

# **HUMAN TRAFFICKING FOR FORCED LABOUR AT SEA: AN ASSESSMENT OF NEW ZEALAND'S RESPONSE**

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by Thomas David Andrew Harré

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## Abstract

*The fishing industry is worth approximately \$1.4 billion annually to the New Zealand economy, making seafood New Zealand's fifth largest export earner, and giving the industry as a whole a position of high importance to New Zealand. All is not well however. Recent events have exposed a sordid underside to this industry involving the abuse of labour of foreign fishermen at the hands of Korean boat owners, chartered by New Zealand companies to fish New Zealand waters.*

*Since the introduction of the quota management system in the 1980s, the New Zealand fishing industry has had problems relating to the exploitation of migrant workers. In some instances, this exploitation appears to be manifested in the form of human trafficking. Adopting a socio-legal methodology, this thesis examines the facts that support claims of human trafficking of economically vulnerable fishers from countries such as Indonesia and the Philippines into New Zealand, where they are required to work in exploitative conditions upon foreign charter vessels in New Zealand's exclusive economic zone.*

*Having established the argument for the existence of human trafficking in New Zealand's territory (a claim which has been consistently downplayed or denied by government officials) this thesis then examines the evolving nature of the legal obligations that have been placed upon the New Zealand government by international law.*

*Combining these international obligations with standards of best practice that have been derived from an examination of three other jurisdictions— Australia, the United Kingdom and the United States of America – into a set of benchmark criteria, this thesis concludes with a critical assessment of the New Zealand anti-trafficking framework by these standards.*

## **Acknowledgements**

The process of researching and writing a thesis is challenging, and in this case would not have been possible without the support of a number of people. In particular, I would like to thank the following people who have played a significant role over the last year:

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Thanks are also due to the people who have made researching the content of this paper possible, in particular a number of people from Slave Free Seas, and Sara and Sue – law librarians extraordinaire! Thanks also to all the people who have been generous enough to proof read this work.

Lastly, I would like to thank my parents for always being positive when the subject matter of this thesis became too depressing (and having a constant supply of coffee and food on hand for caffeine and starvation-related emergencies), and to Michelle for her support and encouraging Skype calls.

## Note on style

Where possible, this thesis has followed the *New Zealand Law Style Guide*.<sup>1</sup> This thesis differs in respect to the format of headings, which have been numbered rather than listed alphabetically for the purposes of clarity. The bibliography also differs slightly, listing authors by their surname followed by an initial, as opposed to stating names in full. Some of the sources used in researching of this thesis were not covered by the style guide. In these cases, citation has been made consistently with the style of the guide. Lastly, due to widely recognised technical constraints associated with Microsoft Word 2007 which was used to write this thesis, there are anomalies in the continuity of footnote numbering in pages following two of the tables in this thesis. This affects the footnotes on pages 81-84, and 135-136.

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<sup>1</sup> G McLay, C Murray and J Orpin *New Zealand Law Style Guide* (2<sup>nd</sup> ed, Thomson Reuters, Wellington, 2011).

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*"We are slaves because normal employees have a voice, but we do not. ... In the old days slaves were paid and chained, now we are paid and trapped... but we are worse than slaves."*

– Crew members onboard Oyang 75.<sup>1</sup>

*"[It's] nothing more than workplace bullying."*

– New Zealand Police.<sup>2</sup>

## Introduction

### Background

For a large number of people working at sea fishing in New Zealand's waters over the last decade and a half, deception, coercion and exploitation have been a large part of day to day life.

Human trafficking for forced labour appears to exist in the New Zealand fishing industry. This is not a new problem, however it is only recently that it has begun to gain widespread recognition. Despite this increase in attention, from the perspective of legal academia, this research represents the first time that the issues surrounding this topic have been examined in depth. Outside of academia, very little work has been conducted on human trafficking in New Zealand.

It is a widely acknowledged fact that the Asia-Pacific region – in particular South-East Asian countries – serve as a major hub for trafficking in people.<sup>3</sup> While much research has been conducted on the countries in the Greater Mekong sub-region<sup>4</sup> in terms of being source, destination and transit countries, that research has not expanded to examine the countries usually defined as destination countries – including New Zealand. Such expansion is necessary in order to properly understand the nature of the transnational crime of human trafficking.

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<sup>1</sup> Quoted in C Stringer, G Simmons, D Coulston and H Whittaker "Not in New Zealand's Waters, Surely? Labour and Human Rights Abuses Aboard Foreign Fishing Vessels" (paper presented at Auckland University, August 2011).

<sup>2</sup> M Burgess "response to request" (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police).

<sup>3</sup> N Piper "A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania" (2005) 43(1/2) Intl Migration 203 at 203.

<sup>4</sup> Cambodia, China, Laos, Myanmar, Thailand and Vietnam.

## Hypotheses

This thesis hypothesises firstly that human trafficking appears to exist in New Zealand's fishing industry, and secondly that the government response to date has been inadequate to address the problems caused by human trafficking.

## Aims of the Research

Despite repeated reports of human trafficking in various forms – both sexual and labour based, very little research has been conducted with a focus on New Zealand, and that which has been done is fragmented and anecdotal.<sup>5</sup> This research aims to accumulate and critically evaluate some of the fragmented information that currently exists with regard to human trafficking in New Zealand, with a specific focus on human trafficking for forced labour in the New Zealand fishing industry. Through this, the present research aims to achieve five things.

- Establish an appropriate theoretical lens through which to present a jurisprudential inquiry into human trafficking in New Zealand.
- In light of the repeated denials of the New Zealand government in response to allegations of human trafficking, establish the extent to which human trafficking exists in New Zealand.
- Explore the ways in which the international legal anti-trafficking framework has developed since the coming into force of the Trafficking Protocol.
- Compile a framework drawing upon these international legal obligations, human rights jurisprudence, and the experience of Australia, the UK and the USA in order to facilitate an evaluation of the New Zealand response to human trafficking.
- Assess the New Zealand response to human trafficking with reference to this framework.

In seeking to achieve these five aims, the overarching point will be made that when taken as a whole, and viewed through an appropriate theoretical lens, the anti-trafficking measures that

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<sup>5</sup> The Pacific Immigration Directors Conference produces a semi-annual report that touches briefly and non-specifically on human trafficking in the Pacific region (Pacific Immigration Directors Conference *People Smuggling, Human Trafficking and Illegal Migration in the Pacific: A Regional Perspective: January to December 2008* (November 2009). There is a report on labour abuse occurring on Foreign Chartered Fishing Vessels operating in New Zealand waters (C Stringer, G Simmons and D Coulston "Not in New Zealand's Waters, Surely? Labour and Human Rights Abuses Aboard Foreign Fishing Vessels" 2011 New Zealand Asia Institute Working Paper 11-01). With respect to the commercial sexual exploitation of children in NZ, the NGO ECPAT has produced a report that tangentially addresses the issue of trafficking (ECPAT *Commercial Exploitation of Children in New Zealand* (2008)). In terms of research aimed specifically at human trafficking, there are three reports of relevance: Salvation Army *Report of the Pacific Trafficking in Persons Forum* (December 2011); S Coppedge *People Trafficking: An International Crisis Fought at the Local Level* (Fulbright, July 2006), and S Glazebrook J "Human Trafficking and New Zealand" (keynote address to the AGM of the New Zealand Women Judges' Association, 13 August 2010).

have been adopted by the New Zealand government in response to its legal obligations are insufficient. In light of the evidence, it appears that the New Zealand government's delayed reaction to dealing effectively with this issue is perpetuating a regulatory environment where human rights abuses can continue unchecked. More creative approaches that involve partnerships between government, NGOs and industry are needed.

### **Methodology**

In order to test the first hypothesis, this thesis presents an in-depth case study of a commercial fishing arrangement in New Zealand's exclusive economic zone, and suggests that the evidence – if proved in court – appears to fulfil all the legal criteria required under New Zealand law to support a conviction of human trafficking.

The second hypothesis will be tested through the application of a set of criteria to the New Zealand framework. These criteria are drawn from analysis of international law, regional law, and the domestic laws of Australia, the United Kingdom and the United States of America.

### **Socio-legal studies**

When studying a clandestine transnational crime such as human trafficking, it is necessary to be strongly aware of the limitations attached to traditional forms of legal and social science research. These limitations come to the fore when researching issues surrounding the intersections of criminal justice and law. In this context strictly traditional methods of legal research prove to be insufficient to fully analyse all the issues that emerge. A more flexible methodological framework is required. This thesis has used a broadly socio-legal lens through which to conduct research.

It has not been possible in the present research to conduct qualitative or quantitative studies with a representative sample of victims of human trafficking. Likewise it was not possible to conduct participant observation, or interviews with individuals still being victimised. Given appropriate resources however, this obstacle could be overcome.

The theory underlying socio-legal studies derives from the traditions of nineteenth century scholars such as Dicey, Durkheim, Marx and Weber.<sup>6</sup> The aim is to go beyond the boundaries of academic disciplines in order to understand law in society.<sup>7</sup>

The approach taken by socio-legal research differs from traditional legal research in two main respects. Firstly, it takes the study of law "outside the legal office."<sup>8</sup> It considers law, and the processes of law from a perspective that is often outside legal texts. Secondly, this approach

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<sup>6</sup> P Thomas "Socio-Legal Studies: The Case of the Disappearing Fleas and Bustards" in P Thomas (ed) *Socio-Legal Studies* (Dartmouth Publishing Co, Aldershot, 1997) 1 at 9.

<sup>7</sup> At 10.

<sup>8</sup> A Bradshaw "Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods" in P Thomas (ed) *Socio-Legal Studies* (Dartmouth Publishing Co, Aldershot, 1997) 99 at 99.

takes into account all sources of information that are relevant to the problem, and does not limit itself to academic materials.<sup>9</sup>

### **Sources**

The majority of the research for this thesis was “desk research” involving the “usual” sources of information for legal research: academic literature, journals, case law, legislation and so on. In addition to these sources, a number of more unusual sources were used, particularly with respect to chapter two of this thesis. A significant amount of information was obtained through the course of an extensive interview process with an industry source. This source, who must be kept confidential, has conducted interviews with a large number of former and current crew members employed by the Oyang Corporation to work on foreign charter vessels in New Zealand’s fisheries. These interviews are documented by verbatim transcripts, and are supported by signed and witnessed affidavits, as well as by additional documents such as employment contracts, bank statements and letters. Additional corroboration of this evidence is provided by research conducted by Korean civil society organisations. Due to the constraints of the ethics committee consent underlying this research, it is not possible to specifically cite the documents. Instead, citations refer to interviews with this confidential source.

Further information was obtained by extensive Official Information Act 1982 requests; by interviews with one of the police authorities on human trafficking, and interviews with lawyers working in this area. Lastly, information has been taken from the inaugural Immigration New Zealand training workshop on human trafficking, held in Wellington in December 2012.

### **Structure**

Chapter 1: Provides a criminological and legal overview of the concept of human trafficking in order to locate the present research within an appropriate academic context. This chapter proposes that the most appropriate theoretical lens by which to consider the issues surrounding human trafficking is that of a human rights oriented criminal justice approach. This chapter analyses the definition of human trafficking as per the United Nations Trafficking Protocol, and contrasts that with the definition of trafficking as found in the New Zealand Crimes Act 1961.

Chapter 2: This chapter begins with a brief history of human trafficking in New Zealand. It covers the various reports that have examined the issue; the ongoing denials of government officials of the existence of human trafficking, and documents instances in which various judicial bodies have had occasion to consider litigation in which the facts have pointed to

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<sup>9</sup> At 99.

human trafficking. The main focus of this chapter is the presentation of facts that support the allegation of human trafficking in the New Zealand fishing industry.

Chapter 3: This chapter expands upon the initial survey of the Trafficking Protocol covered in chapter one. The discussion in this chapter covers the remainder of the international framework, and discusses further legal developments that have occurred in this area since the coming into force of the Trafficking Protocol.

Chapter 4: Chapter four considers the different responses of Australia, the United Kingdom and the United States of America to the problems posed by human trafficking. Building on the findings of chapter three, and taking into account the strengths and weaknesses that are revealed by the analysis of these three jurisdictions, this chapter sets out a list of criteria that – if adopted by states – would constitute an effective criminal justice response to human trafficking. These criteria take into account the obligations on states as set out in chapter three, but also seek to integrate a focus on the human rights of victims of human trafficking which was set out in chapter one.

Chapter 5: This chapter assesses the New Zealand response to human trafficking based on the framework that was set out at the conclusion of chapter four. This chapter proposes a number of recommendations that if adopted would bring New Zealand's anti-trafficking framework into alignment with this framework. This chapter allows for a comparison of the effectiveness of New Zealand's anti-trafficking framework with the standards imposed by international law, and the standards as adopted by Australia, the UK and the USA.

# 1. Chapter 1

## 1.1. Introduction

From the beginnings of the formation of human rights law, it has been declared that it is fundamentally wrong for one person to have control over another. Human trafficking is an insidious modern manifestation of this control. In order to properly understand human trafficking as it exists in the New Zealand fishing industry, it is necessary to traverse all the levels of that problem. This chapter gives a theoretical overview of the concept of human trafficking in order to locate the current research in the wider academic, legal and social context of the problem as a whole. It will firstly cover the theoretical nature of the problem, before looking in turn at the problems caused by human trafficking at various legal levels: the international, the regional and lastly, and most in depth, the New Zealand level.

As is often the case in areas where domestic law intersects with international politics, the exact parameters of what constitutes human trafficking are heavily contested. It is beyond the scope of this research to look too deeply into this discussion; however it is useful to give an overview of the various arguments in order to give context to the United Nations definition of human trafficking that will be used in the present research.

Conceptually, human trafficking can be split into two categories: trafficking for sex, and trafficking for labour. Predominantly, the literature on human trafficking has focussed on the first category, whereas trafficking for labour is a relatively under-theorised area. Literature on sex trafficking is still useful for providing a theoretical background to labour trafficking, however it is a peculiar characteristic of this area that certain participants in the anti-trafficking movement have “hijacked” the debate, framing it in emotive – as opposed to academic – terms. An example of this is found in Kevin Bales’ *Understanding Global Slavery*,<sup>1</sup> with chapter titles such as “Slavery and the Human Right to Evil” and “Globalisation and Redemption”.<sup>2</sup> Other examples of this hijacking are not difficult to find: The *New York Times* columnist Nicholas Kristof often writes dramatic tales of forced prostitution;<sup>3</sup> an appearance in the 2005 movie

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<sup>1</sup> K Bales *Understanding Global Slavery: A Reader* (University of California Press, California, 2005).

<sup>2</sup> At 7. The text includes statements that “a community that allows slavery in its midst is sick to its core”, and discusses the “sickness of slavery.”

<sup>3</sup> Nicholas Kristof “Opinion Pages” *The New York Times* (online ed, New York).

“Human Trafficking” has turned the actress Mira Sorvino into an “expert” on trafficking;<sup>4</sup> and recently the adoption of human trafficking by Hollywood celebrities as a cause célèbre.<sup>5</sup>

The effect of this hijacking has been to create oversimplified moral imperatives to “rescue” victims of human trafficking. These moral imperatives that are brought to play by the so-called “rescue industry”<sup>6</sup> create a narrative that does no favours to either victims of labour trafficking, or the coherent development of the law on human trafficking. Arguably, the effect of these melodramatic narratives is to replace the right of a victim to seek different remedies with a single right to be “rescued”.<sup>7</sup> It homogenises victims and proposes a “one size fits all” solution to a highly complex and nuanced problem.<sup>8</sup>

The oversimplification of the issues can be seen carried through in the definitions of trafficking proposed by proponents of this rescue industry. As an example, Bales defines human trafficking as:<sup>9</sup>

A relationship in which one person is controlled by another through violence, the threat of violence, or psychological coercion, has lost free will and free movement, is exploited economically, and is paid nothing beyond subsistence.

Unlike more technical definitions of human trafficking, this is a very wide interpretation of human trafficking, as it would also encompass many other forms of exploitation, including traditional forms of slavery, debt bondage and forced labour.

This theoretical<sup>10</sup> conflation of human trafficking with slavery by academics such as Bales stands in contrast to academics at the other end of the spectrum. Professor James Hathaway rejects such a wide interpretation of the concept, arguing that it serves only to detract from the effectiveness of the anti-slavery movement. Hathaway contends that the dialogue surrounding the international law of human trafficking allows States to formally address the problems of modern slavery,

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<sup>4</sup> C Vance “States of Contradiction: Twelve Ways to do Nothing About Trafficking While Pretending to” (2011) 78 Soc Res 933 at 941.

<sup>5</sup> K McLaughlin “Moore, Kutcher: Join our Crusade to end Child Sex Trafficking” *CNN* (online ed, Atlanta, 14 April 2011).

<sup>6</sup> See J Doezema “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women” (2000) 18(1) *Gender Issues* 23.

<sup>7</sup> Vance, above n 4, at 941.

<sup>8</sup> At 942.

<sup>9</sup> K Bales, Z Trodd and AK Williamson *Modern Slavery: The Secret World of 27 Million People* (Oneworld Publications, Oxford, 2009) at 31.

<sup>10</sup> As distinct from legal. As will become apparent in chapter four, from the perspective of a prosecutor there are some practical benefits to be gained from charging a defendant with a variety of offences.

without needing to take substantive steps to do so.<sup>11</sup> In addition, conflating the two distinct concepts also leaves no room for instances of trafficking where a victim seeks work in a foreign country knowing that they may be vulnerable to exploitation.<sup>12</sup>

The definition contained within the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children<sup>13</sup> sits somewhere between these two poles. It takes a position where three elements must be shown in order to fulfil the requirements for trafficking – an action, a means, and a purpose.<sup>14</sup> In some cases, human trafficking will also fall within the parameters of slavery, as defined at international law, however this will not always be the case.

There are several reasons to adopt the strictly legal definition such as the United Nations one in the present research rather than a social one like Bales'. Firstly, it avoids the politicised debate about the social parameters of human trafficking. Secondly, it is the definition on which the New Zealand government based its anti-trafficking framework.<sup>15</sup> Thirdly, the Protocol definition reflects the opinions of a large number of states internationally.<sup>16</sup> Fourthly, the Protocol definition is broad enough to cover all forms of human trafficking.

## 1.2. Quantifying the problem

Due to the underground nature of the crime of human trafficking, reliable data is difficult to come by, and is highly disputed. The United Nations estimates that each year 2.5 million people – mostly women and children – are trafficked internationally.<sup>17</sup> Trafficking revenue has been estimated at \$9.5 billion USD per annum.<sup>18</sup> These figures are often cited; however it is difficult to understand quite how the numbers are derived. The 2006 annual Trafficking in Persons Report, produced by the United States State Department, which attempts to scientifically measure the

<sup>11</sup> JC Hathaway "The Human Rights Quagmire of 'Human Trafficking'" (2008) 49 Va J Intl L 1 at 4.

<sup>12</sup> See generally S Jones "Human Trafficking Victim Identification: Should Consent Matter" (2012) 45 Ind L Rev 483. See also K Warren "Troubling the Victim/Trafficker Dichotomy in Efforts to Combat Human Trafficking: The Unintended Consequences of Moralising Labour Migration" (2012) 19 Ind J Global Stud 105.

<sup>13</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319 (opened for signature 15 November 2000, entered into force 25 December 2003)[Trafficking Protocol].

<sup>14</sup> A Gallagher *The International Law of Human Trafficking* (Cambridge University Press, Cambridge, 2010) at 29.

<sup>15</sup> Although as will be discussed later in this chapter, in practice New Zealand has not fully implemented this definition so the Article 3(a) definition serves to act as a useful benchmark for assessing New Zealand's performance.

<sup>16</sup> At the time of writing, there are 117 Signatories to the Protocol, and 147 Parties.

<sup>17</sup> "UN-backed Container Exhibit Spotlights Plight of Sex Trafficking Victims" (6 February 2008) UN News Centre <www.un.org>.

<sup>18</sup> 2005 *Trafficking in Persons Report* (US Department of State, June 2005) [TIP 2005] at 6.



global extent of human trafficking uses the figure of 600,000 victims of trafficking annually,<sup>19</sup> however it does not cite any sources for this information, nor is it possible to determine from other sources where this information stems from. In her statement made on the release of the 2011 TIP report, US Secretary of State Hillary Clinton stated that an estimated 27 million people are currently victims of trafficking.<sup>20</sup> This is a contested figure however, as it is not possible to determine the accuracy of it, and indeed earlier instances of the TIP report presented significantly different estimates, again with no hint as to the origins of the figure given.<sup>21</sup>

A recent report produced by the United States Government Accountability Office (GAO)<sup>22</sup> set out several serious criticisms of the methodology used by the authors of the Trafficking in Persons Report. Specifically, the report found that the accuracy of estimates was dubious, as the figures had been derived by a single individual who did not fully document his work, meaning that the estimate is not replicable.<sup>23</sup> The report also states that there are methodological weaknesses, gaps in data, and discrepancies in the numbers that call the reliability of the Report's statistics into question.<sup>24</sup>

Other agencies are also culpable with respect to the presentation of statistically unverifiable data.<sup>25</sup> The widely varying figures can be seen in Figure 1 below.

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<sup>19</sup> *2006 Trafficking in Persons Report* (US Department of State, June 2006) [TIP 2006] at 6.

<sup>20</sup> H Clinton "Remarks on the Release of the 2011 Trafficking in Persons Report" (press release, 27 June 2011).

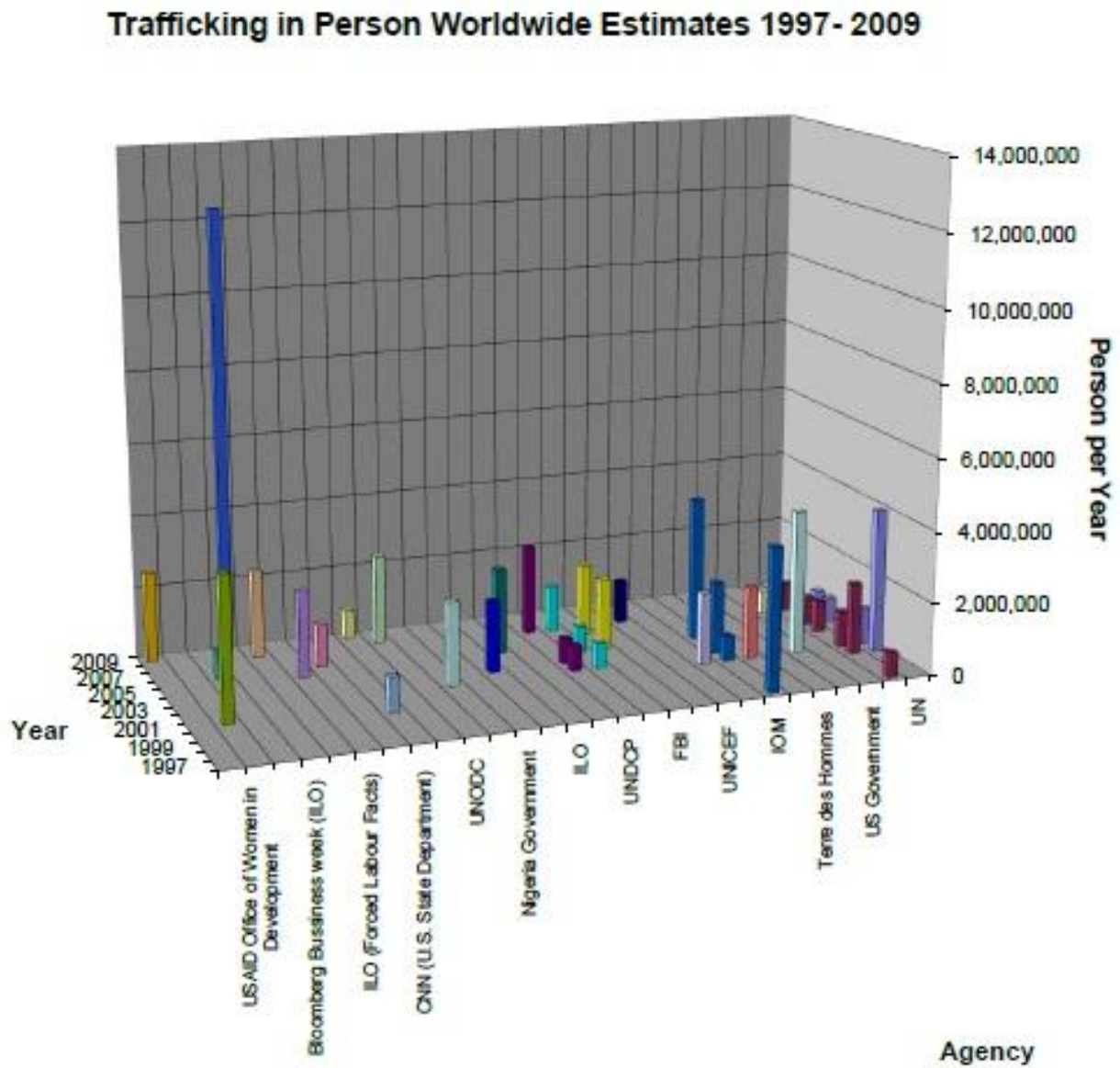
<sup>21</sup> The TIP 2006 report gave a figure of 600,000 victims. The 2008 report estimated the number as 800,000 victims.

<sup>22</sup> *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad* (United States Government Accountability Office, GAO-06-825, 18 July 2006).

<sup>23</sup> At 10.

<sup>24</sup> At 10.

<sup>25</sup> For example, UNICEF state that there are 1.2 million children in sexual slavery ("Children are Still Being Trafficked 200 Years after the Abolition of the Slave Trade" (25 March 2007) UNICEF Press Centre <[www.unicef.org](http://www.unicef.org)>). See also generally D Feingold "Trafficking in Numbers" in P Andreas and K Greenhill (eds) *Sex, Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict* (Cornell University Press, Ithaca, 2010) 46.

Figure 1<sup>26</sup>

<sup>26</sup> United Nations Educational, Scientific and Cultural Organisation "Trafficking Project: Trafficking in Person Worldwide Estimates 1997-2009" (2011) UNESCO Bangkok <[www.unescobkk.org](http://www.unescobkk.org)>.

### 1.3. The Concept of Human Trafficking

This section will present a theoretical concept of human trafficking. This is essential as without a proper understanding of the nature of the issue, it is not possible to formulate effective responses to trafficking. As is suggested in chapter two, it appears that a key reason for the lack of prosecutions for human trafficking in New Zealand is an incomplete knowledge by authorities and officials of the parameters of the offence.

#### 1.3.1. Criminological

Transnational crime is driven by a desire for profit. This means that the actors involved in trafficking take a diverse range of forms. With sex trafficking, often husbands, boyfriends, family members or acquaintances may be the people recruiting women, and trading them into the international prostitution market.<sup>27</sup> Some commentators have argued that this cottage industry dimension to the sex trafficking problem makes combating sex trafficking more difficult than the often more organised crime of migrant smuggling.<sup>28</sup>

The literature reveals four key perspectives for viewing the problem of trafficking: as a migration issue; as a feminist issue; as a criminal issue and as a human rights issue. These are not merely academic arguments, but have serious implications for the way that the offence is dealt with, and how victims are identified.<sup>29</sup> I will argue that instead of doctrinally and rigidly adopting any one of these perspectives, it is more appropriate to adopt a criminal justice approach which draws from all of the viewpoints.

##### 1.3.1.1. Migration approach

From the perspective of migration, human trafficking can be conceptualised as simply an exploitative form of migration between states. David Feingold summarises this approach well in relating the account of a hypothetical victim of trafficking:<sup>30</sup>

Trafficking is a process, not a discrete act. For example, a Shan woman flees her village to escape being press ganged by the Burmese army. At this point, she is an internally displaced person.

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<sup>27</sup> K Carrington and J Hearn *Trafficking and the Sex Industry: From Impunity to Protection* (Parliament of Australia, Current Issues Brief no. 28, 2002-03, 13 May 2003) at 3. See also Y Tverdova “Human Trafficking in Russian and Other Post-Soviet States” (2011) 12 Human Rights Rev 329, writing generally about causes of sex-trafficking in Russia.

<sup>28</sup> Hearn and Carrington at 3.

<sup>29</sup> S Jones “Human Trafficking Victim Identification: Should Consent Matter?” (2012) 45 Ind L Rev 483 at 488.

<sup>30</sup> D Feingold “Trafficking in Numbers” in P Andreas and K Greenhill (eds) *Sex, Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict* (Cornell University Press, Ithaca, 2010) 46 at 69.

Then, without money, she seeks a job in a town on the Burma side of the Thai border. If encountered then, she might be seen as an internal economic migrant. If she crosses the border without proper papers, she becomes an undocumented or illegal migrant. If she is deceived and exploited, she becomes a trafficking victim. ... Although some victims are quite literally kidnapped from their homes, for most, trafficking is linked to a migration event gone awry. ... Trafficking is a dynamic phenomenon, the patterns of which evolve through time. These patterns change not only in response to varying labour demands at destinations, but also in relation to changing social, economic, and social changes in source areas.

The problem with this perspective is that State authorities often fail to differentiate between the points on the spectrum of migration, and misidentify trafficking victims as being smuggled, or vice versa.<sup>31</sup> At one end there is legal migration, moving to asylum seekers, illegal migration, and human trafficking at the other extreme.<sup>32</sup> The implication of this is that incorrect categorisation of migrants leads to situations where victims of trafficking are deported, or even prosecuted.<sup>33</sup> Another problem is that the inherent emphasis in the Trafficking Protocol on national border control has provided states with a reason to intensify efforts at the border to prevent the arrival or entry of unauthorised individuals into that state. In some cases, this will prevent genuine refugees who have enlisted the services of a smuggler or trafficker from being able to seek refugee status.<sup>34</sup>

### 1.3.1.2. Feminist approach

From the feminist perspective, the most troubling aspect of human trafficking is how it deals with the issue of prostitution. This is a debate that has polarised feminist thought. One side of the argument holds that prostitution is an inherently exploitative activity, and as such the concept of trafficking should cover any situation where a woman is prostituted.<sup>35</sup> The opposing argument holds that prostitution is a viable economic choice, and that international anti-trafficking instruments are capable of specifically addressing only the exploitative elements of prostitution.<sup>36</sup> From this perspective, any reference to prostitution should be understood to mean

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<sup>31</sup> Jones, above n 29, at 488.

<sup>32</sup> S Inglis "Expanding International and National Protections Against Trafficking for Forced Labour Using a Human Rights Framework" (2001) 7 Buff Hum Rts L Rev 55 at 96-97.

<sup>33</sup> This type of situation certainly occurs in New Zealand. It is discussed in greater detail in chapter two of this thesis.

<sup>34</sup> Hathaway, above n 11, at 6.

<sup>35</sup> One of the main proponents of this school of thought is the Coalition Against Trafficking in Women, an American based NGO. See further <[www.catwinternational.org](http://www.catwinternational.org)>. See also generally K Barry *Female Sexual Slavery* (New York University Press, New York, 1984).

<sup>36</sup> The Global Alliance Against Traffic in Women <[www.gaatw.org](http://www.gaatw.org)> takes this position. See also generally L Agustin *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books, London, 2007).

“forced prostitution”.<sup>37</sup> This position is reinforced by a United Nations General Assembly Declaration of 1993 which provided that violence against women should be understood to include trafficking in women and forced prostitution.<sup>38</sup>

### 1.3.1.3. Criminal approach

The criminal perspective of human trafficking puts the focus squarely on the perpetrators of the offence, and the maintenance of state security. The Protocol itself is weighted towards a criminal approach,<sup>39</sup> requiring States to criminalise trafficking in all its forms; prosecute and punish traffickers; strengthen border controls, and co-operate internationally with other states to ensure successful prosecutions of traffickers.<sup>40</sup>

Although this approach is framed in terms of criminalising the conduct of traffickers, the effect is to prevent permanent migration by victims of human trafficking. This purpose is not explicitly stated, however its existence is made clear through an examination of data surrounding the issuance of visas to victims of trafficking. For example, in the United States a victim of trafficking is entitled to apply for a “T-visa”, which allows them to remain lawfully in the country. Prior to a 2008 amendment, the condition attached to this though was that the victim must cooperate fully with all relevant authorities to prosecute their trafficker. If they failed to do so, the visa could be revoked.<sup>41</sup> There are tight limits on the number of T-visas that may be issued each year – the number is much lower than the reported estimates of victims of trafficking entering the USA.<sup>42</sup> The T-visas are also difficult to obtain. Although 40,000 T-visas were authorised to be granted during the period 2002-2009, only 1,591 were awarded.<sup>43</sup>

The extent to which this privileges state security priorities over victims’ rights can be seen when this approach is contrasted with Italian law, which provides for a renewable six-month visa

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<sup>37</sup> Inglis, above n 32, at 70.

<sup>38</sup> *Declaration on the Elimination of Violence against Women* UN Doc A/RES/48/104 (1993).

<sup>39</sup> Hathaway, above n 11, at 2.

<sup>40</sup> A Gallagher and P Holmes “Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line” (2008) 18 Intl Criminal J Rev 318 at 320. These obligations are expanded upon in chapter three of this thesis.

<sup>41</sup> Discussed further in chapter four of this thesis.

<sup>42</sup> Vance, above n 4, at 937.

<sup>43</sup> *Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2009* (United States Department of State, Office to Monitor and Combat Trafficking in Persons, 1 June 2009) at 37-38.

available to all victims without any requirements attached, other than that they be “in danger,” and willing to enter social re-engagement programmes.<sup>44</sup>

This approach reflects a response to a specific criminological view of the nature of human trafficking. This view can be described as viewing human trafficking as a crime which needs to be responded to by specifically targeting traffickers, and generally ignoring the needs of victims, and the culpability of consumers of products and services of victims of trafficking.

#### **1.3.1.4. Human rights approach**

Lastly, human trafficking can be conceptualised from a human rights perspective. This is important in the context of abuse in the fishing industry. The framing of fisher’s labour rights as human rights is supported by international law. The United Nations has recognised the strong connection between economic migration and human rights. The preamble to the International Convention on the Protection of the Rights of all Migrant Workers reinforces this, explicitly stating the need to protect the rights of “all migrant workers and their families.”<sup>45</sup> In addition, Article 99 of the United Nations Convention on the Law of the Sea (UNCLOS) which was ratified by New Zealand in 1996 contains a general prohibition on the transport of slaves. It states that:<sup>46</sup>

Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.

The implication of this is that it is not legally possible under international law to be a slave on board a ship. Like several international human rights treaties, UNCLOS refers to slavery and its related concepts without ever explicitly defining what is meant by those terms.<sup>47</sup>

It has been argued by the author of the leading commentary on UNCLOS that in certain cases – including the situation where fishers are kept at sea in conditions of slavery – this will apply to human trafficking.<sup>48</sup> This is caveated by noting that this will only occur in the most extreme cases of trafficking, but the author goes on to define “extreme” by reference to situations that are

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<sup>44</sup> N Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) at 44.

<sup>45</sup> International Convention on the Protection of the Rights of all Migrant Workers 220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003), preamble [Migrant Workers Convention].

<sup>46</sup> United Nations Convention on the Law of the Sea 1833 UNTS 1 (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS], art 99.

<sup>47</sup> *Prosecutor v Kunarac* (Judgment) ICTY Appeals Chamber IT-96-23-T, 22 February 2001, at [533] [Kunarac].

<sup>48</sup> D Guilfoyle *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge, 2009) at 76.

documented to occur frequently in the fishing industry.<sup>49</sup> There is some suggestion that a revised definition of slavery requires that a person be “treated like property”.<sup>50</sup> This solves the difficulty around the issue of having ownership rights over another person. Another definition focuses on the core of the crime – the objectification of a human being – requiring the “[reduction of] a person to a status or condition in which any or all of the powers attaching to the right of property are exercised”.<sup>51</sup>

Further, when one examines the travaux préparatoires behind the drafting of Article 99 a clear intention emerges that in addition to slavery per se, this article includes within its scope “persons in conditions akin to slavery”<sup>52</sup> thus bringing human trafficking within its ambit. Article 99 can be seen as creating a link between human rights law dealing with the abolition of slavery and the law of the sea.<sup>53</sup> It is supported by Article 110(1)(b) allowing inspection of vessels suspected of carrying victims of slavery by certain authorised vessels.<sup>54</sup> This provides a limited but universal right of visit and search where fishers are being trafficked into slavery.<sup>55</sup> The effect of Article 99 is not limited to the high seas, but is given territorial reach into a state’s exclusive economic zone (EEZ) by virtue of Article 58(2).<sup>56</sup>

### 1.3.1.5. Criminal justice approach

It is suggested however that the most appropriate approach towards conceptualising human trafficking is a hybrid one which takes all the various elements into account. The four approaches mentioned are not mutually exclusive, although they are often treated as such in the literature. As Anne Gallagher has argued, an effective response to human trafficking requires “holistic, interdisciplinary and long-term” vision.<sup>57</sup> Specifically, this includes the following principles: trafficking should be criminalised in all its manifestations, targeting the “consumers” of victims of trafficking as well as the traffickers themselves; traffickers should be prosecuted and punished;

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<sup>49</sup> At 76.

<sup>50</sup> United Nations Office on Drugs and Crime *Model law against trafficking in persons* (UNODC, Vienna, 2009) [Model Law] at 21.

<sup>51</sup> At 21. An example of this approach can be found in s 270.1 of Australia’s Criminal Code 1995 (Cth).

<sup>52</sup> M Nordquist (editor in Chief) *UNCLOS 1982 Commentary, Vol 2* (Kluwer Law International, The Hague, 1995) at 180.

<sup>53</sup> At 181.

<sup>54</sup> UNCLOS art 110 provides that a warship may board a foreign vessel at sea where there is reasonable suspicion that the vessel is engaged in the slave trade. The circumstances in which this may occur are governed by art 111.

<sup>55</sup> Guilfoyle, above n 48, at 226.

<sup>56</sup> UNCLOS art 58(2) states that “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”.

<sup>57</sup> A Gallagher “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: a Preliminary Analysis” (2001) 23 Hum Rts Q 975 at 1004.

border controls should be strengthened in a manner that will allow for effective fighting of trafficking; there should be international cooperation with regard to instances of transnational trafficking. Victims should be supported because of their status as victims of crime; and lastly, victims should not be prosecuted for status-related offences.<sup>58</sup>

An issue which has not been addressed in the literature in this area relates to the rights of the traffickers themselves. A criminal justice approach must take seriously the rights that should be afforded to human traffickers in order to maintain a fair and balanced legal system.

A criminal justice approach regards the problems posed by human trafficking in a manner which recognises the complex nature of the offence. The migration perspective is useful in the way that a state will already have border controls in place, and with appropriate training, border officials will be able to detect certain signs that point to the existence of human trafficking. The criminal approach uses the mechanisms available to the Police to further investigate the offence. Admittedly, the various approaches to human trafficking outlined here contain some contradictions. These can be resolved by giving primacy to the human rights approach, where human rights are not a separate consideration, but are “the common thread which should serve as a foundation and reference point for all undertakings in this area.”<sup>59</sup> As it relates to trafficking for forced labour, a well-rounded approach must balance protection of victims with prosecution of perpetrators.

### **1.3.2. Legal**

#### **1.3.2.1. Review of human trafficking at different levels**

Having considered the theoretical nature of human trafficking, I will now turn to consider the legal context within which it is situated.

The legal framework surrounding human trafficking has an international element, a regional element and a national element. This section examines each level, beginning with a brief overview of the history of international anti-trafficking agreements leading up to the negotiation of the Trafficking Protocol.

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<sup>58</sup> Gallagher and Holmes, above n 40, at 320.

<sup>59</sup> Gallagher, above n 57, at 1004.



### 1.3.2.2. Responses to human trafficking at the international level

Human trafficking today is a transnational crime. A by-product of globalisation, transnational crimes are distinct from international crimes in several respects. Whereas international criminal law recognises certain “core crimes” – those listed in the Rome Statute of the International Criminal Court<sup>60</sup> – transnational crimes are “crimes of international concern”,<sup>61</sup> found in treaties. Transnational criminal law is “the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects”.<sup>62</sup> Because of these wide-ranging effects, in order to properly prosecute offenders States must pass legislation that allows them to exercise extraterritorial jurisdiction over elements of the offence that occurred outside their borders.

In many of the multilateral treaties that create transnational crimes, extraterritorial jurisdiction will be provided for based on the principle of *aut dedere aut judicare* – meaning “extradite or prosecute”.<sup>63</sup> Alternatively, the concept of absolute universality holds that states can claim extraterritorial jurisdiction in the absence of a traditionally recognised connection or treaty obligation. The justification for this is argued to be in the protection and enforcement of jus cogens, or peremptory norms which are necessary for the maintenance of international order.<sup>64</sup> Earlier incarnations of absolute universal jurisdiction related to acts of piracy on the high seas in which the danger to international society was apparent.<sup>65</sup> International crimes such as genocide, crimes against humanity and war crimes have since been asserted as rules of jus cogens.<sup>66</sup> Accordingly, this obligates states to enforce them in the interests of the common good. States aiming to establish absolute universal jurisdiction may not require the presence of an accused within their territory.<sup>67</sup> This significantly widens the ambit of potential prosecutions for international crimes and is consequently especially controversial.

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<sup>60</sup> The Rome Statute is the founding document of the International Criminal Court, and gives the Court jurisdiction over a number of offences, namely: genocide, crimes against humanity, war crimes and the crime of aggression.

<sup>61</sup> N Boister “Transnational Criminal Law” (2003) 14 EJIL 953 at 953.

<sup>62</sup> At 955.

<sup>63</sup> I Bantekas and S Nash *International Criminal Law* (2<sup>nd</sup> ed, Cavendish Publishing, London, 2003) at 161.

<sup>64</sup> MC Bassiouni and EM Wise *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers, London, 1995) at 51.

<sup>65</sup> M Sornarajah “Transnational Crimes: The Third Limb of the Criminal Law” (2004) 2 Sing J Legal Studies 390 at 396.

<sup>66</sup> C de Than and E Shorts *International Criminal Law and Human Rights* (Sweet & Maxwell, London, 2003) at 9-10. S Scarpa *Trafficking in Human Beings: Modern Slavery* (Oxford University Press, Oxford, 2008) at 78-81. MC Bassiouni “Enslavement as an International Crime” (1990-1991) 23 NYU J Intl L & Pol 445 at 445.

<sup>67</sup> RP Rabinovitch “Universal Jurisdiction in Absentia” (2004) Working Paper No 279, Fordham University School of Law at 6.

Article 53 of the Vienna Convention on the Law of Treaties 1969 provides in part that:<sup>68</sup>

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

There are few norms which can be authoritatively said to have this character.

It is clear that the international norm against slavery has *jus cogens* status.<sup>69</sup> As the United States 2nd Circuit Court of Appeals stated in *Filitarga v Pena-Irala* “the torturer has become like the pirate and slave trader before him ... an enemy of all mankind”.<sup>70</sup> This statement of the Court was affirmed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Furundzija*.<sup>71</sup> Although there is some jurisprudence in favour of the argument that human trafficking falls within the *jus cogens* norm attaching to slavery,<sup>72</sup> there are also certain characteristics of human trafficking that differentiate it from traditional slavery. As discussed above, in its contemporary form, slavery has been defined as “a relationship in which one person is controlled by another through violence, the threat of violence, or psychological coercion, has lost free will and free movement, is exploited economically, and is paid nothing beyond subsistence”.<sup>73</sup> Whilst this definition may accurately reflect the social interpretation of modern slavery, it is important to consider the stricter parameters of the legal definition. Most importantly, there is no requirement of ownership of the trafficked victim. In addition, the racial element that was often used to justify slave ownership is no longer relevant, as profit from slavery is now the driving motive.<sup>74</sup>

In this regard, the term “slavery” refers specifically to chattel slavery, which is the right of the “master” of a slave to treat the slave as a possession, especially in the way that the master could dispose of the slave by selling or transferring it to another person.<sup>75</sup> The key element in this is

<sup>68</sup> Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 53.

<sup>69</sup> de Than and Shorts, above n 66, at 9-10; Scarpa, above n 66, at 78-81; Bassiouni, above n 66, at 445.

<sup>70</sup> *Filitarga v Pena-Irala* 630 F 2d 876 (2d Cir 1980) at 890.

<sup>71</sup> *Prosecutor v Furundzija* (Judgment) ICTY Appeals Chamber, IT-95-17/1-T, 10 December 1998 at [166].

<sup>72</sup> T Obokata *Trafficking of Human Beings from a Human Rights Perspective* (Martinus Nijhoff Publishers, Leiden, 2006) at 18.

<sup>73</sup> Bales, Trodd and Williamson, above n 9, at 31.

<sup>74</sup> At 31.

<sup>75</sup> D Weissbrodt “Updated Review of the Implementation of and Follow-up to the Conventions on Slavery” UN Doc E/CN.4/sub.2/2000/3 (2000) at [18].

ownership.<sup>76</sup> It must be noted though that “ownership” has a more nuanced meaning than may first appear. Legally, it is not possible to *own* a human being. Consequently, traditional chattel slavery cannot legally exist on the basis of this interpretation of the word. By implication, ownership must mean something more than this. In the *Kunarac* case, the Appeals Chamber of the ICTY affirmed the position set out by the Trial Chamber that “the actus reus of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person”.<sup>77</sup> The Court stated that the fact of enslavement will depend on the existence of particular factors in any given case, including the control of an individual’s movement or physical environment; psychological control; measures taken to prevent escape and the use of force or the threat of force.<sup>78</sup>

This position of taking each case on its own facts to determine whether the exploitation involved in trafficking amounts to slavery appears to have been extended somewhat by a recent judgment of the European Court of Human Rights. In the case of *Rantsev v Russia & Cyprus*,<sup>79</sup> the Court considered the *Kunarac* judgment,<sup>80</sup> and held that by its nature, trafficking is inherently “based on the exercise of powers attaching to the right of ownership.”<sup>81</sup>

The preceding discussion demonstrates that the crime of human trafficking does not fall within the ambit of the jus cogens norm against slavery. Despite this, there is likely to be room in some cases for human trafficking to be prosecuted at the international level.

In some circumstances human trafficking will be cognisable by the ICC under its jurisdiction over crimes against humanity. The Rome Statute recognises enslavement as a crime over which the Court has jurisdiction,<sup>82</sup> so long as the threshold of “sufficient gravity” is met.<sup>83</sup> This threshold is determined by Article 7, which sets out a number of preconditions that must be met before a prosecution could proceed.

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<sup>76</sup> J Allain *The Slavery Conventions : The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff, London, 2008) at 59. See also A Gallagher “Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway” (2009) 49 VJIL 789 at 799-810.

<sup>77</sup> *Kunarac*, above n 47, at [116].

<sup>78</sup> The Court stated that this is not an exclusive list, and it is not possible to exhaustively list all the possible indicia that would lead to a finding of enslavement in a given case. At [119].

<sup>79</sup> *Rantsev v Russia & Cyprus* (25965/04) First Section, ECHR 10 January 2010.

<sup>80</sup> At [280].

<sup>81</sup> At [281].

<sup>82</sup> Rome Statute of the International Criminal Court 2187 UNTS 90(opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute] art 7(1)(c).

<sup>83</sup> At art 17(1).

- Firstly, the actions must be widespread or systematic. “Widespread” refers to the large-scale nature of the attack and the number of victims, while the phrase “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence”.<sup>84</sup> Whether it is widespread or systematic is a relative exercise, determined depending on the population attacked and the nature of the attack.<sup>85</sup> Although traditionally applied to actions of state officials, it has been argued that employees of large corporations could also be covered by the Rome Statute. One commentator cites the example of a Russian trafficking ring as being sufficiently widespread and systematic.<sup>86</sup>
- Secondly, the attack must be carried out as part of a state or organisational policy. Human trafficking would fall under the organisational branch of this requirement. The existing jurisprudence on this point suggests that such a policy does not need to be expressly stated, and can be inferred from the actions that take place.<sup>87</sup>
- Thirdly, the attack must be directed against a civilian population. The term “population” emphasises the large scale required for a prosecution to proceed.<sup>88</sup>
- Lastly, there is the requirement that the accused must have knowledge of the attack. This requirement would mean that in a prosecution for human trafficking, it is likely that only the ringleaders would be prosecuted.<sup>89</sup>

### 1.3.2.3. History of international anti-trafficking agreements

Since the early 20<sup>th</sup> century, various attempts have been made to end human trafficking by way of international agreements. These treaties can be categorised in terms of early steps towards international recognition of human trafficking, and modern steps which culminate in the negotiation and adoption of the United Nations Convention against Transnational Organised Crime<sup>90</sup> and its associated Protocol to Prevent, Suppress and Punish Trafficking in Persons,

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<sup>84</sup> *Kunarac*, above n 47, at [94].

<sup>85</sup> At [95].

<sup>86</sup> E Finlayson-Davis “The International Trade in Women: An Analysis of International and Domestic Law Aimed at Eradicating the Trafficking of Women for Sexual Exploitation” (LLB (Hons) Dissertation, University of Auckland) at 51.

<sup>87</sup> *Prosecutor v Tadic* (Judgment) ICTY Trials Chamber, IT-94-1-T, 7 May 1997, at [653].

<sup>88</sup> Finlayson-Davis, above n 86, at 53.

<sup>89</sup> At 54.

<sup>90</sup> United Nations Convention against Transnational Organised Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003) [Organised Crime Convention].

Especially Women and Children.<sup>91</sup> This section provides a very brief traversal of these preliminary agreements,<sup>92</sup> and a more in depth discussion of the Protocol.

In 1904, the first anti trafficking agreement was signed – the 1904 International Agreement for the Suppression of the White Slave Traffic.<sup>93</sup> This instrument was a reaction to the perceived problem of white women being trafficked from European brothels to the colonial territories. It did not criminalise the practice of trafficking women though. This was achieved in 1910 with the adoption of the International Convention for the Suppression of the White Slave Traffic.<sup>94</sup> There are two further minor international instruments: the 1921 Convention for the Suppression of the Traffic in Women and Children<sup>95</sup> took the step of extending protection to all (not just white) women, and included children within its ambit.<sup>96</sup> Lastly, the 1933 International Convention for the Suppression of the Traffic of Women of Full Age<sup>97</sup> took the step of removing consent of the trafficked victim as a defence to a charge of trafficking.<sup>98</sup>

The law as established by these preliminary agreements was consolidated and expanded upon by the 1949 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others.<sup>99</sup> Of particular relevance was the way in which the 1949 Convention expanded the focus of trafficking to include the exploitative end result – not just looking at the procurement and transportation of victims.<sup>100</sup> Under this Convention, States Parties agreed to

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<sup>91</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319 (opened for signature 15 November 2000, entered into force 25 December 2003) [Trafficking Protocol].

