

## A CRITIQUE OF INTERNATIONAL AND SINGAPORE LEGAL TREATMENTS OF TRAFFICKING IN PERSONS

RONALD J.J. WONG\*

The author discusses the problem of trafficking in persons, its presence in Singapore and critically analyses relevant Singapore legislation with reference to several thematic critiques on international, supranational and national legal treatments of the problem. An omnibus anti-trafficking legislation for Singapore that takes into account some of those critiques will be proposed.

### I. INTRODUCTION

Trafficking in persons (“TIP”) has been said to be modern day slavery,<sup>1</sup> often involving transnational organised crime groups.<sup>2</sup> With the explosion of globalisation, improved technology and transportation systems, the age-old practice of slavery has transformed and burst into new proportions—trafficking is a global problem. Unfortunately, this problem of global proportions appears to be alive in Singapore. This was highlighted recently in the news when various men were charged for sex with an underage girl.<sup>3</sup> The U.S. Department of State’s TIP Reports state that Singapore

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\* LL.B., National University of Singapore. The author is grateful for the valuable feedback from various persons, including Jacqueline Tan, Dr. Sallie Yea, John Gee, Timothy Weerasekera and an anonymous reviewer.

<sup>1</sup> M. Cherif Bassiouni, “A Global Perspective on Trafficking” in International Human Rights Law Institute, *In Modern Bondage: Sex Trafficking in the Americas* (United States of America: DePaul University College of Law, 2002) 118 at 122. It has been estimated that 800,000 persons are trafficked across borders annually, with 80% of them female and 50% minors (U.S., U.S. Department of State, *Trafficking in Persons Report June 2005* (2005) at 6 [*US TIP Report 2005*]).

<sup>2</sup> Dina Francesca Haynes, “Human Trafficking and Migration” in Alice Bullard, ed., *Human Rights in Crisis* (Hampshire: Ashgate, 2008) 111.

<sup>3</sup> “Three men jailed in vice ring case involving underage girl” *Channel NewsAsia* (11 September 2013), online: xinmsn <<http://news.xin.msn.com/en/singapore/three-men-jailed-in-vice-ring-case-involving-underage-girl>> [Channel NewsAsia, “Three men jailed”]; “Pimp who forced minor into prostitution disputes facts” *Channel NewsAsia* (2 October 2013), online: xinmsn <<http://news.xin.msn.com/en/singapore/pimp-who-forced-minor-into-prostitution-disputes-facts>> [Channel NewsAsia, “Pimp disputes facts”].

is a destination country for TIP,<sup>4</sup> where:<sup>5</sup>

Many foreign workers face deception and fraud by recruiters about the ultimate nature of their employment or salary. Foreign workers also reported confiscation of their passports, restrictions on their movements, illegal withholding of their pay, threats of forced repatriation without pay, or physical or sexual abuse – all potential indicators of trafficking.

This paper will begin with a brief discussion on TIP (as defined in the *Palermo Protocol*,<sup>6</sup> i.e. including trafficking for labour-related and sex-related exploitation and the harvesting of organs) in practice and its likely presence in Singapore. In Part III, a thematic critique of existing international, supranational and national legal treatments of TIP will be offered. In Part IV, Singapore legislation possibly applicable to TIP will be critically analysed with reference to the same thematic critiques. It will be argued that Singapore should adopt certain relevant international legal standards, albeit calibrated to take into account the thematic critiques offered in this paper. Part V will conclude with a few legislative and policy proposals that seek to address some of the critiques offered in this paper.

## II. THE NARRATIVES OF TIP IN SINGAPORE

As noted, TIP was recently in the spotlight in Singapore news when various men were charged for sex with an underage girl.<sup>7</sup> The news reports on the case described how the underage girl's family was heavily in debt because of her father's medical bills; the girl was lured by false promises of employment only to find herself raped, detained and then exploited as a prostitute.<sup>8</sup> The trafficker further admitted to "giving the girl drugs on one occasion and having sex with her while she was still in a stupor. He also admitted to repeatedly asking her for sex and beating her if she did not comply".<sup>9</sup>

The above account of this sex trafficking victim is similar to that of many others who have passed through the shores of Singapore. Many women from Thailand, the Philippines, Sri Lanka, India and China are recruited in their home countries with offers of legitimate employment or promises of free holidays.<sup>10</sup> Once they arrive in Singapore, they are forced into prostitution. Their travel documents are confiscated and some are told that they would have to provide sex work until they can pay off the debt that they had supposedly accrued in respect of travel and agency fees, etc. Some

<sup>4</sup> U.S., U.S. Department of State, *Trafficking in Persons Report June 2011* (2011) at 319 [*US TIP Report 2011*]; U.S., U.S. Department of State, *Trafficking in Persons Report June 2010* (2010) at 292 [*US TIP Report 2010*]; *US TIP Report 2005*, *supra* note 1 at 194; U.S., U.S. Department of State, *Trafficking in Persons Report July 2001* (2001) at 66.

<sup>5</sup> *US TIP Report 2011*, *ibid.* at 319.

<sup>6</sup> See *infra* note 32.

<sup>7</sup> See Channel NewsAsia, "Three men jailed", *supra* note 3; Channel NewsAsia, "Pimp disputes facts", *supra* note 3.

<sup>8</sup> Channel NewsAsia, "Three men jailed", *ibid.*

<sup>9</sup> Channel NewsAsia, "Pimp disputes facts", *supra* note 3.

<sup>10</sup> *US TIP Report 2010*, *supra* note 4 at 292. See also Zakir Hussain, "19-year-olds nabbed for tricking minors into vice" *The Straits Times* (31 January 2012).

women may have originally entered Singapore with the intention of engaging in sex work but, on arrival, are subject to conditions manifestly more disadvantageous than had been represented to them.<sup>11</sup>

Some reports suggest that organised crime groups may be involved in trafficking women and even children into Singapore.<sup>12</sup> There have been accounts of foreign women and even young girls held in “forest brothels” located on public lands near migrant worker dormitories.<sup>13</sup> Singaporean men are also noted to be a source of demand for child sex tourism in Southeast Asia.<sup>14</sup>

Such trends are similar to those in other parts of the world, including Europe<sup>15</sup> and the United States,<sup>16</sup> where women from neighbouring countries or within the country are abducted, “bought” from family members, lured by deceptive offers of employment (in sex or other industries) and made false promises of marriage. Once they reach the country of destination, they are forced into sexual exploitation through threats, violence or debt bondage.<sup>17</sup> Their traffickers may exert control over them by threatening harm to their family and friends and by confiscating their identity papers and money.<sup>18</sup>

Labour trafficking shares similarities with sex trafficking. The main distinction is that ‘sex trafficking’ involves sex-related commercial exploitation whereas ‘labour trafficking’ involves non-sex related work. (Those who argue that sex work is a legitimate form of labour would argue that a distinction in the use of the terms, ‘sex’ and ‘labour’ trafficking is misconceived. For the purposes of the present paper, it would nonetheless be useful to rely on the traditional distinction, without delving into the ideological debates; this will be elaborated on further below.) Labour trafficking often involve debts incurred by a worker to pay an agent (often exorbitant amounts of money) to facilitate the transport of, and seeking of employment for, the worker.<sup>19</sup> When the worker is never able to release himself from the debt because of, *inter alia*, severe undervaluation of the work, arbitrary fines or penalties and unreasonable deductions from salary, it would amount to debt bondage. There may also be forced labour through involuntary servitude, where the victim is deceived into working in a foreign country (or even on board ships in international waters); when the victim arrives in such a country, they are forced to work in inhumane conditions, without any way to escape.<sup>20</sup> Another scenario, which some would argue does not

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<sup>11</sup> *US TIP Report 2010, ibid.* at 292; *US TIP Report 2011, supra* note 4 at 320.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* Some of these accounts have been orally conveyed to the author.

<sup>14</sup> *US TIP Report 2010, ibid.* at 292.

<sup>15</sup> Cindy Braspenning, “Human Trafficking in the Netherlands: The Protection of and Assistance to Victims in Light of Domestic and International Law and Policy” (2006) 1 *Intercultural Human Rights Law Review* 329 at 332, 333.

<sup>16</sup> Michelle Crawford Rickert, “Through the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level” (2010) 4 *Liberty University Law Review* 211 at 223, 224; Derek Pennartz, “The Irony of the Land of the Free: How Texas is Cleaning up its Human Trafficking Problem” (2011) 12 *Texas Tech Administrative Law Journal* 367.

<sup>17</sup> Alexandra Amiel, “Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation” (2006) 12 *Buff. H.R.L. Rev.* 5 at 9.

<sup>18</sup> *Ibid.*

<sup>19</sup> Rickert, *supra* note 16 at 223, 224.

<sup>20</sup> *Ibid.* at 224, 225. See Joshua Chiang, “No country for fishermen” *The Online Citizen* (9 January 2012), online: *The Online Citizen* <<http://www.theonlinecitizen.com/2012/01/no-country-for-fishermen/>>.

constitute labour trafficking, is where a worker finds himself working in conditions that are significantly different from what had been represented to him; this may be in respect of the nature of work (including the absence of work at all), working or living conditions or remuneration.<sup>21</sup> The U.S. Department of State's *TIP Report 2011*, which was based on research reports furnished by Singapore Non-Governmental Organisations ("NGOs"), notes the occurrence of the above scenarios in Singapore.<sup>22</sup>

Despite many accounts of sex and labour trafficking victims reported by various NGOs and foreign embassies, the number of reported cases documented and investigated by the Government is disproportionately low. Between 2009 and 2010, NGOs and foreign embassies identified 255 sex and labour trafficking victims; in contrast, the Singapore Government only reported 3 in those years.<sup>23</sup> In 2011, the NGOs and foreign embassies identified 146 cases; the Singapore Government reported 81.<sup>24</sup> It is significant that the huge jump in reported numbers by the Government occurred in 2011, *i.e.* the year after the U.S. Department of State's *TIP Report 2010* downgraded Singapore from "Tier 2" to "Tier 2 Watchlist".<sup>25</sup> Shortly after the 2010 report, the Singapore Government established the Inter-Agency Taskforce on TIP in 2010. In 2012, the Taskforce released a *National Plan of Action Against Trafficking in Persons*<sup>26</sup> which focuses on capacity-building on prevention, prosecution, protection and partnerships. Singapore has since been reverted to "Tier 2" in the U.S. Department of State *TIP Reports*. However, to date, there have been no estimated figures, official or otherwise, as to the full extent of TIP in Singapore.<sup>27</sup>

Several themes arise from the narratives of TIP victims in Singapore alluded to above. These themes form the basis of a critique of the existing legal responses to TIP in the next section.

<sup>21</sup> This is based on accounts from some Non-Governmental Organisations that the author has been engaged with.

