

# CONFRONTING THE CHALLENGE OF HUMAN TRAFFICKING FOR FORCED LABOUR IN THE PACIFIC: SOME THOUGHTS FROM NEW ZEALAND

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## I. INTRODUCTION

Over the past several years, horror stories of abuses suffered by fishermen working on board foreign-owned fishing vessels in New Zealand's exclusive economic zone (EEZ) have found their way into the media both in New Zealand and internationally.<sup>1</sup>

Despite this ongoing and high-level<sup>2</sup> attention on New Zealand, very little reliable information is available regarding human trafficking for forced labour in the wider Pacific region. By drawing on both the experience of New Zealand in this area and what is considered to be best practice internationally, this note seeks to provide some insight into what may be the most appropriate methods for responding to these issues as they arise in the Pacific.

## II. BACKGROUND TO ALLEGATIONS OF FORCED LABOUR IN NEW ZEALAND'S FISHING INDUSTRY

For some time now there have been high profile allegations of human trafficking in New Zealand. Of particular note are the annual reports produced by the American Department of State on Trafficking in Persons, which attempt to summarise the trafficking situation in every country in the world.<sup>3</sup>

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1 See Benjamin Skinner "The Fishing Industry's Cruellest Catch" *Businessweek* (online ed, 23 February 2012); Michael Field "Slave Fishing in New Zealand: The File" <[www.michaelfield.org](http://www.michaelfield.org)>; 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)>; "Korean Forced Labour 'Problem' of Trafficking Downgrade a 'Warning'" <[news.naver.com](http://news.naver.com)> (online ed, 17 February 2013) (translation by google.com).

2 For example, see the Trafficking in Persons Report [TIP], produced annually by the US Department of State. This report grades countries according to three tiers. A country classed as Tier 3 may be subject to sanctions. See US Department of State "Tier Placements" <[www.state.gov](http://www.state.gov)>.

3 The TIP report is created on the basis of the definition of human trafficking that is used in the Trafficking Victims Protection Act 2000 (USA) 22 USC § 7101 [TVPA]. This definition is materially similar to the definition adopted by the United Nations, discussed below. The TIP report is the most comprehensive of the international reports relating to human trafficking, however there are others that also state that New Zealand has human trafficking taking place within its borders. See also *Global Report on Trafficking* (UNODC, Vienna, 2009); 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) and Pacific Immigration Directors Conference *People Smuggling, Human Trafficking and Illegal Migration in the Pacific: A Regional Perspective: January to December 2008* (November 2009) (restricted document, on file with the author).

Although this report has its own set of problems,<sup>4</sup> it is useful in terms of providing an external viewpoint to the New Zealand context. New Zealand has been included in these reports since 2004 with allegations of trafficking for the purpose of sex work. However, only in the 2012 report has the issue of human trafficking for forced labour been recognised.

This high-level recognition of the problems draws from stories of human rights abuses at sea that have emerged over the past several years. The following section details some examples of these stories.

### A. A History of Abuse

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>5</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>6</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>7</sup>

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>8</sup>

Problems with foreign chartered vessels (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>9</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

4 See *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).

5 Jennifer Devlin “Modern Day Slavery: Employment conditions for Foreign Fishing Crews in New Zealand Waters” (2009) 23(1) *A & NZ Mar LJ* 82 at 82.

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

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

8 Christina Stringer, Glenn Simmons and Daren 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 14. See also *Advocates for Public Interest Law*, above n 1.

9 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.

were forced to “massage”<sup>10</sup> 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>11</sup>

In February 2012, a major piece of investigative journalism was published in Bloomberg Businessweek. The report by Ben Skinner contained in depth interviews with fishermen who had worked on FCVs in New Zealand waters.<sup>12</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>13</sup> was at first decent compared to the *Dong Won 519*, another charter vessel operating in New Zealand’s waters.<sup>14</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>15</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 fees had been taken from their pay by agents, the crew were earning only \$1 NZD per hour.<sup>16</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>17</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 for police interviews, but were not given proper food, clothes or money. When interviewed, crew members stated that they were “starving”.<sup>18</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>19</sup>