<sup>92</sup> A more detailed discussion would be outside the purview of this thesis. For a more in depth history, see generally Bassiouni, above n 66.

<sup>93</sup> International Agreement for the Suppression of the White Slave Traffic 1 LNTS 83 (opened for signature 18 May 1904, entered into force 18 July 1905).

<sup>94</sup> International Convention for the Suppression of the White Slave Traffic 3 LNTS 278 (opened for signature 4 May 1910, entered into force 21 June 1951). For further discussion of the 1904 and 1910 agreements, see L Reanda “Prostitution as a Human Rights Question: Problems and Prospects of UN Action” (1991) 13 Hum Rts Q 202 at 207, and N Demleitner “Forced Prostitution: Naming an International Offense” (1994) 18 Fordham Intl LJ 163 at 168.

<sup>95</sup> Convention for the Suppression of the Traffic in Women and Children 9 LNTS 415 (opened for signature 30 September 1921, entered into force 24 August 1924).

<sup>96</sup> See further Demleitner, above n 94, at 169.

<sup>97</sup> International Convention for the Suppression of the Traffic of Women of Full Age 150 LNTS 431 (opened for signature 11 October 1933, entered into force 24 August 1934)

<sup>98</sup> See further Demleitner, above n 94, at 171.

<sup>99</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 96 UNTS 272 (opened for signature 2 December 1949, entered into force 25 July 1951) [1949 Convention].

<sup>100</sup> J Chuang “Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts” (1998) 11 Harv Hum Rts J 65 at 74-5.

commit to three main obligations: firstly, to be bound by an anti-human trafficking principle.<sup>101</sup> Secondly, to commit to certain specified enforcement procedures.<sup>102</sup> Thirdly, States Parties are required to provide support to victims of trafficking.<sup>103</sup>

The last important agreement before the 2000 Convention is the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.<sup>104</sup> Unlike the 1949 Convention, CEDAW was an attempt at creating an expansive treaty to address discrimination against women generally. Article 6 deals specifically with trafficking, stating that “state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”.

There were several problems with the 1949 Convention and the CEDAW Convention. The first is that the definition in Article 1 of the 1949 Convention failed to define the term “prostitution”. As has been discussed previously in this chapter in relation to the feminist construction of “human trafficking” there is significant controversy surrounding this point, and the related point of whether the 1949 Convention represented a paternalistic approach in the way that it disregarded a woman’s consent to sex work.<sup>105</sup> The debate is moot however, and misses both the point that if consent is gained by coercion, then such coercion would serve to vitiate that consent, and the point that even if consent was initially given, exploitation occurring after consent means the woman is now no longer able to make a choice to leave.

Finally, a further problem with both the 1949 Convention and CEDAW is that they exclude other forms of human trafficking – in particular the phenomenon of forced labour. This situation was rectified with the coming into force of the 2000 Convention.

In 1998 in the lead up to the 50<sup>th</sup> anniversary of the 1949 Convention, the General Assembly of the United Nations passed a resolution establishing an ad hoc Committee on the Elaboration of a Convention against Transnational Organised Crime.<sup>106</sup> The negotiations of this Committee

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<sup>101</sup> 1949 Convention, arts 1 – 4. Article 1 defines trafficking, stating that a person is to be punished who “procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person; or who exploits the prostitution of another person, even with the consent of that person”.

<sup>102</sup> 1949 Convention, arts 13 – 15.

<sup>103</sup> 1949 Convention, art 16.

<sup>104</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 14 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW].

<sup>105</sup> See further Demleitner, above n 94.

<sup>106</sup> *Resolution on Transnational Organised Crime* GA Res 53/111, A/53/616 (1998). The terms of reference for this Committee were supplemented by the General Assembly in its *Resolution Strengthening the United Nations Crime*

resulted in one of the most important instruments with regard to human trafficking at the international level – the United Nations Convention against Transnational Organised Crime,<sup>107</sup> and its supplementary protocol, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.<sup>108</sup> There are currently a significant number of States Parties to this Convention and its supplementary Protocols, with New Zealand signing on 14 December 2000, and ratifying on 19 July 2002.

The Convention and its supplementary Protocols are highly significant as they represent the first major attempt by the international community to use the mechanisms of international law to combat transnational crime.<sup>109</sup> Anne Gallagher, who held the position of Advisor on Trafficking to the UN High Commissioner for Human Rights during the negotiation period states that although human rights concerns provided some impetus towards the creation of the Convention,<sup>110</sup> the main push came from the perceived sovereignty and security issues posed by human trafficking and migrant smuggling to wealthy states.<sup>111</sup> The definition that was arrived at is reproduced in full as follows:<sup>112</sup>

(a) “Trafficking in persons” shall mean 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.

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*Prevention and Criminal Justice Programme, in particular its technical cooperation capacity* GA Res 53/114, A/RES/53/114 (1999).

<sup>107</sup> United Nations Convention against Transnational Organised Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003) [Organised Crime Convention].

<sup>108</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319 (opened for signature 15 November 2000, entered into force 25 December 2003) [Trafficking Protocol].

<sup>109</sup> Gallagher, above n 57, at 976.

<sup>110</sup> Before the UN Office on Drugs and Crime brought human trafficking onto its agenda, there was already a UN agency tasked with dealing with human trafficking. The UN Working Group on Contemporary Forms of Slavery, as it was known, was a ‘marginal and marginalised’ body, and had very little effect on human trafficking. See generally Gallagher, above n 76.

<sup>111</sup> Gallagher, above n 57, at 976.

<sup>112</sup> Trafficking Protocol, art 3.

(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” shall mean any person under eighteen years of age.

This definition contains three separate elements. The first relates to an action: “recruitment, transportation, transfer, harbouring or receipt of persons.”<sup>113</sup> The second relates to the means used to undertake that action:<sup>114</sup>

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.

The third element relates to the purpose for which the means were used:<sup>115</sup>

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.

It will not be necessary to show evidence of actual exploitation along these lines. It will suffice to demonstrate the existence of this intention to exploit.<sup>116</sup> This is one of the key differences between human trafficking and slavery – the latter requires intention to reduce to ownership, whereas the former requires only the intention to exploit.<sup>117</sup> All three of these elements are required in order for the offence to be made out with respect to an adult victim. For a child under 18, the offence will be complete regardless of whether the second element is made out.

The first element – action – forms part of the *actus reus* of the offence. The activities listed do not necessarily have a criminal character when taken by themselves, but acquire such a character

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<sup>113</sup> At art 3(a).

<sup>114</sup> At art 3(a).

<sup>115</sup> At art 3(a).

<sup>116</sup> Boister, above n 44, at 42.

<sup>117</sup> At 42.



when they are undertaken in a particular way (the means), with the intention to exploit (the purpose), and with the correct mens rea.<sup>118</sup>

The activities listed as examples of the action element are not defined; however it has been argued that by logical necessity they must be taken to extend the scope of the overall definition of trafficking to include not just the initial steps and process, but also the end situation.<sup>119</sup> To put it another way, the definition will include within its scope not just the brokers and transporters of a victim, but also owners, managers and supervisors of any place where a victim is exploited.<sup>120</sup>

On the basis of this argument, there is potential for the definition to include situations where there is no initial trafficking process, but where a situation changes gradually from being acceptable to exploitative. The victim could be said to be “harboured” through coercion or one of the other stated means, for the purpose of exploitation.<sup>121</sup>

Sub-paragraph (b) of Art 3 recognises the role that deception and half-truths play in the offence. Where one of the means set out in 3(a) is used, the consent of the victim will be considered irrelevant. The effect of this is to include situations where a victim initially consents, but is later subjected to one of the specified means.

Although this is a significant definition, it is important to note that it does not resolve all the debates surrounding definitions. Liz Kelly, in her 2005 report on trafficking in Central Asia, emphasises some of these difficulties, arguing that trafficking is a process, and as such can have overlaps with and transitions from migrant smuggling and other related crimes.<sup>122</sup>

In summary, slavery and human trafficking have been proscribed by international law for a long time. In the most modern manifestation of the international law in this area it is clear that slavery has retained its status as a jus cogens offence. At the present time, despite some moves toward a more expansive definition of slavery, it is undetermined whether human trafficking also holds this status, but it is likely that it does not, except to the extent to which the facts of the offending can also be categorised as slavery. Trafficking can become slavery when the exploitation

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<sup>118</sup> Gallagher, above n 14, at 28-29.

<sup>119</sup> At 29.

<sup>120</sup> At 30.

<sup>121</sup> At 31.

<sup>122</sup> L Kelly *Fertile Fields: Trafficking in Persons in Central Asia* (International Organisation for Migration, Vienna, 2005) at 6, 69.

illustrates an intention to assert ownership over a victim.<sup>123</sup> There also appears to be some room for human trafficking to be prosecuted as a crime against humanity in the International Criminal Court.

#### **1.3.2.4. Responses to human trafficking at the regional level**

Given the transnational nature of the crime of human trafficking, it has become clear that regional cooperation is necessary in order to effectively combat trafficking.<sup>124</sup> New Zealand is a member of a number of different regional bodies with the aim of dealing with trafficking. One of the main organisations of relevance to human trafficking in the Asia-Pacific region is the Bali Process – a regional body formed in 2002 in response to the large numbers of migrants being illegally smuggled in the region.<sup>125</sup> This body now consists of 43 member states, who meet periodically to build both capacity and cooperation with regard to combating human trafficking in the region.<sup>126</sup>

The Bali Process was established by Australia and Indonesia in 2002, following a year in which 6640 boat people attempted to arrive in Australia from Indonesia.<sup>127</sup> New Zealand has taken a leading role in this organisation, and is a key actor in developing concrete initiatives to help deal with the problems associated with irregular migration in the Asia Pacific region. In addition to the Bali Process, the New Zealand government is a member of 16 other regional and international bodies which all aim to prevent human trafficking.<sup>128</sup> Of note are the ASEAN Regional Forum; the International Labour Organisation; the International Organisation for Migration; the OECD, and the Pacific Immigration Directors Conference.

One of the major contributions of regional-level law in this area relates to the interpretation and evolution by regional bodies – especially in the European Union – of the obligations that have been placed on States parties to the UN Trafficking Convention. This is an area of discussion that will be looked at further in chapter three.

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<sup>123</sup> Boister, above n 44, at 42.

<sup>124</sup> The New Zealand Police advocate this view: See *New Zealand's National Plan of Action Against the Commercial Sexual Exploitation of Children* (Ministry of Justice, Wellington, 2002) at 13.

<sup>125</sup> “About the Bali Process” The Bali Process <[www.baliprocess.net](http://www.baliprocess.net)>.

<sup>126</sup> “Membership” The Bali Process <[www.baliprocess.net](http://www.baliprocess.net)>.

<sup>127</sup> K McMillan “Irregular Migration: New Zealand's Experience and Response” (2008) 33(4) *New Zealand International Review* Volume 1 at 2. It has been said that the Tampa incident was a catalyst for the establishment of the organisation: see S Castles, M Cubas, C Kim and D Ozkul “Irregular Migration: Causes, Patterns and Strategies”, in I Omelaniuk (ed) *Global Perspectives on Migration and Development* (Springer, London, 2012) 117 at 139.

<sup>128</sup> See further “International Engagement” Immigration New Zealand <[www.immigration.govt.nz](http://www.immigration.govt.nz)>.

### 1.3.2.5. Responses to human trafficking at the national level

New Zealand is listed as a “tier 1” state in the 2011 annual US Department of State Trafficking in Persons Report.<sup>129</sup> This means that from a legislative point of view New Zealand is fully compliant with what is deemed by the United States of America to be the minimum requirements for effectively combating human trafficking.<sup>130</sup> In New Zealand, the most obvious legislative mechanism in this regard is found in section 98D of the Crimes Act 1961 which is set out in full as follows.

- (1) Every one is liable to the penalty stated in subsection (2) who—
  - (a) arranges the entry of a person into New Zealand or any other State by 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both; or
  - (b) arranges, organises, or procures the reception, concealment, or harbouring in New Zealand or any other State of a person, knowing that the person's entry into New Zealand or that State was arranged by 1 or more acts of coercion against the person, 1 or more acts of deception of the person, or both.
- (2) The penalty is imprisonment for a term not exceeding 20 years, a fine not exceeding \$500,000, or both.
- (3) Proceedings may be brought under this section even if the person coerced or deceived—
  - (a) did not in fact enter the State concerned; or (as the case may be)
  - (b) was not in fact received, concealed, or harboured in the State concerned.
- (4) Proceedings may be brought under this section even if parts of the process by which the person coerced or deceived was brought or came to or towards the State concerned were accomplished without an act of coercion or deception.

There are several points that can be made about this section. Firstly, to break down the section into its component parts in order to show how it reflects the definition contained in the Protocol, it can be seen that subsection 1(a) addresses the initial procurement/transportation of a victim aspect of the offence. Subsection 1(b) aims at the latter stage of the offence – those who harbour victims when they arrive, knowing that entry of the victim (even if legal) was arranged by way of

<sup>129</sup> 2011 *Trafficking in Persons Report* (US Department of State, June 2011) [TIP 2011] at 52.

<sup>130</sup> These minimum requirements are set out in the Trafficking Victims Protection Act 22 USC § 7101 [TVPA], and are similar on those set out in the United Nations Trafficking Protocol.

deception or coercion. Splitting the offence into two parts like this is an attempt to increase the clarity of the section, which in turn aids law enforcement agencies trying to enforce it. Section 98D explicitly provides for an extraterritorial element to the offence. As seen in s 98D(3), it is not necessary that the victim was transported to or from New Zealand – all that is needed for criminal liability is for jurisdiction to be established over a defendant.

Traditionally, some form of nexus is required between a crime, and the exercise of jurisdiction. This proposition has evolved with the development of the doctrine of extraterritoriality. In the *Lotus Case*,<sup>131</sup> the Permanent Court of International Justice commented on the legality of extraterritorial jurisdiction, holding that a state can establish a very broad jurisdiction, so long as it does not “overstep the limits which international law places upon it”.<sup>132</sup> However, in practice states have reciprocal interests in seeking an objective legal platform for their jurisdiction and thus objective connections are sought between acts and states claiming jurisdiction over them.

States have historically used one of several methods to establish this connection. The principles of active and passive personality are linked by the nationality of the offender and the victim.<sup>133</sup> The subjective and objective territoriality principles involve the territory on which the crime was perpetrated and completed. The protective principle finds sufficient connection in a threat to a state’s sovereignty, security or functions of government and the principle of universal jurisdiction finds a connection when an act constitutes an international crime.

#### **1.3.2.5.1. Analysis of section 98D**

This subsection begins with a brief historical background to the inclusion of s 98D in the New Zealand Crimes Act, before moving on to a legal analysis of the section. New Zealand is a signatory to several international and regional instruments aimed at countering human trafficking, particularly the United Nations Convention Against Transnational Organised Crime, and is a member of the Bali Process. As part of New Zealand’s obligations under the Bali Process, in June 2009 the New Zealand government approved the first ever National Plan of Action to

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<sup>131</sup> *Lotus Case (France v Turkish Republic)* (1927) PCIJ 1.

<sup>132</sup> L Reydam's *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, Oxford, 2003) at 12.

<sup>133</sup> A Puttler “Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad” in K Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International Ltd, London, 1996) 103 at 109.

Prevent People Trafficking.<sup>134</sup> This action plan has three major focus areas: prevention of human trafficking, prosecution of traffickers and protection of victims.

In order to give effect to New Zealand's obligations arising under the Convention Against Transnational Organised Crime and the protocols on the smuggling of migrants and the trafficking of people,<sup>135</sup> in 2002 the Transnational Organised Crime Bill was introduced into Parliament by then Minister of Justice, Hon Phil Goff.<sup>136</sup> The government recognised that although New Zealand is a geographically isolated country, it was necessary to take the risk of trafficking seriously.<sup>137</sup> On its third reading in Parliament, that bill was split off into what became the Crimes Amendment Act 2002. That Act provided for a new section 98D to be added to the Crimes Act 1961, dealing with human trafficking.<sup>138</sup> The amendment Act also inserted a new s 7A into the Crimes Act providing that extraterritorial jurisdiction could be asserted by the courts (with the Attorney General's consent)<sup>139</sup> in relation to human trafficking.<sup>140</sup>

Section 7A has been noted only once in criminal proceedings. *R v Konsaijan*<sup>141</sup> involved a case of migrant smuggling. The Court simply noted that offences covered by section 7A are actionable in New Zealand's criminal courts even when no relevant act or omission took place inside New Zealand.<sup>142</sup> Commentary on section 7A notes that while the section was introduced to give effect to a number of international conventions, in some respects it goes beyond what is required under those conventions. Jurisdiction may be established under this section where the alleged offender has some link to New Zealand, or where the offending was in some manner connected to New Zealand by virtue of where it took place, or where the victim of the offending was linked to New Zealand. In relation to the offence of human trafficking, jurisdiction may be established where the aim of the conduct was to illegally bring a migrant into New Zealand.<sup>143</sup>

From a procedural point of view, where jurisdiction is claimed under this section, consent must be gained from the Attorney-General to proceed with a prosecution.<sup>144</sup> In practice, it will likely

<sup>134</sup> *Plan of Action to Prevent People Trafficking* (Department of Labour, Wellington, 2009).

<sup>135</sup> This is a topic which will be revisited in much greater detail in chapter three of this thesis.

<sup>136</sup> Transnational Organised Crime Bill 2002 (201-1) [Transnational Organised Crime Bill].

<sup>137</sup> (26 February 2002) 598 NZPD 14600.

<sup>138</sup> Crimes Amendment Act 2002, s 5.

<sup>139</sup> Crimes Act 1961, s 7B.

<sup>140</sup> Crimes Amendment Act 2002, s 4.

<sup>141</sup> *R v Konsaijan* [2012] NZHC 2293.

<sup>142</sup> At [25].

<sup>143</sup> B Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA7A.01-02].

<sup>144</sup> Crimes Act 1961, s 7B.

prove difficult to hold foreign offenders accountable for their actions when they reside overseas. Extradition treaties may help facilitate this process.

In the commentary to the Transnational Organised Crime Bill, it was recommended that the offence of human trafficking be worded such that the mens rea of the offence did not require proof of intent to exploit – that this element would be instead an aggravating feature of the offence at sentencing.<sup>145</sup> This recommendation was adopted by Parliament and can be seen reflected in what is now s 98D of the Crimes Act 1961. This is interesting as it demonstrates a departure from the definition of trafficking as found in the Trafficking Protocol, which includes as part of the definition a requirement that there be intent to exploit the trafficked victim.<sup>146</sup>

Section 98D could potentially have effect on a wide range of defendants – not only those people who are actively involved in the process will be caught in the net – it covers people who employ the labour of victims, knowing the means by which they were brought here.

Section 98D(1)(a) states the scope of the offence as coercion or deception,<sup>147</sup> seemingly restricting the definition as found in the Trafficking Protocol. Interestingly, Parliament did not debate this reduced definition, nor is it mentioned in the explanatory note to the Bill. The section also omits any mention of the end-purposes of trafficking – exploitation. Three possible reasons exist for this. Firstly, section 98E considers the end purpose to be an aggravating factor in sentencing. Secondly, section 98 comprehensively deals with dealing in slaves. It is possible that Parliament considered the joint effect of these two provisions to adequately cover the issue. Although slavery and human trafficking are two separate offences, they are often considered to be related, as the discussion of the international law above shows, and the prosecutorial practice of Australia also shows.<sup>148</sup> Thirdly, this omission may be considered to be a reflection of the true concern of Parliament – to prevent traffickers from bringing victims to New Zealand at all, rather than addressing the issue of enslavement, or the exploitation of those victims who do end up here. The effect of not including exploitation as an element of the offence is that the scope of the section is wider than the definition found in Article 3 of the Protocol.<sup>149</sup> Conversely though, the scope of s 98D is also narrower than Article 3 in the way that it requires a transnational element to be present in the offending. This more limited approach taken by the New Zealand

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<sup>145</sup> Transnational Organised Crime Bill, explanatory note, at 7.

<sup>146</sup> See Article 3(a) of the Trafficking Protocol.

<sup>147</sup> The parameters of this section are discussed more fully in chapter four of this thesis.

<sup>148</sup> This is discussed in chapter four of this thesis.

<sup>149</sup> Finlayson-Davis, above n 86, at 34-5.

government is curious, and it is unclear why this change was made. While the requirement for a transnational element to the crime is found in the Organised Crime Convention,<sup>150</sup> it was specifically excluded from the Protocol to ensure that internal trafficking was also criminalised by states.<sup>151</sup>

To date, no prosecutions have been made under this section, and it is necessary to look to other legislative provisions in order to determine the extent to which traffickers are dealt with (or not) in the New Zealand court system. This task will be undertaken in chapters two and five.

In order to understand the parameters of the offence, it is necessary to examine more closely the terms within the offence. This will allow us to determine under what circumstances the section might be used.

#### **1.3.2.5.2. Coercion**

Section 98B of the Crimes Act defines coercion as including abducting the person, using force in respect of the person, harming the person, or threatening the person – expressly or impliedly – with the use of force in respect of that person or some other person.<sup>152</sup> “Harming the person” should be interpreted widely, however the legislation gives a number of examples which should be considered particularly serious, namely physical, psychological, financial or sexual harm, and harm to the person’s “reputation, status or prospects.”<sup>153</sup>

As is made clear in chapter two, in many instances of human trafficking in the New Zealand fishing industry the facts will involve the victim being coerced or deceived by way of a contract between the victim and the trafficker. The law is clear that a contract of this nature would be unenforceable under the Illegal Contracts Act 1970.<sup>154</sup> Useful insight into the tests that may be applied for s 98D “deception”, “coercion” and “fraud” can be gained through an examination of how those terms are applied in the area of contract law.

The legal concept of duress has useful overlaps with the concept of coercion. Insights into the parameters of coercion can be obtained through an examination of duress. The leading case on duress is *McIntyre v Nemesis DBK Ltd*.<sup>155</sup> The Court of Appeal in that case discussed the concept of duress, drawing on English law to find that it involves two essential elements. Firstly, there

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<sup>150</sup> Article 3.

<sup>151</sup> N Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012), at 41.

<sup>152</sup> Crimes Act 1961, s 98B.

<sup>153</sup> Crimes Act 1961, s 98B.

<sup>154</sup> Illegal Contracts Act 1970, ss3, 5 and 6.

<sup>155</sup> *McIntyre v Nemesis DBK Ltd* [2010] 1 NZLR 4, per O’Regan J.

must be *illegitimate* pressure exerted upon the victim. Illegitimacy is the crucial part of this branch of the test.<sup>156</sup> Secondly; it must be as a result of that illegitimate pressure that the victim was coerced into entering the contract.<sup>157</sup>

The Court in *McIntyre* noted the problems involved in properly identifying the concept of coercion. Historically, courts have taken the position that coercion involves the overbearing of a victim's free will.<sup>158</sup> This has been criticised though. In *Haines v Carter*,<sup>159</sup> it was noted that coercion does not require that a victim be "psychologically crippled", or have no free will whatsoever. *McIntyre* took the position that coercion will be established where the victim has "no reasonable alternative."<sup>160</sup> This draws on statements made by the Court of Appeal in *Pharmacy Care Systems v AG* that:<sup>161</sup>

Whether there was a reasonable alternative will ... depend on all the relevant circumstances, including the characteristics of the victim, the relation of the parties, and the availability of professional advice to the victim.

This takes a hybrid approach that combines both a subjective and objective element: the threat of coercion must have left the particular victim with "no reasonable alternative" – a standard which will be assessed objectively.

Under criminal law, the concept of duress operates as a defence to allegations of criminal activity. It has been held that the presence of duress does not negate the intent behind the action committed, but is superimposed on top of those actions to remove guilt.<sup>162</sup> This approach marks a departure from the old theory – that duress represents a total overbearing of the victim's will.<sup>163</sup> It appears from this that duress is related to the concept of coercion, but is perhaps slightly wider in scope.

In terms of economic duress, which will most often be the type alleged in a trafficking case, it will need to be shown that the victim had the option open to them to reject the duress, but the

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<sup>156</sup> At [26] per O'Regan J.

<sup>157</sup> At [20] and [63] per O'Regan J.

<sup>158</sup> See *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 at 720; *Pao On v Lau Yiu Long* [1980] AC 614 (PC) at 636.

<sup>159</sup> *Haines v Carter* [2001] 2 NZLR 167 (CA) at [112].

<sup>160</sup> *McIntyre v Nemesis DBK Ltd*, above n 155 at [67] per O'Regan J.

<sup>161</sup> *Pharmacy Care Systems v AG* (2004) 2 NZCCLR 187 (CA), at [96]

<sup>162</sup> P Atiyah "Economic Duress and the 'Overborne Will'" (1982) 98 LQR 197 at 198.

<sup>163</sup> At 199.



alternative option is “so disagreeable”<sup>164</sup> that the victim of trafficking feels that they must proceed with the option offered to them by the offender.

#### **1.3.2.5.3. Deception**

An act of deception is said to include fraudulent action,<sup>165</sup> and so appears to include the “fraud” means element as set out in the Protocol definition. With respect to what is meant by the term “deception,” commentary on this point suggests that clarification with respect to acts of deception can be found by looking to the dishonesty offences.<sup>166</sup> In the context of dishonesty offences, the word “fraudulent” has the specific legal meaning of “dishonest disregard of one’s legal obligations,”<sup>167</sup> however the author of the *Adams* commentary on this point suggests that there may be policy reasons for giving the term “fraudulent” a wider interpretation in order to preclude the defence of moral justification being used by a defendant.<sup>168</sup>

#### **1.3.2.5.4. Slavery Legislation in New Zealand**

The Australian experience shows the usefulness of slavery jurisprudence for trafficking offences.<sup>169</sup> The leading New Zealand case on slavery is *R v Decha-Iamsakun*.<sup>170</sup> In a discussion of jury directions as to the meaning of slavery, the Court held that the definition of “slave” as “a person held as property” is preferred as more apt in the context of s 98 to that of “one who is submissive under domination.”<sup>171</sup> Domination was said to mean “control and authority that brooks no opposition or disobedience.”<sup>172</sup> Submissive means the acceptance of that form of domination, either willingly or unwillingly. If a person is unable to escape from domination, they will be considered a slave for the purpose of s 98.<sup>173</sup>

#### **1.3.2.5.5. Discrepancies between s 98D and Article 3 of the Protocol**

It will be noted that in addition to coercion, deception and fraud, the Trafficking Protocol definition also provided explicitly for two other means: the giving or receipt of payments to achieve consent, and abuse of power or of a position of vulnerability. These two criteria are

<sup>164</sup> This is the terminology used by the Court in *Lynch v DPP of Northern Ireland* [1975] AC 653, at 692, per Lord Simon of Glaisdale.

<sup>165</sup> Crimes Act 1961, s 98B.

<sup>166</sup> B Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA98B.01].

<sup>167</sup> At [CA98B.01].

<sup>168</sup> At [CA98B.01].

<sup>169</sup> Discussed further in chapter three of this thesis

<sup>170</sup> *R v Decha-Iamsakun*, [1993] 1 NZLR 141 (CA).

<sup>171</sup> *R v Decha-Iamsakun*, [1993] 1 NZLR 141 (CA) at 141.

<sup>172</sup> At 144.

<sup>173</sup> At 144.

absent from s 98D. Three possible reasons exist to explain this omission, and it is concluded that the criteria should be implied into s 98D.

Firstly, it can be argued that Parliament intended for a restricted definition to be implemented. When the ways in which a treaty may be incorporated into domestic law are considered, there is some margin for discrepancies to occur. Treaties can be incorporated into New Zealand law through an enabling Act of Parliament.<sup>174</sup> This Act can either explicitly restate the treaty provisions, or can be “woven into the texture of the existing legislation”.<sup>175</sup> In the case of the Trafficking Protocol, New Zealand must be considered to have adopted the latter method of incorporation due to the absence of specific enabling legislation, and the statements made by officials that the Crimes Act legislation serves to ratify New Zealand’s obligation to criminalise human trafficking.<sup>176</sup> It could be argued that while New Zealand ratified without reservations at the international level, Parliament chose not to fully adopt the agreed-upon definition. There is little evidence to support this argument though, and the thorough and multi-step process by which a treaty is ratified in New Zealand suggests that if a reduced definition were to be adopted, it would have been debated during one of the steps between signing the treaty and ratification.<sup>177</sup>

Secondly, it can be argued that Parliament intended for a wide definition of trafficking to be included in s 98D. The terms “coercion” and “deception” are defined widely, and are necessary for a part of the trafficking arrangement in order for the section to take effect.<sup>178</sup> It would seem from this that Parliament intended the section to have a wide scope. The explanatory note to the Bill that introduced s 98D notes that the Bill “contains the provisions that are needed in New Zealand law to implement obligations in the [Trafficking Protocol]”.<sup>179</sup> One of the primary obligations under the Trafficking Protocol is to criminalise the offence of human trafficking as defined in the Protocol.<sup>180</sup>

It is logical to conclude that Parliament would not ratify the Protocol if there was doubt about the extent to which the agreed definition in Article 3 would apply in New Zealand. An examination

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<sup>174</sup> See *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA), per Cooke J at 224.

<sup>175</sup> Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (Report 6, Wellington, 1991) appendix E, “Treaties: what are they, what do they do, how are they made and how are they given effect?” at 5.

<sup>176</sup> Transnational Organised Crime Bill, Explanatory Note.

<sup>177</sup> The ratification process is explained at *Brookers Human Rights Law*, (looseleaf ed, Brookers) at [IHRL4.02].

<sup>178</sup> Crimes Act 1961, s 98D(4).

<sup>179</sup> Transnational Organised Crime Bill, Explanatory Note.

<sup>180</sup> For further discussion of this see chapter three of this thesis

of the documents produced by the New Zealand delegates to the negotiations of the Protocol does not provide any evidence that New Zealand would only accept a limited definition.<sup>181</sup>

Therefore, by ratifying the Protocol, Parliament should be taken as having intended that the list of two actions in s 98D (coercion or deception) be interpreted as being a non-exhaustive list which also includes the other action elements contained within the Article 3 definition in the Protocol. New Zealand has not registered any reservations to the Protocol, and so cannot be said to have intended to “exclude or modify the legal effect”<sup>182</sup> of the Article 3 definition. As such, it is submitted that s 98D should be read as impliedly including all the Protocol’s means elements, including the giving or receipt of payments to achieve consent, and abuse of power or of a position of vulnerability. This is a weak argument however. The omission of these elements may have occurred as a result of a drafting error. In this case, it is the responsibility of the legislature to rectify the omission by amending the Act.

In the absence of such amending legislation, the third option arises. There is scope for an argument that the missing elements could be construed by a court as being examples of coercion or deception, and as such are not required to be explicitly stated in the s 98D definition, but will be included so as to interpret the concept of coercion in the spirit of the Convention and Protocol. It is difficult to imagine a factual scenario where there was no degree of overlap between the means elements. In many instances – particularly in the fishing industry where the receiving of payments, and abuse of a position of economic vulnerability are key factors – these means could well be considered evidence going towards the establishment of coercion or deception.

On the evidence available, the strongest argument is the final one. This is supported by the presumption of consistency – the concept that Parliament intends to legislate consistently with New Zealand’s obligations under international law. In order to determine exactly what the parameters of s 98D are, it will be necessary for a court to determine to what extent s 98D can be said to include all the means listed in the Article 3 definition.

#### **1.3.2.5.6. *Giving/receiving payments to achieve consent***

This will be a simple matter of fact, and potentially falls under the categories of coercion or deception as defined in s 98B.

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<sup>181</sup> Documents held by the Ministry of Justice relating to the negotiations surrounding the Trafficking Protocol. (Obtained under Official Information Act 1982 Request to the Criminal Justice Group, Ministry of Justice).

<sup>182</sup> Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) art 2(1)(d).

#### **1.3.2.5.7. Abuse of power or of a position of vulnerability**

In a trafficking case, establishing the fact of victim vulnerability is likely to play an important role. Justice Susan Glazebrook, writing extrajudicially, has called this element one of the “core features” of the trafficking process.<sup>183</sup> In a criminal prosecution that alleges abuse of a position of power or of vulnerability as an act of human trafficking, it will need to be proved that an act of abuse of power or of a position of vulnerability caused the victim to enter New Zealand. Case law from other jurisdictions suggests that this element will be proved with reference to a subjective test: was the victim in fact coerced through an abuse of power or of a position of vulnerability?<sup>184</sup>

#### **1.3.2.5.8. Exploitation as an aggravating feature**

Under the Protocol, exploitation is a central element of the offence, however in New Zealand it is an aggravating feature to be taken account of during sentencing.<sup>185</sup> This position was adopted as an “essential position” by the New Zealand delegation to the Trafficking Protocol negotiations.<sup>186</sup> The justification for this was that if the element of exploitation was kept separate from the main offence, it would not preclude a prosecution from being brought in a situation where a victim had been freed before exploitation took place.<sup>187</sup>

#### **1.3.2.5.9. Requirement for AG consent to prosecution**

The Protocol does not mention the procedural element that is required in New Zealand for high-level consent to prosecution of human traffickers. It was noted by the Foreign Affairs, Defence and Trade Committee that in matters involving transnational crime, it is appropriate for prosecutorial decisions to be made at a high level in order that diplomatic considerations can be taken into account.<sup>188</sup>

#### **1.3.2.5.10. Enforcement**

Because of the lack of prosecutions under s 98D, in order to find judicial evidence of human trafficking in New Zealand it is necessary to look further afield to other pieces of legislation that have a similar effect to s 98D. Examples of other relevant legislation can be found in the

<sup>183</sup> S Glazebrook J “Human Trafficking and New Zealand” (keynote address to the AGM of the New Zealand Women Judges Association, 13 August 2010) at 2.

<sup>184</sup> See further discussion of this concept as applied in US jurisprudence in chapter four.

<sup>185</sup> Crimes Act 1961, s 98E.

<sup>186</sup> Email Correspondence (Obtained under Official Information Act 1982 Request to the Criminal Justice Group, Ministry of Justice).

<sup>187</sup> Email Correspondence (Obtained under Official Information Act 1982 Request to the Criminal Justice Group, Ministry of Justice).

<sup>188</sup> Transnational Organised Crime Bill 2002 (201-2) (Select Committee Report) at 10.

Prostitution Reform Act 2003,<sup>189</sup> the Immigration Act 2009,<sup>190</sup> the Passports Act 1992,<sup>191</sup> and the Fisheries Act 1996.<sup>192</sup> In addition, there are other pieces of New Zealand legislation that play a role in the overall anti-trafficking framework. The Immigration Act 2009 also plays an important role in the framework, especially in light of the government's apparent approach of viewing human trafficking as an immigration issue.<sup>193</sup> The Immigration Act gives powers to immigration officials to enter and inspect the records of accommodation providers.<sup>194</sup> Officials also have powers under the Act to enter and inspect the records of employers.<sup>195</sup> This is a wide ranging power, and may be used at any reasonable time, with or without a warrant. Further, the Immigration Act also creates a series of offences that are relevant to human trafficking. It is an offence to provide false or misleading information,<sup>196</sup> or to deal improperly with identity documents.<sup>197</sup> The Act also makes it an offence to employ an individual, knowing that they are not entitled to work in New Zealand,<sup>198</sup> or perhaps of more obvious relevance to exploit the labour of a person not legally entitled to work.<sup>199</sup> An employer found guilty of an offence under ss 350 or 351 is liable to a term of imprisonment not exceeding seven years, or a fine of up to \$50,000 NZD for a breach of s 350; and a fine of up to \$100,000 for a breach of s 351.<sup>200</sup>

<sup>189</sup> Section 16 prohibits “inducing or compelling persons to provide commercial sexual services or earnings from prostitution”. Section 17 states that a person may at any time refuse to provide a sexual service, despite any contract to the contrary. Sections 20-23 prohibit any person from causing a person under the age of 18 to engage in sexual services.

<sup>190</sup> Immigration Act 2009, s 131 (allowing protected person status to be granted to an applicant under the International Covenant on Civil and Political Rights (ICCPR)) may apply to a victim of trafficking if there is a substantial risk of the victim being inhumanly treated (as per Article 7 of the ICCPR, this includes various forms of servitude which would cover human trafficking). Section 172 allows the Minister of Immigration to suspend a deportation notice on certain conditions. Section 206 allows a trafficked victim to appeal against a deportation notice on humanitarian grounds. Section 351 makes it an offence for an employer to exploit a person who is not legally entitled to work in New Zealand.

<sup>191</sup> The Passports Act 1992 makes provisions for the misuse of passports.

<sup>192</sup> Section 103 provides for certain New Zealand laws – including the Holidays Act 2003 and the Minimum Wage Act 1983 – to apply to foreign vessels in New Zealand waters.

<sup>193</sup> See chapter two.

<sup>194</sup> Immigration Act 2009, s 276. Note that this section gives power to officials “for the purposes of locating any person who is liable for deportation” (s 276(1)). It will often be the case that victims of trafficking will be liable for deportation, and must rely on their ability to seek refugee status, or apply for a temporary visa in order to stay in the country.

<sup>195</sup> Immigration Act 2009, s 277.

<sup>196</sup> Immigration Act 2009, s 342.

<sup>197</sup> Immigration Act 2009, s 345. For example, passing off a document as relating to a person when it does in fact not relate to that person (subsection 1).

<sup>198</sup> Immigration Act 2009, s 350. This section represents a weakening of the position under s39 of the old 1987 Immigration Act, where employers had an obligation to ensure that their employees were legally entitled to work in New Zealand. Under s 350 of the 2009 Act, employers have lack of knowledge available as a defence.

<sup>199</sup> Immigration Act 2009, s 351.

<sup>200</sup> Immigration Act 2009, s 357.

However, offences under these sections do not carry the same denunciative weight of a conviction for human trafficking, as many of them are regulatory in nature.

Another way in which traffickers could be held to account is through the section of the Crimes Act dealing with participation in an organised criminal group.<sup>201</sup> This section will apply where three or more people exist in a continuing association with the one of the objects of the group being the commission of an offence punishable by four or more years imprisonment.<sup>202</sup> It is not necessary that the group be mutually communicating with one another – the offence will be complete so long as some link exists.<sup>203</sup>

Although these pieces of legislation could in theory be used both to prosecute traffickers and protect victims of trafficking, the evidence available suggests that this is not happening. A 2001 case demonstrates this. A Thai woman paid a trafficker \$6,000 NZD ostensibly so that she could come to New Zealand to work in a restaurant. When she arrived, she was put to work in a brothel. After escaping, she went to the Police, who referred her to the Human Rights Commission. Instead of a prosecution eventuating, the woman ended up in the small claims tribunal where she was simply awarded the \$6,000 that she had paid to her trafficker.<sup>204</sup> This is not an isolated case however. Again in 2001, a Thai woman turned herself in to the border investigation group of Immigration New Zealand. She had been told by her traffickers that by paying \$10,000 NZD she could get a job in a restaurant in Auckland. Like the victim in the previous case, she found herself working in a brothel. As a result of the woman's complaint, Immigration officials arranged to search the house. The woman was removed to Thailand by Immigration New Zealand, and no case was ever brought against the traffickers. As Justice Susan Glazebrook has noted, despite the fact that s 98D was not yet in existence, there were other provisions of the Crimes Act that the traffickers could have been charged under.<sup>205</sup>

A different kind of example is found in the context of the fishing industry. The offence of trafficking can be made out in two separate ways. Firstly, deception occurs when a fisherman is misled into the conditions of work he is legally entitled to while working in New Zealand. He is then transported to New Zealand on the basis of this deception, and is put to work under exploitative conditions on a foreign charter fishing vessel. A second scenario is where after

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<sup>201</sup> Crimes Act 1961, s 98A.

<sup>202</sup> Crimes Act 1961, s 98A(2).

<sup>203</sup> B Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA98A.01].

<sup>204</sup> "Money Returned in Sex Trafficking Case" *Tirohia: Quarterly Newsletter of the Human Rights Commission*, April 2001 at 1-2.

<sup>205</sup> Glazebrook, above n 183, at 9.

arriving in New Zealand, the fisherman is coerced through an abuse of power into working under exploitative conditions on board a foreign charter vessel (FCV). The fisherman is then transported out of New Zealand's territory into the exclusive economic zone (EEZ), and then brought back in to port. This constitutes the transportation element of the offence.<sup>206</sup>

The liability of commercial carriers of trafficked persons is not made explicit under the 2009 Immigration Act. Presumably, if knowledge and intent to carry a victim of trafficking to New Zealand can be shown, then liability will be incurred under the trafficking provisions of the Crimes Act. It is possible though that in the absence of such knowledge or intent that a carrier may also commit regulatory offences under the Immigration Act 2009. Sections 96, 101, 102 and 103 of that Act set out a number of responsibilities incumbent upon a carrier – and person in charge – of commercial craft travelling to New Zealand. These responsibilities relate to the gathering and provision of required information from passengers.

In addition to these criminal and immigration offences, the 2006 Code of Practice regulating foreign charter vessels brings certain labour laws, including the Holidays Act 2003, the Minimum Wage Act 1983 and the Wages Protection Act 1983 into the realm of trafficking. The Code of Practice was introduced by the Department of Labour, with input from industry groups Seafic (the New Zealand Seafood Industry Council) and the New Zealand Fishing Industry Guild (NZFIG), purporting to resolve all the issues relating to working conditions on board foreign vessels.<sup>207</sup> It is unenforceable, however it serves to build norms of corporate social responsibility in this area.

#### 1.4. Conclusion

At its core, human trafficking is a relationship between different parties: it is a social relationship, an economic relationship, and also an emotional relationship.<sup>208</sup> While this relationship can be “packaged”<sup>209</sup> in many different ways, there are certain attributes of the human trafficking relationship that are consistent between cases. These are the state of control exercised over the victim, based on real or threatened violence, coercion or deceit; a lack of remuneration beyond

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<sup>206</sup> These scenarios, and the evidence supporting them, are discussed more fully in chapter two of this thesis.

<sup>207</sup> Seafood Industry Council *Code of Practice for Foreign Fishing Crew: Regulatory Framework* (Seafood Industry Council, Wellington, 2006) [Code of Practice].

<sup>208</sup> K Bales *Testing a Theory of Modern Slavery* (Free the Slaves, Washington, 2006) at 2.

<sup>209</sup> At 15.

subsistence level, and the use of the victim's labour or other qualities for the financial gain of the trafficker.<sup>210</sup> These attributes are reflected in the UN definition of trafficking.

By framing the debate in melodramatic dichotomies of good and evil; heroes and villains, it is easy to manipulate the opinion of the public.<sup>211</sup> The most appropriate method of conceptualising human trafficking is a hybrid approach that recognises that human trafficking is not a monolithic offence. It is rather a consequence of different events, both legal and illegal. As mentioned, an individual can start as a legal migrant, but develop over time into a victim of trafficking. The implication of this is that one of the most important considerations in countering trafficking is to contextualise the particular case in an appropriate way. A purely migration or criminal based approach does not allow for this context to be gained. A purely feminist perspective marginalises the victims of labour trafficking, and a purely human rights based approach neglects political realities.

The implications of taking a blinkered approach can be seen in New Zealand. More problematic than the absence of trafficking prosecutions is the evidence that the Police are in fact prosecuting trafficking victims for various immigration offences instead of protecting them.<sup>212</sup>

At the national level, there are certainly problems with the way s 98D of the Crimes Act has been drafted. Using techniques that are commonly used by courts when deciding the parameters of untested law, I have argued for an interpretation of s 98D that includes the elements of the UN definition that have been omitted.

The following chapter sets out the factual evidence of human trafficking for forced labour in New Zealand's fishing industry, and applies those facts to the legal context that has been established here.

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<sup>210</sup> At 15.

<sup>211</sup> Vance, above n 4, at 940.

<sup>212</sup> S Wood "Victims of trafficking 'need to seek help'" *The Press* (online ed, 7 September 2009). The litigation that this report relates to has been reported at *AG v District Court at Auckland* [2007] BCL 272.



## 2. Chapter 2

### 2.1. Introduction

Human trafficking is often dismissed as being a problem of little relevance to New Zealand. This can be explained by the fact that many of the parties involved in the processes of combating human trafficking appear to have misunderstandings about the nature of the offence.

The purpose of this chapter is to consider whether human trafficking exists in the New Zealand fishing industry. This will be achieved by presenting an overview of international opinion of New Zealand's human trafficking situation, followed by a discussion of cases that have come before various judicial tribunals where the facts have pointed toward human trafficking for forced labour, which is the specific focus of this thesis, but this has not been officially recognised. The focal point of this chapter is a detailed discussion of the practice of human trafficking in the context of the New Zealand fishing industry since 1990. This will be done primarily through a case study of the activities of the Sajo Oyang Corporation in New Zealand. This particular case study has been chosen because of the range of information available on it. The Sajo Oyang Corporation has been the subject of governmental audits and NGO and academic research.

#### 2.1.1. Methodology of this chapter

In light of the evidence that will be presented, one of the main unanswered questions is why the New Zealand police have failed to investigate instances of apparent trafficking. This chapter will conclude with a discussion of the doctrine of prosecutorial discretion in New Zealand, and the manner in which it may be challenged.

The methodology adopted in this chapter presents the available evidence in a narrative form as objectively as possible, allowing the evidence to speak for itself. I then re-examine the elements of the offence, fitting the various pieces of evidence to those elements. The overall result is to present an argument for the apparent existence of incidences of human trafficking in New Zealand.

The information I have used in the writing of this chapter comes from a range of sources – what could be termed the “usual” sources: case law, journalistic reporting, and information obtained under the Official Information Act. Of these sources, this thesis has drawn in particular from research conducted by academics from the Auckland University Business School.

In addition to these sources, a significant amount of information was obtained through the course of an extensive interview process with an industry source. This source, who must be kept confidential, has conducted interviews with a large number of former and current crew members employed by the Oyang Corporation to work on FCVs in New Zealand's fisheries.

These interviews are documented by verbatim transcripts, and are supported by signed and witnessed affidavits, as well as by additional documents such as employment contracts, bank statements and letters. Due to the constraints of the ethics committee consent underlying this research, it is not possible to specifically cite these documents. Instead, citations refer to this series of interviews with the confidential source.

## **2.2. International interpretation of New Zealand's trafficking situation**

The benefit of examining external reviews of the New Zealand trafficking situation is that it provides a unique view, synthesising both governmental, NGO and academic perspectives on the issues. The annual US State Department Trafficking in Persons report (TIP report) sets out “country narratives”, where each country is assessed according to the requirements of the Trafficking Victims Protection Act (US) (TVPA), and is given what is essentially a report card, grading the country under the “Three Ps”: prosecution, protection and prevention. Each country’s report is compiled by a local US embassy, based on information obtained during the annual reporting period.

The TIP report is created on the basis of the definition of human trafficking that is used in the Trafficking Victims Protection Act<sup>1</sup> – it is an umbrella term that encompasses aspects of involuntary servitude, slavery, debt bondage and forced labour.<sup>2</sup> This definition is not the same as the one used in the Protocol, however it is largely consistent both formally and substantively. Both definitions require acts, means and purposes. Both definitions emphasise the use of force, fraud or coercion in the offence of trafficking. Lastly, both definitions frame the offence around the central element of exploitation of a victim which characterises the offence. The TVPA was enacted shortly before the Protocol was negotiated, and can be seen to reflect the substance of much of the international norms contained in the Protocol. Section 102(B)(23) of the TVPA states that:<sup>3</sup>

[t]he international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports, including the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labour Convention; [and] the International Covenant on Civil and Political Rights.

The essential element of the definition is “severe forms of trafficking”, meaning:<sup>4</sup>

Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or, the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or

<sup>1</sup> Trafficking Victims Protection Act 2000 (USA) 22 USC § 7101 [TVPA].

<sup>2</sup> TVPA, at s 108.

<sup>3</sup> TVPA, at s 102(B)(23).

<sup>4</sup> TVPA, at s 108.

services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

It is important to note that in contrast to New Zealand law, it is not necessary under this definition for an individual to be physically transported from one location to another in order for the offence to be captured within the ambit of this definition.

The TIP report is prepared on the basis of information provided to the State Department by individual American embassies in countries around the world. Each embassy collects data on trafficking, and uses that data to assess the standard of trafficking in that state using the criteria set out in the TVPA as a benchmark by which to measure the progress of individual states in combating human trafficking.

Countries are placed on a tier scale, with tier one being the highest ranking, indicating that:<sup>5</sup>

a government has acknowledged the existence of human trafficking, has made efforts to address the problem, and meets the TVPA's minimum standards ... Tier one represents a responsibility rather than a reprieve.

Tier two is awarded to countries whose governments do not fully comply with the minimum requirements, but are making efforts to bring themselves into compliance. The tier two watch list applies to countries where there is evidence of increasing numbers of victims of trafficking.<sup>6</sup> This category does not allow for the imposition of sanctions upon a tier two state, however it would be diplomatically embarrassing for a state to be lowered from tier one to tier two.

Tier three, conversely, is a status given to countries whose governments "do not fully comply with the minimum standards and are not making significant efforts to do so".<sup>7</sup> New Zealand has been given tier one status since first being included in the report in 2004.

Under the TVPA, a government of a country listed as tier three may be subject to certain sanctions, including the withdrawal of nonhumanitarian, nontrade related foreign assistance; and the withdrawal of funding for educational and cultural exchange programs. Countries on tier three may also face opposition from the USA with regard to obtaining assistance from certain international organisations such as the World Bank and the International Monetary Fund.<sup>8</sup>

Data is collected through interviews with NGOs, IGOs, published reports, Government Departments, and research trips.<sup>9</sup> In New Zealand, the US Embassy collates data based on news media stories, governmental press reports, NGO reports, and conducts interviews with

<sup>5</sup> *2011 Trafficking in Persons Report* (U.S Department of State, June 2011) [TIP 2011] at 11.

<sup>6</sup> US Department of State "Tier Placements" <[www.state.gov](http://www.state.gov)>.

<sup>7</sup> At 11.

<sup>8</sup> At 14.