<sup>22</sup> *US TIP Report 2011*, *supra* note 4 at 319, 320. See also Sallie Yea, "Troubled Waters: Trafficking of Filipino Men into the Long Haul Fishing Industry through Singapore" *Transient Workers Count Too* (December 2012), online: TWC2 <[http://twc2.org.sg/wp-content/uploads/2013/01/Troubled\\_waters\\_sallie\\_yea.pdf](http://twc2.org.sg/wp-content/uploads/2013/01/Troubled_waters_sallie_yea.pdf)>; Humanitarian Organisation for Migration Economics, "FDW Trafficking Research Report" (December 2012), online: H.O.M.E. <<http://www.home.org.sg/research/downloads/2012-FDW-Trafficking-Research-Report.pdf>>; Humanitarian Organisation for Migration Economics & Transient Workers Count Too, "Justice Delayed, Justice Denied: The Experiences of Migrant Workers in Singapore" (2010), online: TWC2 <<http://twc2.org.sg/wp-content/uploads/2013/09/Justice-Delayed-Justice-Denied-ver2.pdf>>; Humanitarian Organisation for Migration Economics, "The Exploitation of Migrant Chinese Construction Workers In Singapore" (2011), online: H.O.M.E. <<http://www.home.org.sg/research/downloads/2011-Exploitation-of-Migrant-Chinese-Construction-Workers-Singapore.pdf>>.

<sup>23</sup> U.S., U.S. Department of State, *Trafficking in Persons Report June 2009* at 257; *US TIP Report 2010*, *supra* note 4 at 293, 294.

<sup>24</sup> *US TIP Report 2011*, *supra* note 4 at 321.

<sup>25</sup> *US TIP Report 2010*, *supra* note 4 at 292.

<sup>26</sup> Sing., Singapore Inter-Agency Taskforce on Trafficking in Persons, *National Plan of Action Against Trafficking in Persons 2012-2015* (21 March 2012), online: Ministry of Manpower <[http://www.mom.gov.sg/Documents/tip/tipbooklet\\_080812.pdf](http://www.mom.gov.sg/Documents/tip/tipbooklet_080812.pdf)> [*National Plan of Action*].

<sup>27</sup> An empirical study on sex trafficking in Singapore has recently been conducted by Dr. Sallie Yea: Toh Yong Chuan & Janice Tai, "Study sheds light on sex trafficking in Singapore" *The Straits Times* (10 February 2014).

### III. PROBLEMS WITH THE EXISTING LEGAL TREATMENT

TIP has received a substantial amount of legal treatment at the international, regional and national levels.<sup>28</sup> Although there appears to be a proliferation and plethora of legal responses undertaken to address TIP, it shall be argued that much of these are inadequate and flawed. In this section, a four-fold critique of the existing international, supranational and national legal responses to TIP is offered: (i) definitional uncertainty; (ii) an overemphasis on law enforcement and crime control rather than a victim-centred, victim-welfare approach; (iii) contested images and ideologies; and (iv) a lack of focus on demand-side factors.

#### A. *Definitional Uncertainty*

As alluded to in the preceding section, it remains uncertain what exactly amounts to TIP. Such uncertainty has resulted in differing stances taken in national legislation and therefore difficulties in law enforcement, victim identification, monitoring and reporting, and international cooperation.<sup>29</sup> Definitional uncertainty in international legal instruments also results in states being unable to ascertain the precise nature of their obligations under the same;<sup>30</sup> states would therefore be disinclined to ratify such instruments.

The key contemporary international legal instrument on TIP is the *United Nations Convention against Transnational Organized Crime*<sup>31</sup> with its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*.<sup>32</sup> Indeed, various international, regional and national legal bodies and instruments have since adopted the definitions of TIP provided in the *Palermo Protocol*.<sup>33</sup> Notably, the Singapore Taskforce on TIP has also adopted the *Palermo Protocol* definition in its 2012 *National Plan of Action*.<sup>34</sup>

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<sup>28</sup> For a general survey of academic treatment on the issue, see Mohamed Y. Mattar, "Trafficking in Persons: An Annotated Legal Bibliography" (2004) 96 Law Libr. J. 669.

<sup>29</sup> Kauko Aromaa, "Trafficking in Human Beings: Uniform Definitions for Better Measuring and for Effective Counter-Measures" in Ernesto U. Savona & Sonia Stefanizzi, eds., *Measuring Human Trafficking: Complexities and Pitfalls* (New York: Springer, 2007) 13.

<sup>30</sup> Anne T. Gallagher, *The International Law of Human Trafficking* (United States of America: Cambridge University Press, 2012) at 64 [Gallagher, *International Law of Human Trafficking*].

<sup>31</sup> 12 December 2000, 2225 U.N.T.S. 209 (entered into force 29 September 2003).

<sup>32</sup> 12 December 2000, 2237 U.N.T.S. 319 (entered into force 25 December 2003) [*Palermo Protocol*].

<sup>33</sup> See e.g., the *Council of Europe Convention on Action against Trafficking in Human Beings*, 16 May 2005, Council of Europe Treaty Series No. 197 (entered into force 1 February 2008) [*Council of Europe Convention*]; EC, *Council Resolution of 20 October 2003 on initiatives to combat trafficking in human beings, in particular women*, [2003] O.J. C 260/3; *Memorandum of Understanding Between the Government of the Lao People's Democratic Republic and the Government of the Kingdom of Thailand on Cooperation to Combat Trafficking in Persons, Especially Women and Children*, 13 July 2005; *Agreement Between the Government of the Lao People's Democratic Republic and the Government of the Socialist Republic of Vietnam on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking*, 3 November 2010; *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Singapore*, UN CEDAWOR, 39th Sess., UN Doc. CEDAW/C/SGP/CO/3 (2007) at para. 22; *Trafficking and Smuggling of Persons Order, 2004* (No. S 82 of 2004, Brunei).

<sup>34</sup> *National Plan of Action*, *supra* note 26.

Article 3(a) of the *Palermo Protocol* defines TIP as being constituted by three elements—act, means and purpose.<sup>35</sup>

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons [*i.e. the act*], 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 [*i.e. the means*], for the purpose of exploitation [*i.e. the purpose*]. 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.

Article 3(b)-(d) then sets out several provisos to the definition of TIP:<sup>36</sup>

(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.

Underlying the definitional approach in art. 3 is the notion that nullified or the lack of consent is the cornerstone of TIP. The reason for this is the distinction that the drafters had intended to preserve between TIP and migrant smuggling.<sup>37</sup> Hence, the ‘means’ element in art. 3(a) requires consent-nullifying acts, and art. 3(b) expressly clarifies this rationale.<sup>38</sup> Although consent is such a crucial concept in the definition of TIP, it is unfortunate that the nature and extent of the consent in question is not clarified. It therefore gives rise to the following definitional issues.

First, do the means that nullify informed consent relate to the nature of the promised work that the consenter believes he is undertaking, the conditions of the same or both? Gallagher posits that the consent in question relates to the nature and/or conditions of promised work.<sup>39</sup> The United Nations Office on Drugs and Crime (“UNODC”) also takes the view that consent includes matters relating to conditions of work; however, it is not clear what scope or extent of conditions would suffice.<sup>40</sup> This uncertainty has practical implications and the possible spectrum of scenarios is very wide. For instance, one might intuitively agree that a person who had consented to sex work but was subsequently deprived of basic liberties such as

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<sup>35</sup> Article 3 of the *Palermo Protocol*, *supra* note 32.

<sup>36</sup> *Ibid.*

<sup>37</sup> Gallagher, *International Law of Human Trafficking*, *supra* note 30 at 25, 26, 31.

<sup>38</sup> *Ibid.* at 28.

<sup>39</sup> *Ibid.* at 31, 32.

<sup>40</sup> UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners: Module 1* (New York: United Nations, 2009) at 9 [UNODC, *Anti-Human Trafficking Manual*].

freedom of movement would be a TIP victim; it might not be so clear if the person had consented to sex work but was given only 10% of the revenue generated instead of 50% as promised.

Secondly, is the requisite nature of the coercion merely physical? If not, does psychological coercion or even “severe economic pressures” amount to coercion for the purposes of TIP?<sup>41</sup>

Thirdly, what does the “abuse of power or of a position of vulnerability” entail? Should the vulnerability in question relate to physical, financial, psychological, social and/or linguistic factors?<sup>42</sup> Should the vulnerability be viewed subjectively from the purported victim’s perspective or objectively? It is interesting to note that art. 2(1)(1) of the Taiwanese *Human Trafficking Prevention and Control Act* includes “drugs [and] hypnosis” as ‘means’ elements.<sup>43</sup> To what extent should one take into account the local socio-economic and cultural context? In this regard, it has been reported that human traffickers in African nations have turned to using witchcraft or “juju” to bind TIP victims who subjectively believe in the same.<sup>44</sup> Hence, s. 4(i) of the Ugandan *Prevention of Trafficking in Persons Act* expressly criminalises various acts done “for purposes of... any other act related to witchcraft”.<sup>45</sup> Another issue is whether the fact that a TIP victim might have committed an illegal act is in a position of vulnerability that suffices as an element in TIP. In several local cases that the author has come across, the victim did not initially start out as a trafficked person but came to Singapore on a visitor pass and worked illegally; the victim overstays, thereby becoming vulnerable to criminal liability for her overstaying and illegal work and thus vulnerable to abuse by her employer into accepting conditions of work (often severe) which she would otherwise not have agreed to.

Fourthly, what is the nature of the ‘purpose’ element? The phrase, “for the purpose of”, effectively renders this element a ‘*dolus specialis*’ *mens rea* requirement and therefore does not actually require the successful execution of the intended purpose.<sup>46</sup> What then is the level of *mens rea* required? The UNODC has made it clear that these issues are left to the individual state to determine.<sup>47</sup> The respective states should

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<sup>41</sup> Gallagher, *International Law of Human Trafficking*, *supra* note 30 at 32.

<sup>42</sup> International Labour Office, “Operational indicators of trafficking in human beings: Results from a Delphi survey implemented by the ILO and the European Commission” (September 2009), online: International Labour Organization <[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_105023.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf)> [ILO, *Operational Indicators*].

<sup>43</sup> Article 2(1) of the *Human Trafficking Prevention and Control Act* (No. 09800019281 of 23 January 2009, Taiwan) [*Taiwan HTPCA*].

<sup>44</sup> See *e.g.*, Elizabeth Willmott Harrop, “A Bewitching Economy: Witchcraft and Human Trafficking” *Think Africa Press* (17 September 2012), online: Think Africa Press <<http://thinkafricapress.com/society/african-witchcraft-contemporary-slavery-human-trafficking-nigeria>>; LexisNexis International & Foreign Law Center, “Nigerian Sex Trafficking, Witchcraft, and the Rule of Law” *LexisNexis Legal Newsroom* (27 November 2012), online: LexisNexis <<http://www.lexisnexis.com/legalnewsroom/international-law/b/issuesspotlight/archive/2012/11/27/nigeria-sex-trafficking-human-rights-rule-of-law.aspx>>.

<sup>45</sup> *Prevention of Trafficking in Persons Act* (Act 7 of 2009, Uganda).

<sup>46</sup> See UNODC, *Anti-Human Trafficking Manual*, *supra* note 40 at 4; UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto* (New York: United Nations, 2004) at 269.

<sup>47</sup> See UNODC, *Anti-Human Trafficking Manual*, *ibid.* at 6.

therefore determine whether there must be a specific intention in mind, *i.e.* if the perpetrator had intended specifically, *e.g.*, sexual exploitation and not any general form of exploitation. Alternatively, should ‘wilful blindness’ or ‘reason to believe’<sup>48</sup> suffice as the mental element?

