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Meeting the Minimum Standards of the Palermo Protocol: The case of South Africa

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CHAPTER 4

Conclusion and Recommendations

The aim of this min-thesis is to establish whether South Africa successfully meets the standards set out in the Palermo Protocol. To achieve this, a comprehensive overview of human trafficking was provided, followed by an examination of South Africa's legal framework in light of the minimum standards provided in the Protocol. This chapter summarises the major findings of the study and provides some recommendations with regard to the prosecution, protection and prevention of human trafficking.

4.1 Conclusion

This study has highlighted the growing concern of human trafficking for the international community. In attempt to combat the trade in human cargo, the international community has adopted a wide array of international standards to combat the trade in humans. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol) is the most significant of the international instruments dealing with human trafficking. The specific goal of the Protocol is to adopt "effective action to prevent and combat trafficking in persons, especially women and children, which requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking."

The efforts to combat human trafficking begins with the definition of trafficking. The study has shown that various definitions of trafficking are provided in international instruments. The most comprehensive definition is provided in the Palermo Protocol. The Palermo Protocol was the first transnational instrument to identify multiple facets of trafficking and was the first treaty to provide a comprehensive definition of trafficking which laid the groundwork for international and domestic laws to be designed to address the issue.

Additionally, it was established that international instruments on trafficking and related aspects of trafficking offer guidance for developing competent strategies to deal with trafficking. The counter-trafficking strategies as found in treaties, protocols, declarations and resolutions, which specifically focus on combating trafficking compel States to prosecute traffickers, protect those who are vulnerable to trafficking along with those already trafficked and produce structures for prevention. The Palermo Protocol is, in particular, designed to

reflect the international community's political will to combat organized crime. The goal of the Palermo Protocol is to adopt "effective action to prevent and combat trafficking in persons, especially women and children, which requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking." study focused on the three elements of the Palermo Protocol, namely, the prosecution of human trafficking offenders, the protection of human trafficking victims and the prevention of human trafficking. The Protocol obliges State Parties to establish polices in order to prosecute persons guilty of human trafficking. Additionally, the Palermo Protocol criminalises any attempt to commit the crime, being an accomplice to human trafficking or taking part in the organising of the crime. The Palermo Protocol makes reference to the duties State parties are to undertake with regard to victims of human trafficking. These duties are, but not limited to, providing assistance for legal matters, to provide suitable shelter, basic medical care and employment opportunities. Furthermore, the Palermo Protocol gives discretionary powers to governments to implement physical, psychological or social recovery measures.

The study has also highlighted five provisions with respect to the prevention, cooperation and other measures to combat trafficking in persons. These provisions require States Parties to create policies, programmes to combat trafficking in persons. In addition, States Parties must host information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons. The Palermo Protocol provides that policies, programmes shall include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society. In addition to governments establishing extensive policies and programmes regarding trafficking in collaboration and cooperation with NGOs, it must also conduct research as it is important in understanding trafficking and developing these policies and responses. It advocates information-sharing between states and the training of experts involved in one capacity or another in the struggle against human trafficking.

The evaluation of the South African counter-trafficking response with the recognized minimum anti-trafficking standards is made difficult due to the fragmented nature of the present domestic response. With respect to prosecution, the domestic response is not incorporated in a single piece of legislation; it can be categorised in three parts. The first part of the South African legal response is that of current common law and statutory crimes that

may well apply in a number of human trafficking cases in prosecuting trafficking offenders for crimes other than human trafficking. However, the above has no direct effect on human trafficking and does not deal with the trafficking crime sufficiently.

The second part of the domestic response comprises of anti-trafficking provisions in two pieces of legislation. The Children's Act 38 of 2005 which proscribes all forms of trafficking in children. However, the object of the Act is to focus solely on the protection of children, therefore no protection is offered for adults against trafficking or any other abuse. Conversely, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act) criminalises the trafficking of children and adult persons for purposes of sexual exploitation, nevertheless does not criminalise any of the alternative forms of trafficking. Additionally, the Sexual Offences Amendment Act does not provide for the prevention of human trafficking or for the protection and assistance of victims of human trafficking.