<sup>9</sup> At 11.

the main anti-trafficking organisations such as ECPAT,<sup>10</sup> Salvation Army, Stop the Traffik, New Zealand Prostitutes Collective, Shakti and Slave Free Seas.<sup>11</sup>

New Zealand has always held tier one status, although certain allegations occur repeatedly throughout the reports. In 2004, New Zealand was officially included in the TIP reports for the first time. The report alleges that New Zealand is a destination country for victims of sex and labour trafficking coming from the People's Republic of China and elsewhere.<sup>12</sup> The report draws on a study undertaken by ECPAT – published in early 2004 – which identified 145 prostitutes under the age of 15. Under the criteria of the TVPA, this is a form of human trafficking, although it is not recognised as such in New Zealand. It is also alleged that some women were trafficked into New Zealand for the purposes of prostitution in order to "repay substantial debts to traffickers", although it is not clear where this information comes from. The report states there were three trafficking related prosecutions in 2003, although it is unclear what cases the report is discussing.<sup>13</sup>

The reports from 2005<sup>14</sup> and 2006<sup>15</sup> repeat the information found in the 2004 report, expanding only on the nationalities of the alleged victims, and making passing note of the differences between New Zealand and US definitions of human trafficking. The 2007<sup>16</sup> and 2008<sup>17</sup> reports contained a much more in depth analysis of trafficking, although following on from previous years, they focussed only on the issue of sex trafficking, completely bypassing the issue of trafficking for labour.<sup>18</sup> From 2009 to 2011,<sup>19</sup> the same information was reiterated each year, with comments being made about the issue of sex trafficking, and passing statements made about the issue of debt bondage of Pacific Islanders.

The most recent report presents the most thorough description of human trafficking in New Zealand to date, and contains several new pieces of information, reflecting perhaps the growing awareness of the problem in New Zealand. This new information – particularly in regard to the issue of FCVs – has been provided by the NGO Slave Free Seas, a group of lawyers and other advocates working to facilitate prosecutions of the owners of FCVs accused of human trafficking.

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<sup>10</sup> This is the commonly used acronym for the NGO End Child Prostitution and Trafficking <[www.ecpat.org.nz](http://www.ecpat.org.nz)>.

<sup>11</sup> Email from Spokesperson of the United States Embassy to New Zealand to the author, regarding the sources of the TIP reports (13 February 2012).

<sup>12</sup> *2004 Trafficking in Persons Report* (US Department of State, June 2004) [TIP 2004] at 103.

<sup>13</sup> At 104.

<sup>14</sup> *2005 Trafficking in Persons Report* (US Department of State, June 2005) [TIP 2005] at 165.

<sup>15</sup> *2006 Trafficking in Persons Report* (US Department of State, June 2006) [TIP 2006] at 189.

<sup>16</sup> *2007 Trafficking in Persons Report* (US Department of State, June 2007) [TIP 2007] at 129.

<sup>17</sup> *2008 Trafficking in Persons Report* (US Department of State, June 2008) [TIP 2008] at 193.

<sup>18</sup> As will be discussed in this chapter below, there are a number of relevant cases that have occurred in New Zealand where the facts point to human trafficking for forced labour.

<sup>19</sup> See generally *2009 Trafficking in Persons Report* (US Department of State, June 2009) [TIP 2009]; *2010 Trafficking in Persons Report* (US Department of State, June 2010) [TIP 2010]; and *2011 Trafficking in Persons Report* (US Department of State, June 2011) [TIP 2011].

The 2012 report criticises what is alleged to be an insufficient legislative definition of forced labour, noting that the prohibition does not cover forced labour obtained by “means other than debt, law, custom or agreement”.<sup>20</sup> This is a peculiar criticism however, as it is difficult to imagine forced labour occurring in a manner other than those listed.

Other international reports have also mentioned the issue of human trafficking in New Zealand, although not with the detail of the TIP report. A global survey conducted by the UNODC notes that the definition of trafficking in section 98D is wider than the Protocol definition in that there is no requirement for the element of exploitation, however it fails to note that the definition is also narrower than the Protocol in that it requires a transnational element – an element that is not present in the Protocol – and does not explicitly mention the means elements of abuse of a position of vulnerability, or the giving or receiving of payments to achieve consent.<sup>21</sup> A report of the Advisory Council of Jurists notes the relatively high number of Thai women working illegally in the sex industry in Auckland, although makes the comment that due to the lack of thorough identification procedures it is impossible to put an accurate figure on the number of those women who have been trafficked. It gives non-specific anecdotal information of South-East Asian women being trafficked for the purposes of forced labour, and also states that New Zealand is a transit country for moving the victims of trafficking from Thailand to Japan, Australia and the United States.<sup>22</sup> Lastly, the Pacific Immigration Directors Conference (PIDC) publishes a report on trafficking in the Pacific.<sup>23</sup> This report is compiled from information provided by members of the PIDC. In the most recent 2009 report, there were 38 reported instances of human trafficking in New Zealand and Australia.<sup>24</sup> The report goes on to note the methodological difficulties in obtaining accurate data, stating that due to misidentification of victims as illegal migrants, the number of victims of trafficking is likely to be much greater.<sup>25</sup>

### 2.3. New Zealand Government Response

In contrast to the continued allegations of human trafficking in New Zealand made by these various reports is the consistent response of the New Zealand government, which counter the claims by stating that there is no evidence of human trafficking in New Zealand, or drawing attention to the differences in definition that exist between New Zealand and the US.

The New Zealand government’s position as stated by the Ministry of Justice is that trafficking involves “actual exploitation of vulnerable people”. There must be movement

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<sup>20</sup> *2012 Trafficking in Persons Report* (US Department of State, June 2012) [TIP 2012] at 265.

<sup>21</sup> *Global Report on Trafficking* (UNODC, Vienna, 2009) at 179. See chapter one of this thesis for a more detailed discussion.

<sup>22</sup> Advisory Council of Jurists “Consideration of the Issue of Trafficking: Background Paper” (The Asia Pacific Forum of National Human Rights Institutions, New Delhi, India, 11-12 November 2002) at 84.

<sup>23</sup> Pacific Immigration Directors Conference *People Smuggling, Human Trafficking and Illegal Migration in the Pacific: A Regional Perspective: January to December 2008* (November 2009).

<sup>24</sup> At 20. Unfortunately the report does not break the data down further than this, so it is not possible to determine the number of victims encountered in New Zealand.

<sup>25</sup> At 23.

across international borders in order for trafficking to occur.<sup>26</sup> However, this position is conflicted. The same document setting out the position just stated also notes that the New Zealand approach does not require “exploitation” as part of the offence.<sup>27</sup> This requirement for a transnational element to the offence is held out as important by the New Zealand government, however it does not reflect the internationally agreed definition.

In June 2004, in response to the TIP report in which New Zealand first appeared, the then Justice Minister Hon Phil Goff refuted allegations set out in the report that New Zealand had a problem with human trafficking, and stated that the report gave a “misleading” impression of the situation in New Zealand.<sup>28</sup> In response to the 2007 report, a spokesperson for the Foreign Affairs Minister, the Rt Hon Winston Peters, stated that the report “repeatedly misrepresented” figures which had been “discredited” in previous years.<sup>29</sup> Consistent with earlier statements, in response to the 2008 report, both the Police and the Immigration department refuted claims of human trafficking existing in New Zealand.<sup>30</sup> Likewise in 2009, Immigration and Department of Labour officials claimed that allegations of sex trafficking in New Zealand were “unsubstantiated”.<sup>31</sup> In 2010, the head of Immigration New Zealand, Nigel Bickle, reaffirmed the official position that there was “no evidence of people trafficking”, while continuing on to note, however, that it remained something to which officials should remain “alert”.<sup>32</sup>

The official response may be beginning to change. For example, the Human Rights Commission, which acts as a watchdog on the government in relation to human rights, recognised the existence of a number of Thai women who had been “brought to New Zealand under false pretences and who are coerced into working as sex workers”.<sup>33</sup> Reflecting the sentiments behind this viewpoint, in 2012 a Labour and Immigration spokeswoman stated

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<sup>26</sup> “Ministry of Justice Response to Request for Information related to Trafficking in Persons from the Prostitution Law Review Committee” (Obtained under Official Information Act 1982 Request to the Criminal Justice Group, Ministry of Justice) at [2-5].

<sup>27</sup> At [2-5].

<sup>28</sup> “US State Dept Human Trafficking Report Misleading” Scoop.co.nz (online ed, 17 June 2004); “Goff Says Report Wrng [sic] Radio New Zealand Newswire (16 June 2004); “NZ Named in Trafficking Report for the First Time” Radio New Zealand Newswire (16 June 2004). Despite the New Zealand government’s criticism of the report, the US Department of State stood firmly by its allegations. See “US Stands by Criticism of NZ on Sex Trafficking” Radio New Zealand Newswire (18 June 2004).

<sup>29</sup> “NZ Rebuffs Child Trafficking, Prostitution Claims in US Report” New Zealand Herald (online ed, 9 March 2007).

<sup>30</sup> “Prostitution Law Leads to Sex Slavery” The Dominion Post (online ed, 06 June 2008).

<sup>31</sup> J Savage “Sex Slaves may be Working in NZ, Officials Say” New Zealand Herald (Auckland, 4 April 2009) at A07; “Claims Human Trafficking is Happening in New Zealand” Radio New Zealand Newswire (2 September 2009).

<sup>32</sup> Department of Labour “Immigration NZ Raising Awareness of Possible People Trafficking” (Press release, 26 October 2010).

<sup>33</sup> Human Rights Commission “Sex Workers Project: Information for HRC Staff and Safe House People” (11 June 1999) at 1 (Obtained under Official Information Act 1982 Request to the Human Rights Commission).

that “we are increasingly susceptible to people-trafficking. Immigrants are made to work as unpaid kitchen-navvies or sex slaves by traffickers who hold their passports.”<sup>34</sup>

After concerns were raised with the Department of Labour by representatives from the NGO Slave Free Seas about the employment conditions – in particular the requirement that crew members pay large sums of money, or put up personal property in order to secure a job – on board FCVs, the General Manager of Immigration New Zealand<sup>35</sup> stated that the Department of Labour “does not support the use of sureties ... and will be following up on this issue with the relevant New Zealand charter parties”.<sup>36</sup>

In a statement made on 12 November 2012, the General Manager of Immigration New Zealand said that prior to 2011 the government was unaware of allegations of mistreatment of crew on board foreign charter fishing vessels (FCVs) “on that scale”. He said that if there were abuses before then, then the Department did not know.<sup>37</sup>

The evidence suggests that this is incorrect. Documents obtained by journalists under the Official Information Act 1982 reveal longstanding and high level governmental awareness of the problems caused by FCVs.<sup>38</sup> Although it is fair to concede that only in the last year have the unsavoury practices of FCVs attracted significant media attention, a steady stream of litigation, complaints to Police, and government investigations show that although the general public may not have been aware of the extent of the problem, the government certainly was. The following examples demonstrate this knowledge.

## **2.4. Cases indicating trafficking for forced labour in New Zealand**

Going as far back as 1997, the government has been aware of the problems faced by foreign crew working on board fishing vessels in New Zealand's exclusive economic zone. The *Udovenko* was a Russian-owned vessel that was forfeited to the Crown. Litigation was initiated by crew members of that vessel who alleged non-payment of wages.<sup>39</sup> The High Court found that the official wage books maintained by the officers of the vessel did not accurately represent the hours actually worked by the crew, but instead reflected the – significantly fewer – hours of work stated in the crew's employment contracts.<sup>40</sup>

<sup>34</sup> J Milne “Our Porous Borders” New Zealand Herald (online ed, 22 June 2012).

<sup>35</sup> Who was then Fraud and Compliance Manager of Immigration New Zealand.

<sup>36</sup> P Elms “response to request” (24 August 2011) (Obtained under Official Information Act 1982 Request to Immigration New Zealand).

<sup>37</sup> Peter Elms refers to them as “not serious issues”: see “Govt Found Lax in Tackling Abuse on Foreign Boats” (TVNZ, 12 November 2012).

<sup>38</sup> M Field “Slavery At Sea Exposed” Sunday Star Times (online ed, 3 April 2011).

<sup>39</sup> *Udovenko v Karelrybflot AD90/98*, 24 May 1999 [Udovenko] at 2.

<sup>40</sup> *Udovenko*, at 3.

Although the crew technically won the case, after the two years it took to go through the court system, the six remaining crew members that had not returned to Russia were awarded only \$10,000 each.<sup>41</sup>

In December 2004, the Department of Labour conducted an investigation into the fishing industry that dealt with FCVs. That report made a number of disturbing findings: underpayment of wages; physical and mental abuse; long working hours; withholding passports and fishermen's books; no washing or laundry facilities, and bad quality food – or no food at all when fishing was bad.<sup>42</sup>

In September 2005, crew members from the Korean-flagged *Sky 75* jumped ship at the port of Nelson, and laid a complaint with police alleging serious abuse at sea. They claimed they had been forced to eat rotten meat and vegetables, made to “shower” by standing on deck while waves came on board, were abused both physically and emotionally, and were made to work long hours – for a wage of \$200 USD a month, which was not paid to them.<sup>43</sup>

As a result of these complaints, in 2006 the Code of Practice was introduced by the Department of Labour, with input from industry groups Seafic (the New Zealand Seafood Industry Council) and the New Zealand Fishing Industry Guild (NZFIG), purporting to resolve all the issues relating to working conditions on board foreign vessels.<sup>44</sup>

In 2007, the crew on board the *Aleksandr Ksenofonotov* refused to leave the vessel at the end of their contract, alleging that they had not been paid the amount they were owed. The Employment Relations Authority found in favour of the crew, awarding them damages for unpaid wages.<sup>45</sup>

In August 2010, the *Oyang 70* sank, killing 6 crew members. The widows of the dead Indonesian crew members were entitled to compensation from ACC; however the employer did not make the application. Instead, a representative of the widows applied. Eventually, compensation was awarded to the widows, amounting – according to John Key – to seven times what their husbands would earn in a year.<sup>46</sup> Unfortunately, while the ACC payments were made, the widows have not received the payments due to them from the employer of their husbands under New Zealand's wage protection laws, such as the Minimum Wage Act and the Holidays Act. In a letter to the Coroner, the widows complained that the New

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<sup>41</sup> *Karelrebfloot v Udovenko* [2000] 2 NZLR 24 (CA).

<sup>42</sup> See generally “Employment Conditions in the Fishing Industry – Final Report on Foreign Crew on New Zealand fishing Vessels” (2 December 2004) (Obtained under Official Information Act 1982 Request to Department of Labour).

<sup>43</sup> J Devlin “Modern Say Slavery: Employment conditions for Foreign Fishing Crews in New Zealand Waters” (2009) 23(1) A & NZ Mar LJ 82 at 83.

<sup>44</sup> Seafood Industry Council *Code of Practice for Foreign Fishing Crew: Regulatory Framework* (Seafood Industry Council, Wellington, 2006) [Code of Practice].

<sup>45</sup> *DV Ryboproduct Ltd v The 49 crew of the MFV "Aleksandr Ksenofonotov"* CA10/07, 30 January 2007.

<sup>46</sup> “Indonesian Widows to get ACC” (2012) 88(4) Professional Skipper Magazine 51, at 51.



Zealand government had not given them any information relating either to how their husbands were killed, or when the pay they were owed would be forthcoming.<sup>47</sup>

These examples of abuses on board FCVs prior to 2011 show clearly that at one level or another, the government must have been aware of the nature and extent of the problem. The courts have consistently found in favour of crew members who allege financial abuse; the Police have been made aware of instances of physical and sexual abuse, and the Department of Labour is well versed in the nuances of labour abuses on board FCVs.

In addition to the problems on board FCVs, there have been cases before tribunals where the facts have pointed to trafficking for forced labour. The following cases are useful for demonstrating the ongoing nature of the problem of forced labour in New Zealand, and also showing that the legal system has an understanding of the parameters of forced labour.

In the case of *R v Decha-Iamsakun* in 1992, a Thai national was convicted under s 98(1) of the Crimes Act for attempting to sell a young Thai woman as a slave and sentenced to five years imprisonment with a deportation order enforceable after the sentence had been served.<sup>48</sup> On the facts as stated in the judgment, the offending suggests human trafficking. The defendant had persuaded the victim to accompany him to New Zealand on the basis that there was a job for her in Auckland.<sup>49</sup> Upon reaching New Zealand, the defendant withheld the victims' visa and passport, and the victim was made to work in a massage parlour, where the majority of her earnings were collected by the defendant.<sup>50</sup> The defendant contacted an undercover police officer, and attempted to sell the woman for \$7000 NZD, saying "she [is yours] to do whatever [you] like with her."<sup>51</sup> He told the officer that he used the proceeds from selling women to bring more women from Thailand to New Zealand to sell.<sup>52</sup>

In 2000, it emerged that a crime syndicate was operating out of Auckland that was engaging in what appeared to be trafficking. The three members arrested were alleged to have illegally brought thousands of people into New Zealand and Australia over a five year period, some of whom were trafficked for the purposes of forced labour. It was alleged that the group sold forged New Zealand passports for up to \$30,000 NZD.<sup>53</sup> Those who could not afford to pay this were forced to work in criminal enterprises for the syndicate as part of a debt bondage situation.<sup>54</sup> Charges of fraudulent misuse of documents were laid, and the defendants plead guilty.<sup>55</sup> Unfortunately the Court did not mention the issue of trafficking.

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<sup>47</sup> R McKeown "Coroners Inquest into Oyang 70 Sinking" Newstalk ZB (online ed, 16 April 2012).

<sup>48</sup> *R v Decha-Iamsakun* [1992] 8 CRNZ 470 at 470.

<sup>49</sup> At 472.

<sup>50</sup> At 471.

<sup>51</sup> J Kaburise "Case and Comment" (1992) NZLJ 338 at 339.

<sup>52</sup> At 339.

<sup>53</sup> D Mager "Police Widen Hunt for Human Cargo Traders" New Zealand Herald (online ed, 15 March 2000).

<sup>54</sup> D Mager and J Andrews "Human Cargo Officials 'Bribed'" New Zealand Herald (online ed, 14 March 2000).

<sup>55</sup> *R v Sawar Rahimi* CA4/02, 30 April 2002.

Again in 2000 it was discovered that sweatshops were operating in Auckland. One of these, owned by KC Fashions, employed a group of Thai women, paying them approximately \$1.60 NZD per hour. The women were forced to work long hours seven days a week.<sup>56</sup> A case was successfully taken to the Employment Tribunal for the recovery of arrears of wages and holiday pay for eight of the women.<sup>57</sup> Despite the facts of the case clearly pointing toward the existence of human trafficking, no prosecution was ever brought on this point.

A similar case arose a year later in 2001. The respondents, Mrs Sopana Kirk and Sewing Together Ltd, were alleged to have breached provisions of the Minimum Wage Act 1983 and the Holidays Act 1991. Again, the facts show the existence of human trafficking. The respondents brought women to New Zealand from Thailand under false pretences, withheld their passports, and operated a debt-bondage style scheme in order to keep their employees under control.<sup>58</sup>

Again in 2002 a case along similar lines came before the Employment Tribunal. Three Thai women alleged that they had been persuaded by the defendant to come to New Zealand from Thailand, and once in Auckland, were forced to work long hours, seven days a week. They lived and worked in a garage, and were fed poorly.<sup>59</sup>

The most thorough recent judicial consideration of a similar case with transnational elements was in 2004 with the case of *R v Chechelnitski*.<sup>60</sup> According to the summary of the facts, the defendant smuggled a number of Ukrainian nationals into New Zealand using false Israeli passports.<sup>61</sup> It was noted by the Court on appeal against sentence that in cases such as people trafficking and smuggling,<sup>62</sup> the key factor in determining a sentence must be deterrence. It was held by the Court that a monetary penalty would not normally be appropriate, as traffickers would simply build that fee into the costs of running a trafficking organisation.<sup>63</sup> The defendant in this case was not the organiser of the operation though, but was playing a role akin to a drug courier, and was found guilty under the migrant smuggling provision under s 98C(1) of the Crimes Act.<sup>64</sup>

As the result of a Department of Labour investigation into illegal migrant labour abuse schemes operating in the Hawkes Bay area, in 2006 the case of *R v Setiadi*<sup>65</sup> came before the High Court in Napier. The facts of the case were that the defendant had acted as the New Zealand contact for an Indonesian organisation that brought Indonesian labourers into New

<sup>56</sup> K Perry and D Mager “Factory Slaves Toil for Pittance” New Zealand Herald (online ed, 16 October 1999).

<sup>57</sup> *Elliott v Sivoravong* AT88/00, 5 April 2000 at 15.

<sup>58</sup> *Elliott v Kirk* AT17/01, 19 February 2001 at 4, 6.

<sup>59</sup> *Vevers v Sculpher* AT105/02, 18 June 2002 at [5-6].

<sup>60</sup> *R v Chechelnitski* CA160/04, 1 September 2004 [Chechelnitski].

<sup>61</sup> *Chechelnitski*, at [14].

<sup>62</sup> Incidentally, it is interesting to note that the Court did not use the correct term of “migrant smuggling” but rather the incorrect term of “people smuggling”.

<sup>63</sup> *Chechelnitski*, at [23].

<sup>64</sup> *Chechelnitski*, at [1].

<sup>65</sup> *R v Setiadi* [2006] NZHC 619 [Setiadi].

Zealand on false passports to work as labourers on Hawkes Bay orchards. Each victim paid a large sum of money to the organisation, and was told that they could legally work in New Zealand. Upon arrival they were escorted to the orchards by the defendant, and were kept housed in substandard accommodation.<sup>66</sup> Although the defendant was charged with immigration and migrant smuggling offences under the Immigration Act 1987 and the Crimes Act 1961, the facts also appear to support a charge of human trafficking, and evidence led by the prosecution clearly supported this claim.<sup>67</sup> The case report quotes victim statements showing that the victims were economically vulnerable, paid a relatively large sum to an agent and were deceived as to the nature of the work in New Zealand, and were further exploited upon arrival.<sup>68</sup>

In proceedings that stemmed from the same investigation, although relating to a different operation, *R v Thu Huynh and Ut Danh*<sup>69</sup> was heard by the Napier District Court in 2007. In this case, Vietnamese fishermen who had jumped ship from the Korean FCVs they were working on to escape abusive working conditions were enticed by the defendants to work for the company they represented. The directors of the company were prosecuted for immigration offences. The Court of Appeal found that the directors of the company used fictitious sub-contractors to employ the illegal workers so as to disguise the use of their labour in an attempt to distance themselves from the scheme.<sup>70</sup>

The fishermen paid a sum of money to the defendants and were taken to work on orchards in the Hawkes Bay.<sup>71</sup> The sentencing notes of Judge Adeane in this matter reveal a disconcerting disregard for the apparent seriousness of the offending. Judge Adeane took the view that the men were simply filling a niche in the market for cheap labour.<sup>72</sup>

In one of the most recent cases involving facts supporting forced labour, *Pravinsinh v Savvy Contracting 2008 Ltd*<sup>73</sup> involved a woman who had been persuaded to work for the defendant as an office manager for the company who were contractors for vineyards. Her employer paid her substantially below the minimum wage, threatening to have her work permit revoked if she complained.<sup>74</sup> Although the Court awarded Mrs Pravinsinh her unpaid wages, it is unfortunate that it did not mention the wider implications of the Respondent's behaviour.

It can be seen from the number of these cases that the authorities have some experience in investigating and prosecuting cases that relate to forced labour.

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<sup>66</sup> At [8-10].

<sup>67</sup> M Cullen and B McSherry "Without Sex: Slavery, Trafficking in Persons and the Exploitation of Labour in Australia" (2009) 1 Alt LJ 4 at 8.

<sup>68</sup> *Setiadi*, at [8-10].

<sup>69</sup> *R v Thu Huynh and Ut Danh* DC Napier CRI-2007-020-1460, 12 September 2007.

<sup>70</sup> *Elliott v R* [2010] NZCA 611, at [5], per Cooper J

<sup>71</sup> L Tan "Trio Jailed for Hiring Illegal Foreigners" New Zealand Herald (online ed, 24 July 2010).

<sup>72</sup> *R v Thu Huynh and Ut Danh*, above, n 69, sentencing notes of Judge Adeane.

<sup>73</sup> *Pravinsinh v Savvy Contracting 2008 Ltd* [2012] NZERA Christchurch 28.

<sup>74</sup> At [3].

While the evidence available makes it difficult to support a claim that there is intentional understating of the problem, it seems clear that authorities, for whatever reason, are choosing to prosecute offenders under regulatory offences, as opposed to the more serious offence of human trafficking under s 98D of the Crimes Act. To refer back to a point made in chapter one, the incorrect identification of an individual as belonging to the category of “migrant” as opposed to the category of “trafficking victim” can have severe consequences for genuine victims of crime.<sup>75</sup>

As will be seen in chapter four, the legal requirements for taking such cases are highly analogous to those required for the offence of human trafficking. It is notable that more serious action under s 98D of the Crimes Act has not been taken with respect to the issues surrounding FCVs. The following section of this chapter will look at these issues in depth.

## **2.5. Case Study of Trafficking in New Zealand’s Fishing Industry**

### **2.5.1. Introduction**

This chapter has so far covered the international opinion of the New Zealand trafficking situation generally, considered the response of the New Zealand government to these claims, and considered case law which seems to indicate a pattern of “under-charging” in apparent trafficking situations. I will now turn specifically to the issue of human trafficking in the fishing industry, beginning with some context before moving into the details of the actions that amount to trafficking. To reiterate the methodology used in this section, I have compiled all the information I could obtain relating to the activities of the Oyang Corporation in New Zealand waters. This information comes from research conducted by academics from the Auckland University Business School, reporting from a range of media outlets, information obtained under the Official Information Act, and information provided by a representative of the NGO Slave Free Seas. This information is presented in a narrative form, showing how FCVs operated by the Sajo Oyang Corporation and their New Zealand Charter Party Southern Storm Fishing have set up their fishing operation.

### **2.5.2. Case theory**

The evidence available suggests that transnational commercial enterprises are conducting human trafficking for forced labour in New Zealand waters using methods resembling those commonly used by transnational organised criminal groups. The main actors involved in this process are the foreign corporations that own the fishing vessels; the New Zealand Charter Parties; intermediary recruitment agencies and brokers, and senior crew members working on board the vessels. This assertion is, by its nature, an interim one only. It requires a court of competent jurisdiction to make a conviction under s 98D before a conclusion of human trafficking can be categorically reached.

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<sup>75</sup> See text at n 30 of chapter one of this thesis.

These actors appear to be involved in organising and carrying out human trafficking under the cover of what initially appear to be legally straightforward fishing ventures. Broadly speaking, from the perspective of human trafficking, these ventures can be separated into stages: obtaining approval in principle from the New Zealand government; recruiting fishers and transporting them to New Zealand; exploiting the fishers, and laundering the proceeds.

If proved in court, these fishing operations appear to fulfil all the requirements of human trafficking as required by s 98D of the New Zealand Crimes Act 1961. There is transnational movement; deception and coercion, and both the intent to exploit as well as actual exploitation. The missing element has been the failure of New Zealand authorities to exercise their discretion to prosecute.

### 2.5.3. Background

Since the quota management scheme began in 1986, the use of Foreign Charter Vessels (FCVs) in New Zealand waters has created a “wild west” industry.<sup>76</sup> FCVs are foreign owned and flagged, but are leased by New Zealand companies to fish in New Zealand’s exclusive economic zone. An FCV must be registered as a New Zealand fishing vessel before it is permitted to fish New Zealand waters.

FCVs take 62% of the deep ocean fishing catch, and almost the entire Maori fish quota. The catch is often sent to China for processing in factories with exploitative labour conditions, before being resold all over the world branded as “produce of New Zealand”.<sup>77</sup>

For the purposes of this chapter, the focus will be placed predominantly on the actions of the Korean-owned Sajo Oyang Corporation (Oyang), and their associated Christchurch-registered shell company Southern Storm Fishing 2007 Ltd (SSF).<sup>78</sup> Between 2011 and 2012, these two companies have attracted significant media attention as a result of abuses suffered by crew members on board vessels owned by Oyang and chartered by SSF. However, problems on board Oyang FCVs go back several years.

In June 2007 a crew member had left the *Oyang 70* in Dunedin. Southern Storm Ltd took out an advertisement in the Otago Daily Times offering a \$1000 NZD “bounty” for information about the missing crew member. Although at the time this advertisement went unnoticed in the media, it was highlighted in the 2012 TIP report for its similarities to the bounties offered by 19<sup>th</sup> century slave-owners.<sup>79</sup> The *Oyang 70* sank in August 2010, killing an officer and five crew members.

<sup>76</sup> M Field “Probe Exposes Fishing Underbelly” Sunday Star Times (online ed, 26 October 2011).

<sup>77</sup> M Field “Probe Exposes Fishing Underbelly” Sunday Star Times (online ed, 26 October 2011).

<sup>78</sup> M Field and N Matthewson “Strange Voyage of Oyang 77” Stuff.co.nz (1 March 2012). This is reinforced by a search of the Companies Register, which shows the company has a single shareholder and owner. A previous manifestation of this company which has since been struck off the register, Southern Storm Fishing Ltd, was at one point partially owned by the Sajo Oyang Corporation.

<sup>79</sup> TIP 2012, at 19.

The *Oyang 75* replaced the *Oyang 70*, however early in 2011, the crew left the boat in Lyttelton alleging abuse and non-payment of wages. After the crew left the boat, Southern Storm Fishing Ltd alerted Immigration New Zealand seeking deportation orders in an attempt to get the crew deported from New Zealand.<sup>80</sup> This is a tactic that is repeatedly used internationally by traffickers who find it more convenient for victims to be simply removed from the country in order to prevent court action being taken against them.<sup>81</sup>

Unfortunately, the government was unsupportive of the crew members, who are owed more than \$26,000 NZD in unpaid wages. This figure reflects the wage rate set out in their Indonesian contracts.<sup>82</sup> In order to bring it into line with minimum wages the figure is significantly larger. Labour and Associate Immigration Minister Kate Wilkinson refused to waive the \$550 NZD fee required to appeal the decision to deport the fishermen.<sup>83</sup> As a result, the crew members were forced to return home.

Some New Zealand officials working as observers on these FCVs choose to ignore the issues they are faced with. In an interview conducted by investigative journalist Ben Skinner with a crew member on board the *Melilla 203*, the crew member told of whispering to a New Zealand observer to help him. The observer expressed his sympathy, but simply said it was “not my job” to help.<sup>84</sup> This position will change in the early half of 2013, when the role of observers is intended to be widened to include examining labour conditions.<sup>85</sup>

Back at home in Indonesia, crew members face ongoing intimidation by the manning agents that hire crew to work on board FCVs working in New Zealand waters. The day after Sanford – another New Zealand company associated with Korean boat owners – was identified as being implicated in FCV human trafficking claims, a company spokesman made a statement to the effect that the company had identified the “whistleblower” who had talked to researchers investigating slavery and human trafficking issues associated with FCVs. Shortly after this announcement, a crew member who had been interviewed contacted the journalist saying that there were “strangers at my house, leaving with my family, very scared, please help”.<sup>86</sup> The US embassy in Jakarta helped the crew member escape to a safe house. Further investigation revealed that the strangers were agents from an Indonesian manning agent sent to force the crew member to publicly retract his statements about labour abuse.<sup>87</sup>

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<sup>80</sup> M Field “Families of Fishing Crew Face Backlash” Sunday Star Times (online ed, 8 July 2011).

<sup>81</sup> This pattern of behaviour was discussed by the ECHR in the case of *Rantsev v Russia & Cyprus* (Judgment) First Section 25965/04, 10 January 2010, at [84].

<sup>82</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>83</sup> A Vance “Oyang Fishermen Face Deportation” Stuff.co.nz (12 August 2011).

<sup>84</sup> B Skinner “The Fishing Industry’s Cruellest Catch” Businessweek (online ed, 23 February 2012).

<sup>85</sup> N Guy “response to request” (27 October 2012) (Obtained under Official Information Act 1982 Request to Immigration New Zealand).

<sup>86</sup> M Field “Whistleblower in Hiding after ‘Slavery’ Storm” Sunday Star Times (online ed, 26 February 2012).

<sup>87</sup> M Field “Whistleblower in Hiding after ‘Slavery’ Storm” Sunday Star Times (online ed, 26 February 2012).

Despite the government promising to take action against abuses on FCVs,<sup>88</sup> there is clear evidence that labour abuses are ongoing. In March 2012, the Oyang Corporation expelled the Indonesian and Filipino crew of the *Oyang 77* – a sister ship to the *Oyang 70* and *Oyang 75* – without paying them the approximately two million NZD they were owed in wages. The crew were given small cash “bonuses” of \$4000 NZD as total payment for two years’ continuous work. Southern Storm Fishing Ltd, the New Zealand Charter Party for the *Oyang 77*, had also tried unsuccessfully to have the crew of the *Oyang 75* expelled before they could testify in court.<sup>89</sup>

More recently, the National government has taken steps to regulate the industry. A 2012 ministerial inquiry recommended the government adopt 15 proposals aimed at tightening the behaviour of FCVs in New Zealand waters.<sup>90</sup> The industry response to this has been less than enthusiastic. Officially, the Sajo Oyang Corporation states that they cannot afford to pay fishers minimum wage, although they have told New Zealand government officials that they are paying the regulation wages.<sup>91</sup> The New Zealand fishing company Sanford argues that restrictions on the use of FCVs would be “unwarranted and counter-productive”, and would “seriously hamper the future development of New Zealand's fishing industry”.<sup>92</sup> The Chief Executive of the Maori Fisheries Trust, Peter Douglas, claims that reforms to the FCV scheme are “draconian”, and are the result of “media-driven hysteria.”<sup>93</sup>

Showing clearly that claims of hysteria are false, the table below sets out reported cases of fishermen who have left their vessels as a result of suffering abuses between 2005 and 2011.<sup>94</sup>

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<sup>88</sup> Ministry of Agriculture and Forestry *Report of the Ministerial Inquiry into the Use and Operation of Foreign Charter Vessels* (February 2012) at 1.

<sup>89</sup> M Field “Action on Fishing Abuse Escalates” Stuff.co.nz (4 March 2012).

<sup>90</sup> Ministry of Agriculture and Forestry, above n 88 at 10-13.

<sup>91</sup> M Field “untitled” (26 August 2011) <[www.michaelfield.org](http://www.michaelfield.org)>. See also Ministry of Business, Innovation and Employment “CFF – Compliance Report” (1 October 2012) (Obtained under Official Information Act Request to the Ministry of Business, Innovation and Employment) at 2.

<sup>92</sup> M Field “Probe Exposes Fishing Underbelly” Sunday Star Times (online ed, 26 October 2011).

<sup>93</sup> “New Fishing Laws ‘Draconian’: Iwi Fishers” 3 News (online ed, 16 February 2013).

<sup>94</sup> Reproduced from C Stringer, G Simmons and D Coulston “Not in New Zealand’s Waters, Surely? Labour and Human Rights Abuses Aboard Foreign Fishing Vessels” 2011 New Zealand Asia Institute Working Paper 11-01 at 10. Citations omitted.

Year	Incident
2005	<p>Six Indonesian fishermen sought refuge from the Korean vessel <i>Melilla 203</i> citing mistreatment.</p> <p>Ten Indonesian fishermen fled the Korean vessel <i>Sky 75</i> claiming physical and mental abuse.</p> <p>In a later incident two Vietnamese fishermen fled <i>Sky 75</i> also claiming abuse.</p> <p>Four Chinese fishermen fled the Korean vessel <i>Oyang 96</i> citing abuse.</p> <p>Eight Indonesian fishermen fled the <i>San Liberatore</i>, a New Zealand owned vessel.</p> <p>Crew jumped ship from the Korean vessel <i>Melilla 201</i>; this incident “revealed a history of death, injury and pollution on that ship and its sister ship the <i>Melilla 203</i>”.</p>
2006	<p>Nine Indonesian fishermen fled the Korean vessel <i>Marinui</i> claiming physical and mental abuse.</p> <p>Twenty seven crew aboard the Ukrainian vessel <i>Malakhov Kurgan</i> went on strike over a wage dispute.</p> <p>Burmese crew aboard the Korean vessel <i>Sky 75</i> claim abusive treatment.</p>
2009	<p>Eleven Indonesian fishermen fled the Korean vessel <i>Shin Ji</i> claiming physical and verbal abuse and the non-payment of wages.</p> <p>Four crew jump ship from the Korean vessel <i>Melilla 201</i> citing abusive treatment and long shifts.</p>
2010	<p>A Korean vessel, the <i>Oyang 70</i> sunk with the loss of six lives. Survivors complain of physical and mental abuse aboard the vessel as well as non-payment of wages.</p>
2011	<p>Seven Indonesian crew leave the <i>Shin Ji</i> early following the drowning of the Bosun. On returning home bonuses were withheld by the manning agent.</p> <p>Dissatisfied with the insurance payment to the widow of the Bosun, the <i>Shin Ji</i> captain anchored at sea for almost a month refusing to fish.</p> <p>Seven Indonesian crew fled the Korean vessel <i>Shin Ji</i> claiming physical, mental and psychological abuse as well as the non-payment of wages.</p> <p>Thirty two Indonesian crew fled the Korean vessel <i>Oyang 75</i> claiming physical, mental and psychological abuse, as well as the non-payment of wages.</p>

#### 2.5.4. Detailed facts

Through analysis of a typical commercial fishing charter agreement, it will become apparent how the New Zealand system has allowed the operation of transnational criminal enterprises to work unchecked in New Zealand’s exclusive economic zone. The evidence that will be presented points strongly toward the crimes of human trafficking; dealing in slaves; money laundering; dishonesty offences; false accounting practices; deception of government



officials, and natural resource crime. This case study will focus on the activities of one particular arrangement between the New Zealand registered Southern Storm Fishing 2007 Ltd and the Sajo Oyang Corporation. As mentioned, this case study has been chosen because of the wide range of information available which allows the presentation of a relatively complete picture of the activities of the Sajo Oyang Corporation.

#### **2.5.4.1. Parties involved**

There are a number of parties who are involved in this operation.

- Firstly are the New Zealand Charter Parties (NZCP) such as Southern Storm Fishing Ltd,<sup>95</sup> and their directors, legal representatives and agents,<sup>96</sup> employed to apply for Approval in Principle (AIP) from Immigration New Zealand (INZ).
- Secondly, the Korean officers who record false hours of work by crew, and subject crew members to violent and inhumane treatment and working conditions.
- Thirdly, the owner of the vessels, the Korean Sajo Oyang corporation.
- Fourthly, the Korean Manning Agent.<sup>97</sup>
- Fifthly, the Indonesian Manning Agents. The identity of three of these are known to researchers and the New Zealand government: PT Nurindo Mandiri International; PT Panca Karsa Mandiri Sejati; and Oriza Sativa Agency.<sup>98</sup>

#### **2.5.4.2. Chronology of Events**

The first step in the process is when the New Zealand Charter Party intends to charter a foreign vessel to fish the NZCP's annual catch entitlement<sup>99</sup> (ACE) in New Zealand's EEZ. In order for this to go ahead, the NZCP will instruct its agent to lodge an application with INZ for an AIP. This must be done before the fishing season begins. This application is made under section WJ3.1 of the Immigration New Zealand Operational Manual. Under this section, the overriding principle governing the grant of approval in principle is that employment opportunities for New Zealand citizens and residence class visa holders must be prioritised.<sup>100</sup> This section of the Manual states that AIP will be granted when the NZCP can satisfy INZ that there are no suitably qualified New Zealanders available to work.<sup>101</sup> This must be evidenced by reference to a lack of suitable candidates on the Deep Sea Fishing Crew Register (DSCFER), and may be supported by additional evidence provided by

<sup>95</sup> Including in all its previous manifestations.

<sup>96</sup> For example, the agent of Southern Storm Fishing Ltd is Fisheries Consultancy (NZ) Ltd, of Lyttelton.

<sup>97</sup> At this point in time it is uncertain who this agent is. Documents mentioned in the PWC audit refer to a Korean agent, but do not mention its name.

<sup>98</sup> PriceWaterhouseCoopers "Oyang 75 Crewmen Wages Dispute – Tracing of Wages Remitted to Indonesia" (Obtained under Official Information Act 1982 Request to Immigration Group, Department of Labour) at 5.

<sup>99</sup> This is the right for the holder to land a specified number of kilograms of a type of fish in a specified area.

<sup>100</sup> Immigration New Zealand *Operational Manual* [Operational Manual] at [WJ3.1(a)].

<sup>101</sup> At [WJ3.1(b)].

members of the industry.<sup>102</sup> In addition, the NZCP must be a signatory to the Code of Practice.<sup>103</sup> Under this, the NZCP agrees to employ crew members on a contract reflecting a number of standard principles that ensure crew will be properly treated.<sup>104</sup> The NZCP must also provide a deed of guarantee stating that crew members will be paid at the minimum level by the NZCP in the event of a default of payment of wages by the foreign employer.<sup>105</sup> This deed of guarantee was introduced as part of the 2006 Code of Practice designed to protect the rights of crew members.<sup>106</sup> It sets out that where an employer fails to pay its employees, the employees have a right of action against their employer.<sup>107</sup> If this fails for any reason, the employees are then able to take an action against the NZCP.<sup>108</sup> From this process, it can be reasonably inferred that the NZCP must know of the requirements to treat crew members properly.

While the NZCP does in fact make some effort to find crew members, these efforts are demonstrably weak. One organisation interested in the efforts made by NZCPs in this regard posted advertisements for employment on several prominent New Zealand employment websites and received 825 qualifying applications in the space of a few months.<sup>109</sup>

After INZ gives the NZCP approval in principle to proceed, the NZCP will time charter a vessel from the foreign vessel owner, in this case the Sajo Oyang Corporation. The time charter agreement<sup>110</sup> states that the NZCP (the Charterer) will use a vessel owned by Sajo Oyang (the Owner) to target and catch specified quantities of fish in defined areas in New Zealand's EEZ.<sup>111</sup> The contract states that the Owner of the vessel has full responsibility and discretion for hiring officers and crew to run the vessel,<sup>112</sup> and paying their wages.<sup>113</sup> Interestingly, the Owner also agrees to indemnify the Charterer with respect to any legal liability they might incur as a result of any action by the boat owner or their employees.<sup>114</sup> This has implications for the situation where the vessel owner does not pay the crew members. If the crew members then sue the NZCP for their wages, as they are entitled to do under the Admiralty Act 1973,<sup>115</sup> the NZCP can then recover costs from the boat owner.

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<sup>102</sup> At [WJ3.1.1].

<sup>103</sup> At [WJ3.1.5].

<sup>104</sup> Code of Practice, above n 44, at Appendix 9 "Foreign Charter Vessels – Crew Employment Agreements: Standard Principles".

<sup>105</sup> Operational Manual, at [WJ3.1.10].

<sup>106</sup> Code of Practice, above n 44, at Appendix 10 "Deed of Guarantee of Financial Obligations in Respect of Foreign Crew".

<sup>107</sup> At [cl 4].

<sup>108</sup> At [cl 4, 5].

<sup>109</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>110</sup> "Time Charter Agreement Between Oyang Corporation and Southern Storm Fishing (2007) Limited" (15 March 2007) (Obtained under Official Information Act 1982 Request to Department of Labour) [Time Charter Agreement].

<sup>111</sup> Time Charter Agreement, at [Introduction, B].

<sup>112</sup> At [cl 6].

<sup>113</sup> At [cl 18.1(a)].

<sup>114</sup> At [cl 20.1].

<sup>115</sup> Admiralty Act 1973, s 7.

Perhaps more importantly, this clause also allows the NZCP to assure INZ that they are in a position to guarantee the wages of crew members, as required under WJ3.1.10 of the Immigration New Zealand Operational Manual. This means that the NZCP – in this case Southern Storm Fishing – can in practice be a very small operation.

After the time charter agreement is concluded, the vessel owner contracts with a Korean manning agent to recruit crew members. This Korean agent in turn sub-contracts an Indonesian manning agent to hire the required number of crew members. The Indonesian agent then advertises these positions. Applicants are required to pay a cash fee of three months' salary, and to put up security in the form of titles to property, or other equally valuable items.<sup>116</sup> The requirement for sureties is contrary to INZ policy<sup>117</sup> and international law.<sup>118</sup> These Indonesian agents have been found to be "unreputable".<sup>119</sup>

Applicants are then required to sign an Indonesian employment contract which differs significantly from the employment principles set out in the COP. Under this contract, crew members agree to work for significantly less than the minimum New Zealand wage,<sup>120</sup> and must accept harsh financial penalties of up to \$10,000 USD – the equivalent of two and a half years wages, payable by the employee's wife or family if the employee is unable to pay – if they escape from the ship for any reason whatsoever.<sup>121</sup> The contract contains no clauses pertaining to work hours.<sup>122</sup> If an employee must be sent home due to injury caused by an accident or illness, they will have the cost of a return plane trip deducted from the pay owed to them<sup>123</sup> and will not be covered by medical insurance on their return.<sup>124</sup> If the employee is killed on board, the family will receive an insurance payout of \$45 million RP.<sup>125</sup> However, this insurance policy is taken by the vessel owner and not the manning agent. The implication of this is that if payment is not forthcoming, the family of the deceased will find it very difficult to keep the Korean vessel owner accountable.

The problems of this arrangement were highlighted in the aftermath of the sinking of the *Oyang 70* in 2010. The widows of the five Indonesian fishermen who drowned waited two

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<sup>116</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>117</sup> P Elms "response to request" (24 August 2011) (Obtained under Official Information Act 1982 Request to Immigration New Zealand).

<sup>118</sup> Work in Fishing Convention ILO C188, 14 June 2007, at article 22; Maritime Labour Convention MLC, 20 August 2012, at art IV.

<sup>119</sup> Ministry of Business, Innovation and Employment "CFF – Compliance Report" (1 October 2012) (Obtained under Official Information Act Request to the Ministry of Business, Innovation and Employment) at 12.

<sup>120</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>121</sup> At [cl 1].

<sup>122</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>123</sup> At [cl 10].

<sup>124</sup> At [cl 2(b)].

<sup>125</sup> At [cl 2(a)]. This amount is equivalent to \$5,706 NZD.

years for an insurance payout, relying on pro bono legal work from New Zealand to enforce their legal rights to this money.<sup>126</sup>

The applicants are made to sign this contract without being given an opportunity to seek legal advice. They are not shown the AIP and COP compliant New Zealand employment contract.<sup>127</sup> Visa applications are either signed by the applicants at this point, or in some cases their signatures are forged.<sup>128</sup> The effect of this is to ensure that the applicant is completely separated from officials, or official documentation at all times, meaning that the applicant must accept the conditions imposed on them.

Both the compliant New Zealand contract – with forged signatures – and the visa applications are at this point lodged with New Zealand authorities by the NZCP or their agents. At the same time that these are signed, crew members also sign a Korean employment contract. This contract (written in Korean) ensures the boat owner remains compliant with Korean maritime law. It is interesting to note that unlike New Zealand, there appear to be no applicable minimum wage requirements under Korean law, as the monthly salary is the same as per the Indonesian contract.<sup>129</sup> It appears that in some situations, crew members are required to sign blank sheets of paper which are filled in later.<sup>130</sup>

After the signing of these contracts and the forgery of the applicants signatures, it is at this point that it can be said that the crew members have been recruited deceptively, and coerced through an abuse of a position of power into conditions set up for the exploitation of their labour.

The next part of the process is to transport the crew members from Indonesia to New Zealand. Crew members are met at the airport by the NZCP or their agent and are escorted to the vessel to begin work. Crew members' passports and seamen's books are held by vessel officers.<sup>131</sup>

In the case of the crew working on board the *Oyang 75*, after boarding the vessel they were taken one by one to the bridge room of the vessel, and in the presence of the Captain, a representative from SSF and a representative from Oyang Corporation, were made to sign a document which was concealed from them.<sup>132</sup> This document was a nomination form for a

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<sup>126</sup> “Indonesian Widows to get ACC”, above n 46, at 48.

<sup>127</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>128</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>129</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>130</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013). See also “Crew Interview Questions” (Obtained under Official Information Act Request to the Ministry of Business, Innovation and Employment) at 3.

<sup>131</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>132</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

bank account for wages to be paid into. The crew members were not provided with the details of this account.<sup>133</sup>

As per the terms of the time charter agreement between the boat owner and the NZCP, the NZCP provides annual catch entitlement for the vessel to fish.

When at sea, the crew are forced to work shifts of up to 53 hours, and sign false timesheets stating that they have worked six hours a day<sup>134</sup> – adding up to the 42 hour minimum weekly work amount prescribed by the COP.<sup>135</sup> Although a schedule is kept on board stating what the hours of work are meant to be, these are not implemented and appear to be solely for the purpose of any observer on board.<sup>136</sup>

During their time at sea, crews are often subjected to abuse. They are for instance often given no days off during the period during which they work.<sup>137</sup> The following examples show a history of abuse on board FCVs, demonstrating both the abuse of a position of power by officers toward crew, and intent to exploit the labour of the crew. The consistent patterns of behaviour toward crew members show that reports of abuse do not represent isolated instances, but are part of a larger pattern.

In September 2005, ten fishermen working on the Korean fishing vessel *Sky 75* “jumped ship” at the Port of Nelson, climbing over the security fence and going to the police. The complaint they laid alleged serious abuse while working in New Zealand waters. The fishermen alleged that they had been fed rotten meat and vegetables; made to shower by standing on deck while waves came on board; constantly abused both physically and emotionally, and forced to continue working long hours while sick or injured for a wage of \$200USD per month – which was not paid to them.<sup>138</sup>

In July 2011, 32 Indonesian fishermen left their fishing vessel – the *Oyang 75* – in the port of Lyttelton claiming physical and verbal abuse, and the under payment of five months of wages.<sup>139</sup> This walk off came only two months after a media event where journalists from the major New Zealand broadcasting networks were invited to what was held out to be the flagship of the Oyang fleet.<sup>140</sup>

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<sup>133</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>134</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>135</sup> Code of Practice, above n 44, at Appendix 9 “Standard Principles” at [no 8].

<sup>136</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>137</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>138</sup> Devlin, above n 43, at 82.

<sup>139</sup> J Braddock “Slave Labour Conditions in New Zealand’s Fishing Industry” (9 July 2011) World Socialist Web Site <[www.wsws.org](http://www.wsws.org)>.

<sup>140</sup> Maritime Union of New Zealand “Fishing Charges for Oyang 75 Officers Point to Industry Wide Failings” (press release, 16 October 2011).

Crew members on the *Oyang 75* reported officers beating them for working too slowly, and making crew members remain standing in a fixed position for hours as punishment for perceived slights to officers.<sup>141</sup>

Problems with FCVs are not restricted to vessels owned by the Oyang Corporation. The “cockroach infested and leaky” *Shin Ji*, chartered by Tu’ere Fishing Ltd,<sup>142</sup> had no bed linen, no hot water and the life rafts were inaccessible due to mis-stowed fishing gear. Fishermen working aboard the *Shin Ji* went on strike for non-payment of wages dating back two years – the wages only amounted to \$260 NZD a month. Crew members were forced to “massage” the captain nightly, and crew consistently worked shifts between 16 and 30 hours without breaks. No time off was given for sickness or injury, and after the death of a crew member, no action was taken by the New Zealand police, or the boat owners.<sup>143</sup>

In February 2012, a major piece of investigative journalism was published in Bloomberg Businessweek which had a significant impact on public awareness of human trafficking in the fishing industry. The report by Ben Skinner contained in depth interviews with fishermen who had worked on FCVs in New Zealand waters.<sup>144</sup> The stories that emerge stand in stark distinction to the claims made by the CEO of Sanford, Eric Barrett, who stated that the FCVs chartered by Sanford “don’t have any issues with labour abuse”.<sup>145</sup> Skinner’s interviews reveal systematic rape and assault of crew members working on board FCVs.