Fifthly, what is ‘exploitation’? While art. 3(a) sets out, “at the minimum”, certain examples of exploitation, these concepts are not defined or explicated. Presumably, with respect to ‘forced labour’ or ‘slavery’ (the definition of ‘slavery’ is discussed further below), international law definitions of the same would apply in the absence of specific contrary definitions in the *Palermo Protocol*.<sup>49</sup> However, it is not clear what amounts to ‘sexual exploitation’, ‘practices similar to slavery’ or ‘servitude’.<sup>50</sup>

Should the notion of ‘forced labour’ be understood with reference to international law, the International Labour Office’s (“ILO”) instruments on this aspect are pertinent.<sup>51</sup> Generally, ‘forced labour’ has been defined to mean “all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily”.<sup>52</sup> It is significant that the threat of penalty required might also take the form “of a loss of rights or privileges’ such as a promotion, transfer, access to new employment, housing, etc” and might include “psychological coercion or economic compulsion”.<sup>53</sup>

The concept of ‘sexual exploitation’ is especially controversial because of the various lobby groups involved during the drafting of the *Palermo Protocol*, who adopted conflicting ideological positions (this will be discussed further below). Apart from the ideological contentions, the concept of ‘sexual exploitation’ could potentially import a vast spectrum of sex-related acts or purposes, including the provision of sexual acts *per se* (*i.e.* without any commercial benefits),<sup>54</sup> pimping, sexual grooming, production of pornography, dissemination of pornography, pornographic performances and forced marriages. In this regard, certain national and regional legislation have adopted pornography as a form of exploitation,<sup>55</sup> *e.g.*, the E.U.’s *Council Framework Decision of 19 July 2002 on Combating*

<sup>48</sup> *E.g.*, ss. 21(1)(a), 22(1) and 23 of Malaysia’s *Anti-Trafficking in Persons Act 2007* (Act No. 670 of 2007) adopt the mental elements of “reasonable grounds to believe” and “having reason to believe”.

<sup>49</sup> Gallagher, *International Law of Human Trafficking*, *supra* note 30 at 35; *cf.* Kadriye Bakirci, “Human trafficking and forced labour: A criticism of the International Labour Organisation” (2009) 16(2) *Journal of Financial Crime* 160.

<sup>50</sup> See the definition of “servitude” in the UNODC, *Model Law Against Trafficking in Persons* at 18, online: UNODC <[http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf)> [*UNODC Model Law*].

<sup>51</sup> See *e.g.*, International Labour Office, *Forced Labour and Human Trafficking: Casebook of Court Decisions* (Geneva: International Labour Office, 2009) [ILO, *Human Trafficking Casebook*].

<sup>52</sup> See art. 2 of the *Convention Concerning Forced or Compulsory Labour (ILO No. 29)*, 28 June 1930, 39 U.N.T.S. 55 (entered into force 1 May 1932).

<sup>53</sup> ILO, *Human Trafficking Casebook*, *supra* note 51 at 12.

<sup>54</sup> See *e.g.*, Cambodia’s *Law on Suppression of Human Trafficking and Sexual Exploitation* (Royal Kram No: NS/RKM/0208/005 of 2008) which includes “sexual aggression” as a form of exploitation [*Cambodia Human Trafficking Act*].

<sup>55</sup> See *e.g.*, s. 4(e) read with s. 3(h) and (j) of the Philippines’ *Anti-Trafficking in Persons Act of 2003* (Republic Act No. 9208, The Philippines), as amended by the *Expanded Anti-Trafficking in Persons Act of 2012* (Republic Act No. 10364, The Philippines) [*Philippines Anti-Trafficking Act*]; art. 10 of the *Cambodia Human Trafficking Act*, *ibid.*; the *UNODC Model Law*, *supra* note 50 at 19.



*Trafficking in Human Beings*,<sup>56</sup> which Gallagher argues was not the intent of the drafters.<sup>57</sup>

It should be noted that art. 3(a) merely sets out a minimum core of the scope of ‘exploitation’. States are entitled to include other forms of exploitation. In this respect, it is to be wondered how far respective states can broaden the scope of ‘exploitation’. For instance, s. 4 of the Thai *Anti-Trafficking in Persons Act* includes “causing another person to be a beggar” as a form of exploitation,<sup>58</sup> while art. 134 of the Laotian *Penal Law* defines as a form of exploitation, “anything that is against the fine traditions of the nation”.<sup>59</sup>

Sixthly, assuming that TIP is constituted *only* by the *actus reus* of the acts and means coupled with the *mens rea* of exploitation, should the exploitation *per se*, which is presumably objectionable, also be criminalised in national legislation? Is the exploitation only objectionable where there is nullified consent? What if the acts described as exploitation are already criminalised in a state’s legislation albeit that question of whether consent was given is disregarded? Further, what if a person consents to exploitation, *i.e.* none of the means within the meaning of art. 3(a) of the *Palermo Protocol* were present, but did not consent to the harsh, intolerable conditions that the person might suffer in his movement to the place where he would be exploited?

A related question would be whether the acts that are ancillary to, or facilitative of, acts amounting to TIP and/or acts promoting TIP should also be criminalised as measures to “prevent and combat” TIP.<sup>60</sup> Examples of such measures include the criminalisation of acts relating to dealing with travel, identity or other personal documents for the purposes of TIP.<sup>61</sup>

The *Palermo Protocol* is silent about many of the matters raised above, most of which were deliberately left as such. Individual states must therefore deliberate these issues, having regard to existing local legislation and the socio-political mores and ideological values within the specific local cultural milieu.

### B. Law Enforcement v. A Victim-Centred Paradigm

The second general critique of the existing legal framework, influenced by state governments, is that it tends towards a law-enforcement paradigm, concerned with criminalising traffickers,<sup>62</sup> “protecting borders, preventing unwanted migration and

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<sup>56</sup> EC, *Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings*, [2002] O.J. L 203/1 [2002 *Council Framework Decision*].

<sup>57</sup> Gallagher, *International Law of Human Trafficking*, *supra* note 30 at 50, 51; *cf.* Catharine A. MacKinnon, “Pornography as Trafficking” (2005) 26(4) *Mich. J. Int’l L.* 993 cited in Gallagher, *International Law of Human Trafficking*, *ibid.* at 50.

<sup>58</sup> B.E. 2551 (2008), Thailand.

<sup>59</sup> No. 12/NA of 2005, Lao People’s Democratic Republic [*Laos Penal Law*].

<sup>60</sup> Article 9(1)(a) of the *Palermo Protocol*, *supra* note 32.

<sup>61</sup> *E.g.*, s. 5 of the *Philippines Anti-Trafficking Act*, *supra* note 55.

<sup>62</sup> Also noted in Kay Warren, “The 2000 UN Human Trafficking Protocol: Rights, Enforcement, Vulnerabilities” in Mark Goodale & Sally Engle Merry, eds., *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007) 242 at 244, 249, 250, 254.

attacking organised crime”.<sup>63</sup> Such a law-enforcement, crime-control approach tends to sideline the interests of the victims.<sup>64</sup> Further, when the legal infrastructure is focused on crime-control, the statistics and information collected on the prevalence and nature of TIP in the country may be skewed and understated since it is generally difficult to obtain adequate quality evidence to prosecute and convict TIP perpetrators. Instead, if the prevalence of TIP is assessed by indicia relating to TIP victims, reporting and monitoring would be relatively more accurate.

It is indicative of the prioritisation of the law enforcement paradigm in a number of key legal instruments that many provisions addressing victim aftercare are framed aspirationally or instrumentally for law enforcement. For instance, art. 6 of the *Palermo Protocol* dealing with “assistance to and protection of victims” is peppered with limiting and exhortative phrases like “[i]n appropriate cases and to the extent possible”, “shall consider”, and “endeavour”; the U.S.’s *Victims of Trafficking and Violence Protection Act of 2000* allows T-visas to the victim only if she has been helpful, is helpful or is likely to be helpful in the investigation or prosecution of the traffickers.<sup>65</sup> The E.U.’s *2002 Council Framework Decision* provides no assistance or protection for victims (unless the victim is a child); neither does it provide for social or reintegration programs, temporary visas, asylum or repatriation.<sup>66</sup> In many relevant national legislation, victim-centred, victim-welfare provisions are altogether absent.<sup>67</sup> In some others, victim-oriented provisions are phrased in hortatory language without much specificity.<sup>68</sup> The law-enforcement approach can be especially oppressive for TIP victims because many of them are also ‘unlawfully’ present in the jurisdiction in question. The subjective perception of victims that they risk being prosecuted for unlawful entry or residence and other possible crimes would deter victims from seeking redress or offering assistance to the authorities. This would ultimately hinder efforts at combating TIP. Yet, it is unsurprising that some states avoid a victim-centred approach as it is likely that a victim-welfare approach would require states to invest more resources than a purely law enforcement approach. Further, some states might perceive a risk that victim-welfare policies would attract people from poorer states to be smuggled into the country and masquerade as TIP victims to enjoy the victim-welfare benefits. Hence, *e.g.*, §107(e) of the *US TVPA* sets a limit to the number of TIP victims who may be granted T-visas.

The law-enforcement paradigm is contrasted with a victim-centred victim-welfare approach. A victim-centred paradigm principally focuses on identifying TIP victims and providing them with individually tailored support. It is significant to note that a person may, on an objective analysis, be a TIP victim although his or her perpetrator

<sup>63</sup> Haynes, *supra* note 2 at 115.

<sup>64</sup> Amiel, *supra* note 17 at 28.

<sup>65</sup> Haynes, *supra* note 2 at 116. See §101(a)(15) of the U.S. *Immigration and Nationality Act*, 8 U.S.C. as amended by §1513(c) of the *Battered Immigrant Women Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1518 (Title V of the *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464 [*US TVPA*]).

<sup>66</sup> Amiel, *supra* note 17 at 32.

<sup>67</sup> See *e.g.*, the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* (U.K.), c. 19 [*AITCA*]; *Crimes Act 1961* (N.Z.), 1961/43; *The Criminal Code of the Russian Federation* (Federal Law No. 63-FZ of 13 June 1996, Russia); the *Laos Penal Law*, *supra* note 59, c. 6; the *Penal Code* (RT I 2002, 86, 504, Estonia).

<sup>68</sup> See *e.g.*, s. 12 of the *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act* (No. 30 of 2005, Sri Lanka) [*Sri Lanka Anti-Trafficking Act*].

may not ultimately be convicted on TIP charges. Such unsuccessful prosecution or even the absence of prosecution would not negate the fact that the person was a victim who had suffered from TIP and may require aftercare and support. Hence, it would be argued that victim-support services should have been provided to the victim from the outset and continue even after an unsuccessful prosecution. In contrast, a strong law-enforcement paradigm would presumably deny victim support to a person in the event of an unsuccessful prosecution. It might also face the logical conundrum that providing victim support to a person would be unjustifiable until the person's perpetrators have been convicted on TIP charges and the former thereby legally recognised as a TIP victim.