10 Michael Field “Striking Fishermen Deported Penniless” *Sunday Star Times* (online ed, 18 September 2011).

11 Michael Field “Striking Fishermen Deported Penniless” *Sunday Star Times* (online ed, 18 September 2011).

12 Skinner, above n 1.

13 Owned by Taejin Fisheries Ltd (Korea), and chartered by UFL Charters Ltd (New Zealand).

14 Owned by Dong Won Fisheries Co Ltd (Korea) and chartered by Sanford Ltd (New Zealand).

15 Skinner, above, n 1, at 1.

16 Skinner, above n 1, at 1.

17 This case has recently been settled, with the final details being worked out at the time of writing.

18 Michael Field “Crying Captain Went Down With Ship” (undated) <[www.michaelfield.org](http://www.michaelfield.org)>.

19 Michael Field “Untitled” (undated) <[www.michaelfield.org](http://www.michaelfield.org)>.

### *B. The Offence of Human Trafficking at International Law*

Having briefly covered the factual background through an overview of what has taken place in New Zealand's fishing industry, I will now look at the elements of the crime of human trafficking as defined by the United Nations. The conclusion will be reached that on the facts, the elements of the offence of human trafficking appear to have been met.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>20</sup> is highly significant as it represents the first major attempt by the international community to use the mechanisms of international law to combat transnational crime.<sup>21</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>22</sup> the main push came from the perceived sovereignty and security issues posed by human trafficking and migrant smuggling to wealthy states.<sup>23</sup> The definition that was arrived at is reproduced in full as follows:<sup>24</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.
- (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.

20 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].

21 Anne Gallagher "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: a Preliminary Analysis" (2001) 23 Hum Rts Q 975 at 976.

22 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 Anne Gallagher "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway" (2009) 49 VJIL 789.

23 Gallagher, above n 21, at 976.

24 Trafficking Protocol, art 3.

This definition contains three separate elements. The first relates to an action: “recruitment, transportation, transfer, harbouring or receipt of persons.”<sup>25</sup> The second relates to the means used to undertake that action:<sup>26</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>27</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.

Under this definition, 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>28</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>29</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 when they are undertaken in a particular way (the means), with the intention to exploit (the purpose), and with the correct *mens rea*.<sup>30</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>31</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>32</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>33</sup>

25 At art 3(a).

26 At art 3(a).

27 At art 3(a).

28 Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) at 42.

29 At 42.

30 Anne Gallagher *The International Law of Human Trafficking* (Cambridge University Press, Cambridge, 2010) at 28-29.

31 At 29.

32 At 30.

33 At 31.

Sub-paragraph (b) of Article 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.

The implication of this is that Article 3 has a wide scope that has the potential to catch all aspects of an abusive commercial fishing operation. The officers on board a vessel will not be able to rely on the argument that they were simply following instructions, but will be liable for the offence of human trafficking. It will also not be a defence to state that a crew member agreed to work under abusive conditions through signing an employment contract.

#### 1. Fitting the Facts to the Offence

Conceivably, there are two key means by which the facts as described above can be said to fulfil the elements of the crime of human trafficking as defined by the Trafficking Protocol.

In the first scenario, the “means” 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 “action” element.

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 – thereby fulfilling the “means” element – into working under exploitative conditions on board the vessel under threat of deportation and black-listing. This completes the “action” element.

In both scenarios, the purpose element is inferred from the lack of payment and abusive working conditions suffered by the victims.

In the absence of a prosecution for human trafficking<sup>34</sup> where a court could consider how best to fit the facts to the elements of the offence, these are based on conjecture. Nonetheless, it is important to present these options in order to show that such a conclusion can be logically reached.

### III. A SUMMARY OF CURRENT KNOWLEDGE ABOUT HUMAN TRAFFICKING FOR FORCED LABOUR IN THE PACIFIC

At present, very little is known about human trafficking for forced labour in the Pacific. Research suggests that a significant number of Pacific Island nations are typified by “weak and underdeveloped governance structures,

34 Until recently, the New Zealand government has refused to entertain claims of human trafficking. The Police have said it is “nothing more than workplace bullying”, M Burgess “response to request” (11 October 2011) (Obtained under Official Information Act 1982 Request to New Zealand Police). More recently, it has emerged that the New Zealand government has in fact investigated a fishing company, although it was unable to substantiate the allegations. S Stuart “response to request” (15 August 2013) (Obtained under Official Information Act 1982 Request to Ministry of Business, Innovation and Employment).

corruption and a lack of law enforcement capacity”.<sup>35</sup> The implications of this are that for sophisticated and mobile international fishing operations, it is very straightforward to simply move from one jurisdiction into another. Pacific Island nations have large exclusive economic zones (EEZs) that can be exploited for fish.<sup>36</sup> The problem is potentially made worse by the economic vulnerability that many Pacific Island nations face. As with the Indonesian fishers that are exploited for their labour, Pacific Islanders are vulnerable to this form of exploitation.