In these interviews, some crew members made the point that comparatively, working on board the *Melilla 203*<sup>146</sup> was at first decent compared to the *Dong Won 519*, another charter vessel operating in New Zealand’s waters.<sup>147</sup> However after setting sail the conditions became increasingly worse, and like on the *Dong Won 519*, patterns of assault and sexual abuse of Indonesian crew members by Korean officers emerged. Crew would work 16 hour shifts at a minimum, and often up to 30 hours without a break. Over the decade that the *Melilla* ships have operated in New Zealand waters, dozens of crew have suffered fatigue related injuries, and several have died.<sup>148</sup>

After working for eight months on board the *Melilla 203*, two dozen crew members protested to the Captain over their mistreatment by officers and lack of wages. Although under New Zealand law the crew were entitled to at least \$12 NZD per hour, after all the deductions and

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<sup>141</sup> Stringer, Simmons and Coulston, above n 94 at 14. See also Advocates for Public Interest Law “Comments Concerning the Human Trafficking in Republic of Korea to the United States Department of State” 21 February 2013 <[www.apil.or.kr](http://www.apil.or.kr)>.

<sup>142</sup> Now in liquidation. It is interesting to note that one of the Directors of Tu’ere Fishing Ltd was until recently also a Director of Southern Storm Fishing Ltd.

<sup>143</sup> M Field “Striking Fishermen Deported Penniless” Sunday Star Times (online ed, 18 September 2011).

<sup>144</sup> Skinner, above n 84.

<sup>145</sup> Skinner, above n 84.

<sup>146</sup> Owned by Taejin Fisheries Ltd (Korea), and chartered by UFL Charters Ltd (New Zealand).

<sup>147</sup> Owned by Dong Won Fisheries Co Ltd (Korea) and chartered by Sanford Ltd (New Zealand).

<sup>148</sup> Skinner, above, n 84.

fees had been taken from their pay by agents, the crew were earning only \$1 NZD per hour.<sup>149</sup> In response, the Captain of the vessel threatened to send the protesting crew members home to face retribution from the manning agents who had hired them. The crew walked off the boat in Lyttelton and took an action under the Admiralty Act for unpaid wages.<sup>150</sup>

Even when not on board the vessel, the actions of crew members are tightly monitored. After the sinking of the *Oyang 70*, the surviving crew were escorted by private security guards paid for by the Oyang Corporation to a motel in Christchurch between August 20 and 23 2010 for police interviews but were not given proper food, clothes or money. When interviewed, crew members stated that they were “starving”.<sup>151</sup> In response to a media request for comment on this situation, the agent for Southern Storm Fishing reportedly showed “nothing but contempt” for the fishermen.<sup>152</sup>

The disregard toward the rights of the crew is mirrored by the disregard toward environmental laws. Crew members are routinely ordered to high-grade catch,<sup>153</sup> dump by-catch species with a high deemed value cost<sup>154</sup> and dump low quality fish on a daily basis.<sup>155</sup> In addition, crew are ordered to discharge oil and rubbish overboard.<sup>156</sup> One inference that can be made from this is that the companies in charge of the fishing operation have a total disregard for the laws they are supposed to be bound by.

Joe Fleetwood, the Secretary General of the Maritime Union of New Zealand has stated that “the pattern of worker exploitation and environmental plunder are two faces of the same coin”.<sup>157</sup> Fleetwood argues that the common scenario of blame being placed on crews for labour and environmental abuses is misplaced, and that:<sup>158</sup>

corporate executives at the top of the food chain [are] walking away with profits from rotten and unethical practices... the system is set up so the big operators keep their distance from the dirty end of things.

After the time charter is completed, if they have not been completed during the voyage, time sheets purporting to show that crew members have been paid the minimum wage are fabricated,<sup>159</sup> with signatures of crew members forged.<sup>160</sup>

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<sup>149</sup> Skinner, above n 84.

<sup>150</sup> This case is currently before the High Court in Christchurch.

<sup>151</sup> M field “untitled” no date available <[www.michaelfield.org](http://www.michaelfield.org)>.

<sup>152</sup> M field “untitled” no date available <[www.michaelfield.org](http://www.michaelfield.org)>.

<sup>153</sup> This is the practice whereby fish of the highest value are kept and the rest are thrown back overboard.

<sup>154</sup> When by-catch is landed, the NZCP is required to pay a fixed price for each species of by catch. By dumping species with a high deemed value, more profit can be made.

<sup>155</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>156</sup> *US v Sanford Ltd.* 841 F Supp 2d 309 (DDC 2012).

<sup>157</sup> Maritime Union of New Zealand, above n 140.

<sup>158</sup> Maritime Union of New Zealand, above n 140.

<sup>159</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>160</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

The vessel owner pays the Korean manning agent an amount per crew member to be used for salaries (between \$350-\$800 USD per month, depending on the length of service). After deducting their commission of up to 50%, the Korean agent forwards the remainder to the Indonesian agent, who in turn deducts their commission of between \$50-\$100 USD per person. The balance (less a percentage of around 40% held to ensure co-operative future behaviour) is then paid to the crew member. The final amount received is between \$180 and \$260 USD per month.<sup>161</sup>

There is a step missing in this chain of events. What is clear from statements made by crew is that wages were paid into bank accounts that were purportedly in their names,<sup>162</sup> but in fact were not controlled by them, instead of their nominated bank account.<sup>163</sup> In one case, it was found that the bank account alleged to belong to a crew member did not in fact exist, and the crew member was never paid.<sup>164</sup> The amount received by each crew member is around 15% of what is owed to them under the New Zealand employment contract.<sup>165</sup>

There appears to be intent on behalf of the boat owner and the NZCP to not pay the employees' minimum wage. To be found guilty for human trafficking under s 98D, it is necessary to show either that the accused intended to coerce or deceive the victim, or were reckless as to whether the victim would be coerced or deceived by the actions of the accused.

There are a number of pieces of evidence that if proved in court could be used to support a claim that the vessel owner and the NZCP intended to coerce or deceive the crew members into entering New Zealand, or were reckless as to whether they would be coerced or deceived.

Firstly, interviews with crew members show that they never see the Department of Labour pamphlet containing information regarding wages as set out in the Code of Practice.<sup>166</sup>

Secondly, crew members are never informed by officers of minimum wage requirements.<sup>167</sup> In some cases, it seems that crew are actively misled about what the minimum wage is. One statement by a crew member on the *Oyang 70* said he was told by an officer that the minimum was \$260 USD a month,<sup>168</sup> when in fact the minimum wage is \$651 NZD a week.<sup>169</sup>

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<sup>161</sup> See generally PriceWaterhouseCoopers, above n 98.

<sup>162</sup> Maritime Union of New Zealand, above n 140.

<sup>163</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>164</sup> M Field "Sanford to Pay Crew Direct" Stuff.co.nz (30 July 2012).

<sup>165</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>166</sup> Code of Practice, above n 44, at Appendix 2.

<sup>167</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013). See also Ministry of Business, Innovation and Employment "CFF – Compliance Report" (1 October 2012) (Obtained under Official Information Act Request to the Ministry of Business, Innovation and Employment) at 18.

<sup>168</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>169</sup> This is calculated by taking the current minimum wage (as at December 2012), adding the \$2NZD per hour as required by the Code of Practice, and multiplying by 42 hours – the minimum allowable under the Code of Practice, at Appendix 10, Schedule 1 "Government Requirements".



Thirdly, crew members are required to sign three different employment contracts containing clauses which differ significantly from each other. Two of these three contracts are written in languages that are not spoken by the crew member. In some cases crew members are not shown these contracts at all, and their signatures are forged, or taken from a blank page that the crew member has signed multiple times.<sup>170</sup>

Fourthly, the timesheets kept on board the vessel are inaccurate. An examination of the timesheets shows that the record of hours worked has been entered incorrectly. Interviews with many crew members from Korean-flagged fishing vessels have shown uniformly that the hours that are worked by them are not reflected in the industry-standard timesheets that are completed by Korean officers on board those vessels. Of those crew members interviewed, several had maintained their own private timesheets, which when compared to the official timesheets show a consistent under-recording of hours worked by the Korean officers who fill out the official timesheets.<sup>171</sup>

Lastly, there is the unanswered question of what happens to the money paid to the crew after it leaves New Zealand. An audit conducted at the end of 2012 by Price Waterhouse Coopers was unable to determine this, finding only that between leaving New Zealand and arriving in a crew members' bank account, a significant amount had disappeared.<sup>172</sup>

In the final step of the process, crew members are escorted to the airport by the NZCP or their agent,<sup>173</sup> and are flown back to Jakarta. It is only after the crew have left New Zealand and are back in Indonesia that the process of transferring wages begins. This ensures that if a crew member "misbehaves" in any way, it will be possible to withhold payment of wages to that crew member. It also reduces the ability of crew members to seek redress in New Zealand courts.

#### **2.5.4.3. The aftermath (ongoing issues)**

Earlier in 2012, crew members from the *Oyang 75* had been given accommodation in a Christchurch hostel. Given the prior history of the Sajo Oyang Corporation, it was believed that some attempt might be made to intimidate the crew. This belief proved to be correct. Members of the crew recognised an agent of the Oyang Corporation attempting to check in to the backpackers. Fortunately, however, the manager had been instructed not to allow any other guests to check in while the crew were staying there. A conversation with the agent by a member of Slave Free Seas confirmed that the agent, along with several other employees of the Oyang Corporation, was attempting to discourage the crew from staying in New Zealand and cooperating with authorities.<sup>174</sup> In addition, the Sajo Oyang Corporation has sent letters to the Indonesian manning agents attempting to prevent ex crew members from complaining

<sup>170</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>171</sup> Interview with Peter Dawson (the Author, Nelson, 17 December 2012).

<sup>172</sup> See generally PriceWaterhouseCoopers, above n 98.

<sup>173</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>174</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

to authorities, and stating that if the manning agents do not take steps to remedy the situation, Sajo Oyang will discontinue using their services.<sup>175</sup> This suggests that the Sajo Oyang Corporation has some direct relationship with the agents, in addition to a more formal relationship through the Korean manning agent. This is reinforced by a finding by the accounting firm PriceWaterhouseCoopers in its audit that the relationship between the manning agents and the Sajo Oyang Corporation “is unusual, lacks transparency and [it can be inferred] that a special relationship exists”.<sup>176</sup> The report hypothesises that the Sajo Oyang Corporation acts in collusion with the manning agents to revert money paid for the payment of crew wages back to the Sajo Oyang Corporation.<sup>177</sup>

During an audit conducted by the Ministry of Business, Innovation and Employment, SSF retracted documentation that had previously provided to the MBIE as evidence of correct wage payments to crew. The audit concludes that this brings into question the credibility of information that has been provided by SSF to officials.<sup>178</sup>

More recently, the Oyang Corporation has made another attempt to prevent witnesses from appearing in court cases against the Oyang Corporation by offering “peace contracts” under which crew members receive a small payment in return for promising not to testify as a witness in any legal proceedings.<sup>179</sup>

Arguably, this could be viewed as an attempt to pervert the course of justice.<sup>180</sup> In addition, it appears to be an illegal contract. There is an established line of authority for the proposition that a contract attempting to hinder the investigation or prosecution of an offence will be illegal.<sup>181</sup>

A more general comment on this is that it demonstrates the interconnected relationships that all the parties share. Although at first glance it appears that the parties are kept at arm’s length from each other, in practice it appears they are closer than they first seem.

It is conceded that in the facts just presented there are a number of questions that remain unanswered. In spite of this, it is submitted that the facts – if proved in court – would support a charge of human trafficking. To summarise, human trafficking under section 98D requires

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<sup>175</sup> Interview with Confidential Industry Source (the Author, Christchurch, 24 January 2013).

<sup>176</sup> PriceWaterhouseCoopers, above n 98, at 9.

<sup>177</sup> PriceWaterhouseCoopers, above n 98, at 9.

<sup>178</sup> Ministry of Business, Innovation and Employment “CFF – Compliance Report” (1 October 2012) (Obtained under Official Information Act Request to the Ministry of Business, Innovation and Employment) at 2.

<sup>179</sup> D Levy “Korean fishing firm gags crew with ‘peace’ contract” Stuff.co.nz (7 October 2012).

<sup>180</sup> D Levy “Korean fishing firm gags crew with ‘peace’ contract” Stuff.co.nz (7 October 2012).

<sup>181</sup> *Slater v Mall Finance and Investment Co Ltd* [1976] 2 NZLR 1; *A v Hayden* (1985) 56 ALR 82.

an element of cross-border movement by the victim which is induced by an element of coercion or deception.<sup>182</sup>

There are two main ways of fitting the facts to the offence.

- In the first scenario, the element of coercion or deception can be said to be filled when the economically vulnerable victim is required to provide payments in order to secure a job under a set of contractual arrangements which are set up to deceive the victim. The international movement element is complete when the victim travels to New Zealand on the basis of this coercion and deception to begin work.
- In the alternative, the offence can be conceived as beginning in New Zealand. The victim is coerced through an abuse of a position of power into working under exploitative conditions on board the vessel under threat of deportation and black-listing. The movement element then occurs when the vessel leaves the 12 nautical mile territorial limit, and then re-enters port at the conclusion of the fishing period. During the entry into New Zealand territory, the crew are still under coerced working conditions.

Section 66(2) of the Crimes Act states that where two or more people have a common intention to carry out an unlawful purpose, each person will be considered to be a party to every offence carried out by any member of the group.

To prove either of these and achieve convictions against all the main parties, it will be important to show that the parties were acting together in furtherance of an unlawful common purpose as per s 66(2) of the Crimes Act. This could be stated as aiming to make a financial profit through a charter fishing arrangement through the exploitation of crew labour and the exploitation of the environment. It is submitted that the complex commercial and contractual arrangement that underlies the relationships between the different parties in this case demonstrates an intention to carry out this common purpose.

Using s 66(2) to sustain a charge of human trafficking against multiple parties would require proof that one of the parties to the common purpose committed the offence, although it is not necessary that the party be convicted for the offence.<sup>183</sup> It is also not necessary to prove that the other parties to the common purpose were directly involved, or knew of the exact details by which the offence would occur.<sup>184</sup> It will suffice to show that the common purpose is ongoing, and that the offence charged and proved with respect to one party is a known probable consequence of the common plan, and occurred during the prosecution of the

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<sup>182</sup> I have already argued that these terms impliedly contain the other elements of the UN definition – abuse of a position of vulnerability or power and the giving or receiving of payment to achieve consent – in chapter one of this thesis.

<sup>183</sup> B Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA66.24].

<sup>184</sup> At [CA66.19(1)(a)].

plan.<sup>185</sup> So long as the secondary parties do not withdraw from the common purpose, it is irrelevant whether or not the secondary parties authorised or agreed to the commission of the offence.<sup>186</sup>

Whether or not each party knew human trafficking to be a probable consequence of the plan will be determined by a subjective test.<sup>187</sup> Wilful blindness to the risk of commission of human trafficking may constitute knowledge.<sup>188</sup> A party will be deemed to have passed this test if it is established that the accused knew that the offence was something that “could well happen”.<sup>189</sup>

In relation to the first case theory, it is the Indonesian manning agent who is likely to be the principal. Jurisdiction can be established over the agent by way of s 7A(2)(a) of the Crimes Act.<sup>190</sup> The secondary parties will be the NZCP and the Sajo Oyang Corporation. Jurisdiction over these parties can in both cases be established through the operation of the same section.

In relation to the second case theory, it is the Sajo Oyang Corporation which is likely to be the principal. The Korean officers on board the vessel are employees of the Sajo Oyang Corporation, and can be treated as agents of the corporation. In most large corporations, the site of work is far removed from the administrative headquarters. The New Zealand Court of Appeal has found that it would be unacceptable for a corporate employer to be able to avoid criminal liability by reason of distance from the site where the harm is occurring.<sup>191</sup> It was held that the “acts and omissions of the person who is in effective charge of the worksite” can be attributable to the corporation.<sup>192</sup> The secondary parties will be the NZCP and the Indonesian manning agent. Jurisdiction can be established over the Sajo Oyang Corporation in this scenario through operation of s 7A(1)(a)(iii), which provides that the section will apply where the person to be charged has been found in New Zealand and has not been extradited. The NZCP will fall into the s 7A(1)(a)(1) category, covering legal persons who are New Zealand citizens. The Indonesian agent will be covered by s 7A(2)(b) – relating to arranging the bringing of a person to New Zealand.

It will be noted that one party absent from these theories of culpability is the Korean manning agent. At the present time, no information is available about this agent, so it is not possible to accurately hypothesise what level of culpability they may have.

The following table is a breakdown of the narrative just presented. It organises the facts according to the party they were committed by. This allows us to easily see the potential

<sup>185</sup> At [CA66.24]. See also *R v Chen* [2009] NZCA 445.

<sup>186</sup> *R v Powell; R v English* [1999] AC 1 (HOL).

<sup>187</sup> Robertson, above n 183, at [CA66.25].

<sup>188</sup> *R v Hubbard* (1990) 6 CRNZ 80, at 85, per Williamson J.

<sup>189</sup> *R v Vaihu* [2009] NZCA 111, at [56], per Chisholm and Heath JJ.

<sup>190</sup> The operation of which is discussed at 1.3.2.5.1.

<sup>191</sup> *Linework Ltd v Department of Labour* [2001] 2 NZLR 639, at [23], per Blanchard J.

<sup>192</sup> At [40].

culpability of each party as either a principal offender or as a party to the offence if *only* the facts of the case study above were proved in court. This could change somewhat in an actual trial situation, where it is likely that more material would be uncovered during the discovery process. To briefly reiterate, the aim is to show that one or more of the parties described committed the required actions with the requisite mens rea in order to be liable for the offences of human trafficking found in s 98D of the Crimes Act.

The two offences relate firstly to arranging the entry of a person into New Zealand by an act of coercion or deception against the person,<sup>193</sup> and secondly to arranging, organising or procuring the reception, concealment or harbouring in New Zealand (or any other state) a person, knowing that the person's entry into New Zealand or the other state was arranged by an act of coercion or deception against the person.<sup>194</sup>

The actus reus for the first offence is the act of arranging the entry of a person into New Zealand. That entry must be facilitated through an act of coercion or deception. The actus reus for the second offence requires the accused to have made an arrangement to receive, conceal or harbour a person. With respect to each offence, the mens rea element will be intention.

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<sup>193</sup> Crimes Act 1961, s 98D(1)(a).

<sup>194</sup> Crimes Act 1961, s 98D(1)(b).

Party	Elements of the offence potentially committed	Actions going toward proof of actus reus	Actions going toward proof of mens rea
<b>New Zealand Charter Party</b>	<ul style="list-style-type: none"> <li>• Arrange entry of persons into New Zealand.</li> <li>• Abuse a position of power over crew members to create an environment where crew are coerced into working.</li> </ul>	<ul style="list-style-type: none"> <li>• Instructs their agent to lodge application with Immigration New Zealand for approval in principle.</li> <li>• Lodges forged visa applications with New Zealand authorities.</li> <li>• Meet crew at airport and escort to vessel.</li> <li>• Take crew members travel documents and seaman's book. Give to vessel officers to hold.</li> <li>• Force crew to sign a bank nomination form for wages to be paid into an account not controlled by crew.</li> <li>• Sought deportation orders against crew members from Immigration New Zealand.</li> </ul>	<ul style="list-style-type: none"> <li>• Intends to charter a foreign vessel to fish their annual catch entitlement.</li> <li>• Makes demonstrably weak effort to obtain New Zealand crew from DSFCER. This helps to ensure that Indonesian crew will be required.</li> <li>• Took out advertisement in Otago Daily Times offering a "bounty" for information on missing crew member. This helps to reinforce the position held by the NZCP as being in a position of power over crew members.</li> <li>• Intimidate crew members by identifying "whistleblowers". Again creates an environment where the NZCP is in a position of power over vulnerable crew members.</li> </ul>
<b>Korean Officers</b>	<ul style="list-style-type: none"> <li>• Arranged entry of crew into New Zealand.</li> <li>• Coerced crew members</li> </ul>	<ul style="list-style-type: none"> <li>• Maintained control over the vessel leaving and re-entering New Zealand ports.</li> <li>• Physically, emotionally and sexually abused crew members on board the vessel.</li> </ul>	

		<ul style="list-style-type: none"> <li>• Took possession of crew members documents.</li> <li>• Forced crew to sign a bank nomination form for wages to be paid into an account not controlled by crew.</li> <li>• Forced crew to work long periods without breaks.</li> <li>• Threatened crew with retribution from manning agents.</li> </ul>	
<b>The Sajo Oyang Corporation</b>	<ul style="list-style-type: none"> <li>• Arranged entry into New Zealand of crew, knowing that the entry was arranged through an act of coercion or deception.</li> <li>• Arranged or procured or organised the reception in New Zealand of a person, knowing that the person's entry was arranged by an act of coercion or deception.</li> </ul>	<ul style="list-style-type: none"> <li>• Makes charter agreement with NZCP to fish. Contract set up to ensure INZ will allow fishing operation to proceed.</li> <li>• Agrees with NZCP to hire officers and crew, and takes primary responsibility for paying their wages.</li> <li>• Makes contract with Korean manning agent.</li> <li>• Pays for crew to travel to New Zealand.</li> <li>• Force crew to sign a bank nomination form for wages to be paid into an account not controlled by crew.</li> <li>• Pays Korean manning agent the monthly salary for each crew member as stated on the Indonesian contract.</li> </ul>	<ul style="list-style-type: none"> <li>• Terminated contracts of other fishers, sending them home early before they could testify in court.</li> <li>• Attempted to prevent crew members from talking to authorities by entering a "peace contract" with them</li> </ul>
<b>The Korean Manning Agent</b>		<ul style="list-style-type: none"> <li>• Receives money to be paid to crew, but deducts 50% of this. Forwards remainder to Indonesian agent.</li> </ul>	<ul style="list-style-type: none"> <li>• Makes contract with Indonesian manning agents to provide crew.</li> </ul>
<b>The</b>	<ul style="list-style-type: none"> <li>• Arranged entry into</li> </ul>	<ul style="list-style-type: none"> <li>• Recruits crew members as per contract</li> </ul>	

**Indonesian  
Manning  
Agents**

New Zealand of crew, knowing that the entry was arranged through an act of coercion or deception.

- with Korean manning agent.
- Requires applicants to sign harsh employment contract which is non-compliant with the terms governing the agreement between the NZCP and the New Zealand government.
- Applicants must pay a cash fee of three months' salary.
- Applicants must put up security in the form of titles to property.
- Applicants unable to seek legal advice.
- Visa applications are forged.
- Applicant not shown New Zealand employment contract.
- Requires some applicants to sign a blank signature page several times.
- Intimidate crew members to ensure compliance.
- Deducts commission from funds received from Korean manning agent. Withholds up to 40% of remainder to ensure ongoing compliance, and pays what is left to crew member.



Some of the parties may be jointly or separately liable for trafficking offences. On the basis of the information currently available, the NZCP and the Sajo Oyang Corporation appear to be liable separately for human trafficking offences. Conversely, the Korean manning agent is likely to only be liable for an offence as a party along with others.

This Table leaves some pieces of information unaccounted for. Firstly, it is unclear what the exact nature of the relationship between Southern Storm Fishing and the Sajo Oyang Corporation is. Secondly, there is an unclear relationship between the Sajo Oyang Corporation and the Korean and Indonesian manning agents. Thirdly, it is not known where the money owed to crew members goes after leaving New Zealand. There is no evidence available clearly showing the intention of the Korean officers or the Indonesian manning agents. This may be able to be inferred by a court from the actions they have taken.

In light of what appears to be compelling information, a remaining question of significant importance is why the police have chosen not to investigate these facts further.

## **2.6. Prosecutorial discretion**

A study conducted in 1997 concluded that port states generally paid only lip-service to inspecting substandard visiting vessels.<sup>1</sup> A lack of follow-up research means that it is unclear to what extent this has improved or declined since that time, however the lack of official action taken to remedy the situations that exist on board FCVs in New Zealand and indeed, elsewhere, suggests that any improvement has not been significant. This cannot explain the absence of investigation though. As discussed above, the government has had these issues brought to its attention since the late 1990s, and yet no prosecutions have been forthcoming.

Criminal prosecutions in New Zealand are initiated by the Police or the relevant government department. Responsibility for prosecution is a consequence of the investigatory role of the relevant organisation. As a result of the lack of an overarching system for structuring prosecutions, the various agencies with investigatory powers follow their own internal rules regarding when an offence should or should not be prosecuted.

It is clear that not every offence committed results in a prosecution by police – the police must have some discretion not to prosecute.<sup>2</sup> However, this discretion should not be limitless. The test that is currently used is set out in the most recent Solicitor-General's prosecution guidelines. It states that a prosecution should be undertaken if the evidence provides a reasonable prospect of conviction, and if a prosecution is required in the public interest.<sup>3</sup>

After a prosecution has begun, there are mechanisms available to the court to oversee the process. The New Zealand Bill of Rights Act 1990, the doctrine of abuse of process and

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<sup>1</sup> J Hare "Port State Control: Strong Medicine to Cure a Sick Industry" (1997) 26(3) Ga J Intl & Comp L 571 at 573.

<sup>2</sup> Law Commission *Criminal Prosecution* (NZLC R66, 2000) at 46.

<sup>3</sup> Solicitor-General *Prosecution Guidelines* (1 January 2010) at [6.5].

section 347 of the Crimes Act are three ways by which a prosecution can be halted. Of more interest here is the other side of the equation, where a prosecution is not undertaken. There are a variety of reasons why Police choose not to prosecute, generally relating to the question of whether or not an offence is “serious” enough to prosecute.<sup>4</sup>

The offence of human trafficking, carrying a maximum sentence of 20 years imprisonment, is quite clearly in the category of a serious offence. The New Zealand Police have been provided with ample evidence of human trafficking, but it has apparently been determined that the evidence does not point to criminal offending.<sup>5</sup>

It is possible for decisions relating to prosecutions to be judicially reviewed,<sup>6</sup> however the courts have traditionally been reluctant to interfere with this discretion. In the case of *Polynesian Spa Ltd v Osborne*,<sup>7</sup> Randerson J stated that only in rare cases will a judicial review of the decision to prosecute be successful.<sup>8</sup> His Honour cited a number of policy and constitutional justifications in support.<sup>9</sup>

In *Hallett v Attorney General*,<sup>10</sup> Gallen J held that a decision not to prosecute was judicially reviewable. The outcome of the review cannot be to force a prosecution however, as this could result in a civil court prejudicing the outcome of a criminal proceeding.<sup>11</sup> The court is entitled to ensure that the decision has been made with reference to all the relevant facts.<sup>12</sup> *Hallett* is authority for the proposition that where a policy decision is made not to prosecute a class of cases, this decision will be reviewable.

On the facts, there is certainly an arguable case that a policy decision has been made by police not to treat abuse on board FCVs as a criminal matter. In October 2011, the Police stated firmly that issues on board FCVs were not of concern to the Police, as they did not “constitute criminal offending”,<sup>13</sup> but were “nothing more than workplace bullying.”<sup>14</sup> This apparent misreading of the facts is compounded by what appears to be a serious misunderstanding of the legislation. In the statement, the Police state that human trafficking is the same as legal slavery; is negated by consent; requires money to be paid to criminal organisations for the purpose of being transported from one country to another, and that the

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<sup>4</sup> P Stenning *The Modern Prosecution Process in New Zealand* (Victoria University Press, Wellington, 2008) at 20.

<sup>5</sup> M Burgess “response to request” (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police).

<sup>6</sup> Judicature Amendment Act 1972, s 4.

<sup>7</sup> *Polynesian Spa Ltd v Osborne* [2005] NZAR 408.

<sup>8</sup> At [68] and [69].

<sup>9</sup> At [61] and [62].

<sup>10</sup> *Hallett v Attorney General* [1989] 2 NZLR 87.

<sup>11</sup> At 89.

<sup>12</sup> At 89.

<sup>13</sup> M Burgess “response to request” (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police).

<sup>14</sup> M Burgess “response to request” (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police).

issue of working conditions is peripheral and unrelated to the question of human trafficking.<sup>15</sup> The Police statement went on to say that no investigation would take place, as it would be a “futile exercise”, and not a “prudent” use of Police resources.<sup>16</sup> According to Police, investigating claims of human trafficking would be an abuse of process.<sup>17</sup> There also appears to be reluctance on the behalf of the Police to investigate material provided to them which may substantiate claims of human trafficking. A Police spokesperson has been reported as saying that statements made in Indonesian “are of no practical use”.<sup>18</sup>

This constitutes at least an implicit policy decision not to prosecute a class of cases. The class here can be defined quite specifically as instances of alleged labour abuse toward foreign fishermen working on temporary visas on board foreign charter vessels.

## 2.7. Conclusion

This chapter has demonstrated the reality of human trafficking in the New Zealand fishing industry. The government has consistently denied any problem with human rights abuses on board FCVs. Despite all the evidence provided to the Department of Labour and the Police proving that the patterns of behaviour found on board these vessels amount to human trafficking, the response has always been to play down the allegations. Documents obtained under the Official Information Act show the Police making assurances that “serious criminal offending” on board FCVs would be investigated, the alleged behaviour amounted to “nothing more than workplace bullying” or “minor assaults at best” and that it was an industrial matter that the Police had no role in.<sup>19</sup> Immigration New Zealand is of the opinion that the complaints made by crew members related only to “contractual issues” and “unsafe work practices”.<sup>20</sup> A spokesperson for the union representing migrant workers in New Zealand has stated that labour abuses suffered by migrants are “widespread and common”. The spokesperson contended that the MBIE and INZ pay only “lip service” to the commitment made by them to dedicate more resources to investigating these cases.<sup>21</sup>

The evidence currently available speaks for itself. It is apparent that Southern Storm Fishing and the Sajo Oyang Corporation have a long history of at the very least recklessness and negligence towards crew members, resulting in the abuse and underpayment of crew members. There are a number of unanswered questions though. Why were crew signatures

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<sup>15</sup> M Burgess “response to request” (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police).

<sup>16</sup> M Burgess “response to request” (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police).

<sup>17</sup> M Burgess “response to request” (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police).

<sup>18</sup> C Stringer, G Simmons, D Coulston and H Whittaker “Not in New Zealand’s Waters, Surely? Labour and Human Rights Abuses Aboard Foreign Fishing Vessels” (paper presented at Auckland University, August 2011).

<sup>19</sup> M Burgess “response to request” (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police).

<sup>20</sup> Email from the Department of Labour to the New Zealand Police regarding the crew members of the Oyang 75 (8 July 2011) (obtained under Official Information Act 1982 request to the New Zealand Police).

<sup>21</sup> L Tan, “\$2 an Hour ‘Common’ for Migrants” New Zealand Herald (online ed, 12 February 2013).

forged? Why were crew members required to sign three different employment contracts, but only paid under the Indonesian one? What happens to the money after it leaves New Zealand?

Hypothetical answers to these questions infer a more structured intent to maximise profit from fishing contracts by utilising cheap and expendable Indonesian labour in an exploitative manner into the overall pattern of behaviour. This is consistent with what has been found by other research, which suggests that the reason such labour abuses occur is purely profit motivated. Compliance with international and domestic standards is costly, and operators have in many instances chosen to ignore standards in order to maximise profit.<sup>22</sup> Based on the evidence presented, it is submitted that these facts do not point to isolated events which have led to the accidental abuse of a number of fishermen, but rather reflect a highly sophisticated business structure that has strong similarities to the methods of operation employed by organised criminal groups. It is not the task of the present research to draw these conclusions, rather it is to present the evidence and allow it to speak for itself.

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<sup>22</sup> P Morris “Ships, Slaves and Competition” (International Commission on Shipping, Charlestown, 2001) at 8.

### 3. Chapter 3

In the years following the negotiation of the Trafficking Protocol the law of human trafficking has evolved in new directions, particularly with respect to the protection of victims' human rights. Insights into the nuances of this evolution can be found by examination of the relevant regional agreements.

In chapter one of this thesis, the Trafficking Protocol was discussed broadly, with a particular emphasis on the definition of human trafficking contained in Article 3. The purposes of this chapter are to examine the remainder of the international anti-trafficking framework, and discuss further legal developments that have occurred in this area since the coming into force of the Trafficking Protocol.

At a wider level, the law of human trafficking has been covered extensively by other authors.<sup>1</sup> This chapter will therefore not review this material in much depth, but will instead focus on the novel developments in international law as it relates to human trafficking for forced labour in the fishing industry. It should be noted at this point that other obligations relating to human trafficking more widely do exist, but are beyond the scope of this thesis.<sup>2</sup>

States have a responsibility to make reparations for internationally wrongful acts.<sup>3</sup> At international law, there are a number of identifiable obligations placed on States. Some of these derive from the United Nations Convention on Transnational Crime and the accompanying Protocols (particularly those obligations relating to criminalisation and prosecution), while others arise from less obvious sources. These obligations can be grouped according to the “three Ps” that are often used to categorise responses to human trafficking: Prosecution of traffickers, prevention of human trafficking, and protecting victims and witnesses. New Zealand is only bound by the obligations that it has accepted – such as those contained within the Trafficking Protocol – but the option is open for it to voluntarily embrace further obligations in some cases. In the following discussion it will be noted where this option is available.

This chapter will examine each of these three categories in turn, looking at each in terms of the prescribed format at international law, and how regional agreements have helped shape the way these obligations should be interpreted.<sup>4</sup> It will become clear through this discussion that in some ways the content of the Trafficking Protocol has become outdated, and that the obligations contained within it have been extended by regional law. How these obligations

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<sup>1</sup> See generally the comprehensive work on this topic by A Gallagher *The International Law of Human Trafficking* (Cambridge University Press, Cambridge, 2010).

<sup>2</sup> For example, see the discussion of the obligations of states in relation to child victims of human trafficking in A Gallagher *The International Law of Human Trafficking* (Cambridge University Press, Cambridge, 2010), at 323.

<sup>3</sup> Gallagher, above n 1, at 219.

<sup>4</sup> This approach builds on the methodology used by A Schloenhardt and J Jolly “Trafficking in Persons: A Critical Appraisal of Criminal Offences in Australia” (Australia Institute of Criminology, Griffith, 2010) at 9.

have been implemented by States will be examined in the remaining two chapters of this thesis. The findings of this chapter will then be revisited at the conclusion of chapter four of this thesis, before an examination of New Zealand compliance with the law in chapter five.

### 3.1. Prosecution

#### 3.1.1. The obligation to criminalise trafficking and various other related offences, including obstruction of justice and the laundering of the proceeds of trafficking

The Convention and the Protocols oblige States parties to criminalise a number of offences as a foundation for trafficking offences. These include participation in an organised criminal group,<sup>5</sup> laundering of the proceeds of crime,<sup>6</sup> corruption,<sup>7</sup> and obstruction of justice.<sup>8</sup> The obligation to criminalise trafficking is found in Article Six of the Protocol.<sup>9</sup> As worded in the Protocol, it is a limited obligation, and requires State parties to criminalise the offence of trafficking itself, but not the constitutive acts that comprise the offence.<sup>10</sup> Although this is an obligation of itself, it also relates to the discharge of other obligations imposed upon states by international law. For example, a state that does not fully criminalise human trafficking cannot be said to be fully protecting victims of trafficking, and preventing future instances of trafficking through the imposition of criminal sanctions.<sup>11</sup> Further, the obligation to criminalise trafficking also includes subsidiary obligations to punish the offence, and ensure that an investigation of the offence can be properly undertaken. Although these requirements are not explicitly stated in the Trafficking Protocol, they must exist in order for the Protocol obligations to be properly implemented by ratifying states.

Other international legal instruments also impose obligations upon states to criminalise human trafficking. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>12</sup> requires states to take “all appropriate measures, including legislation” to prevent the trafficking of women.<sup>13</sup> The Convention on the Rights of the Child

<sup>5</sup> United Nations Convention against Transnational Organised Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003) [Organised Crime Convention], art 5.

<sup>6</sup> Organised Crime Convention, art 6. This offence was considered by the drafters of the Convention to be equivalent to money laundering. See *Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* A/55/383/Add.1, 3 November 2000 [Travaux Préparatoires of the Organised Crime Convention] at [10].

<sup>7</sup> Organised Crime Convention, art 8. With respect to a charge of corruption, it was intended that compulsion or duress would be available as a complete defence. See Travaux Préparatoires of the Organized Crime Convention at [18].

<sup>8</sup> Organised Crime Convention, art 23.

<sup>9</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319 (opened for signature 15 November 2000, entered into force 25 December 2003) [Trafficking Protocol], art 5.

<sup>10</sup> Gallagher, above n 1, at 371, 376.

<sup>11</sup> At 371.

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 13 December 1979, entered into force 3 September 1981).

<sup>13</sup> Art 6.

(CRC) contains a similar provision with respect to the trafficking of children.<sup>14</sup> A number of international policy documents support this obligation, calling upon governments to effectively implement legislation criminalising human trafficking.<sup>15</sup>

The precise elements of the obligation to criminalise trafficking can be found in commentary to the Protocol, and in more recent regional agreements. The main element of this obligation is that the behaviour to be criminalised must fall under the definition of human trafficking as set out in the Protocol.<sup>16</sup>

The Protocol obligation is expanded upon by the position taken by the 2008 Council of Europe Convention on Action against Trafficking.<sup>17</sup> Article 18 of that Convention reproduces the obligation to criminalise trafficking as stated in Article 5 of the Trafficking Protocol. The Preamble to the Council of Europe Trafficking Convention states that the offence of trafficking is complete as soon as there is intent to exploit. It is not necessary for *actual* exploitation to have occurred.<sup>18</sup> The offence of trafficking must be punished by “effective, proportionate and dissuasive sanctions”, which must extend to the option of imprisonment, extradition or monetary sanctions.<sup>19</sup> In addition, the Council of Europe Trafficking Convention provides guidance on other patterns of behaviour that may be criminalised along with the core offence of trafficking. These additional offences include the misuse of travel documents,<sup>20</sup> and the use of services of a victim of trafficking.<sup>21</sup> The latter – although couched in more cautious language – demonstrates a widening of the scope of offences which are thought to fall within the sphere of human trafficking and is clearly aimed at reducing consumer demand for services provided by victims of human trafficking.<sup>22</sup>

The 2011 European Union Trafficking Directive is more explicit with regard to what actions should be criminalised. Article 2 provides a definition of trafficking.<sup>23</sup> It goes further than the Protocol definition in the way it criminalises the “exchange or transfer of control over” trafficking victims, and the “abuse of power or of a position of vulnerability or of the giving

<sup>14</sup> Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), at art 35.

<sup>15</sup> See for example UN General Assembly “Trafficking in Women and Girls” UN Doc A/RES/63/156 (30 January 2009), UN General Assembly and UN Human Rights Council “Trafficking in Persons, Especially Women and Children” UN Doc A/HRC/RES/11/3 (17 June 2009).

<sup>16</sup> UNODC *Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organised Crime and the Protocols Thereto* (UNODC, New York, 2004) [Legislative Guide] part 2, [35].

<sup>17</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS 148 (open for signature 16 May 2005, entered into force 1 February 2008) [Council of Europe Trafficking Convention]. It is possible for non-EU member States, such as New Zealand to accede to this Convention.

<sup>18</sup> Council of Europe Trafficking Convention, Preamble, at [223] to [226].

<sup>19</sup> Council of Europe Trafficking Convention, art 23(1).

<sup>20</sup> Council of Europe Trafficking Convention, art 20.

<sup>21</sup> Council of Europe Trafficking Convention, art 19.

<sup>22</sup> A goal which is not found in the Trafficking Protocol. See N Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012), at 41.

<sup>23</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1 [EU Trafficking Directive 2011], art 2(1).

or receiving of payments or benefits to achieve the consent of a person having control over another person” for the purposes of exploitation.<sup>24</sup> The Directive also defines the term “exploitation”, stating it to include:<sup>25</sup>

as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

The Directive also makes it an offence to incite, aid, abet or attempt the offence of human trafficking.<sup>26</sup>

Conversely, the South Asian Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention) defines trafficking more narrowly, limiting its scope to forced prostitution, and excluding forced labour.<sup>27</sup>

A criminal offence must be accompanied by sanctions to punish offenders with in order to have full denunciatory effect, or to be effective as a deterrent. The EU Trafficking Directive 2011 is useful for guidance on appropriate penalties for the offences relating to human trafficking. It provides a base penalty of five years imprisonment,<sup>28</sup> which is increased when any of a number of given aggravating factors are present in the offending.<sup>29</sup> The Directive explicitly states that Member States must ensure that the prosecution of an offender can continue even if the victim of the offender’s actions has withdrawn their statement.<sup>30</sup> Commentary on this point suggests that trafficking should be viewed as being on par with crimes such as rape and drug trafficking.<sup>31</sup>

### **3.1.2. The obligation to establish a long statute of limitations period for trafficking offences**

In addition to the creation of a range of offences, States Parties are also required to provide for certain procedural requirements relating to criminal proceedings. This is a mandatory requirement of the Convention, which applies *mutatis mutandis*<sup>32</sup> to the Protocol. As part of the requirement to hold offenders liable for offences covered by the Convention and

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<sup>24</sup> At art 2(1).

<sup>25</sup> At art 2(3).

<sup>26</sup> EU Trafficking Directive 2011, art 3.

<sup>27</sup> South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (opened for signature 5 January 2002, entered into force 1 December 2005), art III.

<sup>28</sup> At art 4.

<sup>29</sup> At art 4(2). The provision includes human trafficking committed against children or other vulnerable persons; when it was committed as part of an organised criminal organisation; where particularly serious violence was used.

<sup>30</sup> At art 9(1).

<sup>31</sup> M Mattar “Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention” (2005-2006) 14 *Tul J Intl & Comp L* 357 at 372.

<sup>32</sup> “The necessary changes being made”. This is a convenient way by which to incorporate text from a separate agreement without having to restate it.



Protocols, Article 11(5) requires States to provide a long statute of limitations period. There is little guidance on what constitutes a “long” period however. The Legislative Guide to the Convention suggests that it should be “comparatively” long<sup>33</sup> and longer still when the offender has evaded the administration of justice.<sup>34</sup>

There is some interesting case law internationally on this point. To take an example from a jurisdiction not usually examined in New Zealand, courts in Bolivia have taken the view that although there is normally a three year statute of limitations under Bolivian law, international law prescribes that in cases involving sexual exploitation of minors the statute of limitations must be extended until the victim reaches the age of majority.<sup>35</sup>

### **3.1.3. The obligation to ensure that defendants can be put on trial and do not leave the country**

The obligation to ensure that defendants can be put on trial and do not leave the country where they are being brought before the courts<sup>36</sup> is underpinned by the extradite or prosecute principle. With respect to the first part of this obligation – to place defendants on trial – the focus is on prosecution rather than extradition. In order to give effect to this obligation it is first necessary to determine whether a prosecuting state is able to exercise jurisdiction over the defendant. The United Nations Model Law on Trafficking in Persons provides for the application of the active personality principle,<sup>37</sup> and the flag state principle.<sup>38</sup>

The United Nations Convention on the Law of the Sea (UNCLOS) has a significant amount of relevance to the issue of trafficking in persons in the fishing industry. Article Two of UNCLOS defines the legal status of the territorial sea – the area over which a state may exercise jurisdiction. By virtue of this Convention (but subject to the rest of UNCLOS and other rules of international law), this provides that the:<sup>39</sup>

Sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

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<sup>33</sup> United Nations Office on Drugs and Crime *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organised Crime and the Protocol Thereto* (UNODC, New York, 2004) [Legislative Guide], Part 1, at [256].

<sup>34</sup> Organised Crime Convention, art 11(5).

<sup>35</sup> UNODC *Human Trafficking Case Law Database*, “Translated Summary of Auto Supremo no. 571 Sucre, Supreme Court of Bolivia, First Criminal Division, District of Cochabamba (22 November 2010)” <[www.unodc.org/cld/](http://www.unodc.org/cld/)>.

<sup>36</sup> Trafficking Protocol, art 11(3).

<sup>37</sup> Where jurisdiction is established over a national of a state acting in another state. United Nations Office on Drugs and Crime *Model law against trafficking in persons* (UNODC, Vienna, 2009) [Model Law] at 25.

<sup>38</sup> Where jurisdiction is established on the basis of acts committed in a state’s territory. UNODC Model Law, at 24.

<sup>39</sup> United Nations Convention on the Law of the Sea 1833 UNTS 1 (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS], art 2.

This territorial sea extends up to twelve nautical miles, measured from baselines determined in accordance with the Convention.<sup>40</sup>

This jurisdictional issue sets the scene for the exercise of criminal jurisdiction on board a foreign ship. Article 27 of UNCLOS allows for criminal jurisdiction to be asserted by a state over a foreign flagged vessel if the consequences of the crime extend to the state,<sup>41</sup> or if the crime is of a type that will disturb the peace of the state or the good order of the territorial sea.<sup>42</sup> This said, Article 27 also provides that these rules do not impact on the ability of a state to take steps authorised under its domestic law to carry out an arrest or investigation on board a foreign flagged vessel in its territorial waters.<sup>43</sup> Although Article 27(5) prevents arrests or investigations being made for crimes committed before the vessel entered the state's territorial waters, it should be noted that with respect to a crime such as human trafficking, the offence is an ongoing one, and will in most situations still be occurring when the vessel enters territorial waters.

The EU Trafficking Directive 2011 sheds some light on how the obligation to keep the defendant in the state should be interpreted regionally and nationally. The Directive provides that jurisdiction should be established where the offender is a national of the state claiming jurisdiction and the offence is committed outside that state. Similarly, jurisdiction can be claimed where the victim is a national of the state claiming jurisdiction.<sup>44</sup> These are uncontroversial grounds for establishing jurisdiction over the offence, and reflect the principles of passive and active personality which are commonly used to determine questions of jurisdiction over crimes with an international element.<sup>45</sup>

#### **3.1.4. The obligation to provide for the freezing, tracing and confiscation of the proceeds of trafficking**

The Organised Crime Convention requires states to adopt measures necessary to provide for the freezing, tracing and confiscation of the proceeds of any crime covered by the Convention or its Protocols.<sup>46</sup> Expanding on this slightly, the UNODC recommends that a State's national strategy to combat human trafficking should include measures allowing for identification, freezing, seizure and confiscation of property gained in the course of human trafficking.<sup>47</sup> The obligation to provide for the freezing and confiscation of the proceeds of trafficking is

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<sup>40</sup> At art 3.

<sup>41</sup> At art 27(1)(a).

<sup>42</sup> At art 27(1)(b).

<sup>43</sup> At art 27(2). Article 27 further provides that the master of a vessel under investigation may require the investigating state to notify an authorised agent of the flag state before taking further steps. The investigating state must take steps to facilitate communication between the vessel and the flag state.

<sup>44</sup> EU Trafficking Directive, preamble [16]. This is implemented by art 10 of the Directive. See also Council of Europe Trafficking Convention, art 31.

<sup>45</sup> A Puttler "Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad" in K Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International Ltd, London, 1996) 103 at 109.

<sup>46</sup> Organised Crime Convention, art 12.

<sup>47</sup> UNODC, above n 37, at 113.

intended to have a wide scope in order that law enforcement officials can effectively combat organised criminal groups. Indeed, the term “freezing” should be understood to include evidence as well as property.<sup>48</sup> From this, it can be seen that one of the purposes underlying the inclusion of this obligation is to reinforce the criminalisation provision discussed above. Sophisticated criminal organisations take strong measures to disguise money trails, and as such States need appropriate legal tools allowing them to trace the proceeds of crime and impose penalties for money laundering.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005 Council of Europe Convention) requires member states to adopt any legislation that may be necessary to “identify, trace, freeze or seize the proceeds” of human trafficking.<sup>49</sup> In the European experience, based on previous Conventions that provide for the confiscation of proceeds of crime, this measure is regarded as being an effective tool against organised crime.<sup>50</sup>

### **3.1.5. The obligation to encourage those involved with trafficking to cooperate with authorities**

Lastly in terms of the obligations relating to prosecution of offenders, Article 26 of the Organised Crime Convention requires States to encourage those involved with organised crime to cooperate with and assist investigating authorities.<sup>51</sup> The Convention does not specify the methods by which this cooperation can be obtained, however many states have interpreted this obligation to mean that penalties can be mitigated based on cooperation.<sup>52</sup>

### **3.1.6. The obligation to provide mutual assistance to other states**

Under this heading fall two aspects of the obligation to prosecute offenders: the provision of relevant assistance to other states parties, and ensuring communication channels between relevant authorities are open. Because of the transnational nature of the crime of human trafficking, certain unique problems present themselves with regard to criminal proceedings. The Convention seeks to remedy these by requiring States Parties to work cooperatively with other states.<sup>53</sup>

In terms of how this obligation has been implemented regionally, some useful lessons can be learned from ASEAN.<sup>54</sup> The ASEAN Charter requires member states to “extend assistance”

<sup>48</sup> Travaux Préparatoires of the Organised Crime Convention, above n 6, at [5]. This means that in the same way that frozen assets cannot be disposed of, evidence that may be used in criminal proceedings cannot be disposed of.

<sup>49</sup> Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism CETS 198 (opened for signature 16 May 2005, entered into force 1 May 2008), art 15(4). New Zealand has the option open to it to accede to this Convention.

<sup>50</sup> Gallagher, above n 1, at 402.

<sup>51</sup> Organised Crime Convention, Article 26.

<sup>52</sup> Legislative Guide, above n 33, at 275.

<sup>53</sup> Trafficking Protocol, art 9(5), 10, 11(6).

<sup>54</sup> See generally Association of Southeast Asian Nations *Handbook on International Legal Cooperation in Trafficking in Persons Cases* (ASEAN, Jakarta, 2010), chapter 3.

to migrant workers from other member states who require help in crisis situations.<sup>55</sup> More specific to the issue of trafficking, the ASEAN Declaration on Transnational Crime “encourages” member states to foster cooperation between law enforcement agencies through joint policing.<sup>56</sup> Member states are required to increase efforts to counter trafficking,<sup>57</sup> and work closely with other relevant ASEAN bodies.<sup>58</sup>

The Organisation of American States has interpreted this obligation slightly more narrowly, restricting its scope to providing assistance in criminal matters to other signatories,<sup>59</sup> though explicitly stating that the principle of state sovereignty is paramount.<sup>60</sup> Conversely, the European Union has taken a broader view. Member states are to cooperate “to the widest extent possible”,<sup>61</sup> and must adopt legislation in order to fully facilitate this.<sup>62</sup>

Article 27 of the Organised Crime Convention requires States Parties to maintain open communication channels with relevant authorities. In order to facilitate this, the Organised Crime Convention and the Trafficking Protocol provide a framework within which States Parties can share information. The Conference of the Parties<sup>63</sup> is mandated to review and facilitate the implementation of the Convention and Protocols by States Parties.