Upon the foregoing premises, a victim-centred paradigm would therefore entail, *inter alia*, an established TIP victim identification process,<sup>69</sup> including a “recovery and reflection period” for victims;<sup>70</sup> protecting the privacy of TIP victims;<sup>71</sup> protection from perpetrators;<sup>72</sup> providing welfare services including shelter, basic necessities, counselling, rehabilitation programs, medical treatment, legal aid, translation, temporary employment and/or vocational training *etc.*;<sup>73</sup> provision of stay permits of appropriate duration;<sup>74</sup> legal immunity to victims who might have *prima facie* committed criminal acts albeit principally due to the fact that they were victims;<sup>75</sup> allowing victims to claim restitution or compensation from perpetrators;<sup>76</sup>

<sup>69</sup> Appropriate TIP victim identification indicators should be adopted. Reference should be made to international and other national standards and best practices, *e.g.*, Thailand's Office of Anti-Trafficking in Persons Committee, Ministry of Social Development and Human Security, “Scope and Elements of Identification of Trafficked Persons”, online: Office of Anti-Trafficking in Persons Committee <<http://www.nocht.m-society.go.th/album/download/b51674547bbc5e26ea9805681c664736.pdf>>; International Organization for Migration, *The IOM Handbook on Direct Assistance for Victims of Trafficking* (Geneva: International Organization for Migration, 2007) at 35-52; ILO, *Operational Indicators, supra* note 42; Kanchana N. Ruwanpura & Pallavi Rai, “Forced Labour: Definition, Indicators and Measurement” *International Labour Office* (3 January 2004), online: International Labour Organization <[http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_081991.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_081991.pdf)>; International Labour Organization, *Forced Labour and Human Trafficking: Handbook for Labour Inspectors* (Geneva: International Labour Organization, 2008) at 18. See Suzanna L. Tiapula & Melissa Millican, “Identifying The Victims Of Human Trafficking” (2008) 42(1) *Prosecutor* 34.

<sup>70</sup> See arts. 10 and 13 of the *Council of Europe Convention, supra* note 33. See also arts. 18 and 30 of the *UNODC Model Law, supra* note 50; art. 11 of the *Taiwan HTPCA, supra* note 43.

<sup>71</sup> See s. 7 of the *Philippines Anti-Trafficking Act, supra* note 55 on confidentiality; arts. 16, 22, 23 and 25 of the *UNODC Model Law, ibid.*; arts. 21 and 23 of the *Taiwan HTPCA, ibid.* In respect of Singapore legislation, see ss. 153-155 of the *Women's Charter* (Cap. 353, 2009 Rev. Ed. Sing.) [WC]—such legislation should be extended, amended or adopted accordingly to address a broader range of TIP scenarios.

<sup>72</sup> See art. 28 of the *Council of Europe Convention, supra* note 33; art. 21 of the *UNODC Model Law, ibid.*; art. 8 of the *Taiwan HTPCA, ibid.*

<sup>73</sup> See art. 12 of the *Council of Europe Convention, ibid.*; ss. 16(b), (d) and 23 of the *Philippines Anti-Trafficking Act, supra* note 55; art. 20 of the *UNODC Model Law, ibid.*; arts. 12-15 and 17 of the *Taiwan HTPCA, ibid.*; art. 26 of the *Law on the Prevention and Combat of Trafficking in Human Beings* (No. 678/2001, Romania) [*Romanian Anti-Trafficking Law*].

<sup>74</sup> See art. 14 of the *Council of Europe Convention, ibid.*; art. 31 of the *UNODC Model Law, ibid.*; art. 16 of the *Taiwan HTPCA, ibid.*

<sup>75</sup> See s. 17 of the *Philippines Anti-Trafficking Act, supra* note 55; art. 26 of the *Council of Europe Convention, ibid.*; art. 10 of the *UNODC Model Law, ibid.*

<sup>76</sup> See art. 15 of the *Council of Europe Convention, ibid.*; §1593 of the *US TVPA, supra* note 65; s. 23(c) of the *Philippines Anti-Trafficking Act, ibid.*; arts 27-29 of the *UNODC Model Law, ibid.*

and safe repatriation (possibly through partnering NGOs in the victims' home countries for aftercare).<sup>77</sup> Criminal proceedings against perpetrators could be designed to prevent secondary victimisation.<sup>78</sup> It has been suggested that a strong victim-centred approach should not predicate the provision of the victim-care services on the victim's ability and willingness to assist the authorities in criminal enforcement (*e.g.*, agreeing to give evidence as a witness in a criminal trial).<sup>79</sup> Further, legal safeguards should be afforded to NGOs who assist in tackling TIP, *e.g.*, the rescue of TIP victims.<sup>80</sup> Dedicated accessible communication channels, *e.g.*, a national hotline for TIP victims could be set up.<sup>81</sup> Both the law enforcement and victim-centred human rights approaches are not mutually exclusive, so it would be ideal if there is practical implementation of both.<sup>82</sup>

### C. Images and Ideologies

#### 1. The Gendered Sexualised Victim

The third critique is that implicit in many TIP legal instruments is a focus on a gendered, sexualised image of the trafficking victim, *i.e.* the image of a helpless female victim without agency and therefore in need of benevolent intervention. This notion would readily embrace children and women who appear weak and battered. Conversely, men and women who do not fit into that paradigm may be excluded from being recognised as TIP victims.<sup>83</sup>

This image of the victim is to be understood in the historical context of the pre-*Palermo Protocol* international treaties, which generally only addressed women, *e.g.*,

<sup>77</sup> See arts. 32, 33 of the *UNODC Model Law*, *ibid.*; s. 25 of the *Philippines Anti-Trafficking Act*, *ibid.* See also Cherish Adams, "Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims" (2011) 43 *Geo. Wash. Int'l L. Rev.* 201 at 233, 234.

<sup>78</sup> Adams, *ibid.* at 233, 234. See art. 25 of the *Taiwan HTPCA*, *supra* note 43. See also ss. 152 and 153 of the *WC*, *supra* note 71—these provisions should be adopted and broadened to include a wider range of TIP scenarios.

<sup>79</sup> Amiel, *supra* note 17 at 33. See art. 12(6) of the *Council of Europe Convention*, *supra* note 33.

<sup>80</sup> See s. 17C of the *Philippines Anti-Trafficking Act*, *supra* note 55.

<sup>81</sup> See art. 10 of the *Taiwan HTPCA*, *supra* note 43.

<sup>82</sup> See Joan Fitzpatrick, "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking" (2003) 24 *Mich. J. Int'l L.* 1143; Elizabeth M. Bruch, "Models Wanted: The Search for an Effective Response to Human Trafficking" (2004) 40 *Stan. J. Int'l L.* 1.

<sup>83</sup> See Rebecca Surtees, *Trafficking of Men—A Trend Less Considered: The Case of Belarus and Ukraine* (Geneva: International Organization for Migration, 2008); Sharon Pickering & Julie Ham, "Hot Pants at the Border: Sorting Sex Work from Trafficking" (2014) 54 *Brit. J. Crim.* 2 at 9-11; Tom Ellis & James Akpala, "Making Sense of the Relationship between Trafficking in Persons, Human Smuggling, and Organised Crime: The Case of Nigeria" (2011) 84 *Police Journal* 13; Samuel Vincent Jones, "The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking" (2010) *Utah L. Rev.* 1143; Jonathan Todres, "Widening Our Lens: Incorporating Essential Perspectives in the Fight against Human Trafficking" (2012) 33 *Mich. J. Int'l L.* 53 at 59-61; Amanda Peters, "Disparate Protections for American Human Trafficking Victims" (2013) 61 *Clev. St. L. Rev.* 1 at 34; Laura L. Shoaps, "Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act" (2013) 17 *Lewis & Clark Law Review* 931 at 938. There appears to be little scholarship on transgender persons *qua* TIP victims.

the 1910 *International Convention for the Suppression of the White Slave Traffic*,<sup>84</sup> which improved on the 1904 *International Agreement for the Suppression of the White Slave Traffic*;<sup>85</sup> the 1921 *International Convention for the Suppression of the Traffic in Women and Children*;<sup>86</sup> the 1933 *International Convention for the Suppression of the Traffic in Women of Full Age*;<sup>87</sup> and the 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*.<sup>88</sup> It is significant that the phrase, “especially women and children”, used in the title and body of the *Palermo Protocol* also manifests this bias.<sup>89</sup> Many national legislation on TIP also tend to focus only on women.<sup>90</sup>

Perpetuation of this helpless female victim image may also result in laws and policies which require a TIP victim to undergo secondary victimisation in order to obtain the benefits of the law. This reduces or essentialises the survivors’ identity to vulnerable pitiable “others”.<sup>91</sup> *E.g.*, the *US TVPA* requires applicants of T-visas to prove themselves victims of a “severe form of trafficking” and to assist in investigation or prosecution of TIP perpetrators.<sup>92</sup> Where cases do not fit these images, they risk being deemed not sufficiently worthy of state intervention. When the TIP victim is required to assist in the investigation or prosecution of TIP perpetrators, the victim may be required to re-tell his or her story several times, revisit traumatic places or people or reformulate his or her narrative in terms of his or her guilt or helplessness. It is therefore critical that the TIP victim assisting in investigations should be granted protections from secondary victimisations, *e.g.*, ensuring non-contact between the victim and the perpetrator, immunity from prosecution, ensuring the privacy and confidentiality of any subsequent proceedings, *etc.*<sup>93</sup> Hence, some legislation do not

<sup>84</sup> 4 May 1910, 211 Cons. T.S. 45.

<sup>85</sup> 18 May 1904, 1 L.N.T.S. 83 (entered into force 18 July 1905). See the *Transfer to the United Nations of the Functions Exercised by the French Government Under the International Agreement of 18 May 1904 and the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, and the Agreement of 4 May 1910 for the Suppression of the Circulation of Obscene Publications*, GA Res. 256(III), UN GAOR, 3d Sess., UN Doc. A/810 (1948) 164.

<sup>86</sup> 30 September 1921, 9 L.N.T.S. 415.

<sup>87</sup> 11 October 1933, 150 L.N.T.S. 431. See the *Transfer to the United Nations of the Functions and Powers Exercised by the League of Nations Under the International Convention of 30 September 1921 on Traffic in Women and Children, the Convention of 11 October 1933 on Traffic in Women of Full Age, and the Convention of 12 September 1923 on Traffic in Obscene Publications*, GA Res. 126(II), UN GAOR, 2d Sess., UN Doc. A/519 (1947) 32.

<sup>88</sup> 21 March 1950, 96 U.N.T.S. 271 (entered into force 25 July 1951). See the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, GA Res. 317(IV), UN GAOR, 4th Sess., UN Doc. A/1251 (1949) 33.

<sup>89</sup> Haynes, *supra* note 2 at 119; Warren, *supra* note 62 at 247-250.

<sup>90</sup> In the Singapore context, see s. 373A of the *Penal Code* (Cap. 224, 2008 Rev. Ed. Sing.) [PC] and ss. 141 and 142 of the *WC*, *supra* note 71. See also art. 119 of the *Penal Code* (No. 15/1999/QH10, Vietnam); *Law on Development and Protection of Women*, (No. 70/PO of 2004, Lao People’s Democratic Republic), Part IV; Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security and Ministry of Justice, “Opinions on Severely Punishing Trafficking in Women and Children according to Law” (15 March 2010), online: UNIAP <[http://www.no-trafficking.org/reports\\_docs/china/china\\_guidelines\\_2010\\_en.pdf](http://www.no-trafficking.org/reports_docs/china/china_guidelines_2010_en.pdf)>; *Sri Lanka Anti-Trafficking Act*, *supra* note 68; *The Immoral Traffic (Prevention) Act, 1956* (No. 104 of 1956, India).

<sup>91</sup> Haynes, *supra* note 2 at 118, 119.