There are a number of reports that give rise to concerns that practices similar to those that have taken place in New Zealand’s waters are occurring in the Pacific. In 2001, the Pacific Islands Report published a brief statement noting that four Asian fishermen were being questioned after it was discovered that a man’s body had been kept in the fish freezer on board their boat for two months.<sup>37</sup>

The most recent US Department of State Trafficking in Persons Report<sup>38</sup> makes several comments relating to forced labour in the Pacific. In particular, Fiji is noted as being a transit hub for victims of trafficking for forced labour in the Pacific region. Andreas Schloenhardt’s 2002 analysis of migrant trafficking in the Asia Pacific also highlights Fiji, as well as New Caledonia as being hotspots for human trafficking.<sup>39</sup> The potential for the illegal smuggling of groups of people left homeless by the effects of climate change, especially sea level rise, is also a prospective risk for the South Pacific region.<sup>40</sup>

A 2009 report published by the Pacific Immigration Directors Conference summarises the levels of officially recognised instances of human trafficking in the Pacific, with the general trend being for an overall increase in the numbers of people trafficked over the last few years. Of course, this may reflect simply an increasing awareness of the problem, and not necessarily an increase in trafficking.<sup>41</sup>

Writing in 2010, a fisheries observer working in the Pacific region reported receiving a letter from a fisherman, who was working under conditions that were very similar to those described above.<sup>42</sup> The letter notes the isolated work environment – far from any official oversight.<sup>43</sup> The author of the letter uses the term “slavery” to describe how they were treated.<sup>44</sup>

35 Robin Warner “Joining Forces to Combat Crime in the Maritime Domain: Cooperative Maritime Surveillance and Enforcement in the South Pacific Region” (2008) 8 NZ Armed F LR 1 at 2.

36 These are in the range of millions of square kilometres. See < [www.seaaroundus.org](http://www.seaaroundus.org)>.

37 Pacific Islands Report “Fiji: Dead Fisherman Stored With Fish For Two Months”. <<http://pidp.org/archive/2001/November/11-21-19.htm>>.

38 *2013 Trafficking in Persons Report* (US Department of State, June 2013).

39 Andreas Scholtenhardt *Organised Crime and Migrant Trafficking: Australia and the Asia Pacific* (Australian Institute of Criminology Research and Public Policy Series No 44, Australian Institute of Criminology, Canberra, 2002).

40 Warner, above n 35, at 5.

41 See Pacific Immigration Directors Conference, above n 3.

42 Peter Sharples, Secretariat of the Pacific Community (2010) 133 *SPC Newsletter* 27.

43 At 27.

44 At 27.

Most recently, it has emerged that an Indonesian fisherman working on board a Japanese vessel in the Pacific was confined to a bathroom for several days. When the door was reopened, the man was dead.<sup>45</sup>

#### IV. AN OVERVIEW OF INTERNATIONAL BEST PRACTICE

Drawing on both established international principles of best practice, and practical lessons learned from New Zealand's experience with human trafficking at sea, the following section briefly outlines what is considered to be the best way to deal with the trafficking problem. The key elements of this are that:

- Trafficking should be criminalised in all its manifestations.
- 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>46</sup>

Overall, these general principles point to the need for a well-balanced criminal justice approach to human trafficking. Traditionally, the literature on human trafficking breaks discussion of responses to human trafficking into three "P's": Protection, Prevention and Prosecution.<sup>47</sup> The following is structured along these lines.

##### *A. Protection*

#### 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>48</sup> In the absence of formal identification, victims will be precluded from seeking the remedies available to them. In

45 Nasik Swami "Man Dies in Ship Lock-Up" *Fiji Times* (online ed, 29 August 2013) < www.fijitimes.com >.

46 These principles are drawn from Anne Gallagher and Paul Holmes "Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line" (2008) 18 (3) *Intl Criminal Justice Review* 318 at 320. See also Fiona David "Prosecuting Trafficking in Persons: Known Issues, Emerging Responses" (2008) 358 *Trends and Issues in Crime and Criminal Justice* 1. In the context of the fishing industry, status-related offences could include offences such as dumping and high-grading.