### 3.1.7. Summary

The overall purpose of the obligations contained under the heading of prosecution is to ensure that human traffickers are not able to hide from the legal consequences of their actions. The obligations on states discussed in this section show that the requirement to criminalise all forms of trafficking as set out in the Protocol has been expanded upon by the Council of Europe Trafficking Convention. Regional law has also been of use in the way that it has reinforced and clarified the other obligations mentioned above.

## 3.2. Prevention

It has been noted already that states have a responsibility to prevent internationally wrongful acts from taking place within their jurisdictions.<sup>64</sup> The standard that will be applied to states is due diligence. A state must take “all reasonable and necessary measures to prevent a given event from occurring.”<sup>65</sup>

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<sup>55</sup> Charter of the Association of Southeast Asian Nations, art 1.8.

<sup>56</sup> ASEAN Declaration on Transnational Crime (opened for signature 20 December 1997), art 6.

<sup>57</sup> At art 8.

<sup>58</sup> At art 10.

<sup>59</sup> Inter-American Convention on Mutual Assistance in Criminal Matters and its Protocol (23 May 1992), art 7 sets out a list of the types of assistance envisaged.

<sup>60</sup> At art 2.

<sup>61</sup> 2005 Council of Europe Convention, above, n 49, art 15(1).

<sup>62</sup> At art 15(2).

<sup>63</sup> Established by Article 32 of the Organised Crime Convention.

<sup>64</sup> Gallagher, above n 1, at 219.

<sup>65</sup> Gallagher, above n 1, at 414.

In the context of human trafficking for forced labour at sea, the obligation to prevent human trafficking relates to positive acts taken by states to address the causes of human trafficking. Gallagher proposes that in order to discharge the obligation to prevent human trafficking, states must firstly address vulnerability of victims and potential victims to human trafficking. Secondly, states must reduce demand for the goods and services produced by victims of human trafficking. Thirdly, states must address governmental corruption.

### 3.2.1. Address vulnerability to trafficking

The United Nations commentary to the obligation to address vulnerability of individuals to trafficking suggests that a person is considered to be vulnerable to trafficking where they have illegally entered a country, or have entered without proper documentation; where they have a reduced capacity to make judgements as a result of mental or physical incapacity; or where they are in a precarious position with respect to “social survival.”<sup>66</sup> Of course, many other forms of vulnerability are possible and the travaux préparatoires indicate that vulnerability should be widely understood as referring to any situation wherein a person has no acceptable alternative but to submit to abuse.<sup>67</sup>

Of specific relevance to the issue of trafficking in the fishing industry is the International Labour Organisation (ILO) Convention 188 Work in Fishing Convention 2007. Although it has not yet fully ratified, New Zealand is a signatory to this convention and is currently in the process of ratification.<sup>68</sup> This Convention sets out a number of useful definitions,<sup>69</sup> and provides certain responsibilities of fishing vessel owners, skippers and fishers,<sup>70</sup> including placing responsibility on the skipper of the vessel for the safety of the fishers on board.<sup>71</sup> The Convention contains a number of provisions aimed at the safety and protection of fishers, including a minimum age of 16 years for work on fishing vessels,<sup>72</sup> the requirement that fishers have a current medical certificate to show their ability to work safely,<sup>73</sup> the requirement that member states adopt laws to ensure that flagged fishing vessels provide adequate periods of rest for fishers.<sup>74</sup> Vessels are required to carry crew lists, with copies provided to authorised persons ashore.<sup>75</sup> The Convention also regulates the matter of fishers work agreements. Article 16 sets out the minimum particulars that must be contained in an agreement.<sup>76</sup> Article 17 requires member states to ensure that fishers have the opportunity to

<sup>66</sup> UNODC Model Law, above n 37, at 11.

<sup>67</sup> Travaux Préparatoires of the Organised Crime Convention, above n 6, at [63].

<sup>68</sup> (2011) 1 NZTS at 23. Email from A Smith (Ministry of Transport) to the Author regarding ratification of ILO C188 (17 July 2012).

<sup>69</sup> Work in Fishing Convention 2007, ILO C188, art 1.

<sup>70</sup> At art 8.

<sup>71</sup> At art 8(2).

<sup>72</sup> At art 9.

<sup>73</sup> At art 12.

<sup>74</sup> At art 13-14. Article 14(1) states that the minimum hours of rest shall not be less than ten hours in any 24 hour period, and 77 hours in any seven day period.

<sup>75</sup> At art 15. See also the Convention on the Facilitation of International Maritime Traffic FAL (adopted 9 April 1965, entered into force 5 March 1967).

<sup>76</sup> By way of reference to Annex II.

seek independent advice on their work agreement, and have the ability to access dispute resolution processes. Article 18 requires copies of the work agreements to be carried on board the vessel and be available to the fisher and other authorised parties on request. With respect to work agreements, the final provision in this Convention is Article 20, stating that it is the responsibility of the fishing vessel owner to ensure that each fisher has a written fisher's work agreement signed by both the fisher and the fishing vessel owner providing for decent work and living conditions on board the vessel as required by this Convention. From this list of provisions, it is clear that this Convention takes large steps forward in terms of addressing the practical elements that make certain individuals vulnerable to trafficking.

The United Nations General Assembly passed a Resolution on “Oceans and the Law of the Sea” in December 2010.<sup>77</sup> This Resolution provides insight into the intent behind the Work in Fishing Convention previously discussed, and elements of the UNCLOS. In particular, the resolution notes the ongoing problem of human trafficking, and recognises the fact that it is often intertwined with other forms of transnational crime. The General Assembly through this resolution encourages states to ratify the Maritime Labour Convention 2006, and to utilise mechanisms of international cooperation in order to properly prevent and react to human trafficking and other forms of organised transnational crime.

Article 22 of the Maritime Labour Convention requires member states to regulate recruitment of fishers by ensuring that the recruitment services that exist are part of, or coordinated with public employment services. This means that under the Convention, private employment agencies will be subject to the same scrutiny as government-run agencies. Further, member states must prohibit recruitment agencies from blacklisting individuals,<sup>78</sup> or from charging recruitment fees.<sup>79</sup> As with the Work in Fishing Convention, this is an attempt to address and prevent the practices that commonly occur in relation to victims of trafficking in the fishing industry. In addition, the Convention considers the issue of manning agents, who are often used by fishing vessel owners to provide crew for vessels. The Convention states that a fishing vessel owner shall be liable in the event that a manning agent defaults on its obligations to fishers.<sup>80</sup>

The Maritime Labour Convention provides for the proper payment of fishers. Article 23 states that “each Member, after consultation, shall adopt laws, regulations or other measures providing that fishers who are paid a wage are ensured a monthly or other regular payment.” Article 24 obligates member states to provide a means by which fishers may transmit part or all of their income to their families at no cost.

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<sup>77</sup> UN General Assembly “Oceans and the Law of the Sea” GA Res 65/37, UN Doc A/Res/65/37 A (2011).

<sup>78</sup> Maritime Labour Convention MLC 2006, at art 22(2).

<sup>79</sup> At art 22(3).

<sup>80</sup> At art 22(4)-(6).

Further, fishers' rights with respect to accommodation and food are provided for.<sup>81</sup> The Convention requires Member states to adopt measures<sup>82</sup> to ensure that vessels have appropriate – in terms of size, quality, hygiene and comfort – accommodation.<sup>83</sup> Likewise, the food and water carried on board must be “of a sufficient nutritional value, quality and quantity.”<sup>84</sup>

Lastly, the Maritime Labour Convention deals with the matter of medical care for fishers. Article 29 requires that fishing vessels carry appropriate medical equipment for the number of fishers on board, the work being done, and the length of the voyage.<sup>85</sup> Each vessel must have a minimum of one fisher on board who is trained in medical care, and has the knowledge and ability to use the medical equipment on board the vessel.<sup>86</sup> The vessel must have the equipment on board needed to communicate with persons ashore who can provide medical advice,<sup>87</sup> and fishers have the right to timely shore based medical assistance if required.<sup>88</sup>

The Convention provides for occupational health and safety measures on board fishing vessels. Specifically, fishers are required to be properly trained for the work they will be required to do on board.<sup>89</sup> Fishers must be provided with adequate protective clothing and equipment and given safety training.<sup>90</sup> Finally, there must be proper reporting and investigation mechanisms in place for dealing with accidents that do occur.<sup>91</sup>

In addition to the Maritime Labour Convention, the International Convention on the Protection of the Rights of all Migrant Workers<sup>92</sup> makes explicit statements that migrant workers must not be subjected to forced labour,<sup>93</sup> and that States Parties must criminalise the withholding of passports or other travel documents.<sup>94</sup> New Zealand has not ratified the Migrant Labour Convention. In the 2009 Universal Periodic Review, it was recommended by

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<sup>81</sup> At art 25 to 27, as supplemented by Annex III of the Maritime Labour Convention, which contains a number of technical provisions relating to vessel size.

<sup>82</sup> At art 25.

<sup>83</sup> At art 26.

<sup>84</sup> At art 27(a)(b). Note art 27(c) allows for the cost of providing such food and water to be considered an operational cost and thereby recovered, if the collective work agreement of the fishers allows this.

<sup>85</sup> At art 29(a).

<sup>86</sup> At art 29(b)(c).

<sup>87</sup> At art 29(d).

<sup>88</sup> At art 29(e). Insofar as it is not incompatible with domestic law, this medical care is required by art 30(f) to be free of charge.

<sup>89</sup> At art 31(a)(b)(c).

<sup>90</sup> At art 32.

<sup>91</sup> At art 31(d)(e).

<sup>92</sup> International Convention on the Protection of the Rights of all Migrant Workers 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003), preamble [Migrant Workers Convention].

<sup>93</sup> At art 11.

<sup>94</sup> At art 21.

the Committee that New Zealand ratify this Convention, but New Zealand declined, stating that there are laws in place to adequately protect the rights of migrants.<sup>95</sup>

### 3.2.2. Reduce demand for products and services provided by victims of trafficking

One of the root causes of human trafficking is markets that demand sources of cheap and unregulated labour and the goods and services that such labour is able to produce.<sup>96</sup> Recognised forms of this are found in sex tourism, internet pornography and organised marriages.<sup>97</sup> In addition, some labour markets also seek to use the labour provided by victims of human trafficking.<sup>98</sup>

In determining the scope of application of this obligation to reduce demand, the term “demand” should be considered to refer both to demand by producers for the labour of victims of trafficking, and demand by consumers for products and services produced by those victims.<sup>99</sup>

Article 9(5) of the Trafficking Protocol states a requirement for states to adopt legislation or policy measures to discourage the demand “that fosters... exploitation of persons.”<sup>100</sup> This is a mandatory requirement, and has been reiterated by the Legislative Guide to the Protocol,<sup>101</sup> and the Conference of Parties to the Organised Crime Convention.<sup>102</sup> In the context of trafficking for sexual exploitation, the UN General Assembly has emphasised the importance of discouraging the demand for women and girls for exploitative purposes.<sup>103</sup> In addition, the CEDAW Committee has also made statements calling on states to reduce demand for victims of trafficking.<sup>104</sup>

The Council of Europe Trafficking Convention reproduces Article 9(5) in similar terms.<sup>105</sup> It provides additional guidance on the obligation by setting out a number of minimum requirements. The Explanatory Report to the Convention states that the most important of these requirements are research into best practices to reduce demand, cooperation with media and civil society, the creation of information campaigns targeting at-risk demographics, and

<sup>95</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review - New Zealand* A/HRC/12/8; A/HRC/WG.6/5/L.7 (4 June 2009) at [55].

<sup>96</sup> Office of the United Nations High Commissioner for Human Rights “Recommended Principles and Guidelines on Human Rights and Human Trafficking (United Nations, Geneva, 2010), [Principle 4].

<sup>97</sup> Gallagher, above n 1, at 432.

<sup>98</sup> See UNODC *Transnational Organised Crime in the Fishing Industry* (UNODC, New York, 2011), at 25.

<sup>99</sup> See generally B Anderson and J Davidson *Trafficking: A Demand-Led Problem? A Multi-Country Pilot Study* (Save the Children, 2002).

<sup>100</sup> Trafficking Protocol, art 9(5).

<sup>101</sup> Legislative Guide, above n 16, part two, at 297.

<sup>102</sup> Conference of Parties to the United Nations Convention on Transnational Organised Crime “Report of the Conference of Parties to the United Nations Convention on Transnational Organised Crime on its third session, held in Vienna from 9 to 18 October 2006” UN Doc CTOC/COP/2006/2006 (2006) at 7, [G].

<sup>103</sup> UN General Assembly “Trafficking in Women and Girls” UN Doc A/RES/63/156 (2009).

<sup>104</sup> See for example UN Committee on the Elimination of all Forms of Discrimination against Women “Concluding Observations: Australia” UN Doc CEDAW/C/AUL/CO/5 (2006) at [20-21].

<sup>105</sup> Council of Europe Trafficking Convention, art 6.



the adoption of educational measures.<sup>106</sup> The overall aim is to achieve “effective dissuasion” of consumer and producer demand for products and services created by victims of human trafficking.<sup>107</sup>

The Council of Europe Trafficking Convention also builds on the Protocol in the way that it requires states to consider criminalising the use of the services of a victim of trafficking.<sup>108</sup> It is a weak obligation, but one that nonetheless is important. It extends the reach of criminalisation of conduct associated with human trafficking to include those individuals who are part of the trafficking process, but against who the elements of the offence of human trafficking itself may be difficult to prove. Examples of such people include the owners of business premises that are used for trafficking.<sup>109</sup> The Explanatory Report to the Council of Europe Trafficking Convention gives another example of the use of this section, stating that it would criminalise those persons who use the services of a prostitute, knowing that they have been trafficked.<sup>110</sup>

### **3.2.3. Address corruption and complicity by officials.**

The term “corruption” generally refers to the “misuse of public power for personal benefit or gain”.<sup>111</sup> The available evidence of human trafficking in the New Zealand fishing industry does not support a claim of governmental corruption, so this will not be explored further here. Potentially though, there is scope to suggest that complicity has taken place.

Complicity is understood to mean the responsibility of one person for the actions of another through knowledge, acquiescence or consent.<sup>112</sup> Gallagher argues that complicity will fall within the scope of corruption.<sup>113</sup> However, the Organised Crime Convention criminalises the corruption of officials in Article 8. The forms of corruption identified there reflect a much higher degree of criminal culpability than is evident in New Zealand. They require either active or passive bribery, or participation as an accomplice to bribery.<sup>114</sup>

The Council of Europe Trafficking Convention does not fully consider the issue of public sector corruption. It only requires states to recognise the complicity of members of the public sector as an aggravating feature to be taken account of during sentencing.<sup>115</sup> The SAARC Convention takes a similar approach.<sup>116</sup>

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<sup>106</sup> Council of Europe Trafficking Convention, Explanatory Report, [110].

<sup>107</sup> At [109].

<sup>108</sup> Council of Europe Trafficking Convention, art 19.

<sup>109</sup> Gallagher, above n 1, at 441.

<sup>110</sup> Council of Europe Trafficking Convention, Explanatory Report, [232].

<sup>111</sup> Gallagher, above n 1, at 442.

<sup>112</sup> At 442.

<sup>113</sup> At 442.

<sup>114</sup> Organised Crime Convention, art 3.

<sup>115</sup> Council of Europe Trafficking Convention, art 24(c).

<sup>116</sup> SAARC Convention, art IV.

Outside the international instruments on human trafficking, there is a growing body of law recognising the importance of combating official corruption and complicity in a range of offences. The United Nations Convention against Corruption (Corruption Convention)<sup>117</sup> covers the issue of corruption in much greater depth, and provides that states must take proactive measures to prevent acts of corruption by officials.<sup>118</sup>

The underlying standard governing the obligation to address corruption and complicity by officials is one of due diligence. In this context, this means that a state must exercise care in preventing acts of corruption or complicity by its officials in human trafficking.<sup>119</sup> This will be satisfied if the state has taken “sufficient steps” to prevent corruption or complicity in human trafficking by its officials; has properly investigated instances of alleged complicity or corruption, and has appropriately provided for punishment of any corrupt or complicit actions by officials.<sup>120</sup>

It is unclear from the international legal instruments and the commentary to them whether officials can be complicit in human trafficking by omission. Indeed this is a question that appears to be unaddressed throughout the literature. It would seem that a complicit omission by officials in relation to an instance of human trafficking will constitute a breach of the due diligence standard that underlies this particular obligation.

#### **3.2.4. Summary**

Under the heading of prevention, three obligations have been discussed here. States have a responsibility to prevent the occurrence of internationally wrongful acts. The standard that they will be held to in assessing this is one of due diligence. With respect to the obligations to address vulnerability to trafficking and address corruption and complicity by officials, regional agreements have served to reinforce the importance of the corresponding obligations as found in the Organised Crime Convention and Trafficking Protocol. Various international instruments that are not directly related to human trafficking have served to reinterpret and extend these obligations. In regard to the obligation to reduce the demand for products and services created by victims of trafficking, the Council of Europe Convention again goes further than international agreements, and places an obligation – albeit weakly phrased – on states to criminalise the use of services of a victim.

### **3.3. Protection**

States have been cautious in accepting that victims have specific rights, and taking on the corresponding obligations to uphold those rights. The adoption of these rights has come about partly because of the recognition that victims play a valuable part in the prosecutorial process,

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<sup>117</sup> United Nations Convention on Corruption 2349 UNTS 41 (opened for signature 31 October 2003, entered into force 14 December 2005).

<sup>118</sup> At chapter Two.

<sup>119</sup> Gallagher, above n 1, at 241.

<sup>120</sup> At 447.

and should be supported in order to encourage participation.<sup>121</sup> Four of the main obligations will be examined in this chapter: the obligation to identify victims of trafficking, the obligation to protect victims and witnesses, the obligation to ensure the non-criminalisation of victims, and the provision of immediate protection and support to victims of trafficking.

### 3.3.1. Identify victims of trafficking

The identification of victims is an important part of states' obligations toward victims of human trafficking. Unfortunately, victims are often unidentified due to a reluctance of the state to take on the responsibilities that arise from identification taking place, or because of a misunderstanding of the facts, a lack of resources, or the underground nature of the crime.<sup>122</sup> The Protocol does not explicitly impose on states parties an obligation to identify victims of trafficking. During the negotiation process, several requests were made to the drafting committee to address the issue of identification; however such requests were not taken up.<sup>123</sup>

The omission of the issue of identification in the Protocol can be contrasted with the European Trafficking Convention. The drafters of the Convention recognised the importance of making timely identification of victims, noting that failure to identify a victim will not only breach their human rights, but will also impede the prosecution process.<sup>124</sup> Identification of victims can be a time consuming and complicated process, but in order to protect the rights of victims, the Convention provides that the protection provisions of the Convention are applicable to any person whom authorities have grounds to believe are a victim of trafficking, pending formal identification.<sup>125</sup>

Arguably, States such as New Zealand, which are parties to the Protocol but not parties to the European Trafficking Convention are nevertheless bound by a similar implied obligation to identify victims. This can be said to derive from the fact that the rights given to victims of trafficking by the Protocol will be meaningless unless there is a corresponding obligation on States Parties to identify victims.<sup>126</sup> To put it another way, the rights of victims of trafficking are of no use if there is not an obligation upon states to identify genuine victims of trafficking.

New Zealand authorities will grant official trafficking victim status on the basis of a police certification that has been endorsed by a senior police officer, having assessed available evidence and witness statements.<sup>127</sup> A grant of victim status will be made when police suspect that the person has been trafficked into New Zealand according to the definition found in s 98D of the Crimes Act.<sup>128</sup> This presents some problems though, when it is clear

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<sup>121</sup> At 276.

<sup>122</sup> Gallagher, above n 1, at 278.

<sup>123</sup> At 280.

<sup>124</sup> Council of Europe Trafficking Convention, Preamble at [127].

<sup>125</sup> Council of Europe Trafficking convention, art 10(2).

<sup>126</sup> Gallagher, above n 1, at 282.

<sup>127</sup> *Plan of Action to Prevent People Trafficking* (Department of Labour, Wellington, 2009) at 17.

<sup>128</sup> At 17.

that officials – including police – are reluctant to determine any trafficking as falling under s 98D.

### 3.3.2. Protect victims and witnesses

The Trafficking Protocol places a general requirement on States parties to “consider” implementing measures to provide for the physical, psychological and social wellbeing of victims of trafficking in a timely manner, and in a language that they understand.<sup>129</sup> The UN Model Law on Trafficking suggests that a state should adopt a precautionary approach, and consider a person a victim of trafficking regardless of whether there is a strong suspicion against an alleged trafficker, or an official recognition of victim status.<sup>130</sup> Victims should be given all relevant information relating to court and administrative proceedings.<sup>131</sup> Witnesses are required to be protected whether or not they end up testifying, with a particular emphasis on protection during pre-trial investigations.<sup>132</sup>

Witnesses play an important role in criminal proceedings relating to human trafficking. The UNODC considers the issue of witness protection to be crucial when organised criminal groups are involved in proceedings. In a best practice document, the UNODC considers effective witness protection to be comprised of physical and psychological elements.<sup>133</sup>

### 3.3.3. Non-criminalisation of victims

The Protocol does not expressly deal with the issue of the criminalisation of victims<sup>134</sup> of trafficking for the so-called “status-related” offences.<sup>135</sup> In fact, during the negotiations leading up to the Protocol, efforts to include a provision on this issue were not accepted.<sup>136</sup> Later developments have suggested a change in this stance however. The 2009 Conference of the Parties to the Organised Crime Convention recommended that States Parties to the Protocol “consider” not punishing victims of trafficking for status related offences.<sup>137</sup> Further support for this position is found in the recommended Principles and Guidelines on Human

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<sup>129</sup> Trafficking Protocol, art 6(3).

<sup>130</sup> UNODC Model Law, above n 37, at 44.

<sup>131</sup> At 44.

<sup>132</sup> Trafficking Protocol, art 6(1); Organised Crime Convention, art 24; UNODC Model Law, at 48. The UNODC has produced a paper on best practices for witness protection. See UNODC *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime* (UNODC, New York, 2008).

<sup>133</sup> United Nations Office on Drugs and Crime [UNODC] *Toolkit to Combat Trafficking in Persons* (UNODC, Vienna, 2008) at [Tool 5.17].

<sup>134</sup> Note that the Trafficking Protocol does not define “victim”. Compare The Council of Europe Trafficking Convention, at art 4(e): a victim is “any natural person who is subjected to trafficking in human beings as defined”.

<sup>135</sup> Those offences that are committed by a victim purely because of their status as a victim of trafficking.

<sup>136</sup> Gallagher, above n 1, at 284.

<sup>137</sup> Conference of the Parties to the United Nations Convention on Transnational Organised Crime “Report on the Meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009” UN Doc. CTOC/COP/WG.4/2009/2 (21 April 2009) at Recommendation [1(H)].

Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights,<sup>138</sup> which state that:<sup>139</sup>

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

This position has also been affirmed by the General Assembly,<sup>140</sup> along with several of the UN human rights bodies.<sup>141</sup> Commentators have also noted the strong position of this evolving obligation at international law.<sup>142</sup>

The Organisation for Security and Cooperation in Europe (OSCE) has recommended “ensuring that victims of trafficking are not subjected to criminal proceedings solely as a direct result of them having been trafficked.”<sup>143</sup>

The Council of Europe Trafficking Convention adopts weak language with respect to the non criminalisation of victims. States parties must “provide for the possibility” of not prosecuting victims of trafficking for their involvement in illegal activity.<sup>144</sup> This appears to be a concession to State’s concerns about immigration policy. However, it is certainly arguable that the obligation of non-criminalisation of victims must be an implied principle when one considers that the overarching purpose of the Convention is to criminalise the perpetrators of the crime, rather than the victims.<sup>145</sup>

### **3.3.4. Provision of immediate protection and support, provision of legal assistance including temporary residency, and safe and voluntary return**

The Trafficking Protocol provides a softly stated obligation whereby States Parties must “endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.”<sup>146</sup> It is curious that the Protocol contains a weaker statement in this respect than the Convention, which obligates States to protect witnesses (including those who are victims) from potential retaliation.<sup>147</sup> Academic commentary suggests that despite the weakness of this obligation in the Protocol, there is a clearly identifiable obligation on States

<sup>138</sup> *United Nations High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking* E/2002/68/Add.1 (20 May 2002).

<sup>139</sup> At principle [7].

<sup>140</sup> *Trafficking in Women and Girls* UN Doc A/RES/63/156 at [12].

<sup>141</sup> *United Nations Committee on the Rights of the Child: Concluding Observations, Kenya* UN Doc. CRC/C/KEN/CO/2 (19 June 2007), at [66]; *Committee on the Elimination of Discrimination against Women: Concluding Observations, Lebanon* UN Doc. CEDAW/C/LBN/CO/3 (1 February 2008), at [28-29].

<sup>142</sup> Gallagher, above n 1, at 287.

<sup>143</sup> Organisation for Security and Co-operation in Europe Permanent Council “OSCE Action Plan to Combat Trafficking in Human Beings” PC DEC/557/rev.1 (7 July 2005) at [1.8].

<sup>144</sup> Council of Europe Trafficking Convention, art 26. Article 8 provides in similarly weak terms that national authorities should be entitled to determine whether or not to prosecute.

<sup>145</sup> J Elliot “(Mis)Identification of Victims of Human Trafficking: The Case of R v O” (2009) 4 IJRL 727 at 739.

<sup>146</sup> Trafficking Protocol, art 6(5).

<sup>147</sup> Organised Crime Convention, art 24.

to protect victims of trafficking, citing the Convention on the Rights of the Child Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and resolutions of the General Assembly and Human Rights Council in support.<sup>148</sup> Measures of protection of victims that States are required to undertake will include taking immediate action to remove a victim to a place of safety, and paying attention to any medical requirements that they may have. A State must also take into account whether the victim is under a particular risk of retaliation or revictimisation.<sup>149</sup>

The 2011 EU Directive provides more insight into the content of the obligation to support victims. It states that Member States should take measures to allow victims to recover and escape from their traffickers, and that state support should be available to victims before, during and after criminal proceedings, whether or not the victim is residing lawfully in the state concerned.<sup>150</sup> The European Convention on Trafficking requires States to provide assistance to all victims of trafficking including providing for adequate living arrangements, psychological and material assistance, medical treatment, and information relating to the legal process.<sup>151</sup>

The 2004 ASEAN Declaration against Trafficking in Persons states that victims must be treated “humanely”, and given “appropriate” forms of assistance which includes medical care and prompt repatriation.<sup>152</sup> Of course, this should be balanced by the other obligations on states to ensure effective prosecutions of traffickers.

There are a number of provisions spread across several New Zealand acts that provide for the rights of victims to be upheld. The relevance of these provisions to victims of trafficking is obvious – the nature of the crime means that victims are likely to be particularly vulnerable.

### 3.3.5. Summary

As with the obligations contained under the headings of prosecution and prevention, the obligations that fall into the category of protection have been reinforced, and in some cases extended by regional agreements. The obligations as originally stated in the Organised Crime Convention and Trafficking Protocol have been described as “ungenerous” to victims of trafficking.<sup>153</sup> The Council of Europe Trafficking Convention, as well as a number of international policy documents have gone far in changing this position. The obligations discussed above represent those obligations which are now generally regarded as acceptable by states.

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<sup>148</sup> Gallagher, above n 1, at 302.

<sup>149</sup> At 303.

<sup>150</sup> EU Trafficking Directive 2011, at [18].

<sup>151</sup> Council of Europe Trafficking Convention, art 12.1.

<sup>152</sup> At art 5.

<sup>153</sup> Gallagher, above n 1, at 336.

### 3.4. Conclusion

This chapter has shown that the international law of human trafficking places a number of obligations on States to prosecute offenders, prevent further human trafficking, and protect victims of human trafficking. It can be seen from the above discussion that the focus of international law is primarily reactive, with the majority of obligations imposed by the Convention against Transnational Organised Crime and the Trafficking Protocol dealing with promoting effective prosecutions of offenders. Obligations relating to preventative measures against human trafficking are largely left out of these agreements.

International law in this area does not stand still. Since the coming into force of the Organised Crime Convention and the Trafficking Protocol, the international legal obligations contained in these instruments have been developed in novel ways through other international legal agreements and policy documents. These developments do not bind New Zealand, as New Zealand has not ratified the relevant conventions. The discussion in this chapter has shown the ways in which the international law of human trafficking is evolving, which gives some indication of the likely future of the law in this area.

It is obligations put forward by these alternative sources which appear to be gaining strength against the traditional state-centric rights contained in the Trafficking Protocol. The Council of Europe Trafficking Convention has set higher and more specific standards, reflecting an approach which has been adopted in many of the international legal instruments and policy documents that have been created since the coming into force of the Organised Crime Convention and its Protocols.

The effect of this evolution of the international legal obligations relating to human trafficking could be said to be heading in the direction of increased state responsibility for the protection of victims. These obligations will be returned to at the conclusion of chapter four of this thesis, where they are combined into an assessment framework along with several other principles of an effective criminal justice response to human trafficking. This framework will then be applied to New Zealand in chapter five, in order to see precisely how New Zealand's response to human trafficking compares to international standards.

## 4. Chapter 4

### 4.1. Introduction

As has been made clear throughout this thesis, New Zealand is lacking in practical legal, political and criminal justice infrastructure, laws, policies and practice in order to respond to human trafficking. New Zealand is not alone in this – there is not one country that can claim to have developed a comprehensive strategy to investigate the offence, prosecute offenders and protect victims.<sup>1</sup> In light of this, this chapter presents a comparative study of three different jurisdictions, each having a unique character, from which New Zealand can take important lessons. The information presented in this chapter will be used, along with that in chapter three to create a series of benchmarks to which New Zealand's anti-trafficking efforts will be assessed in chapter five of this thesis.

Firstly, Australia has been chosen because of its close relationship with New Zealand in a legal, social and political sense. Australian case law is persuasive in New Zealand courts. While the judicial consideration of human trafficking cases in Australia has produced some useful points of jurisprudence, the Australian framework also demonstrates the problems that can be caused by confused and incoherent legislation.

Secondly, the United Kingdom has been chosen. In addition to UK case law having strong persuasive value in New Zealand courts, important lessons can be taken from the way in which the UK intersects with regional European human rights bodies, and the unique methods it has adopted to combat human trafficking.

Finally, the United States will also be examined. The United States' legal and political system is very different to New Zealand's, and as such, United States case law will have a lower persuasive value in New Zealand courts than that of Australia or the United Kingdom. It is important to examine the United States' experience with human trafficking though, because it is the leading global player in driving trafficking policy. It would be beyond the scope of this chapter to fully examine US law at the State level, so the discussion will focus predominantly on Federal level law, with the exception of an examination of novel developments in approaches to anti-trafficking at the State level that will be of value to New Zealand.

A full-scale investigation into the minutiae of the detail of each jurisdiction is beyond the scope of this research. Instead, I intend to cover the points that are controversial, novel, or likely to be of most use to the New Zealand government and judiciary. This will entail a brief, non-exhaustive overview of the main relevant parts of the legislative and policy framework, followed by a discussion of leading cases, and the strengths and weaknesses of each

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<sup>1</sup> A Gallagher "Prosecuting and adjudicating trafficking in persons cases in Australia: obstacles and opportunities" (paper presented at the National Judicial College of Australia twilight seminar on human trafficking, Canberra, 15 June 2009) at 8.



jurisdiction's approach to countering human trafficking. In addition, this chapter demonstrates how – *in practice* – three other jurisdictions have engaged with the issues surrounding human trafficking. It shifts the level of discussion from the abstract international legal realm to the more concrete area of national law and policy.

The purposes of this chapter are firstly to assess the general framework and policies in these three jurisdictions which can be applied to any form of human trafficking; and secondly, examine the specific rules that relate to the issue of human trafficking at sea, which is the core issue of this thesis. New Zealand occupies a unique space in this regard, as there is very little academic, governmental or legal material indicating the existence of trafficking for forced labour in the fishing industry in any other jurisdiction, including the three which are the focus of this chapter. However, these three jurisdictions do have some relevant experience in analogous forms of trafficking where individuals are trafficked into legal enterprises, such as farming, mining and garment making. This type of trafficking is similar to the trafficking presented in chapter two of this thesis: it involves deceiving or coercing individuals to take up work in exploitative conditions, and as such will be relevant to the New Zealand context.

It will be noted that across each of the three jurisdictions, similar issues emerge from case law. These issues predominantly relate to defining the parameters of the “means” element of the offence of human trafficking.

## **4.2. Australia.**

### **4.2.1. Introduction**

Australia has consistently been awarded Tier One status in the Trafficking in Persons Reports.<sup>2</sup> The most recent TIP report states that Australia is primarily a destination country for victims of sex trafficking, and forced labour trafficking also occurs to a lesser extent.<sup>3</sup> Actual estimates of the extent of the problem are scarce though. Research conducted by the Australian Institute of Criminology was hesitant to place an estimate on the number of victims of trafficking in Australia, noting a wide discrepancy between officially detected cases and unofficial estimates.<sup>4</sup> The researchers found that although the majority of prosecutions for trafficking in Australia are related to sex trafficking, recent investigations are likely to result in more prosecutions for labour trafficking in a number of different industries.<sup>5</sup>

There is no available research detailing human trafficking for forced labour in Australia's fishing industry. However, the Australian government has recognised that there are issues

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<sup>2</sup> 2012 *Trafficking in Persons Report* (US Department of State, June 2012) [TIP 2012] at 6.

<sup>3</sup> At 72.

<sup>4</sup> J Larsen and L Renshaw “People Trafficking in Australia” (2012) 441 *Trends and Issues in Crime and Criminal Justice* June 2012 at 2.

<sup>5</sup> At 5.

relating to trafficking in the mining and agriculture sectors.<sup>6</sup> Despite this official recognition of the problem, no cases reflecting these facts have been through the legal system. The following discussion summarises Australian trafficking law, focusing on human trafficking for forced labour, which is of most use for the purposes of this thesis.

#### 4.2.2. Australian legislative and policy framework

Australia signed the UN Trafficking Protocol in December 2002. A review of the existing legislation<sup>7</sup> found that while existing offences were effective, a “speedy review” was necessary in order for Australia to ratify the Protocol.<sup>8</sup> In 2005, the Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act 2005 was passed with the intent of bringing Australian legislation in line with the obligations contained in the Protocol. This Act inserted sections 270 and 271 into the Criminal Code 1995 (Cth). These sections now form the core of Australia’s anti-trafficking legislative framework. Section 270 criminalises slavery, sexual servitude and deceptive recruiting. Section 271 deals with trafficking in persons and debt bondage.

In addition, there are offences found in the Migration Act 1958 (Cth) inserted by the Migration (Employer Sanctions Amendment) Act 2007, which created offences of exploiting migrant workers through forced labour, sexual servitude or slavery.<sup>9</sup> These offences were drafted with the intent of criminalising behaviour associated with human trafficking.<sup>10</sup> Punishments for these offences are commensurate with penalties prescribed for other serious crimes. There are also offences found in tax, immigration and labour legislation that have been used in cases against human traffickers, despite not being specifically related to human trafficking.<sup>11</sup> At the state and territory level, there are no specific offences dealing with human trafficking, although there are offences that could be used to prosecute conduct associated with human trafficking, such as sexual servitude offences.<sup>12</sup>

Under a 2003 government initiative, the Australian Federal Police were provided with additional funding in order to facilitate the training of front-line police staff in detecting and investigating instances of human trafficking.<sup>13</sup> At this time a “mobile strike-force”<sup>14</sup> was established, and was tasked with investigating transnational sexual exploitation. It was not

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<sup>6</sup> Anti-People Trafficking Interdepartmental Committee (IDC) 2009. *Trafficking in persons: The Australian Government response 1 May 2009–30 June 2010*. Canberra: APTIDC <www.ag.gov.au>.

<sup>7</sup> Parliamentary Joint Committee on the Australian Crime Commission *Inquiry into the Trafficking of Women for Sexual Servitude* (June 2004).

<sup>8</sup> At xiv.

<sup>9</sup> See *Migration Act 1958 (Cth)*, Division 12, at ss228A-236B.

<sup>10</sup> A Schloenhardt and J Jolly “Trafficking in Persons: A Critical Appraisal of Criminal Offences in Australia” Australian Institute of Criminology (15 July 2010) at 7.

<sup>11</sup> At 7.

<sup>12</sup> For more on this, see generally A Schloenhardt “Australia, State and Territory Offences Relating to Trafficking in Persons” The University of Queensland TC Beirne School of Law (22 July 2009).

<sup>13</sup> Australian Federal Police “Stopping Human Trafficking” < www.afp.gov.au/>.

<sup>14</sup> Commonwealth Attorney-General’s Department “Final link forged in regional network to prevent people trafficking” (press release, 18 December 2003).

until 2011 that the ambit of this group was widened to include all forms of human trafficking.<sup>15</sup>

In 2004, the Australian government launched the Commonwealth Action Plan to Eradicate Trafficking in Persons. It sets out a trafficking policy comprised of four main elements: prevention, detection and investigation, criminal prosecution, and victim support and rehabilitation.<sup>16</sup> Since 2004, a visa framework for victims of trafficking has been in place, enabling victims to remain legally in Australia to assist in prosecutions and investigations. Victims are also able to access the government funded Support for Victims of Trafficking Program.<sup>17</sup>

The Action Plan was built upon in 2008. Key measures in the revised strategy include a number of dedicated Federal Police teams tasked with investigating trafficking operations; additional training for prosecutorial and judicial officers; cooperation between criminal justice systems and victim support programmes; increased regional cooperation on human trafficking, and the development of training materials in association with ASEAN that will be delivered to all ASEAN members.<sup>18</sup> As of 2009, the visa framework has been simplified to allow victims to obtain a temporary visa whether or not they agree to cooperate with police investigations.<sup>19</sup>

In 2012, a Crimes Legislation Amendment Bill was introduced for debate. It proposes to widen the scope of the existing legislative framework for human trafficking in order to fully cover the range of purposes for which a person may be recognised as being trafficked.<sup>20</sup>

Internationally, the Australian government provides some support in building up states' capacity to combat human trafficking. Australia has specific bilateral anti-trafficking agreements with the governments of Cambodia, Burma, Laos and Thailand that seek to coordinate investigations and improve cooperation between investigating authorities.<sup>21</sup>

Recognising the importance of a strong criminal justice approach to combating human trafficking, the Australian government has taken the approach of strengthening investigative and prosecutorial capacity to investigate human trafficking; promoting mutual legal assistance in trafficking cases; and working closely with regional bodies such as ASEAN and the Bali Process.<sup>22</sup>

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<sup>15</sup> Australian Federal Police, above n 13.

<sup>16</sup> F Simmons and J Burn "Evaluating Australia's Response to all forms of Trafficking: Towards Rights-Centred Reform" (2010) 84 ALJ 712 at 715.

<sup>17</sup> At 716.

<sup>18</sup> Anti-Slavery Australia "Whole of Government Strategy" <[www.antislavery.org.au/](http://www.antislavery.org.au/)>.

<sup>19</sup> Simmons and Burn, above n 16, at 716.

<sup>20</sup> Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012, Purpose.

<sup>21</sup> L Fergus "Trafficking in Women for Sexual Exploitation" Australian Institute of Family Studies, Briefing No 5, June 2005.

<sup>22</sup> AusAID "Recognising Leadership in Combating Human Trafficking" (20 June 2012) <[www.aisaid.gov.au/](http://www.aisaid.gov.au/)>.

In addition to working with regional bodies, the Australian government has created partnerships with NGOs such as the Red Cross, in order to ensure effective delivery of services to victims of human trafficking.<sup>23</sup> Australian authorities also promote awareness of human trafficking in more novel ways. The Australian Federal Police provided support for an advertising campaign run by the University of Queensland's Human Trafficking Working Group.<sup>24</sup> In a similar vein, AusAID provides support for an MTV anti-trafficking campaign.<sup>25</sup> The aim of both of these projects is to raise awareness, and shift attitudes and behaviour that currently exist with respect to human trafficking both in Australia and internationally.<sup>26</sup>

#### 4.2.3. Analysis of the Criminal Code, sections 270 and 271

These two sections deal with slavery and human trafficking respectively. It was the intent of the Australian Parliament that they work together – despite the fact that they are two separate offences – to implement the obligations imposed on Australia by the Trafficking Protocol.<sup>27</sup> As has been made clear earlier, although they are legally different, parallels have been made between slavery and human trafficking,<sup>28</sup> with some suggestion that the latter is simply a manifestation of the former.<sup>29</sup> It will be seen from the analysis of Australian jurisprudence that the anti-slavery legislation is used in conjunction with anti-trafficking legislation in order to charge offenders with offences covering all forms of the exploitative behaviour that lie at the heart of human trafficking.

Section 271 is divided into offences concerning transnational human trafficking<sup>30</sup> and domestic trafficking.<sup>31</sup> The transnational category of section 271 covers instances where a person “organises” or “facilitates” the “entry, proposed entry or receipt” of another person into Australia. If such conduct is carried out with intent to exploit, or if the victim is subjected to cruel or degrading treatment, then section 271.3 will apply, and the offence will be considered aggravated trafficking. Under s 271.4, a higher penalty is attached to trafficking in children under the age of 18. Section 271.8 defines debt bondage as an agreement to render services where the debt owed is “manifestly excessive”, or the services are “not applied to the liquidation of the debt”, or “the length and nature of the services are not ... limited and defined.”

Under the Criminal Code, the means by which a victim can be considered to be trafficked are stated as being through force, coercion or deception.<sup>32</sup> As with the New Zealand legislation

<sup>23</sup> Australian Red Cross “Support for Trafficked People” <[www.redcross.org.au/](http://www.redcross.org.au/)>.

<sup>24</sup> See “Be Careful what you Pay for” <[www.law.uq.edu.au/awareness-and-education/](http://www.law.uq.edu.au/awareness-and-education/)>.

<sup>25</sup> See “MTV Exit: End Exploitation and Trafficking” <[www.mtvexit.org/](http://www.mtvexit.org/)>.

<sup>26</sup> AusAID, above n 22.

<sup>27</sup> Schloenhardt and Jolly, above n 10, at 7.

<sup>28</sup> See chapter one of this thesis

<sup>29</sup> See generally S Scarpa *Trafficking in Human Beings: Modern Slavery* (Oxford University Press, Oxford, 2008) and K Bales *Understanding Global Slavery: A Reader* (University of California Press, California, 2005).

<sup>30</sup> Criminal Code 1995 (Cth) s 271.2.

<sup>31</sup> At 271.5.

<sup>32</sup> At s 271.

though, the terms “abuse of a position of power or vulnerability”, and “the giving or receiving of payments to achieve consent” are omitted. Although these terms were discussed in the explanatory note to the 2004 Criminal Code Amendment (Trafficking in Persons Offences) Bill,<sup>33</sup> it is unclear as to why they have been left out from the offence as it currently stands in law.

Section 271 defines “deceive” as “mislead as to fact (including the intention of any person) or as to law, by words or other conduct”. It has been held by the court that this requires intent to deceive on behalf of the offender. The offender must know that his or her representations are untrue, and the representations must be made in order to mislead the victim.<sup>34</sup>

In summary, the law as it currently stands in Australia focuses on the movement of individuals facilitated by the use or threat of physical force. Whether or not exploitation is involved is a matter that will assist as evidence in a charge of aggravated trafficking. In practice, this has meant that in some cases prosecutors have found it difficult to prove the means element of the offence.<sup>35</sup> As will become clear in the section on Australian case law to follow, prosecutors tend to charge offenders with a range of inter-related offences in order to succeed on at least one charge. It is arguable that this practice is a result of the difficulties present in succeeding in a charge of only human trafficking.

#### 4.2.4. Case law – leading cases

There are a number of cases that revolve around the application of anti-trafficking legislation. The first case to be tried under s 271 was *R v Rasalingam*.<sup>36</sup> The victim in this case testified that the defendant brought him to Australia from India, and forced him to work seven days a week for up to 15 hours a day. The victim had his passport and airline ticket taken from him and was threatened with deportation if he complained to authorities.<sup>37</sup> This case demonstrates inadequacies present in victim protection – while the victim’s name was suppressed in the criminal trial, it was not suppressed in subsequent proceedings related to breaches of labour laws.<sup>38</sup>

The three leading cases are *R v Wei Tang*,<sup>39</sup> *R v Dobie*<sup>40</sup> and *R v Kovacs*.<sup>41</sup> *R v Wei Tang* revolved around a scheme to bring Thai women into Australia to work as prostitutes. Each woman would be escorted into Australia (often by an elderly couple so as not to arouse suspicion by officials). Upon arrival they would have their travel documents taken from them

<sup>33</sup> Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004, explanatory note.

<sup>34</sup> *R v Dobie* (2009) 236 FLR 455, at [20].

<sup>35</sup> TIP 2012, at 75.

<sup>36</sup> *R v Yogalingam Rasalingam* (District Court of New South Wales, Judge Puckeridge, 10–11 October 2007).

<sup>37</sup> A Schloenhardt, G Beirne and T Corsby “Human Trafficking and Sexual Servitude in Australia” (2008) 32 UNSW Law J 27 at 46.

<sup>38</sup> Gallagher, above n 1, at 7.

<sup>39</sup> *R v Tang* (2008) 237 CLR 1.

<sup>40</sup> *R v Dobie* (2009) 236 FLR 455.

<sup>41</sup> *R v Kovacs* [2009] 2 Qd R 51.

until the woman's debt – usually around \$40,000-\$45,000 AUD – was paid. The fee paid by each client was \$110 AUD. This amount would be divided between the brothel owner and the contract owner. Fifty AUD would be paid toward the debt. The women were required to work six days a week from 6pm to 2am or later. If the women chose to work on the 7<sup>th</sup> day, they could keep the \$50 which would normally go toward offsetting the debt. The women were forced to live in apartments controlled by the contract owners, and were not permitted to leave without an escort.<sup>42</sup>

The case of *Wei Tang* is useful to demonstrate the shortcomings of Australian legislation. The Court in that case gave careful consideration to the meaning of “slavery”, and the legal elements of “ownership”.<sup>43</sup> Gleeson CJ concluded that because it is not legally possible to “own” a person under Australian law, the concept of slavery as contemplated by s 270 must necessarily be wider than traditional chattel slavery. Rather, the section addresses the “de facto condition of slavery”. His Honour felt that creating strict legal boundaries between concepts such as servitude, peonage, forced labour and debt bondage would be unhelpful, as concepts like these are not mutually exclusive.<sup>44</sup>

This has been criticised as overcomplicating the proceedings – especially when it is considered that one of the aims of the Trafficking Protocol was to remove the uncertainties that surrounded old legal concepts such as slavery.<sup>45</sup> That the Court felt the need to delve into definitions relating to slavery in a trafficking case shows that there is room for trafficking legislation to be clarified.<sup>46</sup>

In *R v DS*,<sup>47</sup> which involved litigation related to the proceedings in *Wei Tang*, the defendant DS was successfully prosecuted under the slavery provisions. DS had herself been brought to Australia by a Thai organiser to work as a contracted prostitute. After she had serviced 700 clients she was given “a chance to earn money” in Australia. However, she herself then engaged in human trafficking, although for reasons which are unclear she was not charged with trafficking offences, but rather under slavery legislation. DS pleaded guilty to three counts of possessing a slave, and two counts of engaging in slave trading. After an appeal against sentence, she was sentenced to six years imprisonment.

In *R v Dobie*,<sup>48</sup> the Crown alleged that the defendant deceptively recruited two Thai women to travel to Australia. The women were deceived about the conditions of their stay and employment. They were kept locked in hotel rooms, and were forced to service up to eight men a day for a small fraction of the pay that they were promised. The defendant presented

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<sup>42</sup> Facts taken from *R v Wei Tang* [2006] VCC 637.

<sup>43</sup> See judgments of Gleeson CJ, Hayne and Kirby JJ.

<sup>44</sup> *R v Wei Tang* [2008] HCA 39 at [29], per Gleeson CJ.

<sup>45</sup> Gallagher, above n 1, at 6.

<sup>46</sup> At 7.

<sup>47</sup> *R v DS* (2005) 191 FLR 337.

<sup>48</sup> *R v Dobie* (2009) 236 FLR 455.

immigration officials with false information in order to obtain visas for the women.<sup>49</sup> In a discussion on the point of confinement of the women, the Court noted that the women did not need to be locked up, as they “were isolated by culture, by language and by poverty.”<sup>50</sup>

The third leading case is that of *R v Kovacs*.<sup>51</sup> Here, the defendants were alleged to have brought a woman into Australia from the Philippines on the basis of a sham marriage. The prosecution alleged that the woman was effectively enslaved for the purpose of providing labour for the defendant's home and shop. It was alleged that the victim was forced to work for up to 17 hours a day, seven days a week, for little or no pay.<sup>52</sup> When the victim was “recruited” in the Philippines, she was deceived as to the amount of pay she would receive in Australia. She was told that some of her wages would be withheld to cover expenses which were never defined.<sup>53</sup> The victim never complained as she was told that “they would all go to gaol” if she spoke to police.<sup>54</sup>

This case highlighted a number of previously unexamined facets of human trafficking in Australia. The effect of the Court's judgment in this case was to expand the jurisprudence of sexual trafficking to cover cases of labour trafficking.<sup>55</sup> In *Wei Tang* it was emphasised by the High Court that not all instances of harsh employment would be considered slavery.<sup>56</sup> *Kovacs* presents an interesting example of how this distinction might be applied. The Court in *Kovacs* held that:<sup>57</sup>

The offence of slavery is not constituted by the doing of prescribed acts. It is an offence which ... is constituted by a course of conduct which comprises a number of acts over an extended period.

Counsel for the defence argued that the extent to which the victim was allowed personal freedom was inconsistent with a definition of slavery.<sup>58</sup>

#### 4.2.5. Case law – Trafficking for Forced Labour in Australia

In *R v Sieders; R v Somsri*,<sup>59</sup> the Court commented on the nature of being free to make a choice, which is useful to quote in full. Campbell JA observed that:<sup>60</sup>

What the notion of a person being “not free” to engage in a particular action seeks to capture is that there is something about the state of affairs or set of circumstances in which the person

<sup>49</sup> UNODC *Human Trafficking Case Law Database* “*R v Dobie*” <[www.unodc.org/cld/case-law/](http://www.unodc.org/cld/case-law/)>.