<sup>92</sup> *Ibid.* at 116.

<sup>93</sup> *E.g.*, s. 18 of the *Philippines Anti-Trafficking Act*, *supra* note 55, provides for witness protection program under the *Witness Protection, Security and Benefit Act* (Republic Act No. 6981, The Philippines).

require victim-welfare provisions to be predicated on a victim's consent to participate as a witness in prosecution.<sup>94</sup>

The perpetuation of the gendered sexualised image of the TIP victim may also result in a neglect of trafficking not related to sex, *e.g.*, forced labour, debt bondage and servitude-like conditions, which male TIP victims are more likely exploited for (statistically).<sup>95</sup> Yet, it is plausible that there are other political and economic reasons for this focus: low-wage labour in many countries often involves conditions that are similar to the conditions typical of TIP and low-wage labour maintains the prices of many goods and services at suppressed levels.

It should be noted that a victim-centred approach is not contradictory to, but buttresses, the notion that TIP victims should not be portrayed as helpless female or children. This is because a strong victim-centred approach should require victim care services to be provided to *all* victims, insofar as their circumstances fall within the definition of a TIP, and not only persons who fit within a gendered, sexualised image of TIP victims. Further, a strong victim-centred approach would tailor the victim support services to the individual victim and not impose on the individual pre-conceived notions of what helpless female or children victims would require.<sup>96</sup>

## 2. *Neo-Abolitionists, Workers' Rights and Liberal Feminists*

Related to the above critique is the observation that existing legal instruments reflect moral and ideological tensions relating to feminist theories on prostitution.<sup>97</sup> During the drafting of the *Palermo Protocol*, three groupings of NGOs participated in the dialogical process and advocated for differing positions which reflect competing moral and ideological views about the nature of prostitution.<sup>98</sup>

The neo-abolitionists objected to legalising prostitution, which they deem to be a systemic abuse of women, and advocated the protection of victims, along with criminalisation to reduce the demand for prostitution.<sup>99</sup> The workers' rights advocates argued that prostitution is sex work and accordingly, sexual exploitation should be seen as a form of *labour* exploitation; they argue that insofar as a person has not freely consented to the work (sexual or otherwise), it is exploitation. The liberal feminists argued that sex work is legitimate labour insofar as it is voluntarily undertaken, that prostitution should be legalised and not deemed a form of exploitation, and for a distinction between 'free workers' who need labour rights and 'forced workers' who

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<sup>94</sup> This approach is adopted in the *Council of Europe Convention*, *supra* note 33; the *Philippines Anti-Trafficking Act*, *ibid.*; the *UNODC Model Law*, *supra* note 50.

<sup>95</sup> See note 83 above.

<sup>96</sup> See Surtees, *supra* note 83 at 91-95; Shoaps, *supra* note 83 at 941, 942.

<sup>97</sup> See generally Andrew Halpin, "Ideology and Law" (2006) 11 *Journal of Political Ideologies* 153.

<sup>98</sup> See Janie Chung, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law And Policy" (2010) 158 *U. Pa. L. Rev.* 1655; Warren, *supra* note 62 at 257-263; Stephanie M. Berger, "No End in Sight: Why the "End Demand" Movement is the Wrong Focus for Efforts to Eliminate Human Trafficking" (2012) 35 *Harv. J.L. & Gender* 523 at 527, 528; Donna M. Hughes, "Combating Sex Trafficking: A Perpetrator-Focused Approach" (2008) 6(1) *University of St. Thomas Law Journal* 28 at 29-36.

<sup>99</sup> Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (United States of America: Harvard University Press, 1987).

need rescue—because, they argue, sex workers should be treated as anyone else, *i.e.* free to express their identity and autonomy.<sup>100</sup>

The final result was a compromise that attempted to find a common lowest denominator through ambiguity, abstractions and generalisations,<sup>101</sup> devolving the controversial issues to individual states to be arbiters of the conflicting ideological positions. Nevertheless, the *Palermo Protocol* has been critiqued for, *inter alia*, not sufficiently focusing on the severe or modern types of sexual exploitation and failing to distinguish between coerced and consensual prostitution.<sup>102</sup>

Each state inevitably adopts a certain ideology in its implementation of international norms. For instance, states like Sweden have criminalised the purchase of commercial sex whereas states like the Australian state of Victoria have legalised prostitution.<sup>103</sup> This leaves non-state actors, *e.g.*, NGOs (including faith-based groups), to respond with dissenting or contrary ideological positions. State governments may further manage ideological conflicts between the state and non-state actors by devolving certain TIP-related functions to various non-state actors with conflicting ideologies manifested through their activities and advocacy work, *e.g.*, shaming consumers of commercial sex, education programmes (especially targeted at males) and advocacy of labour rights for all sex workers. Ideological tensions are therefore not defused but channelled to competition among non-state actors, which would presumably be leveraged by the state so as to undertake fewer responsibilities.<sup>104</sup> While such competition would not depoliticise issues or eliminate ideological conflicts, this compromise allows for multivalence in praxis, notwithstanding the incommensurability of the underlying ideologies,<sup>105</sup> leaving the burden of selection to the citizenry.

#### D. *Lack of Focus on Demand-Side Factors*

The fourth general critique of existing legal treatments is their tendency to focus on the distribution-side of TIP, *i.e.* traffickers, eschewing the demand side, *e.g.*, the people running the sex trade or sweatshops and the end users of the victims' services.<sup>106</sup> On the other hand, quite apart from the lack of focus on demand-side factors, the root causes of TIP are also often neglected—the *Palermo Protocol* acknowledges these

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<sup>100</sup> Cf. Beverly Balos, "The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation" (2004) 27 Harv. Women's L.J. 137 at 170-173, in which the author critiques the private 'choice' justification as masking power inequality, *i.e.* it is likely that many who are engaged in sex work did not exercise 'true' choice in doing so.

<sup>101</sup> Warren, *supra* note 62 at 257.

<sup>102</sup> Gallagher, *International Law of Human Trafficking*, *supra* note 30 at 61.

<sup>103</sup> Iris Yen, "Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand through Educational Programs and Abolitionist Legislation" (2008) 98(2) J. Crim. L. & Criminology 653 at 684, 685.

<sup>104</sup> *E.g.*, art. 12(5) of the *Council of Europe Convention*, *supra* note 33, imposes an obligation on states to cooperate with NGOs to provide assistance to TIP victims. See also s. 5 of the *Pakistan Prevention and Control of Human Trafficking Ordinance, 2002* (LIX of 2002).

<sup>105</sup> On incommensurability and multivalency, see Andrew Halpin, "Glenn's Legal Traditions of the World: Some Broader Philosophical Issues" (2006) 1 Journal of Comparative Law 116; Andrew Halpin, "A Rejoinder to Glenn" (2007) 2 Journal of Comparative Law 88.

<sup>106</sup> Balos, *supra* note 100 at 164-170; Hughes, *supra* note 98; Yen, *supra* note 103; cf. Berger, *supra* note 98.

to be “poverty, underdevelopment and lack of equal opportunity”.<sup>107</sup> Unfortunately, these problems are often deep-rooted and systemic.

Sustaining trafficking is its high profitability: the upfront costs of acquisition and movement of victims are minimal compared to the profits gained from exploiting victims.<sup>108</sup> Once a victim is availed to the exploiter, she can be used for an unlimited number of “transactions” for an indefinite period of time.<sup>109</sup> Yet, it only costs the trafficker approximately US\$200 to US\$4,000 to acquire and transport the victim.<sup>110</sup> Not surprisingly, it was estimated in the 1990s that exploiters earn about US\$250,000 for each woman trafficked into ‘sex slavery’;<sup>111</sup> Kara estimates US\$180,000 per ‘sex slave’.<sup>112</sup>

For the end user of the ‘sex slave’, depending on the country, it takes only “1.5 to 2 hours of work at that country’s per capita income to purchase 1 hour of sex from a sex slave”.<sup>113</sup> In the light of this, some states have begun to tackle demand by criminalising consumers of sex services.<sup>114</sup> Such approaches are vulnerable to ideological critique. Such criminalisation is argued to be blunt since it disregards the consensual ‘sex worker’ from the coerced ‘sex slave’. Some argue that criminalisation of the sex industry would result in unregulated black markets in which sex workers are exposed to various risks.

Employers of TIP victims who are subject to forced labour, debt bondage, servitude or slave-like conditions would likewise enjoy such exponential returns on investments. It is also significant that companies or individuals upstream of the labour supply chain would benefit from the exploitation downstream by virtue of substantially cheaper goods or services. There would therefore be a compelling argument that entities upstream who have a certain extent of knowledge about the exploitation should be penalised for doing so. Transparency in supply chains should therefore also be mandated. Another way to curb demand is to make the risk of conviction a substantial financial deterrent, *e.g.*, severe fine or a possible order for substantial financial compensation to victim. Where the costs of exploiting TIP victims are raised to be approximately close to the costs of legally (and ethically) procured labour, traffickers would likely choose the latter.

<sup>107</sup> Article 9 of the *Palermo Protocol*, *supra* note 32.

<sup>108</sup> Siddharth Kara, “Twenty-First-Century Slaves: Combating Global Sex Trafficking” *Solutions* (March 2011), online: *The Solutions Journal* <<http://thesolutionsjournal.org/node/896>>.

<sup>109</sup> Katie Bacon, “Slavery, the bottom line” *The Boston Globe* (12 December 2010), online: *boston.com* <[http://www.boston.com/bostonglobe/ideas/articles/2010/12/12/slavery\\_the\\_bottom\\_line/](http://www.boston.com/bostonglobe/ideas/articles/2010/12/12/slavery_the_bottom_line/)>.

<sup>110</sup> This is estimated from the estimated ‘debt’ amounts that victims incur with the ‘recruiters’: see Alexis A. Aronowitz, “The United Nations Global Program Against Trafficking in Human Beings: Results from Phase I of ‘Coalitions Against Trafficking in Human Beings in the Philippines’” in Joshua D. Freilich & Rob T. Guerette, eds., *Migration, Culture Conflict, Crime and Terrorism* (Burlington, VT: Ashgate, 2006) 135 at 149.

<sup>111</sup> See Gillian Caldwell, Steven Galster & Nadia Steinzor, *Crime & Servitude: An Expose of the Traffic in Women for Prostitution from the Newly Independent States* (Washington D.C.: Global Survival Network, 1997).

<sup>112</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (New York: Columbia University Press, 2009) at 200, 219, 224–226.

<sup>113</sup> See Bacon, *supra* note 109.

<sup>114</sup> Ed Davis & Swanee Hunt, “Buying sex? It will cost you” *The Boston Globe* (21 February 2012), online: *boston.com* <[http://www.boston.com/bostonglobe/editorial\\_opinion/blogs/the\\_podium/2012/02/buying\\_sex\\_it\\_will\\_cost\\_you.html](http://www.boston.com/bostonglobe/editorial_opinion/blogs/the_podium/2012/02/buying_sex_it_will_cost_you.html)>.



#### IV. ANALYSIS OF SINGAPORE LEGISLATION

Having considered the above issues, it is pertinent to now analyse the relevant legislation in Singapore and assess whether these laws adequately address the issue of TIP with reference to the relevant international, supranational and national legal definitions and standards notwithstanding their inadequacies (as highlighted in the preceding section) given that they are the only practicable objective criteria available with which Singapore legislation can be compared to. Further, the critical analysis below would evaluate whether Singapore legislation adequately addresses the thrust of the four-fold critique above, *i.e.* clear definitional standards, balance between crime-control and victim-centred approaches, victim image and adequate attention to demand-side factors.