47 The New Zealand Government also adopts this approach. See *Plan of Action to Prevent People Trafficking* (Department of Labour, Wellington, 2009) [NZ Plan of Action] at 14.

48 or more on this obligation, see Gallagher, above n 30, at 282.

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>49</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>50</sup>

The identification process should recognise that victims have been through a traumatic experience and deserve to be treated with respect. Often non-governmental organisations (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>51</sup>

Despite the risk to victims of trafficking of revictimisation, many states will repatriate victims to their home countries.<sup>52</sup> 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>53</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 6 and 7 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>54</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>55</sup>

49 Heather Clawson, Nicole Dutch and Megan 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.

50 Gallagher and Holmes, above n 45, at 330.

51 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.

52 Boister, above n 28, at 44; OECD “Trafficking in Persons as a Human Rights Issue” (June 2008) <[www.oecd.org](http://www.oecd.org)>; A Jobe “The Causes and Consequences of Re-trafficking: Evidence from the IOM Human Trafficking Database” International Organisation for Migration, Switzerland, 2010.

53 Jessica Rodger “Defining the Parameters of the Non-Refoulement Principle” (LLM Thesis, Victoria University of Wellington, 2001) at 2-3.

54 Immigration Act 2009, s 131(1).

55 Udaya Jayasinghe and Sasha Baglay “Protecting Victims of Human Trafficking Within a ‘Non-Refoulement’ Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?” (2011) 23 (3) *IJRL* 489 at 489.

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.<sup>56</sup> 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. Pacific states should endeavour to rapidly and accurately give formal identification to those suspected of being victims of human trafficking.

## 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. Research suggests that there is a correlation between victims acting as witnesses and successful prosecutions.<sup>57</sup> 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>58</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>59</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>60</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. By way of comparison, the process for a victim of rape who testifies in a trial in New Zealand involves significantly more support.<sup>61</sup> According to convention, the victim is deliberately kept separate from the accused;<sup>62</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>63</sup> These protections have not been explicitly extended to victims of human trafficking in New Zealand. It is suggested that Pacific countries consider adopting these measures in order to properly protect the interests of victims.

56 Thomas Harré “Human Trafficking for Forced Labour at Sea: An Assessment of New Zealand’s Response” (LLM Thesis, University of Canterbury, 2013) at 99.

57 David, above n 45, at 3.

58 At 3.

59 United Nations Office on Drugs and Crime [UNODC] *Toolkit to Combat Trafficking in Persons* (UNODC, Vienna, 2008) at 87-88.

60 Gallagher and Holmes, above n 45, at 339.

61 This has consistently been used as an example of an offence of comparative seriousness by the authors of the TIP report.

62 Rape Prevention Education “Going to Court” <<http://rpe.co.nz>>.

63 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.

## *B. Prevention*

### 1. Government Accountability

Without effective mechanisms for ensuring the accountability of governments, instances of human trafficking are likely to continue to occur relatively unchecked. There are a number of responsibilities placed on governments by international law requiring them to take positive steps to protect individuals from human trafficking.<sup>64</sup> Unfortunately, in the context of New Zealand, the New Zealand government has largely denied that the problem of human trafficking exists within New Zealand's territory.<sup>65</sup> 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. As noted above, there are problems associated with weak governance in the Pacific region.<sup>66</sup> In order to implement this aspect of best practice, it will be important for this issue to be addressed throughout the Pacific.

### 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>67</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.<sup>68</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>69</sup>

64 A discussion of these obligations is beyond the scope of this note. See generally the comprehensive work on this topic by Gallagher, above n 30.

65 "US State Dept Human Trafficking Report Misleading" <[www.scoop.co.nz](http://www.scoop.co.nz)> (online ed, 17 June 2004); "Goff Says Report Wrong [sic]" Radio New Zealand Newswire (16 June 2004); "NZ Named in Trafficking Report for the First Time" Radio New Zealand Newswire (16 June 2004); Department of Labour "Immigration NZ Raising Awareness of Possible People Trafficking" (press release, 26 October 2010). 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).