<sup>50</sup> *R v Dobie* (2009) 236 FLR 455 at [37].

<sup>51</sup> *R v Kovacs* [2009] 2 Qd R 51.

<sup>52</sup> At [10].

<sup>53</sup> At [9].

<sup>54</sup> At [11].

<sup>55</sup> A Schloenhardt and J Jolly “Honeymoon from Hell: Human Trafficking and Domestic servitude in Australia” [2010] 32 SLR 671 at 672.

<sup>56</sup> *R v Tang* (2008) 237 CLR 1.

<sup>57</sup> *R v Kovacs*, above n 51 at [41].

<sup>58</sup> At 46.

<sup>59</sup> *R v Sieders; R v Somsri* (2008) 72 NSWLR 417.

<sup>60</sup> At [90], per Campbell JA.

lives that prevents, or seriously inhibits, the person from engaging in that particular action. Being not free to engage in a particular action can arise from a matter of law, as occurs when a person is not free to enter or leave a country without a valid passport, or a married person is at any particular time not free to marry the next day someone other than their present spouse. It can arise from physical constraint, as occurs when a person is kidnapped. It can arise from a social or moral pressure that the person in question cannot resist, as occurs if a child is not free to go out at night without parental permission, or in some cultural traditions a person is not free to wear any type of clothing they might choose in certain situations, such as being in public. It can arise from limitations on the person's economic resources, as when the vast majority of people in Australia aged between 25 and 60 are not free to spend a year without working. It can arise from limitations on the person's own abilities, in the sense that a person of below average intelligence is not free to become a university professor, or a person of ordinary physical skills is not free to compete in the Olympic Games. There may well be other sources of limitations on a person's freedom to act in a particular way.

This quote raises interesting points about the concept of coercion. To show coercion, it is necessary to show that the victim had no reasonable option other than to cooperate with the offender. The statement of Campbell JA in this context goes some way to showing what is required to show a lack of reasonable alternatives.

That case also demonstrates the need for official victim support to be managed carefully. The nature of the adversarial legal system is for the defence counsel to test every facet of the prosecution's case. In the *Sieders* case, defence counsel drew attention to the fact that the Australian Federal Police had helped the victims apply for visas – the implication being that the testimony of the victims could not be trusted as they had hidden motives for participating in the trial.<sup>61</sup>

Australian authorities are increasingly aware of the problem of trafficking for forced labour.<sup>62</sup> However, few of the cases identified by Australian police have conformed to the “traditional stereotype of slavery.”<sup>63</sup> Instead, much more subtle forms of control are being used by traffickers to control their victims in Australia. Instead of victims being kept under lock and key, they are being effectively controlled through the confiscation of their travel documents, threats of violence, fear of authorities, or social, physical or cultural isolation.<sup>64</sup>

The implication of this is that if authorities have a set of criteria that they are using to look for victims which is demonstrably ineffective, then there will be a number of missed opportunities to correctly identify victims of trafficking.<sup>65</sup>

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<sup>61</sup> F David “Prosecuting Trafficking in Persons: Known Issues, Emerging Responses” (2008) 358 Trends and Issues in Crime and Criminal Justice 1 at 2-3.

<sup>62</sup> Simmons and Burn, above n 16, at 713.

<sup>63</sup> F David “Trafficking for Sexual Purposes” Australian Institute of Criminology, Research and Public Policy Series, No 95, at 39.

<sup>64</sup> At 24.

<sup>65</sup> Simmons and Burn, above n 16, at 715.



It is curious that in Australia – similarly to the situation in New Zealand – exploitation within the sex industry will lead to criminal charges whereas exploitation for labour leads to civil penalties.<sup>66</sup> Cullen and McSherry cite the case of *Inspector Robert John Hartle v Aprint (Aust) Pty Ltd & Anor*<sup>67</sup> as an example where migrant labourers were brought from China to Australia after having paid a large fee as a bond to an agent, on top of another large fee as a recruitment price. In Australia, the men were housed in sub-standard accommodation – being charged an exorbitant amount in rent and other expenses, worked long hours and were paid well under minimum wage. When the bond was paid, the men were immediately fired, meaning that under their visa conditions, unless they could find another employer registered to employ migrant labour, they must leave Australia immediately.<sup>68</sup>

In *R v Wei Tang*, the sentencing judge asked the following rhetorical questions:<sup>69</sup>

How could they run away when they had no money, they had no passport or ticket, they entered on an illegally obtained visa, albeit legal on its face, they had limited English language, they had no friends, they were told to avoid immigration, they had come to Australia consensually to earn income and were aware of the need to work particularly hard in order to pay off a debt of approximately \$45,000 before they were able to earn income for themselves.

Cullen and McSherry make the connection between the facts of *Aprint*, involving forced labour and the facts of *Wei Tang*, involving forced prostitution.<sup>70</sup> The answers to McInerney J's rhetorical questions are the same in both cases, yet in *Wei Tang* the charge was human trafficking, and in the *Aprint* case, the charge was much less serious.

#### 4.2.6. Strengths and weaknesses

One of the main strengths of the Australian framework is the visa programme available for victims of trafficking.<sup>71</sup> This is reinforced by a victim support programme that provides effective support for recognised victims of human trafficking. The Red Cross, funded by the federal government, provides financial, welfare, housing and employment assistance to victims.<sup>72</sup> The identification of victims is another strong point of the Australian framework. Evidence suggests that Australian authorities make a relatively strong – if not entirely effective – effort in identifying and certifying victims of human trafficking.<sup>73</sup>

<sup>66</sup> It is unclear why this is the case. See M Cullen and B McSherry “Without Sex: Slavery, Trafficking in Persons and the Exploitation of Labour in Australia” (2009) 34(1) Alt LJ 4. See also TIP 2012 at 74.

<sup>67</sup> *Inspector Robert John Hartle v Aprint (Aust) Pty Ltd & Anor* [2007] FMCA 1547.

<sup>68</sup> Cullen and McSherry, above n 66, at 4.

<sup>69</sup> *Wei Tang* [2006] VCC 637 (Unrep., 9 June 2006, per McInerney J) at [6] and [7].

<sup>70</sup> Cullen and McSherry, above n 66, at 4.

<sup>71</sup> Simmons and Burn, above n 16, at 716.

<sup>72</sup> Red Cross “Migration Support” <[www.redcross.org.au/](http://www.redcross.org.au/)>.

<sup>73</sup> TIP 2012, at 74. Eleven victims identified during the last reporting period, 31 in the period before that.

There are certain weaknesses in the Australian framework however. Firstly, instances of forced labour tend to be dealt with as civil matters,<sup>74</sup> suggesting that there is a disproportionate amount of energy put into dealing with cases of sex trafficking. Secondly, at the present time, coercion is limited to being actual or threatened physical coercion.<sup>75</sup> Thirdly, as the discussion of Australian case law shows, the Australian anti-trafficking legislative framework is confused and incoherent. This conclusion is based firstly on the pattern of defendants being charged with slavery offences where on the facts, a trafficking offence would be more appropriate, and secondly on the statements made by the courts which appear to conflate the two offences.

#### **4.2.7. Conclusion**

Australia's trafficking framework has been described by a leading expert on human trafficking as "incomplete, confusing and overly complicated."<sup>76</sup> The overlap between slavery and human trafficking has led to confused jurisprudence, and related offences such as debt bondage do not have strong enough penalties to warrant charging a defendant with them. This critique of the Australian framework goes some way to explaining why situations of apparent human trafficking are being dealt with under slavery legislation.

### **4.3. United Kingdom**

#### **4.3.1. Introduction**

The United Kingdom is rated by the most recent TIP report as a Tier One state. Authorities reported that along with the more traditional forms of trafficking for sex and forced labour, there are also cases emerging of trafficking for benefit fraud and other types of coerced criminality.<sup>77</sup> In addition, as with the case of human trafficking in the fishing industry, there are instances of human trafficking for forced labour in other legal industries.<sup>78</sup> Similarly to Australia, little evidence of this has come through the legal system. The following discussion notes the few instances of human trafficking for forced labour that have been prosecuted in the UK, however the main focus is on the way in which the jurisprudence has elaborated on the responsibilities of States to victims of human trafficking.

In light of the history of human trafficking in the UK, it might be expected that a well established framework be in place to aid in countering trafficking. In reality, it appears that the legislative and policy framework has been created on an ad hoc basis. This discussion also highlights the problems that an incomplete framework poses to courts and officials when investigating cases of human trafficking.

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<sup>74</sup> At 74.

<sup>75</sup> At 74.

<sup>76</sup> Gallagher, above n 1, at 6.

<sup>77</sup> TIP 2012, at 357.

<sup>78</sup> J Coster van Voorhout "Human Trafficking for Labour Exploitation: Interpreting the Crime" (2007) 3 Utrecht L Rev 44 at 48-49.

As a member of the European Union and as such falling under certain European legislative obligations, the United Kingdom has ratified several important EU treaties relating to human trafficking, and actively incorporates anti-trafficking measures into its domestic law.

#### 4.3.2. Legislative and policy framework

The 2005 Council of Europe Convention on Action Against Trafficking in Human Beings<sup>79</sup> – arguably the most comprehensive European anti-trafficking instrument<sup>80</sup> – was ratified by the UK in December 2008 as a result of increasing pressure to adopt a more victim-oriented approach to trafficking.<sup>81</sup> The UK opted into the EU Directive on Human Trafficking,<sup>82</sup> meaning that it would bring its human trafficking legislation into harmony with the rest of the signatories. The implication of this for the UK is that the definition of trafficking under this directive is wider than the UN Protocol definition, and includes an expanded list of means. This list includes “the exchange or transfer of control over” trafficking victims, and the “giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”<sup>83</sup> This will have the effect of including within its scope parents who sell their children.<sup>84</sup>

The Sexual Offences Act 2003 criminalises trafficking for the purposes of prostitution.<sup>85</sup> The offence will be complete when a person intentionally causes or incites a person to become a prostitute anywhere in the world, or controls the activities of another person for the purposes of prostitution anywhere in the world, where the exploitation is done for the purposes of financial gain.<sup>86</sup> The sentence of up to 14 years imprisonment which is prescribed for sex trafficking sets the offence at a level similar to other serious crimes.<sup>87</sup> This offence goes further than the Trafficking Protocol, not requiring any element of coercion, deception or force or threat thereof during the recruitment of victims.

A year later, the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 was passed into law, creating the offence of labour trafficking.<sup>88</sup> Section 218 of that Act states that a person will commit an offence if they arrange or facilitate the arrival or entry of a person into the UK and intends to exploit the person, or believes that another person is likely to exploit

<sup>79</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS 148 (open for signature 16 May 2005, entered into force 1 February 2008) [Council of Europe Trafficking Convention].

<sup>80</sup> S Chaudary “Trafficking in Europe: An Analysis of the Effectiveness of European Law” (2011) 33 Mich J Intl L 77 at 83.

<sup>81</sup> H Simon “Human Trafficking from an International Protection Perspective: Probing the Meaning of Anti-Trafficking Measures for the Protection of Trafficking Victims, with Special Regard to the United Kingdom” (2010) 28 Penn St Intl L Rev 633 at 637.

<sup>82</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>83</sup> At art 2. See also discussion of this in chapter 3 of this thesis.

<sup>84</sup> N Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012), at 41-42.

<sup>85</sup> Sexual Offences Act 2003, ss 52-53.

<sup>86</sup> At ss 52-53.

<sup>87</sup> TIP 2012, at 358.

<sup>88</sup> Asylum and Immigration (Treatment of Claimants, etc) Act 2004, at ss 4-5.

that person.<sup>89</sup> The offence will also be complete if the person is trafficked within<sup>90</sup> or out of<sup>91</sup> the UK. The term “exploited” in the offence under this Act is given the same meaning as found in Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950).<sup>92</sup>

In the same year, in a response to the deaths of a number of illegal migrant workers, the Gangmaster (Licensing) Act 2004 was passed in an attempt to regulate the market of illegal migrant workers.<sup>93</sup> Although this Act was specifically targeting human trafficking, it has been held up as representing a landmark in recognising the rights of vulnerable migrant workers, who are often victims of exploitative practices.<sup>94</sup>

Some time later, in 2009, the Coroners and Justice Act was implemented, creating offences of slavery, servitude and forced labour.<sup>95</sup> Commentary on these terms notes that the terms of “slavery”, “servitude” and “forced labour” should be construed in accordance with article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) which contains a prohibition on slavery, servitude and forced labour.<sup>96</sup> This obligation is an absolute one, as case law has shown.<sup>97</sup> It has been argued that this acknowledges the fundamental status of this article, putting it on par with other central human rights.<sup>98</sup>

More recently, recognising the role that large corporations can play in perpetuating situations of human trafficking for forced labour, the UK has made moves to ensure that the supply chains of these large corporations are scrutinised. The Transparency in UK Company Supply Chains (Eradication of Slavery) Bill was introduced in 2012. It aims to:<sup>99</sup>

Require large companies in the UK to make annual statements of measures taken by them to eradicate slavery, human trafficking, forced labour and the worst forms of child labour ... from their supply chains; to require such companies to provide customers and investors with information about measures taken by them to eliminate slavery, human trafficking, forced labour and the worst forms of child labour; to provide victims of slavery with necessary protections and rights; and for connected purposes.

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<sup>89</sup> At s 218(1).

<sup>90</sup> At s 218(2).

<sup>91</sup> At s 218(3).

<sup>92</sup> *Halsbury's Laws of England* (5<sup>th</sup> ed, 2012, online ed) vol 57 Immigration and Asylum at [218].

<sup>93</sup> J Goodey “Human Trafficking: Sketchy Data and Policy Responses” (2008) 8 *Criminology and Criminal Justice* 421 at 424.

<sup>94</sup> At 424.

<sup>95</sup> Coroners and Justice Act 2009, at s 71.

<sup>96</sup> *Halsbury's Laws of England*. (5<sup>th</sup> ed, 2010, online ed) vol 25 Criminal Law at [765A].

<sup>97</sup> *Siliadin v France* (73316/01) Second Section, ECHR 26 July 2005, See also *Rantsev v Russia & Cyprus* (25965/04) First Section, ECHR 10 January 2010.

<sup>98</sup> Chaudary, above n 80, at 83.

<sup>99</sup> Transparency in UK Company Supply Chains (Eradication of Slavery) Bill, summary.

In the Parliamentary debate on the first reading of the Bill, it was noted that this Bill followed a similar model to an Act recently adopted in California,<sup>100</sup> although it goes further than that Act in the way that the recruitment practices of the suppliers of the company under scrutiny must be in conformance with the company's standards for "eliminating exploitative labour practices."<sup>101</sup>

Unfortunately, the scheme of assessment established by the Bill is self-regulating, and the Bill lacks effective penalties for non-compliance. However it appears to be possible for an action to be taken by the Attorney General for an injunction requiring non-compliant companies to take action. This could be particularly useful when a breach of section 3 of the Bill – requiring companies who uncover slavery or human trafficking in their supply chains to take any "necessary and appropriate" action to assist those victims – is alleged.

As with other jurisdictions, the major flaw in the UK framework relates to the identification of victims. The framework has been pieced together on an ad hoc basis, firstly dealing with the issue of sex trafficking and then labour trafficking. Despite the UK having ratified the Council of Europe Convention on Action against Human Trafficking in 2009, and therefore being required to provide a comprehensive framework for the identification and protection of victims and witnesses,<sup>102</sup> it does not deal adequately with these aspects of victim protection,<sup>103</sup> instead leaving victim protection to be considered on a case by case basis.<sup>104</sup>

A review was conducted by the government in 2011 in light of criticisms made by NGOs,<sup>105</sup> alleging predominantly that the framework has too strong a focus on the migratory and criminal aspects of human trafficking, at the cost of marginalising the human rights of victims.<sup>106</sup> The review found that in order to bring UK legislation into line with international standards, it would be necessary to pass legislation criminalising trafficking undertaken anywhere in the world by UK nationals; criminalise internal trafficking for non-sexual exploitation; and remedy what was perceived to be an unduly lenient sentencing regime.<sup>107</sup>

Recently there have been some developments relating to protecting under-aged victims of trafficking who agree to be part of a trial process as a witness. The Crown Prosecutor's Service is beginning to work with those officials in the criminal justice system that have

<sup>100</sup> (19 Oct 2012) 551 GBPD 52, at [665-6]. The Californian Act is discussed below.

<sup>101</sup> Transparency in UK Company Supply Chains (Eradication of Slavery) Bill, s 2(3)(f).

<sup>102</sup> Council of Europe Convention on Action against Human Trafficking, above, n 79, at art. 1(b).

<sup>103</sup> M Ventrella "Protecting Victims of Trafficking in Human Beings in the UK: The Italian 'Rimini Method' that could Influence the British Approach" (2007) 3 J Migration & Refugee Issues 40 at 48

<sup>104</sup> Joint Committee on Human Rights *Human Trafficking* (HL Paper 245-1, 2006) at 27.

<sup>105</sup> See for example Liberty and Anti-Slavery *International Joint Briefing on the Coroners and Justice Bill for the Committee Stage of the House of Lords* (June 2009) <[www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk)>.

<sup>106</sup> Goodey, above n 93, at 424.

<sup>107</sup> Home Office *Human Trafficking: The Government's Strategy* (July 2011).

interactions with under-aged victims of trafficking to ensure that those victims have support throughout the trial process.<sup>108</sup>

A 2012 Parliamentary report on the review shows a growing awareness that tough legislation is not enough to resolve the problem of human trafficking, and by focussing solely on achieving convictions of traffickers, the “core issue” – protecting vulnerable victims – is neglected.<sup>109</sup>

Despite this high-level awareness of the need to take proactive steps to combat human trafficking in the UK, it appears that many offenders are not being charged. Two sting operations conducted by police beginning in 2006 resulted in a reported 538 arrests for trafficking offences.<sup>110</sup> Of these arrests, only 80 individuals were formally charged, and by the conclusion of the operation in 2009, only 15 convicted of human trafficking.<sup>111</sup> One conclusion that might be drawn from these figures is that more training of front-line law enforcement officials should be undertaken in order that instances of human trafficking might be more effectively investigated and prosecuted.

A second report published in 2012 shows that this situation may be starting to change for the better. It is reported that front-line officials have received more training via an e-learning package in addition to training provided by local police boroughs.<sup>112</sup> A specialist anti-trafficking police unit exists as part of the Metropolitan Police’s specialist crime division. They are tasked with providing “expert advice” on trafficking investigations.<sup>113</sup>

Work to build anti-trafficking capacity is being undertaken with states that are recognised as being source countries for victims of human trafficking in the UK. In addition, agreements are being put in place to facilitate cross-jurisdictional sharing of information in relation to trafficking cases,<sup>114</sup> and partnerships are being made with non-governmental stakeholders to raise awareness in the general public of the offence, and rapidly and effectively provide services to victims of trafficking.<sup>115</sup>

#### 4.3.3. UK Case Law

There have been several examples of human trafficking for forced labour in the fishing industry. Research conducted by the International Transport Workers’ Federation (ITF) found

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<sup>108</sup> Home Office *First Annual Report of the Inter-Departmental Ministerial Group on Human Trafficking* (October 2012) at 64.

<sup>109</sup> Home Office *Parliamentary Report on the Internal Review of Human Trafficking Legislation* (May 2012) at 3.

<sup>110</sup> J Mandel “Out of Sight, Out of Mind: The Lax and Underutilised Prosecution of Sex Trafficking in the United Kingdom and Israel” (2012) 21 Tul J Intl & Comp L 205 at 224-225.

<sup>111</sup> At 225. See also N Davies “Inquiry Fails to Find Single Trafficker Who Forced Anybody into Prostitution” *The Guardian* (online ed, 19 October 2009).

<sup>112</sup> Home Office, above n 108, at 40.

<sup>113</sup> Metropolitan Police “Specialist Crime” <[www.met.police.uk/sco/](http://www.met.police.uk/sco/)>.

<sup>114</sup> Home Office, above n 108, at 39.

<sup>115</sup> At 4-5.

scenarios which were very similar to those occurring on board FCVs in New Zealand's waters. Indonesian fishermen were recruited under onerous employment contracts in Indonesia and transported to Scotland. Upon beginning work on board the vessel they were subjected to overwork, underpayment and physical abuse.<sup>116</sup> It is unclear whether these facts resulted in any criminal proceedings for human trafficking.

Very few criminal cases on human trafficking for forced labour into legal industries have taken place in the UK.<sup>117</sup> One example of this type of case is *O.O.O. v The Commissioner of Police for the Metropolis*.<sup>118</sup> This case involved four Nigerian women who had been brought to the UK as children, and forced to work as domestic help in various households for a period of nine years.<sup>119</sup> This case was the first in the UK to consider issues of human trafficking for forced labour in light of the *Rantsev* case.<sup>120</sup> The Court held that the Metropolitan Police Service had an obligation to carry out an effective investigation, and had failed to do so.<sup>121</sup> The victims of trafficking in this case were awarded £5,000 each in compensation,<sup>122</sup> however the Police were not required to undertake an investigation.

In *R v K*,<sup>123</sup> the Court considered the impact of the *Siliadin* and *Rantsev* cases on UK law.<sup>124</sup> Drawing on the terminology used in *Rantsev*, the Court held that the core elements of Article 4 of the ECHR – slavery, servitude and forced labour<sup>125</sup> – form a “hierarchy of denial of personal autonomy”, with the concept of trafficking encapsulated within this.<sup>126</sup> Forming other aspects of the hierarchy, the Court noted that “slavery” involves treating a person as an animal or object; “servitude” involves an obligation that is enforced by an element of coercion that a person must perform services for another person. “Forced or compulsory labour” is work carried out under the threat of penalty, performed against the will of the individual concerned. These concepts interrelate to a certain extent with the common denominator being the subjection of a victim to enforced control by another person.<sup>127</sup>

<sup>116</sup> International Transport Workers' Federation “Migrant Workers in the Scottish and Irish Fishing Industry” (ITF, November 2008) at 2-3. This report gives several further examples of similar facts occurring in UK waters.

<sup>117</sup> A search of the Westlaw database with the terms “Nationality, Immigration and Asylum Act 2002”, “human trafficking” and “forced labour” returned no relevant results. Using the search terms “Asylum and Immigration (Treatment of Claimants, etc) Act 2004” and “forced labour” returned five results. The relevant cases are covered in the following discussion. Coster van Voorhout (above, n 78, at 57) finds six cases, however closer examination reveals that these are related to sex trafficking.

<sup>118</sup> *O.O.O. v The Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB).

<sup>119</sup> At [1].

<sup>120</sup> Discussed below at 4.3.4.

<sup>121</sup> At [154].

<sup>122</sup> At [190].

<sup>123</sup> *R v K* [2012] 1 All ER 1090.

<sup>124</sup> Discussed below at 4.3.4.

<sup>125</sup> European Convention on Human Rights ETS 5 (4 November 1950, entered into force 3 September 1953), at art 4.

<sup>126</sup> *R v K* [2012] 1 All ER 1090, at 1091.

<sup>127</sup> *R v K* [2012] 1 All ER 1090, at 1097.

The case of *Attorney-General's Reference (nos. 129 and 132 of 2006)*<sup>128</sup> is appropriate to mention here as it demonstrates the existence in the UK of some of the issues that have tied up Australian courts. According to commentary on this case, the issue of coercion was dominant in this case, as well as a general confusion over the term “trafficking” and whether it should be construed as an immigration offence or a slavery offence.<sup>129</sup> The facts of the case involved a sophisticated trafficking ring which brought women from East Europe, Spain and Malaysia to the UK to work as prostitutes.<sup>130</sup>

In *AT v Dulghieru*, four victims of sex trafficking sued their traffickers under tort law, alleging an unlawful conspiracy to traffic them for sexual exploitation. The English High Court accepted these claims, and awarded the claimants general, aggravated and exemplary damages.<sup>131</sup> One of the interesting aspects of this case is the way in which the tort of unlawful means conspiracy – traditionally an economic tort, requiring actual pecuniary loss – was used. This meant that the claimants had to quantify the loss suffered in terms of actual financial cost.<sup>132</sup>

In some cases, it would seem that a defence of duress will be available to a victim of trafficking.<sup>133</sup> The New Zealand courts have not had an opportunity to consider the defence of duress in the specific context of human trafficking. English courts, on the other hand, have. Although not upheld on the facts, the Court of Appeal in *R v N and R v LE*<sup>134</sup> considered that it would be available if the victim was compelled to commit an offence. Similarly in *R v LM and Others* the Court considered that duress would be available as a defence to a victim of trafficking.<sup>135</sup>

#### 4.3.4. European Court of Human Rights Case Law – *Siliadin and Rantsev*

The main contribution of the UK to the body of jurisprudence on human trafficking relevant to this thesis derives from the case law of the European Court of Human Rights. This is significant because the UK will regard this law as binding, and will apply the principles of this case law in its domestic law. The landmark case of *Siliadin v France* involved a woman – the appellant – who was brought from Togo to France by a couple, the defendants during the initial litigation, to work as a housemaid in their home. The couple “lent” the appellant to friends, who forced her to work seven days a week and never paid her.<sup>136</sup> The French Court of Appeal acquitted the defendants of all charges, holding that the appellant was not in a state

<sup>128</sup> *Attorney-General's Reference (nos. 129 and 132 of 2006)* [2007] EWCA Crim 762

<sup>129</sup> S Kara “Designing More Effective Laws Against Human Trafficking” (2011) 9 Nw U J Intl Hum Rts 123, at [33].

<sup>130</sup> *Attorney-General's Reference*, above, n 128, at 762.

<sup>131</sup> *AT, NT, ML, AK v Gavril Dulghieru and Tamara Dulghieru (Dulghieru)* [2009] EWHC 225 (QB).

<sup>132</sup> A O’Driscoll “AT v Dulghieru: Accounting for the Profits of Sex Trafficking” (2009) 40 VUWLR 695 at 697-698.

<sup>133</sup> J Elliot “(Mis)Identification of Victims of Human Trafficking: The Case of R v O” (2009) 4 IJRL 727 at 730.

<sup>134</sup> *R v N and R v LE* [2012] EWCA Crim 189.

<sup>135</sup> *R v LM and Others* [2010] EWCA Crim 2327.

<sup>136</sup> *Siliadin v France*, above n 97, at [9-30].



of vulnerability, and was not working in conditions “incompatible with human dignity.”<sup>137</sup> At the time of the initial litigation, the French legal system did not contain specific offences of slavery, servitude, forced labour or human trafficking.<sup>138</sup>

On appeal, the European Court of Human Rights recognised that the state has a duty to regulate private conduct.<sup>139</sup> The fact that the respondent in this case – France – did not have a framework that was sufficient to hold the traffickers of the applicant accountable constituted a breach of that country’s human rights obligations.<sup>140</sup>

The Court in *Siliadin* held that in order to establish coercion, it must be demonstrated that some mental or physical constraint had the effect of “overriding” the person’s will.<sup>141</sup> This approach was reiterated by the Court in another leading case. This case, *Rantsev v Russia & Cyprus*,<sup>142</sup> involved the father of a woman who had been deceived into entering Cyprus to work in a cabaret as a prostitute. She escaped from her employers, who called police to arrest her for breaching the terms of her visa. The police did not intend to deport her, but instead contacted her employers, who picked her up. Several hours later, the woman was found dead outside an apartment building owned by her employer.<sup>143</sup>

In addition to adopting the test for coercion set out in *Siliadin*, the Court in *Rantsev* made two important points. Firstly, that human trafficking is an offence that falls within the European Convention of Human Rights’ definition of slavery. Secondly, that there are positive and procedural obligations on states to protect individuals from human trafficking, investigate such crimes, and prosecute offenders.<sup>144</sup> The Court did not specify what the nature of these obligations might be, stating only that States must provide “practical and effective” protections afforded to individuals within their jurisdiction,<sup>145</sup> and “effectively” prosecute acts aimed at keeping a person in a situation of slavery.<sup>146</sup> Additionally, the Court also made it clear that trafficking is an offence that can be committed in multiple jurisdictions during the course of a single set of events. The Court found that an obligation exists on states to cooperate effectively with other states concerned in an investigation into human trafficking.<sup>147</sup>

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<sup>137</sup> At [40-42].

<sup>138</sup> At [98].

<sup>139</sup> At [89].

<sup>140</sup> V Mantouvalou “Modern Slavery: The UK Response” (2010) 39 Indus LJ 425 at 427.

<sup>141</sup> *Siliadin v France*, above n 97, at [117].

<sup>142</sup> *Rantsev v Russia & Cyprus*, above n 97, at [276].

<sup>143</sup> At [18-29].

<sup>144</sup> Kara, above n 129, at [5-6].

<sup>145</sup> *Rantsev v Russia & Cyprus*, above n 97, at [293].

<sup>146</sup> At [285].

<sup>147</sup> At [289].

The definition of coercion that is adopted in UK courts will be based on what has been decided by *Siliadin* and other case law of the European Court of Human Rights.<sup>148</sup> These cases have already made an impact on the UK framework. Material published by the Ministry of Justice to accompany the Coroners and Justice Act 2009 makes it clear that any kind of coercion – including legal and economic coercion – will satisfy the means test, and is not limited to physical coercion.<sup>149</sup>

#### 4.3.5. Strengths and weaknesses

One of the strengths of the UK framework is that the legislation expressly allows for a wide test for coercion.<sup>150</sup> A second strong point is the growing political awareness that tough legislation is not enough to resolve the problem. This attitude should develop into an approach that prioritises the rights of victims.<sup>151</sup>

That said, at the present time there are several weaknesses with the UK framework. One of these weaknesses is the insufficient protection given to victims.<sup>152</sup> In addition, there appear to be only weak efforts made to enforce laws and prosecute offenders.<sup>153</sup> Thirdly, despite recent discussions in Hansard calling for an independent Rapporteur on Human Trafficking to be appointed to scrutinise the activities of the government,<sup>154</sup> there is no formal mechanism by which the government can be held accountable for its actions on human trafficking. The closest equivalent is an annual report made by the Inter-Departmental Ministerial Group on Human Trafficking, which – being constituted of government officials – could be said to lack independence.

#### 4.3.6. Conclusion

The UK has a reasonably robust legislative and policy framework which appears to be developing in a direction where the rights of victims are prioritised, and corporations are kept accountable for their actions. If passed by Parliament, the Transparency in UK Company Supply Chains (Eradication of Slavery) Bill would prevent the sort of scenario that occurred recently in the UK where Noble Foods, one of the largest British suppliers of eggs and chickens – supplying premium free range eggs to Tesco, Sainsbury and McDonalds – were using what was alleged to be trafficked Lithuanian labour in their production lines.<sup>155</sup>

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<sup>148</sup> Human Rights Act 1998 (UK), s 2.

<sup>149</sup> Ministry of Justice “Slavery, Servitude and Forced or Compulsory Labour” at 1 <[www.justice.gov.uk/](http://www.justice.gov.uk/)>.

<sup>150</sup> Ministry of Justice “Slavery, Servitude and Forced or Compulsory Labour” at 1 <[www.justice.gov.uk/](http://www.justice.gov.uk/)>.

<sup>151</sup> Parliamentary Report on the Internal Review of Human Trafficking Legislation, above n 109, at 3.

<sup>152</sup> Kara, above n 129, at [47].

<sup>153</sup> Mandel, above n 110, at 229.

<sup>154</sup> (20 December 2012) 555 GBPD HC 90, at [311WH].

<sup>155</sup> F Lawrence “Workers Who Collected Freedom Food Chickens ‘Were Trafficked and Beaten’” *The Guardian* (online ed, 29 October 2012).

## 4.4. United States of America

### 4.4.1. Introduction

According to its own State Department, the United States is a source, transit and destination country for men, women and children for both sex and labour trafficking.<sup>156</sup> The United States only began assessing itself by its own standards in the TIP report from 2010, but since then has awarded itself Tier One status each year.

The United States is arguably the primary policy driver in terms of globally pushing the anti-trafficking agenda. In terms of the jurisdictions examined in this study, the United States has the most nuanced view of the parameters of the concept of coercion. In addition, the USA has made novel developments in its anti-trafficking legislative framework at the state level.

Unfortunately, a lack of communication and coordination between governmental agencies has led to a failure to accurately monitor anti-trafficking activities. Although the existence of these activities is made clear, it is uncertain what the effect these activities are having.<sup>157</sup>

There is little available data on human trafficking in the US's territorial waters; however interviews conducted by the UNODC suggest that this may be occurring, especially on board foreign-owned fishing vessels.<sup>158</sup>

As with Australia and the UK, the United States also has issues relating to human trafficking for forced labour into legal enterprises. Unlike those other two jurisdictions, more cases reflecting these facts have come before the courts. In particular, case law suggests that issues arise in relation to forced domestic labour, and in relation to the agricultural sector.<sup>159</sup> The discussion that follows will draw on these cases to illustrate how the concept of coercion has been applied in cases that are analogous to the type of trafficking that I have argued exists in New Zealand's fishing industry.

### 4.4.2. Legislative and policy framework

The United States has trafficking legislation at the federal and state level. Human trafficking is a federal crime under Chapter 77 of Title 18 of the United States Code.<sup>160</sup> The Code criminalises forcing an individual to work against their will, whether the compulsion is made through the threat or use of force, threat of legal coercion, or a "climate of fear."<sup>161</sup> It is

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<sup>156</sup> TIP 2012, at 359.

<sup>157</sup> The Action Group to End Human Trafficking and Modern-Day Slavery, "Recommendations for Fighting Human Trafficking in the United States and Abroad", at 17 <[www.freetheslaves.net](http://www.freetheslaves.net)>.

<sup>158</sup> United Nations Office on Drugs and Crime *Transnational Organised Crime in the Fishing Industry: Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drugs Trafficking* (UNODC, Vienna, 2011) at 51. This report references interviews held on file with the UNODC. It has not been possible in the context of the present research to obtain further information about these.

<sup>159</sup> UNODC *Human Trafficking Case Law Database* <[www.unodc.org](http://www.unodc.org)>.

<sup>160</sup> "Peonage, Slavery and Trafficking in Persons" 18 USC § 77, at ss 1584, 1581.

<sup>161</sup> At s 1584.

illegal to hold a person in debt servitude.<sup>162</sup> This is criminalised by the 13<sup>th</sup> Amendment to the Constitution.

The Victims of Trafficking and Violence Protection Act 2000 (TVPA) defines human trafficking in relation to prostitution as inducing a commercial sex act by means of force, fraud or coercion.<sup>163</sup> In relation to labour, trafficking is stated to be the process of recruitment, harbouring, transportation, provision or obtaining of a person through the use of force, fraud or coercion, for the purpose of subjecting the victim to “involuntary servitude, peonage, debt bondage, or slavery.”<sup>164</sup> Although this definition came into force before the Palermo Protocol, the overlap between the two definitions is clearly substantial, with the Protocol adopting the same three-element (action, means, purpose) approach as the TVPA definition.

The TVPA 2000 also created the T-Visa regime. A victim of trafficking will be granted official victim certification contingent upon the victim admitting that they are a victim. For the first eight years of the operation of this scheme, it was also a requirement that the victim must agree to cooperate with any prosecution that may arise. After the 2008 reauthorisation of the Act this requirement was removed.<sup>165</sup> A T-Visa allows the holder to remain and work temporarily in the United States.<sup>166</sup> In practice, victim certification will only be granted if authorities feel the victim will be useful in a trial. In a 2007 *Washington Post* article, it was reported that since 2000, only 1362 victims had been formally identified.<sup>167</sup>

The TVPA was passed to provide guidance to courts on the types of arrangements that would constitute human trafficking.<sup>168</sup> It sets out minimum standards for countering human trafficking:<sup>169</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.

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<sup>162</sup> At s 1581.

<sup>163</sup> Trafficking Victims Protection Act 22 USC § 7101 [TVPA], s 103(8)(a).

<sup>164</sup> At s 103(8)(b).

<sup>165</sup> M Tavano “Trafficking in Persons: A Focus on Preventing Forced Labour” (2011) 32 WRLR 324 at 337.

<sup>166</sup> TVPA, at s 107.

<sup>167</sup> J Markon, “Human Trafficking Evokes Outrage, Little Evidence” *Washington Post* (online ed, 23 September 2007).

<sup>168</sup> M Ontiveros “A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers” (2012) 27 *Wis J L Gender & Socy* 133 at 148.

<sup>169</sup> TVPA, at s 108.

The Act created an interagency task force with the mandate to coordinate anti-trafficking efforts. Among its tasks are the requirements to facilitate cooperation between countries in combating trafficking, and create partnerships with governmental and non-governmental organisations.<sup>170</sup>

In 2003, the Federal government reauthorised the TVPA. The content of the Act was expanded slightly. Firstly, it allowed victims of trafficking to bring federal-level suits against their traffickers for damages. Secondly, it required the US State Department to produce annual reports on its efforts to combat human trafficking. Thirdly, it provided a mandate for the federal government to terminate domestic and international contracts it is involved in where those contracts are implicated with human trafficking.<sup>171</sup>

The TVPA was reauthorised a second time in 2005. The main purpose of this Act was to redress the discrepancies that had arisen under the previous Acts, wherein foreign victims of trafficking in the United States were able to access assistance that was unavailable to domestic victims of trafficking. As a result of lobbying by NGOs, the 2005 reauthorisation provided funding for pilot programmes to be implemented to support domestic victims.<sup>172</sup>

The third reauthorisation in 2008 made attempts to expedite the process of identifying child victims of trafficking. The new process was designed to be used in special cases where authorities are certain that a child is a victim, but the corroboration process is delayed.<sup>173</sup>

The Act is in the process of being reauthorised a fourth time. It contains additional measures for protecting child victims of trafficking, as well as measures to allow the State Department to deploy trafficking experts rapidly into disaster zones where required.<sup>174</sup>

Under the TVPA and its reauthorisation Acts, support has been provided to prosecutors taking cases against traffickers. The TVPA and the reauthorisation Acts simplified and clarified the law of human trafficking in the US. In addition, training conferences have been held since 2008 in order to provide law enforcement authorities with the skills required to combat human trafficking.<sup>175</sup> The TVPA also provided for assistance to be given to legislative programmes in foreign countries in order to facilitate effective international judicial cooperation.<sup>176</sup>

At the same time as capacity to combat human trafficking was being built at the Federal level, the Department of Justice began a two-pronged approach to increase the ability of front-line

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<sup>170</sup> US Department of State “Attorney General’s Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons (Fiscal Year 2008)” (1 June 2009), at 2.

<sup>171</sup> R Bernadin “The Evolution of Anti-Slavery Laws in the United States” (2011) 17 ILSA J Intl & Comp L 507 at 511.

<sup>172</sup> At 511.

<sup>173</sup> At 513.

<sup>174</sup> IJM “The TVPRA Passes the House of Representatives” 28 February 2013” <www.IJM.org>.

<sup>175</sup> US Department of State, above n 170, at 8.

<sup>176</sup> At 2.

investigating authorities to recognise instances of trafficking. This is done by training individuals, and supporting and funding task forces.<sup>177</sup>

Despite these legislative moves which appear to show a slow widening of the US approach to human trafficking, the legal definition of trafficking remains narrower in some respects than that contained in the UN Trafficking Protocol. In particular, the issue of organ trafficking remains unresolved.<sup>178</sup> Conversely though, at the state level, new developments show an intention to keep corporations accountable for their actions.

The 2010 California Transparency in Supply Chains Act entered into force in January 2012. It aims to “provide consumers with information regarding [companies] efforts to eradicate slavery and human trafficking from their supply chains” and to “educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains.”<sup>179</sup> According to one estimate, this Act will affect approximately 3200 companies.<sup>180</sup>

The Act doesn't define human trafficking or slavery, but references the TVPA in its preamble. Although the definition of slavery remains elusive, it is fair to assume that the intention of this Act is that the definition of human trafficking as contained in the TVPA be used in this piece of legislation. Thus, where a person is deceived or coerced into an activity for the purpose of exploitation, that person will be considered a victim of human trafficking. Although worded slightly differently, this definition has the same requirements for the offence as the definition contained within the UN Trafficking Protocol that has been ratified by New Zealand.

Under this Act, any company that is subject to the Act must disclose its actions, if any, in five separate categories:<sup>181</sup>

- Verify product supply chains to evaluate and address risks of human trafficking and slavery, and disclose if the verification was not conducted by a third party;
- Audit suppliers to evaluate their compliance with company standards for human trafficking and slavery in supply chains, and disclose if said audits were not independent and unannounced;
- Require direct suppliers to certify that materials used in the product comply with the laws regarding human trafficking and slavery of the country or countries in which they are doing business;

<sup>177</sup> Department of Justice “Anti-Human Trafficking Task Force Initiative” <[www.bja.gov/](http://www.bja.gov/)>.

<sup>178</sup> Bernadin, above n 171, at 514.

<sup>179</sup> V Farhat, W Shepherd and F Tenerelli “Responding to California’s Transparency in Supply Chains Act” Lexology (25 April 2012) <[www.lexology.com](http://www.lexology.com/)>.

<sup>180</sup> S Gebauer “Complying with the California Transparency in Supply Chains Act 2010” [2011] Society of Corporate Compliance 22 at 22.

<sup>181</sup> Holland & Knight “Human Trafficking: California and President Obama Lay out New Requirements for Prevention of Human Trafficking and Forced Labor” (10 December 2012) <[www.hklaw.com](http://www.hklaw.com/)>.

- Maintain internal accountability standards and procedures for employees or contractors failing to meet company standards regarding human trafficking and slavery; and
- Train company employees and managers who have direct responsibility for supply chain management on human trafficking and slavery, particularly on how to mitigate such risks within supply chains.

The company is required to post actions it has taken under these categories on its website with a “conspicuous” link from the homepage of the website. If there is no company website, a written disclosure must be provided within thirty days of a written request.<sup>182</sup>

Under the Act, the Attorney-General of California is given the ability to take actions for injunctive relief against companies who do not comply with the Act. The Californian tax board is required to provide the Attorney-General with a list of companies that are required to disclose under the Act, based on tax returns filed by those companies.<sup>183</sup>

The Transparency in Supply Chains Act threatens companies with a legal stick, albeit a weak one, to ensure compliance. If a company fails to comply with the Act, the Attorney General has the power to apply for an injunction requiring the company to publish information. However this is not intended to be the primary method of ensuring compliance. The author of the Act hoped that it would have the effect of using the economic leverage possessed by large companies to prevent human trafficking. It was also envisaged that the consumers of products would use the published information to make an informed choice whether or not to purchase products that had been produced by slave labour.<sup>184</sup>

It is still too early to know what effect this Act will have. The first list of companies required to report was provided to the Attorney-General’s office on 30 November 2012, and it appears that as yet no actions have been taken against any companies.

Developments along similar lines to the California Act are taking place at the Federal level. The Business Transparency on Trafficking and Slavery Act – introduced in Congress on 1 August 2011 was modelled partly on the Californian Act, requiring companies to annually disclose any measures taken during the reporting period to identify and address issues of human trafficking or slavery within their supply chains. It would apply to all publicly traded or private companies that are currently required to submit annual reports to the Securities and Exchange Commission if their total worldwide gross receipts exceed \$100 million USD. Although it is estimated that this Bill will not pass into law,<sup>185</sup> it is an important step forward

<sup>182</sup> Holland & Knight “Human Trafficking: California and President Obama Lay out New Requirements for Prevention of Human Trafficking and Forced Labor” (10 December 2012) <[www.hklaw.com](http://www.hklaw.com)>.

<sup>183</sup> Holland & Knight “Human Trafficking: California and President Obama Lay out New Requirements for Prevention of Human Trafficking and Forced Labor” (10 December 2012) <[www.hklaw.com](http://www.hklaw.com)>.

<sup>184</sup> Senate Judiciary Committee (CA) “Bill Analysis: Human Trafficking Bill (SB657)” (21 April 2009).

<sup>185</sup> Govtrack “H.R. 2759 (112<sup>th</sup>): Business Transparency on Trafficking and Slavery Act” <[www.govtrack.us/](http://www.govtrack.us/)>.

in changing perceptions of what the responsibilities of large corporate entities should be with respect to the protection of human rights.

#### 4.4.3. The Concept of Coercion in American Jurisprudence

One of the areas that American jurisprudence can be of most assistance to the development of New Zealand's anti-trafficking law relates to the parameters of the concept of coercion. The question of when a situation transitions from being unpleasant to coercive in the context of human trafficking has largely been unaddressed elsewhere. It is clear from the facts of modern human trafficking that victims are not always kept by force in their jobs, yet it is clear that coercion of some form or another keeps victims from escaping.<sup>186</sup> US Courts have been divided on questions relating to whether a particular situation can be classified as "involuntary servitude" contrary to the 13<sup>th</sup> Amendment to the Constitution, outlawing slavery.

On one side of the debate, it has been stated that "the awful machinery" of the criminal law should not be used against an employer whenever an employee alleges that they cannot leave the job because of threats made by the employer, so long as the employee still has a choice – no matter how painful – to leave.<sup>187</sup> Conversely, it has also been argued that the key test should be the plausibility of the threat made by the employer to the employee.<sup>188</sup>

In developing the concept of legal coercion, the US Supreme Court per Justice O'Connor suggested that the existence of physical or legal coercion – manifested (as an example) through threats made to an immigrant of deportation – could result in involuntary servitude.<sup>189</sup> In the same case, Justice Brennan argued that the focus should remain on the working conditions as a whole, which when viewed holistically, could be "hallmarks of that slavlike condition of servitude".<sup>190</sup>

As the TVPA has developed over the time it has been in force, the way it deals with the requirement of coercion has evolved. The most recent statement, found in the Trafficking Victims Protection Reauthorization Act 2008 (US), poses a purely subjective test, where the victim is looked at holistically in order to determine whether or not they were coerced either physically or non physically.<sup>191</sup> The concept of coercion is stated to encompass:<sup>192</sup>

Any harm, whether physical or non-physical, including psychological, financial, or reputational harm that is sufficiently serious, under all the surrounding circumstances, to

<sup>186</sup> K Kim "The Coercion of Trafficked Workers" (2011) 96 IALR 409 at 411.

<sup>187</sup> *United States v Shackney*, 333 F 2d (1964) 475 at 486.

<sup>188</sup> At 487.

<sup>189</sup> At 935, 948.

<sup>190</sup> *United States v Kozminski*, 487 U.S. 931 (1987) at 962-963.

<sup>191</sup> Kim, above n 186, at 453.

<sup>192</sup> Trafficking Victims Protection Reauthorization Act 2008 18 USC 1589(c)(2). See further C Doyle "The William Wilberforce Trafficking Victims Reauthorization Act of 2008" (Congressional Research Service, Report for Congress, 29 January 2009, PL 110-457).



compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labour or services in order to avoid incurring that harm.

When considering the wide range of non-physical actions that could constitute coercion, it is clear that judges must be careful to distinguish between legitimate situations and those which – given the circumstances – add up to coercion. In *United States v Bradley*, the Court emphasised the special vulnerabilities of the victim and the power inequality between the parties that led to the victim being in fact coerced.<sup>193</sup> In another case, *United States v Calimlim*, the defendants never made direct threats to the victim, but would instead make statements regarding the victim’s precarious immigration status. The defence made the argument that these statements were legitimate warnings of fact.<sup>194</sup> The Court again looked to the power imbalance in the relationship between the parties and found that while factual, the statements constituted a “scheme, pattern or plan” designed to coerce the victim, who was not in a position to negotiate better terms with the defendants.<sup>195</sup>

#### 4.4.4. Abuse of a Position of Vulnerability or Power

In a recent study on the concept of “abuse of a position of vulnerability or power”, it was found that although not specifically mentioning this concept as a means in the definition of trafficking, in practice this concept is treated by American courts and practitioners as an extension of coercion.<sup>196</sup> Facts showing the existence of an abuse of a position of vulnerability will go as evidence toward proving the means element of coercion.<sup>197</sup>

According to internal guidelines issued by the US Department of Justice quoted by the UNODC, the test is “whether the defendants’ conduct would intimidate and coerce a reasonable person in the victim’s situation to believe he or she must remain in the defendants’ service.”<sup>198</sup>

This will be the case where the vulnerabilities of the victim amplify the coerciveness of the defendant’s actions; where the special vulnerabilities of the victim are relevant in determining whether the victim was in fact compelled by the defendant’s coercion; or where the vulnerabilities of the victim meant a particular level or degree of coercion was required to compel the victim.<sup>199</sup> Case law shows that vulnerabilities can include the victim’s age, immigration status, physical or mental condition, and lack of contact with people other than the defendant. Special vulnerabilities have also been recognised where victims were on temporary visas that were sponsored by the defendant, or were entirely reliant upon the

<sup>193</sup> *United States v Bradley* 390 F 3d 145 (1st Cir. 2004), at 151.

<sup>194</sup> *United States v Calimlim* 538 F 3d 706 (7th Cir. 2008), at 711.

<sup>195</sup> At 715.

<sup>196</sup> United Nations Office of Drugs and Crime “Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ Within the Definition of Trafficking in Persons” (UNODC, New York, 2012) at 44.

<sup>197</sup> At 45.

<sup>198</sup> At 45.

<sup>199</sup> At 44-45.

defendant for housing and transportation.<sup>200</sup> One case that demonstrates this is *United States v Marie Pompee*.<sup>201</sup> In this case, a nine year old Haitian girl was brought to Florida from her home in Haiti, and was forced to work as a domestic slave. The girl was vulnerable because of her young age, and was kept in her condition of slavery by way of the defendant's exploitation of Haitian cultural traditions.<sup>202</sup>

Abuse of a position of vulnerability can also be seen in cases where the defendants take advantage of a victim's desire to improve their living conditions. In *United States v Zavala and Ibanez*, the defendants pleaded guilty to bringing a number of Peruvians into the US, confiscating their travel documents, and requiring them to work for the defendants.<sup>203</sup>

Applying the principles from these cases to the New Zealand situation, it can be seen that similar forms of abuse of a position of vulnerability exist in the fishing industry as described in chapter two of this thesis. The victims on board FCVs often have the same hallmarks of economic vulnerability as the cases described here, and the exploitation is similar.

#### 4.4.5. Strengths and weaknesses

There are a number of points that can be drawn from this discussion which are strong areas of the US trafficking framework. Firstly (in theory at least) there is a policy of non-criminalisation of victims of sex trafficking.<sup>204</sup> Secondly, the USA has adopted the role of the global driver of trafficking policy. The US government is mandated to use the TIP report as a foreign policy tool to encourage states to take trafficking seriously. As a transnational crime, it is necessary to target trafficking in every country, not just the destination countries. Using the TIP report as a foreign policy tool to encourage foreign governments to counter trafficking in their own countries should eventually have the effect of lowering overall rates of human trafficking.<sup>205</sup> The United States provides funding to a number of NGOs engaged in counter-trafficking projects around the world. Between 2001 and 2010, \$163.3 million USD was spent on these projects.<sup>206</sup> Further to this, research has been conducted into determining best practice for allocating grant money in an attempt to ensure that resources are used

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<sup>200</sup> At 45.