##### A. *Relevant Legislation*

There is at present no omnibus anti-trafficking legislation in Singapore. Possibly relevant statutory provisions are scattered across various different statutes, including the *PC*<sup>115</sup>, *WC*<sup>116</sup> and the *Children and Young Persons Act*.<sup>117</sup>

##### 1. *Slaves*

It should be noted at the outset that the approach of characterising TIP as ‘slavery’ is contested although there are international human rights instruments which characterise TIP as a form of ‘slavery’.<sup>118</sup> It is likely that the international law definition of ‘slavery’ does not include many aspects and scenarios of TIP.<sup>119</sup> Whether the notion of slavery is adopted as a proxy for TIP would have significant impact on actual victims.<sup>120</sup> Hence, any consideration of ‘slavery’ in the context of TIP should be narrowly undertaken.

Sections 370 and 371 of the *PC* relate to the buying or disposing of, and habitual dealing in, slaves. However, a ‘slave’ is not defined in the *PC*. Slavery as contemplated in the *PC*, which was first enacted in 1871 as the Straits Settlement *Penal Code 1871*,<sup>121</sup> is an archaic concept relating to the exercise of powers attached to rights of ownership over persons.<sup>122</sup> This is consistent with the definitions of slavery

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<sup>115</sup> *Supra* note 90.

<sup>116</sup> *Supra* note 71.

<sup>117</sup> (Cap. 38, 2001 Rev. Ed. Sing.) [*CYPA*]. Although some provisions in the *Immigration Act* (Cap. 133, 2008 Rev. Ed. Sing.) may appear relevant, they are arguably more closely related to human smuggling than TIP; there may be a tendency to conflate the two but the distinction is significant. It would not be possible to elaborate on this distinction in this paper.

<sup>118</sup> *E.g.*, art. 8 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976). See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Arlington: N.P. Engel, 1993) at 148.

<sup>119</sup> See Anne T. Gallagher, “Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway” (2009) 49(4) *Va. J. Int’l L.* 789 [Gallagher, “Quagmire or Firm Ground”]; Rickert, *supra* note 16.

<sup>120</sup> See Rickert, *ibid.* at 217, 218.

<sup>121</sup> (S.S.) (No. 4 of 1871).

<sup>122</sup> See also *R. v. Wei Tang* (2008) 231 C.L.R. 1 at para. 44 (H.C.A.).

propounded in international law contemporaneous with the enactment of the Straits Settlement *Penal Code 1871*. In the League of Nations *Slavery Convention 1926*,<sup>123</sup> art. 1 defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.<sup>124</sup> However, the “powers attaching to the rights of ownership” were not elucidated. In the 1953 United Nations Secretary-General’s report to the Economic and Social Council,<sup>125</sup> six characteristics of such “powers” were identified: (i) the individual may be made the object of a purchase; (ii) the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner; (iii) the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour; (iv) the ownership of the individual of servile status can be transferred to another person; (v) the servile status is permanent, that is to say, it cannot be terminated at the will of the individual subject to it; and (vi) the servile status is transmitted *ipso facto* to descendants of the individual having such status. The above six characteristics of slavery do not appear to be broad enough to include modern forms of ‘slavery’ such as the scenarios of debt bondage and TIP discussed above.<sup>126</sup> The *PC* provisions in slavery therefore seem inadequate in addressing TIP today.

## 2. *Compulsory Labour*

Section 374 of the *PC* criminalises a person who “unlawfully compels any person to labour against the will of that person”. It is not clear what “unlawfully compels” means. Presumably, this means acts which are unlawful under the *PC*, e.g., using criminal force. This falls short of the scope of ‘means’ in the *Palermo Protocol*, e.g., threat of force, deceit, abuse of power or position of vulnerability, etc. It is also not clear whether ‘debt bondage’, which arguably comes within the meaning of ‘forced labour’ under the *Palermo Protocol*, would fall within s. 374. Further, the maximum penalty under the provisions seems disproportionately low for compulsory labour, which would have likely reaped much profit for the perpetrator. This would be unlikely to curb demand of forced labour.

## 3. *Dealing in Persons for Prostitution (Penal Code)*

Sections 372 and 373 of the *PC* criminalise dealing in persons *under 21 years old* for the purposes of prostitution, illicit intercourse or any unlawful or “immoral” purpose. The stipulated *mens rea* requirements are either “intent” or “knowing it to be likely”. Several comments are apposite: (i) these provisions appear to be gender-neutral although the explanation proviso, which introduces a presumption of fact, refers to “female” persons; (ii) they deal with both supply- and demand-side factors; (iii) persons under 21 years of age are deemed minors under these provisions whereas

<sup>123</sup> 25 September 1926, 60 L.N.T.S. 254 (entered into force 9 March 1927).

<sup>124</sup> Gallagher, “Quagmire or Firm Ground”, *supra* note 119 at 800, 801.

<sup>125</sup> Secretary-General of the United Nations, *Slavery, the Slave Trade, and Other Forms of Servitude*, UN ESCOR, 15th Sess., UN Doc. E/2357 (1953).

<sup>126</sup> Gallagher, “Quagmire or Firm Ground”, *supra* note 119 at 800, 801.

minority under the *Palermo Protocol* is 18 years; (iv) it is not clear what “unlawful or immoral” purpose entails—it is plausible that production of pornography would fall within this clause;<sup>127</sup> (v) these provisions do not criminalise the ‘means’ element of TIP under the *Palermo Protocol*—this would only be convergent with the Protocol’s approach relating to minors, *i.e.* persons under 18 years of age, but not otherwise.

Section 373A of the *PC* criminalises the importation of, or dealing in, women above 21 years of age for the purpose of prostitution. While it addresses several ‘means’ elements of TIP *viz.* “false pretence, false representation, or fraudulent or deceitful means”, it is a narrower scope than the definition in the Protocol. The only ‘exploitation’ element addressed is “prostitution” and does not include “sexual exploitation”; this is contrasted with illicit intercourse or any unlawful or “immoral” purpose in ss. 372-373. Further, s. 373A is applicable only to women. The *mens rea* requirement is “intent”, *i.e.* a higher threshold than in ss. 372 and 373.

#### 4. *Dealing in Women for Prostitution* (Women’s Charter)

Sections 140 and 141 of the *WC* criminalises dealing in women or girls for the purpose of prostitution and/or “carnal connection”, “within or without Singapore”;<sup>128</sup> significant sub-sections are elaborated on below.

Section 140(1)(a) substantially mirrors ss. 372 and 373 of the *PC*, albeit for women *above 21 years of age*. The *mens rea* requirement includes “knowing or having reason to believe” in addition to “intent”. Section 140(1)(b) includes as a form of exploitation, “carnal connection” in addition to prostitution. There are two reported decisions on s. 140(1)(b). In *Public Prosecutor v. Chan Soh*,<sup>129</sup> the court sentenced the accused to a mere fine of S\$3,000 for attempting to procure a woman from the People’s Republic of China for the purpose of prostitution within Singapore. In *Public Prosecutor v. Kalathithara Subran Hilan*,<sup>130</sup> several accused persons convinced a 13-year-old Malaysian girl’s mother to let them bring her to Singapore to work as a housemaid; in reality, they procured the girl for prostitution. They were charged, *inter alia*, under ss. 140(1)(b) and, 146 of the *WC* for living off the earnings of the prostitution and under s. 376 of the *PC* for abetting rape. One of the accused was sentenced to one year’s imprisonment and a S\$5,000 fine for procurement of the girl for prostitution and the same sentence for living off the earnings of a prostitute. The sentences meted out were disproportionately low for such serious offences.

Section 140(1)(c) mirrors s. 140(1)(b) albeit additionally criminalising the means of “threats or intimidation”. Section 140(1)(d) is an ancillary offence to s. 140(1)(b), criminalising the intentional assistance of the prohibited acts in the former. Similarly, s. 140(1)(e) is ancillary to s. 140(1)(c). The only reported decision found on s. 140(1)(d) is *Public Prosecutor v. Wang Minjiang*,<sup>131</sup> where the accused pleaded guilty to procuring a 17-year-old female and another woman from the People’s

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<sup>127</sup> See text accompanying note 55.

<sup>128</sup> See also ss. 143-152, 159 of the *WC*, *supra* note 71.

<sup>129</sup> [2008] SGDC 277.

<sup>130</sup> [2003] SGHC 221.

<sup>131</sup> [2008] SGDC 229.

Republic of China for the purpose of prostitution and with the intent to aid such purpose. The accused was merely fined S\$25,000. On the facts, the court found that there was no organised crime and that the ladies were capable of consensual sex and “willingly came to Singapore to work as prostitutes”.<sup>132</sup> The case went on appeal, where the High Court noted that “[a] fine might not be an adequate sentence”<sup>133</sup> and thus increased the penalty to a 12-month imprisonment. It is pertinent that the 17-year-old female would have been deemed a minor under the *Palermo Protocol* such that the consent-nullifying ‘means’ would not be necessary for TIP to be made out.<sup>134</sup> Further, under art. 3(b) of the Protocol, consent would have been irrelevant if any of the ‘means’ elements had been present. It is not clear whether any such ‘means’ were present in the ladies’ circumstances given that these elements were not a requisite in s. 140(1)(d) and thus would not have been enquired into.

Lastly, s. 140(1)(h) criminalises the detention of any woman or girl against her will with intent that she may be employed or used for prostitution or any “unlawful or immoral purpose”. Section 141 criminalises any person who, *inter alia*, “traffics... for the purpose of present or subsequent prostitution”.

Several comments on ss. 140 and 141 of the *WC* are apposite. First, s. 140 appears to cover a range of most steps in a typical TIP process, *i.e.* recruitment (or procurement), transportation, reception, harbouring, detention and exploitation (“carnal connection” or “prostitution”). However, it appears to be lacking in some aspects, *e.g.*, omitting to cover the forgery or preparation of false identification or travel documentation to transport a victim for the purposes of TIP. Secondly, terms like “unlawful or immoral purpose” and “traffic” are not defined in the *WC*. There has to date been no reported decisions based on s. 141, *viz.* “traffic”—unsurprising since without proper definitions, law enforcement agencies and/or prosecutors would not know whether their enforcement is lawful and justifiable. Thirdly, ss. 140 and 141 are only applicable to women and girls. Fourthly, their scope is much narrower than the scope of ‘acts’ and ‘means’ envisaged in the Protocol. Fifthly, it is not clear whether other forms of ‘sexual exploitation’ would be addressed under these provisions. Sixthly, the marriage exception in ss. 140(1)(b) to (e), (g) and (i) may be cause for concern given the possibility of sham marriages.<sup>135</sup>

##### 5. Sex with Minors Under 18 Years of Age

In the recent 2007 *PC* amendments, ss. 376A to 376E were introduced to address the sexual abuse of minors, *i.e.* persons under 18 years of age.<sup>136</sup> While these offences are important and necessary, they do not address the problem of trafficking in minors for sexual exploitation but are clearly targeted at sex with minors, child sex tourism and sexual grooming of minors. They do not deal with, *e.g.*, acts which cause minors to be coerced into, defrauded into, transported or made available for sexual exploitation or prostitution.