66 See Warner, above n 35.

67 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) at 181. See also generally Janie Chuang "Beyond a Snapshot: Preventing Human Trafficking in the Global Economy" (2006) 13 (1) *Ind J Global Legal Studies* 137.

68 Gallagher and Holmes, above n 45, at 336.

69 *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases* (Asia Regional Trafficking in Persons Project, August 2011) at 20.

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>70</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>71</sup> Through the Bali Process,<sup>72</sup> the New Zealand government works to strengthen networks aiming to promote greater regional cooperation to combat human trafficking.<sup>73</sup> Pacific states should continue to work within these existing structures to build capacity to counter human trafficking.

### *C. 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.

#### 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>74</sup> This goal is one of the primary aims of both the UN Convention on Transnational Organised Crime<sup>75</sup> and the UN Trafficking Protocol.<sup>76</sup> One of the most important aspects of this principle relates to the sharing of information internationally between relevant investigating authorities.

In light of what is considered to be best practice,<sup>77</sup> two key recommendations can be made for Pacific states. Firstly, states 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 the Pacific region. Secondly, police forces within the Pacific region should work closely with their counterparts in these source countries to facilitate information sharing.

70 NZ Plan of Action, above n 46, at 13.

71 NZ Plan of Action, above, n 46, at 13.

72 "About the Bali Process" The Bali Process <[www.baliprocess.net](http://www.baliprocess.net)>.

73 *Consultation on a Plan of Action to Prevent People Trafficking* (Interagency Working Group on People Trafficking, May 2008) at 6.

74 *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases*, above n 8, at 20.

75 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.

76 Trafficking Protocol, above n 20, art 2.

77 See Gallagher and Holmes, above n 45, at 335.

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>78</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.

Victims of trafficking can take legal action against their traffickers through the criminal, equitable 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. Assessing the legal frameworks of Pacific states is beyond the scope of this note, but would make a worthwhile subject for further research.

3. A General Law Enforcement Capacity to Respond Effectively to Trafficking Cases

This criterion relates to the criteria below 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>79</sup> Consequently, it is submitted that in order to increase the capacity of law enforcement officials in the Pacific to adequately recognise and report instances of human trafficking, additional training should be carried out.

78 At 322. See also United Nations Office on Drugs and Crime [UNODC] *Toolkit to Combat Trafficking in Persons* (UNODC, Vienna, 2008) at 31.

79 Gallagher and Holmes, above, n 45, at 329.

#### 4. 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>80</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>81</sup> In theory, it is a hub from which a co-ordinated approach to undertaking trafficking operations can be launched.<sup>82</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>83</sup>

Unfortunately, given the limited resources available in the Pacific, it is not likely that specialised anti trafficking policing units can be created. Consequently, it would appear that the most effective way by which law enforcement capacity can be expanded is through regional and international cooperation and partnership building.

#### 5. 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>84</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>85</sup> It is suggested that providing training to Pacific-based prosecutors on human trafficking and other related offences would minimise the risk of these errors occurring in the future.

80 At 324.

81 New Zealand Plan of Action, above n 46, at 11.

82 Ministry of Justice "Police, New Zealand: NIC" <www.justice.govt.nz>.

83 Interview with Liam Clinton, Detective Senior Sergeant, holds Human Trafficking Portfolio at National Headquarters, New Zealand Police (the Author, Christchurch, 4 March 2013).

84 Gallagher and Holmes, above n 45, at 327.

85 Kurt Bayer "Police Blunder in Case Against Alleged People Smugglers" *New Zealand Herald* (online ed, 25 October 2012). See also David 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 procedure is the same for human trafficking, the point remains the same.

## V. CONCLUSION

As can be seen even through this brief overview, there is a degree of overlap between the areas outlined above. This overlap suggests that the “three P” framework must be advanced as a whole. Focussing simply on one of the three categories will not constitute an effective response to the issues posed by human trafficking for forced labour at sea.

At present, the research that has been conducted by New Zealand academics and advocacy groups represents the most leading-edge understanding of the human rights issues created by unscrupulous commercial fishing operators. Those working on this issue in the wider Pacific region should take lessons from where New Zealand has succeeded – and struggled – with these problems.

Certainly, it is clear that further research in this area is essential. The facts relating to human trafficking for forced labour in the Pacific are so far only anecdotal, and an in-depth, methodologically sound study will be essential if the facts are to be properly uncovered.