<sup>201</sup> UNODC *Human Trafficking Case Law Database*, "Summary of *United States v Marie Pompee* United States District Court for the Southern District of Florida (10 October 2010)" <[www.unodc.org/cld](http://www.unodc.org/cld)>.

<sup>202</sup> UNODC *Human Trafficking Case Law Database*, "Summary of *United States v Marie Pompee* United States District Court for the Southern District of Florida (10 October 2010)" <[www.unodc.org/cld](http://www.unodc.org/cld)>.

<sup>203</sup> UNODC *Human Trafficking Case Law Database*, "Summary of *United States v Zavala and Ibanez* United States District Court for the Eastern District of New York (9 November 2005)" <[www.unodc.org/cld](http://www.unodc.org/cld)>.

<sup>204</sup> Free the Slaves and The Human Rights Center of the University of California, Berkeley "Hidden Slaves: Forced Labour in the United States" (2005) 23 Berkeley J Intl L 47 at 80.

<sup>205</sup> The other side of this is the argument that it is not the place of the USA to unilaterally take up this role, and that using the TIP report in this way has undertones of neo-colonialism.

<sup>206</sup> USAID "Countering Trafficking in Persons" <[www.usaid.gov](http://www.usaid.gov)>.

effectively.<sup>207</sup> The most recently published policy statement of USAID aims to promote regional strategies to counter human trafficking, and promote partnerships with NGOs.<sup>208</sup>

There are also certain areas in which the US framework is weak. Firstly, law enforcement is fragmented, making it difficult to undertake effective anti-trafficking operations.<sup>209</sup> Secondly, there is a lack of appropriate and specific human trafficking training for authorities.<sup>210</sup> Thirdly, there appears to be a lack of awareness of victims of labour trafficking.<sup>211</sup> This is compounded by a fourth weakness, which is the existence of conflict between immigration and trafficking laws.<sup>212</sup>

#### 4.5. Conclusion

This chapter has presented a précis of the law of human trafficking in Australia, the UK and the USA. The overall goal of this discussion has been to set out the information from which it is possible to extrapolate a series of benchmarks that will be used in the following chapter to assess New Zealand's anti-trafficking efforts. Building on the recent work of Anne Gallagher, Paul Holmes and Fiona David,<sup>213</sup> and drawing on the information presented in chapter three, it is submitted that there are ten main criteria that can be used to determine whether a state can be said to have an effective criminal justice response to human trafficking. Categorised according to the "three P's", these are as follows:

- Protection
  - Quick and accurate identification of victims along with immediate protection and support.
  - Special support to victims as witnesses.
- Prevention
  - Government accountability.
  - Effective co-ordination among international donors.
  - Corporate social responsibility, including partnerships with government and civil society organisations.

<sup>207</sup> USAID December 2009 "An Evaluation Framework for USAID-Funded TIP Prevention and Victim Protection Programs" (December 2009) <transition.usaid.gov/>.

<sup>208</sup> USAID "Counter-Trafficking in Persons Policy" (2012), at 6 <pdf.usaid.gov/>.

<sup>209</sup> Free The Slaves and the Human Rights Center of the University of California, above, n 204, at 77.

<sup>210</sup> At 75.

<sup>211</sup> B Loftus "Coordinating US Law on Immigration and Human Trafficking: Lifting the Lamp to Victims" (2011) 43 Colum Hum Rts L Rev 143 at 147.

<sup>212</sup> At 167.

<sup>213</sup> A Gallagher and P Holmes "Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line" (2008) 18 Intl Criminal Justice Review 318, see also F David "Prosecuting Trafficking in Persons: Known Issues, Emerging Responses" (2008) 358 Trends and Issues in Crime and Criminal Justice 1.

- Prosecution
  - Systems and processes that enable effective international investigative and judicial co-operation in human trafficking cases.
  - A general law enforcement capacity to respond effectively to trafficking cases.
  - Specialist law enforcement capacity to investigate human trafficking.
  - Strong and well-informed prosecutorial and judicial support.
  - Comprehensive legal framework, in compliance with international standards, including effective remedies for victims.

Each jurisdiction discussed in this chapter performs on these to a greater or lesser extent. The table below, categorised in terms of the “three P’s”, sets out a summary of the ways in which Australia, the UK and the USA have succeeded or failed to meet these criteria.

	Criteria	Australia	UK	USA
<b>Protection</b>	Quick and accurate identification of victims along with immediate protection and support	Government support available to victims, regardless of cooperation with investigating authorities. However appears that victims are under-identified.	Insufficient efforts made here. Victim identification and protection to be considered on a case-by-case basis.	Under-identification of victims of labour trafficking. However, efforts made to give special support to under-aged victims.
	Special support to victims as witnesses	Commentary suggests this not undertaken.	Recent developments have given additional protections to under-aged victims of trafficking.	Unclear to what extent this happens.
<b>Prevention</b>	Government accountability	Unclear to what extent this exists.	No formal avenue of accountability, other than an annual report.	Government required to produce annual reports on its efforts. These are critiqued by the Government Accountability Office.
	Effective co-ordination among international donors	Plays prominent role in ASEAN and Bali Process. AusAID sponsors awareness raising projects.	UK working to build capacity to combat trafficking in source states	USAID provides funding to a number of anti-trafficking projects
	Corporate social responsibility	Partnerships made with civil society organisations	Efforts made to ensure accountability of corporations, through transparency in supply chains legislation, however too early to tell how effective these efforts will be.	California Transparency in Supply Chains act is a novel development in this area.
<b>Prosecution</b>	Systems and processes that enable effective international	Bilateral agreements in place with several states. Promotes	As of 2012 progress has started to be made in this	Interagency task force facilitates information

# Chapter 4

	investigative and judicial co-operation in human trafficking cases.	mutual legal assistance.	area. This reflects recognition at EU level that this is important.	sharing
	A general law enforcement capacity to respond effectively to trafficking cases	Funding set aside for training of front-line staff	Front-line staff appear to lack expertise in conducting anti-trafficking operations. Progress on this made in 2012.	Fragmented law enforcement reduces overall effectiveness.
	Specialist law enforcement capacity to investigate human trafficking	Established 2003, given proper mandate in 2011. Additional Federal police teams established 2008.	Specialist task force exists.	Department of Justice supports and funds specialist task forces.
	Strong and well-informed prosecutorial and judicial support	Training provided from 2008.	Recent practice suggests this is not done effectively and prosecutorial staff require further training. Recently published Ministry of Justice documents appear to show progress in this area.	Support provided for prosecutors under the TVPA. Training conferences implemented from 2008. Overall though argued to be insufficient.
	Comprehensive legal framework, in compliance with international standards	Been described as confused and incoherent. Instances of labour trafficking marginalised. Concept of “coercion” limited to physical coercion.	Appears to have been created ad hoc. Overall, relatively effective though.	Relatively comprehensive at Federal level. Well developed jurisprudence on issue of “coercion” and “abuse of a position of power or vulnerability.” Unfortunately, there are conflicts between trafficking and immigration laws.

The main point to be taken from this table is that of the countries studied in this chapter, none can be said to have a fully comprehensive criminal justice framework for combating human trafficking. Each jurisdiction has strengths and weaknesses. In addition, discussion of each jurisdiction has highlighted other difficulties.

This discussion of jurisprudence from Australia, the UK and the USA has shown that in the experience of the courts, it has not been possible to clearly delineate the related offences of slavery, human trafficking and forced labour. Rather, it appears that accepted best practice in Australia, the UK and the USA is to concatenate all the facts together in order to paint a picture of the offending as a whole. It is submitted that this does not serve the development of the law of human trafficking. While it is true that there is overlap between the offences, taking a “shotgun approach” to prosecuting offenders by charging them with a variety of offences serves only to muddy the waters. To return to a point made by James Hathaway cited in chapter one, the danger of taking a view of human trafficking that is conflated with slavery is that the effectiveness of the anti-slavery movement as a whole is reduced. When such an approach is taken by prosecutors and judicial officers, the parameters of the offence of human trafficking are not made clear, leading to difficulties in mounting future cases against human traffickers. In addition, it could also be said that this approach reduces the denunciatory effect that a specific conviction for human trafficking may have.

It is important to maintain the distinction between slavery and human trafficking because the perception of slavery as being one of the most heinous crimes builds reluctance amongst law enforcement officials to categorise conduct as slave trading. The danger is that the conduct in question will not be categorised as human trafficking either, which is still a serious crime and one which reflects the different kinds of exploitation found in modern commercial environments.

That being said, the case law demonstrates the difficulties of maintaining clarity in cases where an offender is charged with more than one offence. The overlap between slavery, human trafficking, servitude and forced labour, and the uncertainty about the extent of this overlap both at the international and domestic legal level has led to situations where the offence is convicted under sections that may not have been a proper fit. There has been some suggestion that the reason for this approach is due to the offences of slavery and forced labour being understood better than the offence of human trafficking by prosecutors.<sup>1</sup>

Another common theme that has emerged from all three jurisdictions is the struggle with the concept of coercion. Of these jurisdictions, the USA has developed the most nuanced view of coercion which will have positive implications for future prosecutions of traffickers.

New Zealand courts have had no experience in applying human trafficking legislation, however as cases taken in various tribunals have shown, the facts of trafficking for forced

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<sup>1</sup> Gallagher and Holmes, at 322.

labour are not an uncommon occurrence. This chapter has shown that case law from Australia, the UK and the USA has much to offer New Zealand jurisprudence. McInerney J's rhetorical questions in *Wei Tang*<sup>2</sup> could equally be applied to the cases that have been discussed as arising in New Zealand.<sup>3</sup> The *Siliadin* and *Rantsev* judgments as applied in *R v K* in the UK demonstrate the court's ability to uphold rights of victims against governments in legal environments with no written constitution. This is a particularly interesting and novel area of law. As it develops, the international legal obligations placed upon states will become sharper, and states will find it more difficult to hide behind the veil of sovereignty which is present throughout the UN Trafficking Protocol.

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<sup>2</sup> *R v Wei Tang* [2006] VCC 637 at [6] and [7].

<sup>3</sup> See chapter two of this thesis.



## 5. Chapter 5

### 5.1. Introduction

This chapter brings together the issues that have been highlighted over the previous four chapters and suggests a number of pragmatic solutions to the problems created by the phenomena of human trafficking. Building on the work of Anne Gallagher, Paul Holmes and Fiona David<sup>1</sup> mentioned at the conclusion of chapter four, it is a logical progression from chapters three and four. It takes the theory and practice of international and comparative jurisprudence in the area of human trafficking described in those chapters, and seeks to translate those into specific and practical actions that could be adopted as solutions to the problem of human trafficking as it exists in the New Zealand fishing industry.

It has been argued that there is a growing consensus amongst a number of the more influential countries of destination for victims of trafficking<sup>2</sup> with regard to the best way to deal with the trafficking problem. The key elements of this, as discussed in chapter one, are that:

- Trafficking should be criminalised in all its manifestations, targeting both the traffickers themselves and the “consumers” of victims of trafficking.
- Traffickers should be prosecuted and punished.
- Border controls should be strengthened in a manner that will allow for effective fighting of trafficking.
- There should be international cooperation with regard to instances of transnational trafficking.

These principles reflect a strong concern with traditional notions of state security. However, there is also emerging international support for the rights of victims. To add to the list:

- Victims should be supported because of their status as victims of crime.
- Victims should not be prosecuted for status-related offences.<sup>3</sup>

Overall, these general principles point to the need for a well-balanced criminal justice approach to human trafficking. The table set out at the end of chapter four of this thesis presented ten criteria of an effective criminal justice response to human trafficking. As in

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<sup>1</sup> A Gallagher and P Holmes “Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line” (2008) 18 Intl Criminal Justice Review 318, see also F David “Prosecuting Trafficking in Persons: Known Issues, Emerging Responses” (2008) 358 Trends and Issues in Crime and Criminal Justice 1.

<sup>2</sup> Gallagher and Holmes, at 319-320.

<sup>3</sup> Gallagher and Holmes, at 320.

chapter three of this thesis, this chapter is structured to reflect the “three Ps” of trafficking: Protection, Prevention and Prosecution, with discussion of the ten criteria categorised into the appropriate headings. To make clear a point that has been made before in this thesis, as yet no victims of trafficking have been certified by authorities in New Zealand. The implication of this is that much of the following discussion is based on hypothetical situations.

## 5.2. Protection

### 5.2.1. Quick and accurate identification of victims along with immediate protection and support

Under international law, there is an emerging obligation on states to quickly identify victims of trafficking.<sup>4</sup> Without being formally identified, victims will be precluded from seeking the remedies available to them. In practice, this identification process can be difficult for a number of reasons. Victims may not view themselves as being victimised; the covert nature of the crime makes victims difficult to find; victims often have a strong distrust of authorities, and have often been subjected to high levels of trauma and intimidation.<sup>5</sup>

Victim identification will almost always be a reactive process. Due to the officially-perceived similarities between human trafficking and other offences such as migrant smuggling, a victim will often be able to be identified only after exploitation has begun. Due to the difficulties in properly identifying victims, there is an emerging trend to give at-risk individuals a presumption of victim status until proven otherwise.<sup>6</sup>

The identification process should recognise that victims have been through a traumatic experience and deserve to be treated with respect. Often NGOs and other civil society organisations will deliver support to victims; however it is clear that ultimately the state holds the overall responsibility for ensuring the victim’s safety.<sup>7</sup>

In New Zealand, there is an official path of support that will be made available to certified victims of human trafficking. As yet, this is untested as there have been no formal identifications of victims; however this yet-to-be-tested framework appears to be sufficient. The table below, taken from the inaugural Immigration New Zealand Training Workshop attended by the Author in December 2012 sets out a flow chart detailing the responsibilities of various official agencies for a certified victim of trafficking:<sup>8</sup>

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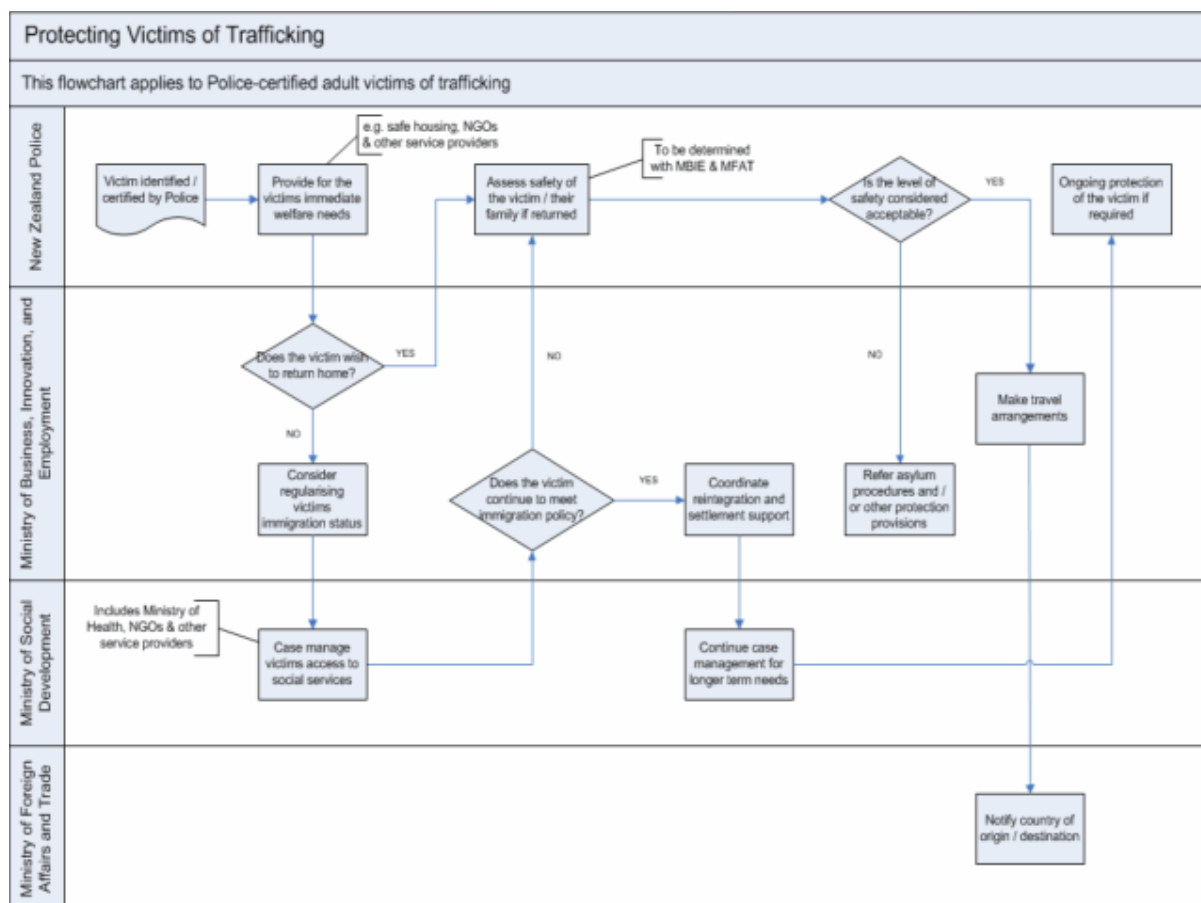
<sup>4</sup> As noted in chapter three.

<sup>5</sup> H Clawson, N Dutch and M Cummings “Law Enforcement Response to Human Trafficking and the Implications for Victims: Current Practices and Lessons Learned” (report submitted to the US Department of Justice, October 2006) at 43.

<sup>6</sup> Gallagher and Holmes, above n 1, at 330.

<sup>7</sup> At 330. See also Controller and Auditor-General “Achieving Public Sector Outcomes with Private Sector Partners” (7 February 2006) Report Produced under s 16 of the Public Audit Act 2001, at 8.

<sup>8</sup> Immigration New Zealand, Training Workshop, attended by the Author (Wellington, New Zealand) 13 December 2012.



The main question that this table poses relates to the first stage. How will the police go about certifying a victim of trafficking? The New Zealand Plan of Action to Prevent People Trafficking states that police certification will be based on “an assessment of evidence and witness statements”.<sup>9</sup> The police state that certification is awarded on the basis of a “reasonable suspicion” that the individual in question is a victim of trafficking.<sup>10</sup>

The New Zealand police have a training model which is delivered to detectives and other Criminal Investigation Bureau staff on how to recognise a victim.<sup>11</sup> However, this training is geared towards the process of investigation after an identification of a victim has been formally made.<sup>12</sup> As noted below however, it is unlikely to be detectives or other specialist staff who have the first contact with a victim of human trafficking. Rather, it will generally fall to the frontline staff in the New Zealand Police, the Ministry of Business, Innovation and

<sup>9</sup> At 16.

<sup>10</sup> Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013). The interviewee also described the standard as whether it is “likely” the person was trafficked.

<sup>11</sup> *Plan of Action to Prevent People Trafficking* (Department of Labour, Wellington, 2009) [NZ Plan of Action] at 8. Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013).

<sup>12</sup> Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013).

Employment, the Ministry of Social Development, or interested NGOs working alongside these departments to make a preliminary identification. Unfortunately, these frontline staff as yet receive no formal training on how to make an identification.<sup>13</sup>

This table also shows the support that will be made available to victims of trafficking. It has been recognised that victims may have acute health requirements, and victims will be entitled to ACC and other publicly-funded health services.<sup>14</sup> In addition, the Housing New Zealand Corporation has committed to using its best endeavours to find immediate temporary housing for identified victims of trafficking.<sup>15</sup>

Following police identification, a victim will be referred to the Ministry of Social Development who will assess the victim on a case-by-case basis to determine what services are required and coordinate the delivery of those services.<sup>16</sup> Finally, the New Zealand Police will provide ongoing protection of the victim, and will communicate where possible with established foreign liaison offices.<sup>17</sup> The certification is not irrevocable however. The police have stated that the certification will be withdrawn if there is evidence that the certification has been obtained for the purpose of immigration fraud,<sup>18</sup> or if the victim obstructs the police investigation in any way.<sup>19</sup>

Part of the support that should be given to victims of human trafficking is the option to remain for a period of time in the country they have been trafficked into. Repatriation of the victim to their home country potentially exposes that victim to revictimisation from their former traffickers.<sup>20</sup> The Immigration New Zealand Operational Manual has a section dealing with victims of trafficking. An applicant under the rules may be granted a work visa that is valid for 12 months. In order to obtain this visa, the victim must obtain certification from the New Zealand Police that they are believed to be a victim of human trafficking.<sup>21</sup> There is a prescribed manner for applying for a work visa, however immigration officers who have been given specialist training in dealing with victims of human trafficking<sup>22</sup> have the discretionary ability to waive the required application fee; evidence of funds or sponsorship; and the

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<sup>13</sup> Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013).

<sup>14</sup> *Plan of Action to Prevent People Trafficking* (Department of Labour, Wellington, 2009) [NZ Plan of Action] at 18.

<sup>15</sup> At 19.

<sup>16</sup> At 20.

<sup>17</sup> At 21.

<sup>18</sup> Statement of Certification (obtained under Official Information Act 1982 request to the New Zealand Police).

<sup>19</sup> Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013).

<sup>20</sup> N Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) at 44.

<sup>21</sup> Immigration New Zealand Operational Manual, at [WI16].

<sup>22</sup> At [WI16.10]. It appears that this represents implementation by Immigration New Zealand of the requirements placed on it by the National Plan of Action to Combat Human Trafficking.

requirement to provide police certificates.<sup>23</sup> An applicant under this part of the Operational Manual will be given priority processing.<sup>24</sup>

Despite the risk to victims of trafficking of revictimisation, many states will repatriate victims to their home countries. In circumstances where the victim is able to demonstrate the risk of revictimisation, a claim for non-refoulement under refugee law may be available.<sup>25</sup> Although it does not specifically mention victims of trafficking, it would appear that victims are entitled to apply for protected person status under the Immigration Act 2009. Section 131 of the Act implements New Zealand's obligations under Articles six and seven of the International Covenant on Civil and Political Rights (ICCPR) to implement the non-refoulement principle – that is, not to deport a protected person to a country where they would face “arbitrary deprivation of life or cruel treatment.”<sup>26</sup> Although the ICCPR is not the ideal framework within which to view claims made by victims of human trafficking, there appears to be some room in which to do so.<sup>27</sup>

Despite these plans, no victims have ever been officially certified in New Zealand, and it appears that the certification process has never been used.<sup>28</sup> Evidence presented in chapter two points to the apparent existence of human trafficking. Authorities are aware of crew members of fishing vessels who have lodged formal complaints, and yet no steps have been taken to investigate, or certify them as victims.<sup>29</sup> In the National Plan of Action to Prevent People Trafficking, the New Zealand government adopted a “whole-of-government” approach, balancing the “three Ps” in order to combat human trafficking.<sup>30</sup> In order to implement the “protection” element, it is necessary to identify victims to protect. It is suggested that the most appropriate method of doing this is to seriously investigate claims of human trafficking made by those alleging abuse, and civil society organisations acting on behalf of those individuals. Training must also be provided to frontline staff. It has been suggested that the most effective way to deliver this training is via e-learning, or during pre-shift briefing sessions of police officers.<sup>31</sup> This would involve computer-based training, which can be delivered quickly to a large number of staff.

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<sup>23</sup> At [WI16.5].

<sup>24</sup> At [WI16.10].

<sup>25</sup> J Rodger “Defining the Parameters of the Non-Refoulement Principle” (LLM Thesis, Victoria University of Wellington, 2001) at 2-3.

<sup>26</sup> Immigration Act 2009, s 131(1).

<sup>27</sup> U Jayasinghe and S Baglay “Protecting Victims of Human Trafficking Within a ‘Non-Refoulement’ Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?” (2011) 23 *IJRL* 489, at 489.

<sup>28</sup> Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013).

<sup>29</sup> See chapter two.

<sup>30</sup> NZ Plan of Action, above n14, at 3.

<sup>31</sup> Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013).

When compared to other jurisdictions such as Australia, the United Kingdom and the United States of America, New Zealand appears to have provided for a similar level of support to be given to victims of trafficking. The real test of this support will come if – and when – authorities begin to issue victim certification to individuals. Until that time, these support mechanisms will continue to be formal, but not substantive.

### 5.2.2. Special support to victims as witnesses

While it is important to offer support to all victims of trafficking, it is essential that those victims who agree to take part in a trial as witnesses against their traffickers be given special protection. As noted above, there is a correlation between victims acting as witnesses and successful prosecutions. In a trafficking scenario, it is likely that the victim will be one of very few people who have the ability to testify as to exactly what took place.<sup>32</sup>

It is regarded as best practice to discuss with victims the limits of the protection that is available to them. Victims who take part as witnesses in a trial will often have a well-placed fear of reprisals against themselves or their families, and should not be persuaded to give evidence on the basis of unrealistic promises of safety.<sup>33</sup> It has been argued that lessons can be learned from experience of dealing with and protecting victims of sexual violence or domestic abuse who give evidence at trial.<sup>34</sup>

There are four recommendations made in the New Zealand Plan of Action relating to additional support to be given to a victim who is taking part in a trial. Police are advised to use “victim-friendly” interviewing techniques; advisors are to be trained on providing information on court proceedings; interpreters and advisors will be made available to assist a victim; and a free information line will be made available to victims of trafficking.<sup>35</sup> In addition to these provisions, the Victims’ Rights Act 2002 contains three legally unenforceable “principles”<sup>36</sup> relating to treating the victim with compassion,<sup>37</sup> providing the victim with services that are required as a result of the offence,<sup>38</sup> and arranging meetings if needed to resolve issues between the victim and offender.<sup>39</sup>

In the event that a witness is threatened during the course of a trial, the offence of contempt of court, created by the Judicature Act 1908 may be available to punish the offender. The offence covers the situation where a person “assaults, threatens, intimidates, or wilfully

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<sup>32</sup> F David “Prosecuting Trafficking in Persons: Known Issues, Emerging Responses” (2008) 358 Trends and Issues in Crime and Criminal Justice 1, at 3.

<sup>33</sup> United Nations Office on Drugs and Crime [UNODC] *Toolkit to Combat Trafficking in Persons* (UNODC, Vienna, 2008) at 87-88.

<sup>34</sup> Gallagher and Holmes, above n 1 at 339.

<sup>35</sup> NZ Plan of Action, above n14, at 23.

<sup>36</sup> Victims’ Rights Act 2002, s 10.

<sup>37</sup> At s 7.

<sup>38</sup> At s 8.

<sup>39</sup> At s 9.

insults<sup>40</sup> a witness. The penalty for this is imprisonment for up to three months, or a \$1000 fine.<sup>41</sup>

Additional measures may be available on a case-by-case basis to protect victims acting as witnesses under the Evidence Act 2006.<sup>42</sup> Subpart 5 of that Act provides for a number of alternative ways of giving evidence in a trial. Under these provisions, a witness may be allowed to give evidence while hidden from the defendant, or from a location outside the courtroom, either in New Zealand or elsewhere, or by way of video recording.<sup>43</sup> These provisions will normally apply only in a criminal trial, although the court retains inherent jurisdiction to ensure the anonymity of witnesses in civil proceedings.<sup>44</sup>

It could be argued that when compared to what is accepted internationally as best practice, New Zealand is not prepared to go far enough to support a victim of trafficking during a trial. The process for a victim of rape who testifies in a trial in New Zealand involves significantly more support. According to convention, the victim is deliberately kept separate from the accused;<sup>45</sup> the court will be closed to the public during the testimony of the victim, and in some cases it will be possible for the victim to give evidence in a private room via closed-circuit television.<sup>46</sup> These protections have not been explicitly extended to victims of human trafficking in New Zealand. It is suggested that in order to bring New Zealand's practice into line with international best practice, the protections conventionally afforded to victims testifying in rape trials, and the protections available on a case-by-case basis under the Evidence Act 2006 also be given to victims of human trafficking.

## 5.3. Prevention

### 5.3.1. Government accountability

Without effective mechanisms for ensuring the accountability of governments, instances of human trafficking are likely to continue to occur relatively unchecked. As discussed in chapter three, there are a number of responsibilities placed on governments by international law requiring them to take positive steps to protect individuals from human trafficking. As was made clear in chapter two, the New Zealand government has largely denied that the problem of human trafficking exists within New Zealand's territory. The principle of government accountability forms an important part of an effective criminal justice response to trafficking, as it seeks to ensure that decisions made by government officials are reviewed, and if necessary, remedied.

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<sup>40</sup> Judicature Act 1908, s 56C(1).

<sup>41</sup> Judicature Act 1908, s 56C(2).

<sup>42</sup> Evidence Act 2006, s 103.

<sup>43</sup> Evidence Act 2006, s 105.

<sup>44</sup> See *Withey v AG* CP10/95 HC Palmerston North 18 August 1998, per Greig J.

<sup>45</sup> Rape Prevention Education "Going to Court" <[www.rpe.co.nz](http://www.rpe.co.nz)>.

<sup>46</sup> Wellington Community Law Centre & Ministry of Justice *Rape Survivors Legal Guide: Navigating the Legal System After Rape* (3<sup>rd</sup> ed, Wellington Community Law Centre, Wellington, 2011) at 32.

As a parliamentary democracy, in New Zealand important policy decisions are generally made by the Cabinet. The responsibility of Ministers to Parliament is secured through constitutional convention. Under the convention of collective responsibility, the Cabinet is collectively responsible to Parliament for the conduct of the government.<sup>47</sup> Problems with this system potentially arise where accountability for decisions is shared between two or more individuals, departments or organisations. These problems manifest themselves in the form of blame shifting, unclear lines of accountability or poor ability to impose sanctions.<sup>48</sup> There is potential for issues such as these to arise in the context of the Inter-Agency Working Group on human trafficking (IWG), headed by the MBIE. The stated aim of the IWG is to achieve a consistent approach to human trafficking across all the relevant government departments.<sup>49</sup> However, in spite of information alleging human trafficking being provided to the Department of Labour by NGOs,<sup>50</sup> this group met only twice during the period June 2011 to June 2012,<sup>51</sup> and no investigations have been forthcoming. This suggests that the IWG lacks the ability, or leverage, to make effective decisions and garner action.

As well as promoting accountability within the government, accountability must also be promoted externally. There are a number of international agreements that if ratified by New Zealand, would help to achieve external accountability of the New Zealand government's actions and decisions with respect to the rights of victims of human trafficking. Unfortunately, the New Zealand government has decided not to ratify the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC).<sup>52</sup> It has stated that the reasons for this decision relate to concerns over "consistency with domestic legislation; the effects on immigration policy; deficiencies in the MWC's text, and the lack of support of other likeminded states."<sup>53</sup> The Migrant Workers Convention is the most comprehensive human rights treaty relating to the rights of migrants. Unfortunately, it has not been widely ratified by the states that tend to receive migrants such as those in Western Europe and North America.<sup>54</sup> The 1975 Supplementary Provisions Convention comprehensively addresses the issues posed by labour migration, and provides minimum standards for the treatment of migrants in both regular and irregular migration situations.<sup>55</sup>

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<sup>47</sup> P Joseph *Constitutional and Administrative Law in New Zealand* (3<sup>rd</sup> ed, Brookers Ltd, Wellington, 2006) at 229. See also J Boston and D Gill "Joint or Shared Accountability: Issues and Options" Institute of Policy Studies WP11/03 (June 2011) at 2.

<sup>48</sup> Boston and Gill, at 2.

<sup>49</sup> NZ Plan of Action, above n 14, at 11.

<sup>50</sup> Memorandum from Terry Pawson (Manager Fraud Branch, MBIE) to Peter Elms (Manager, Fraud and Compliance, MBIE) "Assessment of Information re Fishing Industry" (obtained under Official Information Act 1982 request to the MBIE).

<sup>51</sup> *2012 Trafficking in Persons Report* (US Department of State, June 2012) [TIP 2012] at 266.

<sup>52</sup> Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003).

<sup>53</sup> Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (3<sup>rd</sup> ed, Ministry of Foreign Affairs and Trade, Wellington, 2008) at 54.

<sup>54</sup> United Nations Treaty Collection "Status Report" (24 February 2013) <[www.treaties.un.org](http://www.treaties.un.org)>.

<sup>55</sup> Asia Pacific Forum "Promoting and Protecting the Rights of Migrant Workers: The Role of National Human Rights Institutions" (Asia Pacific Forum of National Human Rights Institutions, August 2012) at 43.



Unfortunately this Convention does not apply to fishers;<sup>56</sup> however it would still be beneficial for New Zealand to ratify the Convention in order to more fully protect the rights of other migrant workers.<sup>57</sup>

Aside from the MWC, the two most significant agreements that New Zealand is in a position to ratify are the Maritime Labour Convention 2006 (MLC)<sup>58</sup> and the Work in Fishing Convention 2007 (WIF).<sup>59</sup> The MLC seeks to create a single instrument that brings together all the standards of previous maritime labour conventions, as well as the fundamental principles found in other international labour organisation conventions.<sup>60</sup> The WIF Convention aims to ensure that fishers have decent working conditions on board vessels.<sup>61</sup> The Ministry of Foreign Affairs and Trade has been considering ratifying these treaties since before January 2008 and 2009 respectively,<sup>62</sup> however according to a spokesperson for the Ministry of Transport (the agency tasked with overseeing ratification of these two conventions), New Zealand will not ratify until further consultation is undertaken with industry and other partners.<sup>63</sup> It was estimated that this would begin in 2013.<sup>64</sup>

### 5.3.2. Effective coordination among international donors

Working against human trafficking is highly resource intensive. It is an important part of a well-balanced criminal justice system that support is given to states and civil society organisations that are building up their capacity to deal with human trafficking, and deliver support services to victims.

Human trafficking tends to flow from poor countries to wealthy ones.<sup>65</sup> While the demand side of the problem can be addressed from the wealthy countries, the supply side often needs to be addressed in those states which can least afford to take action. This is one area which has benefited from the use by the USA of the Trafficking in Persons report as a foreign policy tool. The report measures success against human trafficking in terms of numbers of

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<sup>56</sup> MWC, art 11.

<sup>57</sup> See chapter two.

<sup>58</sup> Maritime Labour Convention MLC 2006.

<sup>59</sup> Work in Fishing Convention 2007 ILO C188.

<sup>60</sup> MLC 2006, preamble.

<sup>61</sup> WIF Convention, preamble.

<sup>62</sup> Ministry of Foreign Affairs and Trade, *New Zealand Treaty Series* (Ministry of Foreign Affairs and Trade, Wellington), January 2008, January 2009.

<sup>63</sup> Email from A Smith (Ministry of Transport) to the Author regarding the ratification status of the Maritime Labour Convention and the Work in Fishing Convention (17 July 2012).

<sup>64</sup> Email from A Smith (Ministry of Transport) to the Author regarding the ratification status of the Maritime Labour Convention and the Work in Fishing Convention (17 July 2012).

<sup>65</sup> A Di Nicola "Trafficking in Human Beings and Smuggling of Migrants", in P Reichel (ed) (2005) *Handbook of Transnational Crime and Justice*. (Sage Publications, California, 2005) 181 at 181. See also generally J Chuang "Beyond a Snapshot: Preventing Human Trafficking in the Global Economy" (2006) 13 Ind J Global Legal Studies 137.

prosecutions. This focus has led to increased support being given to criminal justice programmes in these poorer states.<sup>66</sup>

In order to reduce the problem of human trafficking at a global level, it is important to strengthen international and transnational law and institutions that relate to human trafficking. While it is possible for all the elements of the offence of human trafficking to occur within the borders of a single state, it is more typical for the various elements to take place in several different states.<sup>67</sup>

According to the Ministry of Business, Innovation and Employment (MBIE), New Zealand has made commitments to assist a number of developing states in the region.<sup>68</sup> In addition, the New Zealand government funds a number of organisations who undertake anti-trafficking activities. The MBIE has staff working in the Pacific Islands tasked with proactively mitigating the risks of human trafficking in the region.<sup>69</sup> Through the Bali Process,<sup>70</sup> the New Zealand government works to strengthen networks aiming to promote greater regional cooperation to combat human trafficking.<sup>71</sup> New Zealand supports a number of international anti-trafficking initiatives that appear to be appropriate given its small size and relative lack of available resources when compared to larger jurisdictions such as Australia, the United Kingdom or the United States. Rather than work simply to build overall anti-trafficking capacity in the region, New Zealand could specifically target projects for support that aim to reduce the forms of trafficking that New Zealand is known to be at risk from.

### 5.3.3. Corporate social responsibility

It is an unfortunate truth that the government has been reluctant to give official victim of trafficking status to any of the crew of fishing vessels who have complained about the conditions they were forced to work under. By putting in place legislation obliging transparency in supply chains, fishing companies will be responsible for determining where the risks of human rights abuses lie, and taking measures to address those risks. The government needs to be responsible for prosecution of corporately irresponsible behaviour, and would take a regulatory and corporate behaviour monitoring role.

It is useful to differentiate between companies occupying different positions in the supply chain. The closer a company is to the actual act of fishing, the higher the risk of corporate social irresponsibility. By way of example, a purchaser of processed fish products is less likely to be socially irresponsible than the company who owns the fishing vessel and employs the crew on that vessel. However, if each link in the supply chain takes an active role in

<sup>66</sup> Gallagher and Holmes, above n 1, at 336.

<sup>67</sup> *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases* (Asia Regional Trafficking in Persons Project, August 2011) at 20.

<sup>68</sup> NZ Plan of Action, above n14, at 13. See also discussion in chapter one.

<sup>69</sup> NZ Plan of Action, at 13.

<sup>70</sup> Discussed in chapter one of this thesis.

<sup>71</sup> *Consultation on a Plan of Action to Prevent People Trafficking* (Interagency Working Group on People Trafficking, May 2008) at 6.

countering irresponsible behaviour, then the pressure to improve exploitative situations is increased down the line.

In the long run, this should result in a culture shift where consumers are empowered to make a choice not to purchase fish products that are tainted by human rights abuse. This involves the privatisation of the task of suppression of human trafficking. The benefit of this approach is that it avoids the government's lack of capacity to properly and proactively investigate human trafficking. It relies on the detailed knowledge that companies have about their own supply chains.

At the heart of this is the concept of “corporate social responsibility” (CSR), which is the idea that companies have a vital role to play in upholding human rights. This is not a new idea. John Ruggie – who was the United Nations Special Rapporteur for business and human rights – developed a framework entitled “Protect, Respect, Remedy”. Briefly, this framework sets out the principles that States have a duty to protect individuals from the human rights abuses committed by businesses; that businesses have a duty to respect human rights; and when abuse occurs, there must be effective remedies available to the victim.<sup>72</sup> In New Zealand, where the primary problem is forced labour, the application of corporate social responsibility mechanisms has undoubted value.

Of particular interest to the present research is the second principle of the framework, requiring businesses to respect human rights. This is a relatively new concept in the New Zealand context. In 2007, a petition undertaken by Trade Aid was presented to Parliament and requested that a law be passed banning the import of goods made with slave labour.<sup>73</sup> In its report on the petition, the Foreign Affairs and Trade Select Committee noted certain technical difficulties with implementing such a law – in particular relating to the provisions contained within the General Agreement on Tariffs and Trade prohibiting the banning of imports – but went on to note that corporate social responsibility mechanisms might prove to be a fitting solution to this problem.<sup>74</sup> The possibility of using a certification scheme analogous to that used by fair trade product producers was also mentioned.

The private sector has three main characteristics which give it a unique ability to respond to instances of human trafficking.<sup>75</sup> Firstly, the position of the private sector in relation to commerce. Secondly, the strong focus of the private sector on innovation, and thirdly, its access to resources.

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<sup>72</sup> H Clayton “Business and Human Rights: Businesses Doing More Than Domestic Law Requires” [2011] HRR 1 at 2.

<sup>73</sup> Trade Aid “New Zealanders Want Slavery in Products Banned” (press release, 16 August 2007).

<sup>74</sup> Petition 2005/151 of Geoff White on Behalf of Trade Aid and 17,000 Others (19 February 2009).

<sup>75</sup> For more detail on this, see generally J Todres “The Private Sector’s Pivotal Role in Combating Human Trafficking” (2012) 3 Cal L Rev Circuit 80.

With the passing of the Californian Transparency in Supply Chains Act 2012,<sup>76</sup> large companies based in California have had to take steps to ensure that their supply chains are free from labour exploitation. It has been argued that in terms of apportioning responsibility for this, it is best that the cost falls on the company rather than the consumer, as large companies are likely to already have in place systems for auditing suppliers, and are thereby able to more easily absorb the cost of compliance.<sup>77</sup> It is thought that adopting measures requiring companies to audit their supply chains will have the effect of proactively preventing human trafficking for forced labour. Whereas law enforcement can generally only take reactive measures to combat trafficking, a company that conducts regular audits will be more likely to notice instances of trafficking.<sup>78</sup>

A focus on innovation has led to situations where the business community has developed creative solutions to trafficking. One such solution has been put in place in the United Arab Emirates (UAE). Children as young as four years old were being trafficked into the UAE for the purpose of camel racing.<sup>79</sup> A Swiss company developed robotic jockeys which has negated the need for human riders, and this has had the effect of reducing the number of child victims of trafficking.<sup>80</sup> This is an unusual example of technological innovation, and it is not suggested that robots should be adopted universally as a method of combating human trafficking, however the point remains that innovation can occur in many ways including relating to improvements in efficiency that reduce the demand for trafficked labour.<sup>81</sup>

In many cases, large corporations have more resources readily available to devote to anti-trafficking initiatives than governments. It is for this reason that governments should invest in partnerships with the private sector.<sup>82</sup> Involving the private sector in anti-trafficking initiatives can ease the financial burden on the government by having strong partnerships with businesses.<sup>83</sup>

This concept of partnership is a developing one. The United Nations has established a framework for creating private/public partnerships at the international level. The United Nations Inter-Agency Project on Human Trafficking (UNIAP) was established in 2000 with the aim of creating linkages between governments, civil society organisations, and members of the private sector. The overarching goal is to develop a coordinated response to human trafficking in the Greater Mekong Subregion.<sup>84</sup> Research suggests this is a geographical

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<sup>76</sup> For discussion of which, see chapter four.

<sup>77</sup> Todres, above n 75, at 83-84.

<sup>78</sup> At 84.

<sup>79</sup> See generally S Asghar, S Farhat and S Niaz, (2005) "Camel Jockeys of Rahimyar Khan: Findings of a Participatory Research on the Life and Situation of Child Camel Jockeys" (Save the Children, Sweden, 2005).

<sup>80</sup> W Knight "Robot Camel-Jockeys Take to the Track" *New Scientist* (online ed, 21 July 2005).

<sup>81</sup> Todres, above n 75, at 84.

<sup>82</sup> M McSween "Investing in the Business Against Human Trafficking: Embracing the Fourth 'P' – Partnerships" (2011) 6 *Intercultural Hum Rts L Rev* 283 at 284.

<sup>83</sup> At 286.

<sup>84</sup> United Nations Inter-Agency Project on Human Trafficking "About UNIAP" <[www.no-trafficking.org/](http://www.no-trafficking.org/)>.

hotbed of trafficking,<sup>85</sup> and is a geographical area from which victims are trafficked into New Zealand.<sup>86</sup>

Since the 1980s, the New Zealand government has shifted towards a model of partnership with the private sector to effectively deliver social services.<sup>87</sup> In 2006, a report by the Office of the Auditor-General noted that public-private partnerships were gaining traction both in New Zealand and overseas,<sup>88</sup> and set out recommendations for implementing these types of partnerships in New Zealand.<sup>89</sup>

Corporate social responsibility relates not only to what corporations do with their profits, but also to the issue of how those profits are made.<sup>90</sup> As a member of the OECD, New Zealand endorses the guidelines published by the OECD for the responsible operation of large companies.<sup>91</sup> One purpose of the guidelines is to ensure that multinational corporations are working in accordance with government policies.<sup>92</sup> These guidelines are not enforceable, however if a company does not meet the standards set in the guidelines a complaint can be laid with the MBIE, which will provide mediation assistance.<sup>93</sup>

The New Zealand government has taken a number of steps to improve the accountability of corporations in regard to human trafficking occurring in the New Zealand fishing industry, and has accepted in principle several of the recommendations made by the 2012 Ministerial Inquiry into FCVs. As such, efforts will be made to strengthen monitoring and enforcement of FCVs by the Ministry of Primary Industries, Maritime New Zealand and the Ministry of Business, Innovation and Employment. A pilot monitoring program is in the process of being established in order to coordinate activities between these agencies.<sup>94</sup> As a result of accepting these recommendations, detailed safety inspections have been carried out on a number of FCVs.

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<sup>85</sup> See N Piper “A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania” (2005) 43 *International Migration* 203; J Huguet and V Ramangkura *The Long Road Home: Analysis of Regional and National Processes for the Return and Reintegration of Victims of Trafficking in the Greater Mekong Sub-Region* (International Organisation for Migration, Switzerland, 2007); and K Archavanitkul *Combating the Trafficking in Children and their Exploitation in Prostitution and Other Intolerable Forms of Child Labor in Mekong Basin Countries* (International Organisation for Migration, Switzerland, 1998).

<sup>86</sup> See discussion in chapter four.

<sup>87</sup> R Buchanan and C Pilgrim “Transparency and Accountability in Government Decision-Making: Devolved Service Delivery” (paper prepared for the Conferenz 6<sup>th</sup> Annual Public Law Forum, May 2004).

<sup>88</sup> Controller and Auditor-General, above n 7, at 7.

<sup>89</sup> See generally Controller and Auditor-General, above n 7.

<sup>90</sup> B Kytte and J Ruggie “Corporate Social Responsibility as Risk Management: A Model for Multinationals.” Working Paper No. 10 (Corporate Social Responsibility Initiative, John F Kennedy School of Government, Harvard University, 2005).

<sup>91</sup> OECD, *OECD Guidelines for Multinational Enterprises* (2011 ed, OECD Publishing) at 8.

<sup>92</sup> OECD, “Annual Report on the OECD Guidelines for Multinational Enterprises 2010” (OECD Publishing, 2010) at 130.

<sup>93</sup> Ministry of Business Innovation and Employment “OECD Guidelines for Multi-National Enterprises” <[www.med.govt.nz](http://www.med.govt.nz)>.

<sup>94</sup> Cabinet Business Committee “Government Response to the Ministerial Inquiry on Foreign Charter Vessels” (25 September 2012) SUB11-055 at 1.

Additionally, FCVs will be required to be flagged as New Zealand vessels from 1 May 2016, and observers will be required on all FCVs fishing in New Zealand waters.<sup>95</sup> The Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill 2012, which passed its First Reading on 14 February 2013, will implement these steps.<sup>96</sup> Further, recent amendments to the Immigration New Zealand Operations Manual require that where manning agents are used to recruit crew, they must fall within criteria set by the Operational Manual: they cannot require crew to pay fees, or hold collateral, or exercise coercion, duress or undue influence over crew members, or have a history of engaging in debt bondage, human trafficking or other exploitative behaviours.<sup>97</sup>

In addition to these steps already taken by the government, there are a number of additional measures that if adopted by the New Zealand government would improve the performance of corporations with respect to human trafficking. Often corporate entities are part of the problem of human trafficking. These suggestions would begin the process of co-opting corporations into being part of the solution.

Firstly, provide support to NGOs working on the development of a certification scheme. Currently, Slave Free Seas is in the process of creating a scheme that will award companies who comply with a set number of criteria a certification to show that the company does not use victims of debt bondage, forced labour or human trafficking.<sup>98</sup>

Secondly, pass legislation modelled on the Californian or United Kingdom's transparency in supply chain legislation. In chapter four, the concept of transparency in supply chains legislation was introduced. A law of this kind in New Zealand, requiring fishing companies to audit their supply lines in order to ensure that no human trafficking, forced labour or other forms of slavery are present would have dramatic effect. As noted already, this approach delegates investigative duties to corporations, however the government should maintain oversight with respect to the process, and retain powers to obtain injunctions against companies that do not exercise due diligence.

Of real value would be the way in which a scheme such as this would prevent foreign boat-owning companies from operating out of New Zealand through the use of shell companies. It is common practice in New Zealand for boat-owning companies to set up what are essentially shell companies to enter into FCV agreements. This allows the profit from fishing to be siphoned off-shore. By adopting the approach taken by the US and the UK, New Zealand fishing companies will be required to audit their business partners as they form part of the supply chain.

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<sup>95</sup> D Carter and K Wilkinson "Foreign Charter Vessels to be Reflagged" (press release, 22 May 2012).

<sup>96</sup> Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill 2012, explanatory note.

<sup>97</sup> Immigration New Zealand Operational Manual at [WJ4.20.1].

<sup>98</sup> Email from Kate Day (Researcher, Slave Free Seas) to the Author, regarding certification schemes, 18 February 2013.

The counter argument to this solution revolves around the additional expense that companies will be put to in order to bring themselves into compliance with the legislation. While this has some merit, it must be remembered that only the largest of New Zealand's fishing companies will be covered by this legislation, and the benefits that will accrue to them by way of being able to market themselves as “slave free” will be substantial. It has been found that increasingly, consumers are interested in what can be categorised as non-economic costs of production, including social and environmental issues.<sup>99</sup>

Thirdly, amend the Overseas Investment Act 2005 to explicitly cover FCV scenarios. The Act regulates the process of foreign companies investing in New Zealand. It requires foreign companies who acquire a fishing quota or a legal or equitable interest in a fishing quota to obtain consent from the Overseas Investment Office.<sup>100</sup> Prior to 2006, the Oyang Corporation owned 75% of the Christchurch-based Southern Storm Fishing Ltd (SSF). These shares were sold, however the two companies still appear to have close ties.<sup>101</sup> If it were proved that the nature of this relationship showed an equitable interest by Oyang in SSF, then there would be a breach of the Overseas Investment Act.<sup>102</sup> The Oyang Corporation might then be liable for fines and/or imprisonment under sub-part 5 of the Act, and liable to have its interest in the fishing quota forfeited to the Crown by way of section 58A of the Fisheries Act 1996.

Fourthly, address issues of environmental abuse. As mentioned earlier, labour and environmental abuses are “two sides of the same coin.”<sup>103</sup> One major hole in the system that allows for the exploitation of marine resources is the concept of deemed value (DV). This is a set price-per-tonne of fish that is intended to discourage commercial fishers from catching fish outside their quota. If a vessel catches species of fish outside its quota, the vessel owner must pay the DV per tonne of non-quota fish caught.<sup>104</sup> The scheme is regarded as problematic though, as often the market price for the fish caught will be higher than the fee imposed by the DV, so the fisher still makes an overall profit.<sup>105</sup>

#### 5.4. Prosecution

The underlying principle behind this heading is that in some situations, methods of prevention and protection will not be adequate to avoid trafficking situations. In these cases, more coercive measures are required. One of the obligations imposed upon states by international law is to provide for a long statute of limitations for trafficking offences.<sup>106</sup> In New Zealand, the Crimes Act 1961 provides for a statute of limitation of ten years after the

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<sup>99</sup> H Clayton, above n 72, at 2.