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<sup>132</sup> *Ibid.* at para. 13.

<sup>133</sup> *Public Prosecutor v. Wang Minjiang* [2009] 1 S.L.R.(R.) 867 at para. 3.

<sup>134</sup> Article 3(c) of the *Palermo Protocol*, *supra* note 32.

<sup>135</sup> See text accompanying note 172.

<sup>136</sup> Sing., *Penal Code (Amendment) Act 2007*, No. 51 of 2007.

## 6. *Children and Young Persons Act*

The *CYPA* defines “child” as a person who is below the age of 14 and “young person” as a person who is 14-years-old and above but below the age of 16 years.<sup>137</sup> Section 7 criminalises the commission of “any obscene or indecent act” on children or young persons and the abetment, procurement or attempt to do the same. Sections 12(1) and (2) address transactions which “transfer or confer... possession, custody or control of a child for any valuable consideration”. However, s. 12(3) provides for a defence of “bona fide marriage or adoption” in which “at least one of the natural parents of the child or the legal guardian was a consenting party to the marriage or to the adoption by the adopting party, and had expressly consented to the marriage or adoption”. Section 13 criminalises anyone who brings or assists in bringing any child into Singapore “by or under any false pretence, false representations or fraudulent or deceitful means”.

Several comments are apposite. First, the age for a “child” in the *CYPA* is 14 years whereas that for a minor in the Protocol is 18 years. Secondly, s. 12 appears to adopt an inclusive approach towards the forms of ‘exploitation’. However, it would not apply should the traffickers exploit the child themselves and do not obtain “valuable consideration” for the child. Thirdly, it is not clear what “bona fide marriage or adoption” in s. 12(3) means. If the “bona fide” element is not a separate requirement from the parent’s or guardian’s consent, the defence appears to omit scenarios where parents sell their children for money or consent to the traffickers taking their children so that they may receive income from the child’s exploitation; unfortunately, such scenarios are not uncommon.<sup>138</sup> Fourthly, it is not clear what other forms of sexual exploitation would fall within the meaning of “indecent acts” in s. 7.

## 7. *Rape*

Sections 375 and 376 of the *PC* set out various offences for rape of both males and females. It is significant that the Ministry of Home Affairs is of the view that the offence of *abetment* of rape addresses TIP.<sup>139</sup> The premise in its reasoning is that TIP is present only where the person did not consent to sex at all, or it involves sex with a girl below 14 years of age. This definition of TIP is manifestly narrower than that in the Protocol. Sections 375 and 376 only address two modes of consent-nullifying ‘means’, *i.e.* causing hurt to the victim or another person; putting victim in fear of death or hurt to the victim or another person. Also, the question of consent in ss. 375 and 376 is likely to be confined to consent to sex or otherwise; it is not sufficiently nuanced to include issues of consent to *conditions* of sex work.<sup>140</sup> Further, TIP involves an extensive process with many aspects which are unlikely to be caught within the offence of abetment of rape.

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<sup>137</sup> *Supra* note 117, s. 2(1).

<sup>138</sup> See Patricia J. Meier, “Small Commodities: How Child Traffickers Exploit Children and Families in Intercountry Adoption and What the United States Must Do to Stop Them” (2008) 12(1) *J. Gender Race & Just.* 185.

<sup>139</sup> See the *Oral Answers to Questions on Trafficking of Women for the Sex Industry*, Sing., *Parliamentary Debates*, vol. 78, col. 533 (2 September 2004) by then-Senior Minister of State for Home Affairs, Assoc. Prof. Ho Peng Kee.

<sup>140</sup> See text accompanying note 39.

### 8. *Kidnapping, Abduction, Wrongful Restraint and Wrongful Confinement*

Sections 359 to 369 of the *PC* provide for various offences of kidnapping and abduction. Again, these provisions are insufficient to deal with various scenarios and aspects of TIP. *E.g.*, a recruiter may have deceitfully induced a victim to be transported for the purposes of exploitation. However, once that victim has given her purported consent to be transported, the actions of the trafficker who transports that victim arguably would not fall within the meaning of “deceitful inducement” merely because he did not exercise ‘inducement’ or ‘compulsion’ on the victim notwithstanding that he may have intended, known or have had reason to believe that his act of transporting the victim would be for the purposes of exploitation.

Sections 339 and 340 set out the offences of wrongful restraint and confinement respectively. While these offences are applicable to TIP, *e.g.*, where the traffickers physically restrain victims, arguably it may not be applicable to traffickers who held, transported or harboured victims who had given their purported consent to his act based on “fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits”.<sup>141</sup> Further, the penalties for these offences are disproportionately low for a crime as heinous as TIP.

#### B. *General Observations*

Having analysed the above legislation possibly relevant to TIP, the following general observations are pertinent. First, while the cornerstone of the *Palermo Protocol*'s definition of TIP is the lack of consent, some of the provisions in the Singapore statutes do not distinguish between consensual and non-consensual acts and thus generally do not contain the consent-nullifying ‘means’ elements in TIP.<sup>142</sup> Further, where consent is relevant to the offence, it only relates to a narrow issue of whether certain outcomes were present at all—it is not sufficiently nuanced to consider whether there was consent to certain *conditions* of the outcome.

Secondly, the scope of the *actus reus* criminalised under the local statutes is substantially smaller than the scope of ‘acts’ and ‘means’ of TIP under the *Palermo Protocol*. Generally, there is an absence of means such as 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”.<sup>143</sup>

Thirdly, there is a paucity of laws on other forms of exploitation than prostitution. As mentioned above, it is not clear whether the laws on slavery would encompass the types of scenarios of “forced labour, slavery or practices similar to it” envisaged in the Protocol. There is also no local legislation on ‘debt bondage’ as defined *e.g.*, by the *US TVPA*; more general labour exploitation; acts and means of TIP which result in extraction of human organs;<sup>144</sup> or forms of sexual exploitation other than prostitution, *e.g.*, in the production of pornography.

<sup>141</sup> Article 3(a) of the *Palermo Protocol*, *supra* note 32.

<sup>142</sup> *E.g.*, ss. 140 and 141 of the *WC*, *supra* note 71, insofar as they relate to women above 18 years of age.

<sup>143</sup> Article 3(a) of the *Palermo Protocol*, *supra* note 32.

<sup>144</sup> The closest legislation would be s. 14 of the *Human Organ Transplant Act* (Cap. 131A, 2012 Rev. Ed. Sing.).

Fourthly, while the ‘purpose’ or ‘exploitation’ element in the Protocol is merely a ‘*dolus specialis*’ *mens rea* requirement, some of the relevant legislative provisions cited above appear to criminalise the exploitation itself, *e.g.*, compulsory labour, kidnapping, abduction, wrongful restraint and wrongful confinement. Fifthly, the *mens rea* requirements for the various offences vary; some require specific intent while some merely require a form of wilful blindness, *e.g.*, “having reason to believe”.

Fifthly, victim-centred provisions are glaringly absent from the various legislation. Only the *CYPA* provide *generally* for certain child protection powers (and not specifically for TIP victims).<sup>145</sup> The other statutes are all narrowly focused on criminalising various conduct.

Sixthly, the relevant provisions tend to perpetuate the image of the helpless female sexual victim. Few of the provisions envisage men as possible victims. Further, many of the laws are not sufficiently nuanced to capture scenarios where the victim might have initially consented to certain circumstances but discovers subsequently that he or she was ensnared in a different circumstance that he or she would not have consented to. There are also no specific provisions which address secondary victimisation.<sup>146</sup>

Seventhly, the penalties for the respective local provisions are generally short imprisonment terms and not severe financial penalties.<sup>147</sup> There appears to be no provision for perpetrators to recompense victims.<sup>148</sup> Even the imprisonment terms for some of the above offences are disproportionately low compared to other national legislation.<sup>149</sup>

## V. PROPOSALS

In the light of the above analysis, I now sketch several legislative and policy proposals which address some of the above critiques.

### A. *Tackling the Economics of Demand*

A sustainable and deep response to the trafficking problem must be one targeted at supply, distribution and demand. Distribution-side responses, *e.g.*, criminalising traffickers, are well-established in most existing legal treatments. Supply-side solutions on the other hand are systemic, resource-heavy and long-term, requiring a “human security”<sup>150</sup> or human development approach, for which law is arguably less appropriate.

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<sup>145</sup> See *e.g.*, ss. 8A, 9, 9A, 49 and 51 of the *CYPA*, *supra* note 117.

<sup>146</sup> In practice, a gag order is often obtained for criminal proceedings involving sex crimes.

<sup>147</sup> See *e.g.*, Chapter Four of the *Taiwan HTPCA*, *supra* note 43, in which financial penalties may be up to NT\$7 million, which is approximately S\$300,000 (at the exchange rate during the time of writing).

<sup>148</sup> See art. 6(6) of the *Palermo Protocol*, *supra* note 32.

<sup>149</sup> See *e.g.*, s. 10 of the *Philippines Anti-Trafficking Act*, *supra* note 55, in which the imprisonment terms generally range between a maximum of 15 years and life imprisonment.

<sup>150</sup> UN Commission on Human Security, *Human Security Now* (New York: Commission on Human Security, 2003) at 4. See Ryszard Piotrowicz, “Human security and trafficking of human beings: the myth and the reality” in Alice Edwards & Carla Ferstman, eds., *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge: Cambridge University Press, 2010) 404.

However, the law can address demand-side factors, *e.g.*, by increasing the costs of consuming goods or services of TIP until a significant percentage of potential consumers are priced out of the market.<sup>151</sup>

For sex-related exploitation, several options are theoretically plausible: (i) criminalise sex consumers with extremely substantial fines and imprisonment; (ii) criminalise people running the sex trade with similar penalties; (iii) impose heavy taxes on people running the sex trade such that the costs are channelled to end consumers; (iv) criminalise only people running the sex trade on TIP victims; and (v) heavily penalise sex consumers who know or ought to know that a TIP victim is involved.<sup>152</sup> It has been found that patrons of sex workers view *trafficked* sex workers as less desirable (due to knowledge of the non-consensual nature of their service).<sup>153</sup> The effect of these solutions would therefore be to increase the price of sexual services; the likely persons that would attract consumers at such high prices would probably be those that are *not* trafficked.<sup>154</sup>

Nevertheless, even amongst these options, there are moral and ideological tensions referred to above at play. With respect to options (i) and (ii), it may be argued that such policies unduly discriminate against persons who autonomously choose sex work; further, they endanger the safety and health of sex workers by driving them further 'underground'. Option (iii) might be critiqued for implicitly endorsing prostitution as a legitimate business. Finally, although options (iv) and (v) may face fewer moral and ideological objections, they are arguably the least efficient because substantial resources would likely be needed to enforce them at low return rate and high risks. Further, various complex socio-cultural factors, *e.g.*, race and "otherness",<sup>155</sup> affect demand for sexual services and/or exploitation. In this regard, further sociological study should be undertaken to better understand the demand trends relating to possible TIP victims.

With respect to non-sex labour, the aim would be to heavily penalise the business person or consumer who knew or ought to have known that upstream of the supply chain of the goods or services in question is tainted with TIP. The enforcement of such measures would require mandated transparency of supply chains. Calibrating appropriate penalties requires an economic analysis of the potential value that exploiters can expect to enjoy as well as the probability of prosecution and probability of conviction.<sup>156</sup>

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<sup>151</sup> Necessarily, this is possible because the demand for the goods and services in question are highly elastic.

