordinate political justice, through coordination with other federal agencies, Judiciary, Legislature, Public Ministry, State Governments, international agencies and civil society organizations;

II - dealing with matters related to parental rating scale electronic gaming, entertainment and public radio and television programs and recommend to correspond with the ages and times appropriate placement;

III - handle matters related to nationality and naturalization and the legal regime of foreigners;

IV - instruct letters;

V - decide on the request, forfeiture and titling federal public service, medals and the installation of foreign civilian organizations to purposes of collective interest, such as associations and foundations in the country, in the area of its competence;

VI - registering and inspecting entities that perform microfilming services;

VII - describe the legal entities of private law as non-profit Civil Society Organizations of Public Interest and, if applicable, the confiscation of qualification;

VIII - drive, negotiate and coordinate studies relating to the integration law and the activities of judicial cooperation in international agreements to which Brazil is a party;

IX - to coordinate national policy on refugees;

X - represent the Ministry at the National Immigration Council; and

XI - to guide and coordinate actions aimed at combating money laundering and asset recovery.

Competence established by Decree No. 6,061, of March 15, 2007, Annex I

#### Department of Foreign Jurisdiction:

I - process, issue opinions and refer matters relating to nationality, naturalization and legal status of foreigners;

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<sup>303</sup> Ministry of Justice, Brazil, n.d., “Brazil Legal Framework and Brazilian Politics”, viewed on 26 June 2014, from <http://portal.mj.gov.br/main.asp?View={E8833249-5827-4772-BDC6-}>.

- II - process, issue opinions and forward issues related to the coercive measures of expulsion, extradition and deportation;
  - III - prosecuting cases relating to the transfer of prisoners to serve their sentence in their country of origin, from agreements to which Brazil is a party;
  - IV - instruct processes of recognition of refugee status and political asylum; and
  - V – provide administrative support to the National Committee for Refugees - CONARE.
- Competence established by Decree No. 6,061, of March 15, 2007, Annex I.

Department of Justice, Rating, Titles and Qualification Jurisdiction:

- I - registering entities that perform services microfilming;
  - II - investigate and analyse requests related to parental rating of public entertainment, radio and television programs, motion pictures, video and DVD players, electronic games, RPG (role playing), music video, scenic and musical performances;
  - III - monitor TV programs and recommend age groups and their schedules;
  - IV - supervise the entities registered at the Ministry; and
  - V - instruct the qualification of legal persons of private law non-profit as Civil Society Organizations of Public Interest . Competence established by Decree No. 6061 of 15 March 2007, Annex I and VI - Oversee and coordinate implementation of actions related to Combat Trafficking in Persons, reporting to the National Secretary of Justice
- Competence established by Ordinance No. 10, of May 9, 2011

Department of Assets Recovery and International Legal Cooperation Jurisdiction:

- I - coordinate, integrate and propose actions of the Government in matters relating to combating money laundering, transnational organized crime, asset recovery and international legal cooperation;
- II - to promote coordination of the organs of the executive, legislative and judicial branches, including the Federal and State Government Ministries, as regards the fight against money laundering and transnational organized crime;
- III - negotiate agreements and coordinating the implementation of international legal cooperation;
- IV - act as the central authority for the processing of requests for international legal cooperation;

V - coordinating the activities of the Brazilian state in international forums on preventing and combating money laundering and transnational organized crime, asset recovery and international legal cooperation;

VI - to instruct, opinions and coordinate the implementation of, including letters regarding active and passive international legal cooperation; and

VII - to promote the dissemination of information on asset recovery and international legal cooperation, preventing and combating money laundering and transnational organized crime in the country

Competence established by Decree No. 6,061, of March 15, 2007, Annex I

10 March 2016

**Ms Andrea Claire Mellon (210501040)**  
School of Law  
Howard College Campus

Dear Ms Mellon,

**Protocol reference number: HSS/1169/014M**

**New project title:** Legislation regarding the Role of State and NGOs in addressing trafficking in persons: A focus on sexual exploitation in South Africa and Brazil

**Approval Notification – Amendment Application**

This letter serves to notify you that your application and request for an amendment received on 15 December 2015 has now been approved as follows:

- Change in Title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

**PLEASE NOTE:** Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully



.....  
**Dr Shenuka Singh (Chair)**

/ms

Cc Supervisors: Dr Victoria Balogun and Dr Susan Kreston  
Cc Academic Leader Research: Dr Shannon Bosch  
Cc School Administrator: Mr Pradeep Ramsewak

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