<sup>100</sup> Overseas Investment Act 2005, s 10(2).

<sup>101</sup> As discussed in chapter two.

<sup>102</sup> Overseas Investment Act 2005, s 11.

<sup>103</sup> Maritime Union of New Zealand “Fishing Charges for Oyang 75 Officers Point to Industry Wide Failings” (press release, 16 October 2011).

<sup>104</sup> “Deemed Value” Ministry for Primary Industries <fs.fish.govt.nz>.

<sup>105</sup> (26 August 2004) 619 NZPD 15128.

<sup>106</sup> See chapter three.

commission of an offence. The exception to this is where the offence committed is punishable by more than three years imprisonment or by a greater than \$2,000 fine. In cases covered by the exception, there is no prescribed limitation period. Thus, in the case of human trafficking, a prosecution may be taken against an offender at any stage after the commission of the offence.<sup>107</sup> To date, there have been no New Zealand cases where the court has considered the implications of having no limitation period on prosecutions for serious offences.<sup>108</sup>

#### **5.4.1. Systems and processes that enable effective international investigative and judicial co-operation in human trafficking cases**

Responding to transnational crime requires transnational crime-fighting methods. In order to ensure that offenders are not immune from prosecution, it is essential that states work cooperatively with one another to prosecute traffickers.<sup>109</sup> This goal is one of the primary aims of both the UN Convention on Transnational Organised Crime<sup>110</sup> and the UN Trafficking Protocol.<sup>111</sup> One of the most important aspects of this principle relates to the sharing of information internationally between relevant investigating authorities.

According to a Cabinet paper submitted by the Minister of Immigration, in New Zealand the official process for sharing information with other states is governed by the Official Information Act 1982.<sup>112</sup> In practice however, the process is much more informal. The New Zealand Department of Labour has informal information sharing networks between jurisdictions. The New Zealand Immigration Service has a more formal Memorandum of Understanding (MOU) with its Canadian counterpart, and is considering similar MOUs with Australia and China.<sup>113</sup> On a wider level, as a member of the Bali Process, New Zealand is committed to collecting and sharing information on people trafficking within the Asia Pacific region.<sup>114</sup> The New Zealand government uses “regional liaison officers” – essentially diplomatic staff – throughout the Pacific in order to facilitate the flow of information.<sup>115</sup>

One of the major issues that arise in cases involving transnational criminal behaviour relates to jurisdiction. In terms of its treaty obligations under the UN Trafficking Protocol, New Zealand must make provision for the establishment and exercise of criminal jurisdiction

<sup>107</sup> Crimes Act 1961, s 10B.

<sup>108</sup> B Robertson *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA98F.02] [Adams on Criminal Law], at [CA10B.01].

<sup>109</sup> *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases*, above n 67, at 20.

<sup>110</sup> United Nations Convention against Transnational Organised Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003) [Organised Crime Convention], art 1.

<sup>111</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319 (opened for signature 15 November 2000, entered into force 25 December 2003) [Trafficking Protocol], art 2.

<sup>112</sup> Office of the Minister of Immigration Cabinet Minute “Strengthening of Immigration Provisions Relating to Migrant Trafficking and People Smuggling” (01) 32/8, at 5 (obtained under Official Information Act 1982 request to the Ministry of Justice).

<sup>113</sup> At 5.

<sup>114</sup> “About the Bali Process” The Bali Process <[www.baliprocess.net](http://www.baliprocess.net)>.

<sup>115</sup> NZ Plan of Action, above n14, at 14.



(which may mean seeking extradition from other states parties of alleged criminals who have fled the jurisdiction) and to provide mechanisms for international criminal cooperation to other states (including extradition and mutual legal assistance) if these other states seek help in prosecuting someone who has fled their jurisdiction.<sup>116</sup> Although establishing jurisdiction is achieved by a legislative act, exercising that jurisdiction will often require international cooperation between a number of states. This obligation is provided for in New Zealand by the Extradition Act 1999<sup>117</sup> and the Mutual Legal Assistance in Criminal Matters Act 1992.<sup>118</sup>

The New Zealand Crimes Act provides that extraterritorial jurisdiction may be established over the offence of human trafficking. Although the issue of extraterritorial jurisdiction is normally covered by section 8, the offence of human trafficking falls under an exception covered by Section 7A. This section was inserted into the Crimes Act by the same Amendment Act that created the trafficking offence.<sup>119</sup> The intent was to allow New Zealand courts to properly exercise jurisdiction over a crime which is notoriously difficult to prosecute due to its secretive and transnational nature.<sup>120</sup> Section 7A states that if a New Zealand citizen or body corporate commits an act or omission that constitutes an offence against section 98D wholly outside New Zealand, or if the acts or omissions constituting the offence took place on board a ship or plane registered in New Zealand, or leased by a company whose principal place of business is New Zealand, then proceedings may be brought in a New Zealand court.<sup>121</sup>

In a Cabinet paper drafted in 2001, the Ministry of Justice was of the opinion that:<sup>122</sup>

New Zealand has typically taken extra-territorial jurisdiction on the basis that an offence is committed by a New Zealander rather than against a New Zealander. This form of extra-territoriality is less likely to impinge upon the sovereignty of other nations.

Despite this cautious policy approach, it was considered that opting to exercise jurisdiction over the Convention crimes would enhance New Zealand's international reputation.<sup>123</sup>

In light of what is considered to be best practice,<sup>124</sup> this may not be sufficient to meet the needs of a prosecution of an offender. To highlight two key recommendations, New Zealand should consider developing bilateral mutual legal assistance agreements with countries that are likely to be source countries for victims of trafficking who are taken to New Zealand.

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<sup>116</sup> UN Organised Crime Convention, arts 15, 16.

<sup>117</sup> Extradition Act 1999, s 101B.

<sup>118</sup> Mutual Legal Assistance in Criminal Matters Act 1992, ss 10-11.

<sup>119</sup> Crimes (Amendment) Act 2002.

<sup>120</sup> Transnational Organised Crime Bill 2002 (201-1) [Transnational Organised Crime Bill], Commentary, at 1.

<sup>121</sup> Crimes Act 1961, s 7A. This form of jurisdiction is termed nationality-based jurisdiction. The Organised Crime Convention requires states to provide for the exercise of this form of jurisdiction. See Art 15.

<sup>122</sup> Ministry of Justice Draft Cabinet Paper "UNTOC: Offences and Penalties" (31 October 2001) at 3 (obtained under Official Information Act 1982 request to the Ministry of Justice).

<sup>123</sup> At 5.

<sup>124</sup> See Gallagher and Holmes, above n 1, at 335.

Secondly, the New Zealand Police should work closely with their counterparts in these source countries to facilitate information sharing.

#### **5.4.2. Comprehensive legal framework, in compliance with international standards**

The traditional way of assessing whether a state's anti-trafficking legal framework is "comprehensive" is through the lens of the criminal law. It asks the question: Are all forms of human trafficking, including related offences such as forced labour, debt bondage, sexual exploitation, forced marriage, involvement in organised crime, and money laundering criminalised? This is an important question, and it has been recognised that the criminal law is an essential feature of a comprehensive anti-trafficking framework.<sup>125</sup> This assessment only captures half the issue though. Law is a system of rights and obligations: Addressing only the criminal side deals with the obligations imposed on individuals not to commit the offence of human trafficking, but it ignores the rights that are available to victims of trafficking.

When applied to domestic law, the international legal obligations set out in chapter three translate not just to obligations on the state, but also to rights for individuals. Thus, if a state is to satisfy the requirement for a comprehensive legal framework in compliance with international standards, it must not merely prosecute wrongdoing, but provide avenues by which victims of trafficking may seek their own redress via the various mechanisms of the civil law.

A discussion of New Zealand's human trafficking legislation was set out in chapter one. To briefly reiterate the main points, the definition of human trafficking differs from the definition contained in the UN Trafficking Protocol in respect of the omission of the means elements "abuse of a position of vulnerability or power", and the "giving or receiving of payments to achieve the consent" of a person. The section 98D definition also omits the requirement that the trafficking of a victim occur for the purposes of coercion, leaving that instead to be considered by a sentencing judge as an aggravating feature of the offending.<sup>126</sup> I have argued that these differences will not necessarily be material when it comes to a trial, as they may be "read in" to the offence by several different methods.<sup>127</sup> In addition to section 98D, behaviour associated with human trafficking could be prosecuted under offences found in the Prostitution Reform Act 2003,<sup>128</sup> the Immigration Act 2009,<sup>129</sup> the Passports Act

<sup>125</sup> At 322; See also UNODC, above n 33, at 31.

<sup>126</sup> See chapter one of this thesis.

<sup>127</sup> See discussion at 1.3.2.5.5.

<sup>128</sup> Prostitution Reform Act 2003, s 16 prohibits "inducing or compelling persons to provide commercial sexual services or earnings from prostitution". Section 17 states that a person may at any time refuse to provide a sexual service, despite any contract to the contrary. Sections 20-23 prohibit any person from causing a person under the age of 18 to engage in sexual services.

<sup>129</sup> Section 131 (allowing a protected person status to be granted to an applicant under the International Covenant on Civil and Political Rights (ICCPR)) may apply to a victim of trafficking if there is a substantial risk of the victim being inhumanly treated (as per Article 8 of the ICCPR, this includes various forms of

1992,<sup>130</sup> and the Fisheries Act,<sup>131</sup> although any denunciatory effect associated with a prosecution under trafficking legislation will be lost.

The Crimes Act 1961 also deals more generally with certain offences which could be used to bring a prosecution for human trafficking. Section 98 prohibits dealing in slaves;<sup>132</sup> Section 98AA covers dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour;<sup>133</sup> Section 98A criminalises the participation in an organised criminal group.<sup>134</sup> Even more general are the sections prohibiting the use of forged documents<sup>135</sup> which again could feasibly be used in a prosecution of a human trafficker. Section 243 creates the offence of money laundering.<sup>136</sup>

In accordance with Article 23 of the Convention, States parties must also criminalise the obstruction of justice.<sup>137</sup> This is another way in which the Convention and Protocols focus on prosecuting the different activities associated with human trafficking. Obstruction of justice is viewed as a foundational offence for the crime of human trafficking.<sup>138</sup> In particular, the intent behind the obligation is to cover the situation where attempts are made to influence potential witnesses who may be involved in criminal proceedings. The obligation requires the criminalisation by states of the obstruction of justice by corruption such as bribery, and coercion such as the use or threat of violence.<sup>139</sup>

Before proceedings are brought under section 98D, it is a requirement that the consent of the Attorney-General be gained.<sup>140</sup> There is some room for police to act before gaining this consent. The Police may initiate proceedings, and even go as far as a decision on bail before consent must be obtained. Subsection 2 allows Police to arrest a defendant with or without a warrant for an offence under s 98D. Commentary on this piece of legislation suggests that this rule clearly exists as a practical consideration for the way in which the Police operate.<sup>141</sup>

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servitude which would cover human trafficking). Section 172 allows the Minister of Immigration to suspend a deportation notice on certain conditions. Section 206 allows a trafficked victim to appeal against a deportation notice on humanitarian grounds. Section 351 makes it an offence for an employer to exploit a person who is not legally entitled to work in New Zealand.

<sup>130</sup> The Passports Act 1992 makes provisions for the misuse of passports.

<sup>131</sup> Section 103 provides for certain New Zealand laws – including the Holidays Act 2003 and the Minimum Wage Act 1983 – to apply to foreign vessels in New Zealand waters.

<sup>132</sup> Crimes Act 1961, s 98(1).

<sup>133</sup> Crimes Act 1961, s 98AA is wide ranging, covering both acts and omissions resulting in children under the age of 18 being involved in sexual exploitation, removal of body parts or engagement in forced labour.

<sup>134</sup> This offence requires three or more people to share a common objective which is punishable by more than four years imprisonment.

<sup>135</sup> Crimes Act 1961, s 256 punishes the making of a forged document by up to 10 years imprisonment. Section 257 criminalises the use of forged documents.

<sup>136</sup> Crimes Act 1961, s 243.

<sup>137</sup> Organised Crime Convention, art 23.

<sup>138</sup> United Nations Office on Drugs and Crime *Model Law against Trafficking in Persons*. (UNODC, Vienna, 2009) [UNODC Model Law] at 23.

<sup>139</sup> UNODC, above n 33, at 247.

<sup>140</sup> Crimes Act 1961, s 98F.

<sup>141</sup> *Adams on Criminal Law*, above n 108, at [CA314].

### 5.4.3. Remedies for victims

It is fundamental to a legal system that if a person is wronged, they should be able to seek redress.<sup>142</sup> Remedies form an important aspect of the international legal response to human trafficking. In New Zealand, the specific remedies that will be available to a victim of trafficking are unclear. It has been argued that because of the relationship between the high profits made by traffickers and the physical and psychological suffering undergone by victims, determining appropriate remedies is particularly difficult.<sup>143</sup>

#### 5.4.3.1. Criminal

Firstly, it is necessary to identify who the defendant might be. It is an essential principle of the criminal law that individuals should be kept accountable for their actions. What is less clear are the circumstances in which a company may be held criminally liable. This question is important in the current context, where the main players are predominantly large corporate entities.

##### 5.4.3.1.1. Corporate vicarious liability

The criminal law was developed in order to facilitate the prosecution of natural persons. This has led to difficulties in holding corporations accountable for their criminal actions.<sup>144</sup> Through application of the doctrine of corporate vicarious liability, a corporation can be held criminally accountable for the actions of its agents or employees.<sup>145</sup> This is the so-called “identification test” and will most commonly occur when there is an individual whose acts and mental state satisfy the elements of the offence, and that individual’s acts will be attributed to the corporation.<sup>146</sup> It appears that the attribution of criminal liability to a corporation will be decided by reference to the *actual* exercise of authority within the corporation, as opposed to the *legal* manner in which it is supposed to occur.<sup>147</sup>

This form of liability can attach to a corporation without the need for a formal employer/employee or principal/agent relationship, as long as the employee or agent is acting on the basis of some authority vested in them by the corporation.<sup>148</sup> If the employee or agent acts outside the scope of the authority, the corporation will not be held liable.<sup>149</sup> Case law shows that it will not be necessary that the employee or agent be ranked highly in the corporate structure. There have been instances of the actions of secretaries, sales managers

<sup>142</sup> A Gallagher “The Right to an Effective Remedy for Trafficked Persons” (Paper submitted for the expert consultation convened by the UN Special Rapporteur on Trafficking in Persons, November 2010) at 2.

<sup>143</sup> A O’Driscoll “AT v Dulghieru: Accounting for the Profits of Sex Trafficking” (2009) 40 VUWLR 695 at 695-696.

<sup>144</sup> M Wilkinson “Corporate Criminal Liability- The Move Towards Recognising Genuine Corporate Fault” (2003) 9 *Canta LR* 142 at 142.

<sup>145</sup> Adams on Criminal Law, above n 108, at [CA2.28.03(2)].

<sup>146</sup> *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 at [23], per Blanchard J. As to how this principle applies to the present research, see the discussion at n 189 of chapter two.

<sup>147</sup> *Moir Farms (Maimai) Ltd v Department of Conservation* [2011] NZAR 694 (HC).

<sup>148</sup> *Gifford v Police* [1965] NZLR 484 (CA).

<sup>149</sup> *Jull v Treanor* (1896) 14 NZLR 513.

and marine superintendents being held up as representative of the company.<sup>150</sup> Section 2 of the Crimes Act and section 29 of the Interpretation Act 1999 define “person” to include a corporation, and a body of persons – whether corporate or unincorporate.<sup>151</sup>

The theory of corporate vicarious liability has been criticised as being both too wide and too narrow. It is too wide in the sense that a corporation may be blamed for the fault of a single individual; however it is also too narrow in that liability must flow from that individual, thereby missing wider corporate criminality.<sup>152</sup> A third issue relates to liability for omissions. With respect to the proposal made earlier to create obligations on corporations to carry out due diligence on their supply chains, it is submitted that the criminalisation of this omission might be an effective method to ensure compliance with this obligation. If criminal liability attaches to a company, a change in corporate ownership will not suffice to absolve the corporation of that liability.<sup>153</sup>

#### 5.4.3.1.2. Prosecution

Having established who will be liable for the offence, the next step is to undertake a prosecution of those individuals or corporations identified as defendants. If a prosecution is undertaken by authorities, it will be carried out in the name of the Crown. However, in the context of trafficking in New Zealand’s fishing industry at the present time, there is a demonstrated reluctance on behalf of authorities to lay criminal charges.

As a serious offence, human trafficking will be prosecutable under indictment. Any person may lay an information alleging an offence, and setting out the substance of what is being charged.<sup>154</sup> Proceedings by indictment must be laid under an oath administered by a judge, justice, magistrate or registrar.<sup>155</sup>

The Criminal Disclosure Act 2008 preserves the right of any person to lay a prosecution.<sup>156</sup> However, private criminal prosecutions in New Zealand are rare. A complainant must ensure that the matter is fully investigated. If the police choose not to investigate the matter, this may require the hiring of a private investigator.<sup>157</sup>

In the context of the facts presented in chapter two, this is one way in which proceedings might perhaps be initiated despite official reluctance to investigate the issues for criminal offences. Unlike jurisdictions such as the United States, New Zealand lacks a culture of public interest litigation. Unfortunately, a private prosecution is an expensive solution, and

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<sup>150</sup> Wilkinson, above n 144, at 157.

<sup>151</sup> Crimes Act 1961, s 2; Interpretation Act 1999, s 29.

<sup>152</sup> Wilkinson, above n 144, at 150.

<sup>153</sup> Companies Act 1993 s 225(f).

<sup>154</sup> Summary Proceedings Act 1957, s 13.

<sup>155</sup> Summary Proceedings Act 1957, s 147.

<sup>156</sup> Criminal Disclosure Act 2008, s 6.

<sup>157</sup> (2011) 4 Collins & May Law Newsletter, 4 March 2011 at 1.

may be beyond the resources of those NGOs and concerned individuals in a position to help victims of human trafficking.

The Sentencing Act 2002 contains several principles that must be taken into account by a sentencing judge that are relevant to victims of human trafficking. On sentencing, a judge must hold the offender accountable for harm done to the victim,<sup>158</sup> and must provide for the interests of a victim.<sup>159</sup> The judge must also take into account any information provided to the court relating to the impact the offending has had on the victim.<sup>160</sup> The court has two main options open to it in terms of imposing criminal sanctions upon a defendant who is found guilty of human trafficking.

#### 5.4.3.1.3. Fines/compensation

A court can order an offender to make reparation to the victim. This is supported by a statutory presumption in favour of reparation, and a history of case law demonstrating this presumption.<sup>161</sup> A criminal court can order reparation for any form of emotional harm to the victim caused by the actions of the defendant.<sup>162</sup>

A court can also award the payment of exemplary damages to the victim. In New Zealand, this is underpinned by a punitive or deterrent rationale – to send a message to the defendant that “[their actions] do not pay”.<sup>163</sup> Exemplary damages will be awarded where a defendant’s conduct is “truly outrageous”,<sup>164</sup> and can be given even when the victim is already covered by the ACC scheme.<sup>165</sup> The focus of the court will lie on the quality of the defendant’s conduct, and whether it involved “conscious wrongdoing in contumelious disregard of another’s rights.”<sup>166</sup>

Due to an explicitly stated focus on punishment and moderation, it is unlikely that New Zealand courts will award the levels of compensation that the United States’ legal system is infamous for.<sup>167</sup> New Zealand courts have found that the punishment of behaviour deserving exemplary damages can be achieved through the award of comparatively small amounts.<sup>168</sup> This may be changing however. The leading case of *Couch v AG*<sup>169</sup> awarded punitive

<sup>158</sup> Sentencing Act 2002, s 7(1)(a).

<sup>159</sup> At s 7(1)(c).

<sup>160</sup> Sentencing Act 2002, s 8(f).

<sup>161</sup> Sentencing Act 2002, s 12. See also *R v Pender* [2007] NZCA 465 at 12; *R v Creek* CA199/06, 17 August 2006 at 12; *R v O'Rourke* [1990] 1 NZLR 155 (CA), at 158.

<sup>162</sup> Sentencing Act 2002, s12.

<sup>163</sup> O'Driscoll, above n 143, at 703.

<sup>164</sup> *Ellison v L* [1998] 1 NZLR 416 (CA) at 419.

<sup>165</sup> Accident Compensation Act 2001, s 319(1).

<sup>166</sup> *Taylor v Beere* [1982] 1 NZLR 81 (CA) at 93.

<sup>167</sup> J Gotanda “Punitive Damages: A Comparative Analysis” [2004] 42 Colum J Transnatl L 391 at 418.

<sup>168</sup> *Ellison v L* [1998] 1 NZLR 416 (CA) at 419.

<sup>169</sup> *Couch v AG* [2010] NZSC 27.

damages of \$300,000 NZD to the plaintiff, who was the victim of an attack by a parolee under the supervision of the Parole Service.<sup>170</sup>

In addition, human trafficking falls within the definition of “significant criminal activity” in the Criminal Proceeds (Recovery) Act 2009.<sup>171</sup> This allows the court to impose a profit forfeiture order if it can be satisfied on the balance of probabilities that the defendant had unlawfully benefited from the “significant criminal activity”.<sup>172</sup>

#### **5.4.3.1.4. Imprisonment**

One of the aims of a criminal justice system is retribution by the state on behalf of a victim. The Sentencing Act 2002 states that one of the purposes of sentencing an offender is to hold that offender accountable for the harm done to the victim.<sup>173</sup> Section 98D of the Crimes Act provides for a penalty of up to 20 years imprisonment.<sup>174</sup>

#### **5.4.3.2. Civil**

In addition to the criminal route, victims are able to seek redress via the civil jurisdiction of the court. From the outset, it should be noted that in almost all situations this will be an impractical solution, and the costs involved would be likely to prevent this course of action unless a class action of victims of human trafficking could be undertaken.

##### **5.4.3.2.1. ACC**

In New Zealand, the Accident Compensation scheme (ACC) represents the primary avenue through which compensation is awarded in the large majority of cases. Where compensation is awarded, further actions for damages arising out of that injury cannot be pursued.<sup>175</sup> It has been argued that victims of trafficking would be likely to be compensated under the ACC scheme. Although trafficking is not listed as an offence in the schedule to the Act, it will be possible for a court to find a causal link between a mental disorder suffered by a victim, and the injury caused by the actions of trafficking.<sup>176</sup>

Despite this bar on actions where the ACC scheme has awarded compensation to a victim, there are a number of additional ways by which a victim of trafficking may seek redress under the civil jurisdiction of the court.

##### **5.4.3.2.2. Tort**

Torts that would provide effective remedies to victims include trespass to person – specifically the torts of assault, battery and false imprisonment – and the torts of deceit and conspiracy by unlawful means. These torts require an element of recklessness or intention.

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<sup>170</sup> At [8].

<sup>171</sup> Criminal Proceeds (Recovery) Act 2009, s 6.

<sup>172</sup> Criminal Proceeds (Recovery) Act 2009, s 55.

<sup>173</sup> Sentencing Act 2002, s 7(1)(a).

<sup>174</sup> Crimes Act 1961, s 98D.

<sup>175</sup> Accident Compensation Act 2001, s 317(7)

<sup>176</sup> O’Driscoll, above n 143, at 701.

Torts relating to the negligent infliction of harm will not be relevant in the context of human trafficking, as the nature of the offence requires deliberate or reckless behaviour.

Notwithstanding that the Accident Compensation Act 2001 precludes actions for damages relating to personal harm,<sup>177</sup> the torts of trespass to the person are still important in situations where the assault or battery does not result in personal harm to the claimant.<sup>178</sup> To cover the elements of these torts briefly, an assault is an action that causes a plaintiff to apprehend a battery.<sup>179</sup> The tort of assault provides a remedy with respect to a person's state of mind. The tort of false imprisonment provides a remedy for unlawful detention.<sup>180</sup>

A claim of false imprisonment will require the plaintiff to demonstrate that they were compelled to submit to the instructions of the defendant.<sup>181</sup> Although traditionally the tort related to physical imprisonment, it has been argued that in a contemporary context the tort will also cover instances of psychological containment of a victim.<sup>182</sup> As the analysis of case law in chapter three shows, this approach is likely to be treated favourably by courts. If successful in the claim, a claimant will be entitled to recover damages for the imprisonment, as well as for distress, humiliation or fear.<sup>183</sup>

The tort of deceit may also provide a remedy to a victim of human trafficking. A victim of human trafficking is induced to cross an international border, often by way of deceit. For a claimant to be successful under this tort, they must prove that the defendant made a false representation – either intentionally or recklessly – by words or conduct, which induced the claimant to act in reliance on that representation, and consequently suffered actual damage.<sup>184</sup>

Lastly, the tort of conspiracy by unlawful means could be pursued by a claimant. This tort will be present where two or more people commit an unlawful act with the intent to harm – either directly or indirectly – the economic interests of the plaintiff. The key requirement is that the means by which the conspiracy is carried out be by way of at least one action which is separately actionable in itself.<sup>185</sup> In the context of trafficking in New Zealand's fishing industry, where the facts – if proved in court – appear to support claims of human trafficking, amongst other offences such as immigration fraud, and tortious claims as discussed above, there will be sufficient unlawful means present to support a claim under this heading.

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<sup>177</sup> Accident Compensation Act 2001, s 317.

<sup>178</sup> S Todd *The Law of Torts in New Zealand* (5<sup>th</sup> ed, Brookers, Wellington, 2009) at 60.

<sup>179</sup> At 59.

<sup>180</sup> At 94.

<sup>181</sup> *AG v Niania* [1994] 3 NZLR 106.

<sup>182</sup> P Stewart "Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia" (2011) 34 UNSW Law Journal 898 at 911.

<sup>183</sup> *Willis v AG* [1989] 3 NZLR 574, at p579 (CA).

<sup>184</sup> *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 at [46, 55] (CA).

<sup>185</sup> *Michaels v Taylor Woodrow Developments Ltd* [2001] Ch 493, at 516. See also *SSC & B: Lintas New Zealand Ltd v Murphy* [1986] 2 NZLR 436, at 461.



With respect to each of these torts a court may award exemplary or aggravated damages.<sup>186</sup> Ultimately however, the success of an action in tort will depend on the determination – and resources – of an applicant.<sup>187</sup>

#### 5.4.3.2.3. Damages for breach of contract

Generally the remedy for a breach of contract will be damages. A court must firstly determine the measure of damages – what it is that the plaintiff has in fact lost<sup>188</sup> - and secondly, whether the damage sustained was within the limits of remoteness.<sup>189</sup>

It is beyond the scope of this thesis to delve deeply into this topic.<sup>190</sup> It will suffice to state that the underlying principle is that a plaintiff who has been caused loss by the actions of a defendant should be restored – as far as is possible – to the position they would have been in had the breach not occurred.<sup>191</sup>

In the context of an action for breach of contract taken by or on behalf of a crew member on board an FCV who may be alleging such loss, this means that it would be necessary to demonstrate that on the basis of the New Zealand employment contract, there was a breach caused by the defendant leading to a loss suffered by the plaintiff. Under the Employment Relations Act 2000, there is a bar on taking a common law action for wrongful dismissal.<sup>192</sup> This does not prevent any other action relating to breach of the employment contract.<sup>193</sup> In the event of an action relating to a dispute over the terms of the employment agreement, the Act provides for a process by which the dispute can be settled judicially.<sup>194</sup>

#### 5.4.3.2.4. Equity

The equitable remedy of account of profit shows some promise as an avenue through which the profits made by traffickers can be taken from them. It is an accepted principle that a remedy can be awarded based on the gains of a defendant, rather than the losses of a plaintiff.<sup>195</sup> The intention of the court in awarding this remedy is to ensure that “neither party will have what justly belongs to the other”.<sup>196</sup> In this regard, equity goes further than the common law, providing a remedy where a victim of a breach of contract may not be able to show a loss, yet can recover a gain made by the defendant.<sup>197</sup>

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<sup>186</sup> S Todd, above n 178, at 94.

<sup>187</sup> Stewart, above n 182, at 899.

<sup>188</sup> J Burrows, J Finn and S Todd *Law of Contract in New Zealand* (4<sup>th</sup> ed, LexisNexis, Wellington, 2012) at 822.

<sup>189</sup> At 822.

<sup>190</sup> For a comprehensive study of the law of damages for breach of contract in New Zealand, see Burrows, Finn and Todd, above n 188, at chapter 18.

<sup>191</sup> Burrows, Finn and Todd, at 821-822.

<sup>192</sup> Employment Relations Act 2000, s 113(1).

<sup>193</sup> At s 113(2).

<sup>194</sup> At sub-part 10.

<sup>195</sup> O’Driscoll, above n 143, at 710.

<sup>196</sup> *My Kinda Town Ltd v Soll*, [1982] FSR 147 (Ch) at 159, per Slade J.

<sup>197</sup> Burrows, Finn and Todd, above n 188, at 914-915.

Despite the outcomes being the same, with the court taking away gains made by a defendant during the commission of an offence, the difference between this approach and exemplary damages is that whereas the focus of exemplary damages is on the motive and conduct of the defendant, an account of profit looks at the profit and gains of a defendant.<sup>198</sup> Unlike exemplary damages, it is possible for a court to award an account of profit in addition to other criminal punishments without running into issues relating to double jeopardy.<sup>199</sup>

Further to these avenues, a victim can apply for relief under the admiralty jurisdiction of the court. In New Zealand, the statutory provisions relating to this are contained in the Admiralty Act 1973, which is based upon the original inherent jurisdiction over admiralty issues claimed by the English Court of Admiralty.<sup>200</sup>

#### **5.4.3.2.5. Maritime lien**

A maritime lien creates a security interest over a ship or her cargo, beginning from the time of the events giving rise to the lien.<sup>201</sup> The lien can be asserted against the ship or cargo regardless of any changes of vessel ownership.<sup>202</sup> It attaches to a vessel without any formality or registration required to bring it into effect.<sup>203</sup>

There are a fixed number of maritime lien categories, however the one of most interest to the present research relates to unpaid crew wages. It appears from the case law that this lien arises not from any employment contract, but rather from service to the vessel.<sup>204</sup>

#### **5.4.3.2.6. Actions and damages under Admiralty Act**

In addition to a maritime lien, and slightly more narrow in scope is the action in rem available under the Admiralty Act 1973<sup>205</sup> for a number of specified purposes.<sup>206</sup> Of particular relevance are claims in respect of the injury of crew members<sup>207</sup> or of loss of wages.<sup>208</sup> This jurisdiction will only be exercised against the owner or charterer of the vessel,<sup>209</sup> and unlike a maritime lien, rights are created over the vessel at the time of the issuing of the proceedings.<sup>210</sup>

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<sup>198</sup> O'Driscoll, above n 143, at 719.

<sup>199</sup> At 719. Note though that issues of double counting may arise where the defendant's property is also subject to a property forfeiture order under the Criminal Proceeds (Recovery) Act 2009.

<sup>200</sup> *Laws of New Zealand* Maritime Law: Admiralty (online ed) at [14].

<sup>201</sup> *Laws of New Zealand* Maritime Liens and the Origins and Nature of Actions in Rem (online ed) at [30].

<sup>202</sup> At [30].

<sup>203</sup> At [32].

<sup>204</sup> At [33].

<sup>205</sup> Admiralty Act 1973, s 5.

<sup>206</sup> Set out in s 4(1) of the Admiralty Act 1973.

<sup>207</sup> Admiralty Act 1973 s 4(1)(f).

<sup>208</sup> Admiralty Act 1973 s 4(1)(o).

<sup>209</sup> Admiralty Act 1973 s 5(2)(b).

<sup>210</sup> *Laws of New Zealand*, above n 201, at [30].

#### **5.4.3.3. Summary of remedies available to victims**

In summary, there are clear routes for legal action against human traffickers utilising both the criminal and civil jurisdictions of the court. There are advantages and disadvantages to each route. If the criminal path is chosen, there is a heavy reliance on the tenacity of the investigating authorities to achieve a just outcome. Conversely, if a civil route is taken, a claimant must have solid legal representation, and access to the resources required to fund such a claim. Given the history of New Zealand case law, a victory at civil law under contract, tort or equity is not likely to result in large awards of compensation being made. On the other hand, prosecuting an offender takes responsibility from the victim and places it in the hands of the authorities and provides for denunciation and deterrence. However, if the authorities fail to deliver a fair result, the civil law may provide a means of redressing injustices.

At present, the focus of the New Zealand government is squarely on criminal responses to human trafficking.<sup>211</sup> In order to allow victims of trafficking to fully utilise the range of remedies available to them under New Zealand law, this focus could be widened to encompass the civil remedies available to victims. These remedies are expensive to pursue, and as such it would be desirable to provide clearly stated avenues by which legal and financial support can be made available.

The Legal Services Act 2011 will allow an individual<sup>212</sup> victim of trafficking to gain access to legal aid when the claim relates to civil proceedings in a District Court, High Court, Court of Appeal or Supreme Court.<sup>213</sup> The current National government has sought to restrict the ambit of this Act,<sup>214</sup> and would require applicants under the Act to pay additional charges to providers of legal aid services.<sup>215</sup> It is submitted that these restrictions are inconsistent with a fully comprehensive legal framework.

#### **5.4.4. A general law enforcement capacity to respond effectively to trafficking cases**

This criterion relates to the criteria above for a specialist law enforcement capacity. Specialist staff must be supported by generalist staff. In practice, instances of human trafficking tend to be first brought to the attention of generalist police staff. This means that these individuals must receive training which is adequate for them to recognise a situation involving human trafficking in order that it can be passed on to the specialist group.

It has been found that in countries where frontline law enforcement staff are given training on identifying victims of trafficking, the number of successful prosecutions based on the evidence of victims has increased.<sup>216</sup> In New Zealand, Immigration New Zealand has

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<sup>211</sup> New Zealand Plan of Action, above n14, at 4.

<sup>212</sup> But not a body of persons. See Legal Services Act 2011, s 11(1).

<sup>213</sup> S7(1)

<sup>214</sup> Legal Assistance (Sustainability) Amendment Bill 2011 (316-2).

<sup>215</sup> At cl 10.

<sup>216</sup> Gallagher and Holmes, above n 1, at 329.

developed a training programme which will be delivered to immigration and law enforcement officials beginning in 2013.<sup>217</sup> This programme is very general in nature.<sup>218</sup> It briefly covers the definition of human trafficking by reference to s 98D of the Crimes Act, and notes the differences between trafficking and smuggling. It does not give any suggestions as to the best methods of investigating an instance of trafficking, but instead provides outlines of responsibility chains.

By way of comparison, one of the training programmes used by the USA is much more in depth. For example, the US training programme examines the various forms of trafficking, and demonstrates how the elements of the offence exist in each scenario. It also provides guidance on recognising particular demographics that are vulnerable to human trafficking – an aspect that is ignored in the New Zealand training.<sup>219</sup>

It is submitted that in order to increase the capacity of law enforcement officials in New Zealand to adequately recognise and report instances of human trafficking, the New Zealand training programme should be revised and made more comprehensive.

#### **5.4.5. Specialist law enforcement capacity to investigate human trafficking**

Experts in the field of counter-trafficking have argued that the most effective way to respond to instances of human trafficking is to deploy specialised law enforcement groups. Citing international best practice, they argue that the benefit of this approach to counter-trafficking is that it ensures that the response to human trafficking is centralised, co-ordinated and organised.<sup>220</sup>

In New Zealand, the Police have established a National Intelligence Centre (NIC), based in Wellington, which is designed to facilitate the sharing of intelligence on various criminal matters, including human trafficking.<sup>221</sup> In theory, it is a hub from which a co-ordinated approach to undertaking trafficking operations can be launched.<sup>222</sup> In practice however, human trafficking is a portfolio which is handled by a single individual within the NIC. This individual liaises occasionally with the Interagency Working Group on Human Trafficking. This is not an active investigatory group. Currently, no such investigatory group exists. If a large investigation were required, a task force may be established to respond to it.<sup>223</sup>

In addition – as mentioned earlier – the Ministry of Business, Innovation and Employment (formerly the Department of Labour) heads an Interagency Working Group on Human

<sup>217</sup> Immigration New Zealand, Training Workshop, attended by the Author, (Wellington, New Zealand) 13 December 2012.

<sup>218</sup> Immigration New Zealand, Training Workshop, attended by the Author, (Wellington, New Zealand) 13 December 2012.

<sup>219</sup> US Department of Homeland Security “Human Trafficking Awareness Training” <[www.dhs.gov/](http://www.dhs.gov/)>.

<sup>220</sup> Gallagher and Holmes, above n 1, at 324.

<sup>221</sup> New Zealand Plan of Action, above n14, at 11.

<sup>222</sup> “Police, New Zealand: NIC” Ministry of Justice <[www.justice.govt.nz](http://www.justice.govt.nz/)>.

<sup>223</sup> Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013).

Trafficking (IWG) with the aim of achieving a consistent approach to human trafficking across all the relevant government departments.<sup>224</sup> However, this group met only twice during the period June 2011 to June 2012.<sup>225</sup>

With no formal investigations into human trafficking having occurred in New Zealand, the efficacy of the NIC and the IWG cannot properly be assessed. By international standards, the NIC and IWG do not measure up. Best practice suggests that specialist anti-trafficking law enforcement agencies have the resources to conduct adequate nationwide investigations.<sup>226</sup> Without a specialised anti-trafficking group, the NIC trafficking portfolio is the closest comparable institution currently in existence in New Zealand. If an instance of human trafficking is recognised by police, as it presently stands, the investigatory role will be delegated to a local district manager who will oversee the investigation.<sup>227</sup>

As the NIC trafficking unit is comprised of a single individual who carries a trafficking portfolio in addition to other portfolios, it is difficult to argue that the required resources have been allocated to the unit to allow it to effectively investigate instances of human trafficking. This could cause issues in terms of effectively coordinating investigations into instances of human trafficking. It is recommended firstly that the NIC human trafficking portfolio be allocated more resources. Secondly, that a specialised anti trafficking taskforce be established, and thirdly, that the NIC and IWG be more tightly linked, with a wide mandate given to the NIC to investigate claims of human trafficking.

#### **5.4.6. Strong and well-informed prosecutorial and judicial support**

It will be the frontline law enforcement staff that carry out the initial investigatory work, however it falls to prosecutors to undertake prosecutions.<sup>228</sup> To date, prosecutors have not received human trafficking training in New Zealand. This has led to the situation where prosecutors have made fundamental errors in prosecutions, such as failing to obtain Attorney-General's consent to prosecute as required by section 7B of the *Crimes Act 1961*, resulting in significant delays and the risk of a mistrial.<sup>229</sup> It is submitted that providing training to prosecutors on human trafficking and other related offences would minimise the risk of these errors occurring in the future.

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<sup>224</sup> New Zealand Plan of Action, above n14, at 11.

<sup>225</sup> TIP 2012, at 266.

<sup>226</sup> Gallagher and Holmes, above n 1, at 324.

<sup>227</sup> Interview with Liam Clinton (Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police) (the Author, Christchurch, 4 March 2013).

<sup>228</sup> At 327.

<sup>229</sup> K Bayer "Police Blunder in Case Against Alleged People Smugglers" New Zealand Herald (online ed, 25 October 2012). See also D Clarkson "Police 'Put Smuggling Case in Dotcom Category'" The Press (online ed, 25 October 2012). This particular report relates to a prosecution for migrant smuggling, however as the process is the same for human trafficking, the point remains the same.

## 5.5. Conclusion

There is a degree of overlap between the areas outlined above. This shows that the “three P” framework must be pursued as a whole. Focussing simply on one of the three categories will not constitute an effective response. Using the criteria established in chapter four, this chapter has assessed New Zealand’s overall response to human trafficking.

The following table sets out the criteria for an effective criminal justice response to human trafficking, summarises the actions New Zealand has taken, and lists the recommendations made in the preceding discussion.

	Criteria	Current Actions taken by New Zealand	Recommendations for New Zealand
Protection	<b>Quick and accurate identification of victims along with immediate protection and support.</b>	Established (although untested) paths of official support. Evidence suggests that victims of trafficking exist in New Zealand, but certification has not taken place.	Take seriously and thoroughly investigate claims made by individuals alleging human trafficking, and civil society organisations acting on behalf of those individuals. Provide training on identification of victims to frontline officers.
	<b>Special support to victims as witnesses.</b>	No additional protections given, although Evidence Act 2006 provides scope for case-by-case protection.	Explicitly set out protections for victims testifying in human trafficking cases similar to those given to victims of rape cases.
Prevention	<b>Government accountability.</b>	IWG is a positive first step.	New Zealand government should ratify International Convention on the Protection of the Rights of all Migrant Workers, the Migrant Workers (Supplementary Provisions) Convention 1975, the Maritime Labour Convention 2006 and the Work in Fishing Convention 2007.
	<b>Effective coordination among international donors.</b>	New Zealand government funds a number of international and regional anti-trafficking projects.	Specifically target projects for support that aim to counter the forms of trafficking that New Zealand is most at risk from.
	<b>Corporate social responsibility.</b>	New Zealand government has accepted in principle certain recommendations to improve performance of FCVs	Provide support to NGOs developing certification schemes. Amend existing legislation to include provisions for transparency in supply chains legislation. Amend the Overseas Investment Act to explicitly cover FCV scenarios. Address loopholes in the framework that allow for profit to be made from environmental abuse.
Prosecution	<b>Systems and processes that enable effective international</b>	Extradition Act and Mutual Legal Assistance in Criminal Matters Act provide for international cooperation.	Develop bilateral mutual legal assistance treaties with source countries. Encourage Police to open communication channels with their counterparts in

	<b>investigative and judicial cooperation in human trafficking cases.</b>		source countries.
	<b>Comprehensive legal framework, in compliance with international standards.</b>	Human trafficking can be prosecuted under a range of legislation. New Zealand has a full range of criminal and civil remedies available to victims of trafficking.	Shift focus away from criminal law in order that the remedies available under civil law can be pursued. Ensure that victims have the ability to obtain resources to seek redress.
	<b>A General law enforcement capacity to respond effectively to trafficking cases.</b>	Immigration New Zealand administers a very generalised training programme.	Revise this training programme to make it more comprehensive.
	<b>Specialist law enforcement capacity to investigate human trafficking.</b>	The National Intelligence Centre operates from Wellington, providing support and intelligence-sharing. The IWG also serves to coordinate responses to instances of human trafficking. It will not become clear whether this is effective until the police begin to investigate claims of human trafficking.	IWG and NIC should work together under a wide mandate to investigate claims of human trafficking. Resources should be allocated to the NIC to facilitate the effective nationwide investigation of such claims. A specialised task force should be established to help investigate human trafficking.
	<b>Strong and well-informed prosecutorial and judicial support.</b>	Evidence suggests that prosecutors lack an understanding of how to undertake a human trafficking prosecution.	Training should be provided to prosecutors.



The two major topics discussed in most depth in this chapter relate firstly to the range of remedies available to victims of trafficking, and secondly to the positive and negative roles that corporations play in human trafficking.

As mentioned in chapter one, there has been a tendency among certain elements of the anti-trafficking movement to homogenise victims, replacing the multiplicity of rights and remedies available to them with a single “right to be rescued”.<sup>1</sup> This chapter makes clear that this is incorrect, and sets out the various avenues in New Zealand’s civil and criminal law that a victim can use to have their rights enforced. For a variety of reasons, victims of human trafficking rarely have their day in court.<sup>2</sup> While this phrase generally refers to having testimony heard in court, it could equally refer to the victim taking a proactive role as a claimant in civil proceedings.

The government’s demonstrated lack of effort in investigating human trafficking in the New Zealand’s fishing industry shows the importance of involving the private sector in addressing the problems. Companies – especially large ones – have long been reluctant to agree to binding human rights norms. International experience has shown that the main successes have occurred when incentives to undertake due diligence in order to avoid negative exposure – a stick in the form of a carrot – are used. When corporations can achieve a measurable benefit from upholding human rights, they tend to come on board. With respect to the role played by the private sector in combating human trafficking, it is not suggested that the private sector replace the role of law enforcement agencies, but rather act in a tandem effort.

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<sup>1</sup> See chapter one.

<sup>2</sup> A Gallagher “Prosecuting and Adjudicating Trafficking in Persons Cases in Australia: Obstacles and Opportunities” (paper presented at National Judicial College of Australia Twilight Seminar on Human Trafficking, State Library of New South Wales, 15 June 2009) at 3.

## Conclusion

It has been said that "no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world ... an individual can be smuggled one day and trafficked the next".<sup>1</sup> Human trafficking is not simply a form of organised criminal activity, but is also a reflection of global economic and social realities.<sup>2</sup> A response to trafficking which is based purely on the application of the criminal law, or which treats the problem as relating solely to immigration will not adequately address all facets of the issue. This thesis has argued that a more holistic approach is necessary, and has advocated for the promotion and adoption of a broadly human rights oriented criminal justice response to the problems surrounding the phenomena of human trafficking.

Through the process of setting out the factual scenario of human trafficking in New Zealand's fishing industry, and by comparing the New Zealand response to human trafficking to international standards, this thesis has shown that there is significant room for improvement in New Zealand's anti-trafficking framework. This thesis has shown that while New Zealand has taken steps in the right direction, it has not fully implemented its international legal obligations. In particular, problems relating to the obligation to identify victims of human trafficking mean that the New Zealand anti-trafficking framework remains untested.

This is a finding that is repeated internationally. For a crime that is high on the international agenda, counter-trafficking initiatives that would help in the process of victim identification and protection are relatively under-funded. According to one human trafficking advocacy group, the United States spends more on the "war on drugs" in a week than it has on dealing with slavery-related issues in ten years.<sup>3</sup>

As a crime which is undertaken for profit, human trafficking thrives in unregulated (or loosely regulated) environments. When the foreign charter vessel regime was first implemented in New Zealand, there was a strong case to be made based on business and commercial imperatives that FCVs were the appropriate way forward.<sup>4</sup> More recently, it has been argued that there is now the technical expertise available in New Zealand to do away with FCVs altogether.<sup>5</sup>

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<sup>1</sup> A Gallagher "Human Rights and Human Trafficking: Quagmire or Firm Ground?" (2009) 49(4) *Va J Intl L* 789 at 817.

<sup>2</sup> A Gallagher and P Holmes "Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line" (2008) 18 *Intl Criminal Justice Review* 318 at 321.

<sup>3</sup> Email from Justin Dillon (CEO, Made in a Free World) to the Author, regarding current state of US efforts against human trafficking (20 February 2013).

<sup>4</sup> C Stringer, G Simmons and D Coulston "Not in New Zealand's Waters, Surely? Labour and Human Rights Abuses Aboard Foreign Fishing Vessels" 2011 New Zealand Asia Institute Working Paper 11-01 at 17.

<sup>5</sup> See P Dawson and R Hunt "The Legal Regime Governing the Operation of Foreign Charter Vessels in New Zealand" (2011) 25 *A & NZ Mar LJ* 195.

In light of the evidence presented in this thesis, it is difficult to believe the comments made by former Minister of Labour Kate Wilkinson and former Minister of Fisheries Phil Heatley denying the extent of the problem of human trafficking in the context of FCVs.<sup>6</sup> Heatley has stated to Parliament that the law dealing with FCVs is “entirely adequate.”<sup>7</sup>

The problem of human trafficking is not isolated to New Zealand but is an international one that is manifested in New Zealand in the context of the fishing industry. This chapter has shown that by the standards set internationally, New Zealand has made some progress in dealing with human trafficking. The adoption of some of the recommendations made would establish New Zealand as one of the pioneers in the area of anti-trafficking measures.

### **Limitations**

As with any research project, there are limitations to what could be achieved in the space of this thesis. To highlight the major ones:

- This thesis has only looked in depth into the commercial arrangement between the Oyang Corporation and Southern Storm Fishing. Evidence suggests that similar practices are going on onboard other vessels owned by different companies. Additional resources would have allowed an investigation of these other companies. This would have allowed for a more detailed picture of how these operations are carried out.
- It was not possible to find out the full details of the money trail after it leaves New Zealand. Knowing this may have implicated more parties, and given further weight to existing evidence against other parties.
- It has not been possible in the present research to conduct qualitative or quantitative studies with a representative sample of victims of human trafficking. Likewise it was not possible to conduct participant observation, or interviews with individuals still being victimised.

### **Postscript**

This issue is evolving rapidly, and progress has been made since the research for this thesis was completed. Recently, the government has been taking a more proactive approach to abuses on board FCVs, as demonstrated by a recent example in Timaru where MBIE investigators raided a fishing vessel completely unprompted by advocacy groups.<sup>8</sup>

Internationally, changes are being made that may have an impact on the operation of Korean vessels in New Zealand waters. Korea has always held tier one status in the TIP reports,

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<sup>6</sup> M Field “untitled” 8 April 2011 <[www.michaelfield.org](http://www.michaelfield.org)>.

<sup>7</sup> (5 April 2011) 671 NZPD 17660.

<sup>8</sup> M Field “Fishing Boat Crew Abuse Investigated” Stuff.co.nz (online ed) 5 February 2013.

however it has recently been dropped to the lowest grade in response to the trafficking of individuals into New Zealand waters.<sup>9</sup>

In New Zealand, one of the companies that has been implicated in human trafficking claims, Sanford Fisheries, has admitted the underpayment of nearly 100 Indonesian fishermen on board the FCVs it has chartered over several years. The company admits only to “missed counting” as the reason for underpaying crew by almost \$885,000 NZD.<sup>10</sup>

As the Minister of Immigration wrote in a letter responding to an Official Information Act request, “the more readily instances of trafficking can be brought to light ... the more we will be able to demonstrate that New Zealand proactively detects and investigates any suspicious activities”.<sup>11</sup> Although the government is still reluctant to officially label victims as such, the latest developments in this area suggest that perhaps the time is not far off until this is done.

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<sup>9</sup> “Korean Forced Labour ‘Problem’ of Trafficking Downgrade a ‘Warning’” Naver.com (online ed) 17 February 2013 (Translation by google.com).

<sup>10</sup> M Field “Fishing Company Admits Underpaying Foreign Crew” Stuff.co.nz (online ed) 17 February 2013.

<sup>11</sup> N Guy “response to request” (27 October 2012) (Obtained under Official Information Act 1982 Request to Immigration New Zealand).

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#### **13.6. Workshops**

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