<sup>152</sup> See art. 19 of the *Council of Europe Convention*, *supra* note 33. See also s. 11 of the *Philippines Anti-Trafficking Act*, *supra* note 55, which makes it an offence for a person to buy or engage in services of trafficked persons for prostitution. I propose that the *mens rea* requirement for such an offence should further be clarified to include the scenario where the person 'ought to have known' that the person being engaged was a trafficked person.

<sup>153</sup> Haynes, *supra* note 2 at 120.

<sup>154</sup> This should not be taken to mean that I condone prostitution. I affirmatively do not. However, it is necessary to be realistic about the fact that notwithstanding criminalisation and heavy enforcement, there would always be a black market for such services that are always in demand.

<sup>155</sup> Chung, *supra* note 98 at 1727, 1728.

<sup>156</sup> Siddharth Kara, "Designing More Effective Laws Against Human Trafficking" (2011) 9(2) *Northwestern Journal of International Human Rights* 123 at 139-141.



Generally, substantial financial penalties should be imposed on TIP perpetrators who reap substantial profit from exploiting TIP victims.<sup>157</sup> This could include mandatory restitution or compensation to victims.<sup>158</sup> Also, the fines paid to the State can be used to financially support the state's services to TIP victims.<sup>159</sup> Further, if the perpetrator is hiding behind the corporate veil, it should be provided that the veil should be lifted and that the directors, partners, managers, and/or responsible officers should be held personally liable.<sup>160</sup>

### B. *An Omnibus Anti-Trafficking Legislation*

Shortly after the completion of this article, it was announced that a Private Member's Bill on TIP would be tabled.<sup>161</sup> The merits of an omnibus anti-trafficking legislation are manifold. Assuming that Singapore takes a serious view of TIP,<sup>162</sup> it is necessary for an omnibus anti-trafficking legislation to be enacted for the following reasons.<sup>163</sup>

First, TIP is a complex crime owing to its cross-border, surreptitious, multi-faceted nature. As would be noted from the discussion above, existing piece-meal legislation is manifestly inadequate to address the many aspects and scenarios of TIP.

Secondly, the nature of the circumstances, which TIP victims are in, distinguish them from victims of crimes which are more domestic in nature; TIP victims are typically migrants who are likely to be unlawfully resident in the jurisdiction and/or have committed several offences by reason of their status as victims. TIP victims are therefore systemically more vulnerable to oppression and may even face improper treatment by law enforcement authorities. Further, the definitions of TIP victims and TIP offences are intricately connected.

Thirdly, enacting an omnibus legislation would be a strong signal to TIP perpetrators about the seriousness with which the State takes on the problem. Further, it would promote public awareness and make it more expeditious for stakeholders to have an omnibus legislation that is more accessible than piece-meal provisions scattered across different statutes.

I propose the following broad suggestions on what a Singaporean omnibus anti-trafficking legislation could entail or include. First, there should be a consistent definition of TIP premised on art. 3 of the *Palermo Protocol*. However, the *Palermo Protocol* was meant to be only a *minimum* standard that left a wide margin of

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<sup>157</sup> See art. 23 of the *Council of Europe Convention*, *supra* note 33; arts. 31-35 of the *Taiwan HTPCA*, *supra* note 43.

<sup>158</sup> See art. 15 of the *Council of Europe Convention*, *ibid.*; §1593 of the *US TVPA*, *supra* note 65; s. 23(c) of the *Philippines Anti-Trafficking Act*, *supra* note 55.

<sup>159</sup> See *e.g.*, art. 18 of the *Taiwan HTPCA*, *supra* note 43.

<sup>160</sup> See ss. 10(e) and (f) of the *Philippines Anti-Trafficking Act*, *supra* note 55; art. 22 of the *Council of Europe Convention*, *supra* note 33; art. 39 of the *Taiwan HTPCA*, *supra* note 43.

<sup>161</sup> Andrea Ong, "Christopher de Souza to introduce Private Member's Bill on human trafficking" *The Straits Times* (11 November 2013).

<sup>162</sup> Radha Basu, "Singapore toughens its stance on human trafficking" *The Straits Times* (11 June 2011).

<sup>163</sup> See also John Gee, "Why S'pore needs anti-trafficking laws" *The Straits Times* (21 October 2013).

interpretation for States to adopt in terms of dealing with TIP in its local context. Hence, it would be pertinent to refer to the approaches adopted in other supranational or national legislation.<sup>164</sup> Given that existing pieces of legislation do not adequately address (if at all) labour exploitation and exploitation for organ harvesting,<sup>165</sup> these should be addressed in the legislation. It would also be helpful to provide elaborate definitions on concepts such as ‘abuse of position of vulnerability’,<sup>166</sup> ‘coercion’,<sup>167</sup> ‘forced labour’,<sup>168</sup> ‘debt bondage’,<sup>169</sup> ‘involuntary servitude’<sup>170</sup> and ‘sexual exploitation’.<sup>171</sup> Sham marriages and adoptions should also be addressed.<sup>172</sup> Relevant marriage and adoption legislation should also be revised through the lens of TIP prevention. Further, various scenarios of purported ‘consent’ by the victim which would cause the matter to fall outside the parameters of the TIP legislation should also be made clear.<sup>173</sup>

Secondly, the legislation should also criminalise parts of the entire TIP process (and not require the complete chain of TIP).<sup>174</sup> *E.g.*, acts relating to passports, immigration or other personal documents for TIP purposes should be criminalised.<sup>175</sup> Extra-territorial jurisdiction should also be expressly provided for in the legislation.<sup>176</sup>

Thirdly, the legislation should be gender-neutral. The age of minority should also follow that adopted in the *Palermo Protocol*, *i.e.* 18 years of age. Fourthly, a victim-centred, victim-welfare approach should be adopted.<sup>177</sup> This should be complemented by an intentional collaborative approach with civil society organisations and NGOs.

<sup>164</sup> See *e.g.*, the *US TVPA*, *supra* note 65; the *Council of Europe Convention*, *supra* note 33; the *Philippines Anti-Trafficking Act*, *supra* note 55; the *UNODC Model Law*, *supra* note 50; the *Taiwan HTPCA*, *supra* note 43; the *Romanian Anti-Trafficking Law*, *supra* note 73.

<sup>165</sup> See art. 2(1)(1) of the *Taiwan HTPCA*, *ibid.*; art. 2(2)(d) of the *Romanian Anti-Trafficking Law*, *ibid.*

<sup>166</sup> See art. 5(1)(a) of the *UNODC Model Law*, *supra* note 50.

<sup>167</sup> See art. 5(1)(e) of the *UNODC Model Law*, *ibid.*

<sup>168</sup> See s. 3(d) of the *Philippines Anti-Trafficking Act*, *supra* note 55; §1589 of the *US TVPA*, *supra* note 65; art. 5(1)(i) of the *UNODC Model Law*, *ibid.*

<sup>169</sup> See §103(4) of the *US TVPA*, *supra* note 65 discussed above. See also s. 3(i) of the *Philippines Anti-Trafficking Act*, *ibid.*; art. 5(1)(g) of the *UNODC Model Law*, *ibid.*; art. 2(3) of the *Taiwan HTPCA*, *supra* note 43.

<sup>170</sup> See §103(5) of the *US TVPA*, *ibid.*; the *Philippines Anti-Trafficking Act*, *ibid.*; art. 5(1)(r) of the *UNODC Model Law*, *ibid.*

<sup>171</sup> See s. 3(h) of the *Philippines Anti-Trafficking Act*, *ibid.*, on the definition of sexual exploitation and s. 3(j) on the definition of pornography. See also art. 5(1)(s) of the *UNODC Model Law*, *ibid.*

<sup>172</sup> See Meier, *supra* note 138. In this respect, ss. 4(b) and (c) of the *Philippines Anti-Trafficking Act*, *ibid.*, address such sham marriages as a form of TIP. See also s. 4(g) on adoption and s. 4A on various acts relating to children and women pregnant with child; art. 5(1)(j) of the *UNODC Model Law*, *ibid.*

<sup>173</sup> See note 139 above.

<sup>174</sup> See s. 4A of the *Philippines Anti-Trafficking Act*, *supra* note 55, on attempted offences; ss. 4B and 4C of the act which address accessory or “accomplice” liability; s. 5 of the act which address acts which promote TIP. See also arts. 12-14 of the *UNODC Model Law*, *supra* note 50.

<sup>175</sup> See §1592 of the *US TVPA*, *supra* note 65; art. 20 of the *Council of Europe Convention*, *supra* note 33; art. 15 of the *UNODC Model Law*, *ibid.*; s. 3 of the *AITCA*, *supra* note 67. See also ss. 463-476 of the *PC*, *supra* note 90; the *Passports Act* (Cap. 220, 2008 Rev. Ed. Sing.).

<sup>176</sup> See s. 26A of the *Philippines Anti-Trafficking Act*, *supra* note 55; art. 31 of the *Council of Europe Convention*, *ibid.*; art. 7 of the *UNODC Model Law*, *ibid.*

<sup>177</sup> See text accompanying note 69.

## VI. CONCLUSION

It has been shown that the existing international legal treatment of TIP is plagued by various problems. Singapore does not fare better given its lack of comprehensive and specific legislation addressing TIP—existing piecemeal statutory provisions that may be applicable to TIP fall short of international standards and also suffer from the same problems that beset the latter.

While an omnibus anti-trafficking legislation in the Singapore context is necessary, the enactment of such legislation alone is nevertheless insufficient to adequately combat TIP. Political will, investing sufficient resources in this long-term endeavour, appropriate training,<sup>178</sup> implementing a national monitoring mechanism<sup>179</sup> and facilitating paradigm shifts within the operating culture of the relevant governmental agencies are also necessary.<sup>180</sup> Regional cooperation should also be bolstered by way of an increased usage of inter-state channels of communication and cooperation.<sup>181</sup> It remains to be seen whether Singapore will take a tough stance on TIP, by which enacting appropriate legislation would merely be a first step in a long journey.

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<sup>178</sup> This is expressly provided for in art. 7 of the *Taiwan HTPCA*, *supra* note 43.

<sup>179</sup> See art. 36 of the *UNODC Model Law*, *supra* note 50.

<sup>180</sup> See *e.g.*, in the U.S. context, Dina Francesca Haynes, “Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act” (2008) 6(1) *University of St. Thomas Law Journal* 77. See also Jonathan Todres, “Law, Otherness, and Human Trafficking” (2009) 49 *Santa Clara L. Rev.* 605 on the problem of perceiving the TIP victim and problem as the ‘other’, resulting in a lack of will or impetus to tackle the TIP problem.

<sup>181</sup> See the Second Reading of the *Mutual Assistance in Criminal Matters Bill*, Sing., *Parliamentary Debates*, vol. 71, col. 995 (22 February 2000) by then-Minister for Law, Prof. S. Jayakumar, where the Minister noted that some offences on “trafficking in women and children” are clearly listed in the Bill but that the Bill does not address “mutual assistance in prosecuting unscrupulous foreign agents with respect to foreign illegal workers”. The latter would likely involve instances of labour exploitation in the TIP context.