The study accepts that although common-law crimes and statutes can be relied upon, they are not comprehensive enough to adequately deal with the complexities of human trafficking and provide only a fragmented approach to combating the crime. As regards to the transitional legislation implemented to prosecute trafficking offenders, it was acknowledged that while the Sexual Offences Act 2007 and the Children's Act 2005 encompasses the crime of trafficking, the crime seems to be limited in both Acts. Trafficking in the Sexual Offences Act 2007 is directed at equally to adults and children on the other hand the offence is restricted to trafficking for sexual purposes. The provisions in the Children's Act confine trafficking offences to those committed against children. The provisions in the Sexual Offences Act 2007 and the Children's Act 2005 consequently do not fully comply with international counter-trafficking standards set out in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

The Combating of Trafficking in Persons Act criminalises several acts that constitute or concern trafficking in persons and enforces strict penalties for violations as follows: Trafficking in persons is punishable by a maximum of life imprisonment. Further, engaging in conduct that causes an individual to enter into debt bondage is punishable by up to 15 years' imprisonment. Any benefit gained from services of a trafficking victim is punishable by up to 15 years' imprisonment and the assistance of trafficking in persons is punishable by up to 10 years' imprisonment. However, imprisonment is not the only punishment which the

Act provides for. The Combating of Trafficking in Persons Act also inflicts severe fines and permits the State to seize the assets of traffickers. This legislation will assist in prosecuting suspects and will guarantee that victims of human trafficking are supported by a protective structure involving various role-players.

With respect to the protection of victims of trafficking, it is noted that there is no definite victim identification guidelines in the Trafficking Act, thus, victims find themselves arrested along with their traffickers because law enforcement officials fail to establish the status of the victim. Additionally, there is a grave lack of shelters and adult victims find themselves placed in children's shelters. This could be due to the economic challenges South Africa faces and the lack of funding needed for consistent provision of programmes necessary for the adequate recovery of victims. South Africa Police Service as a first point of contact undermines the efforts to curb human trafficking due to the general distrust for law enforcement and the failure to adequately identify victims. The Provisions of rehabilitation such as education and skills training are not definite but are optional. What emerges from the Trafficking Act is that it fails to address victim related conditions in relations to foreign nationals.

South Africa, in compliance with the Palermo Protocol has also responded to its obligation to prevent human trafficking. It has established comprehensive policies, programmes and other measures to prevent and combat trafficking in persons, such as the Tsireledzani Programme, the Human Trafficking Desk which manages trafficking-in-persons matters received as well as to provide advice to the provinces and organised crime units on intricate matters arising from trafficking in persons' investigations. Additionally, the South African government put in place a Trafficking in Persons Intersectoral Task Team which assists a multi-sectoral response to the advancement and implementation of a National Action Plan to prevent trafficking in persons. South Africa is also a party to the Global Action to Prevent and Address Trafficking in Persons and the Smuggling of Migrants to which South Africa which has held numerous workshops in South Africa focusing on the prevention of human trafficking. Additionally, South Africa has various non- governmental organizations focusing on human trafficking. These include but are not limited to the Salvation Army, A21, the Tshwane Counter-Trafficking Coalition and the Red Light Campaign.

It is clear that South Africa has indeed taken positive steps towards the fight against human trafficking. On many levels South Africa has responded to the Palermo Protocol. However, trafficking has a complex socio-economic and political foundation which is connected to a

greater, global process. It is not merely a social or moral issue to be treated with casual initiatives, as this does not address poverty or related issues of vulnerability and discrimination in strategic or sustainable ways. There needs to be greater relations between trafficking prevention strategies and education, empowerment and poverty relief targeted at vulnerable populations.

4.2 Recommendations

The following recommendations are proposed to ensure South Africa's compliance with the minimum requirements of the Palermo Protocol:

4.2.1 Prosecution

- The role and importance of South Africa's criminal justice system must be elevated to unprecedented heights. This will require considerable financial investments in capacitating prosecutors, interpreters, investigators, law enforcement agencies, social workers and psychologists with essential skills and resources required to investigate and prosecute complex human trafficking cases whilst maintaining a victim-centred approach in prosecution strategies. Important areas for skills development in this sector include trauma-informed care, specialised financial investigations, anti-money laundering, cybercrime, open source- and social media analysis, and responding to the use of cryptocurrencies and the 'dark web' in crimes associated with human trafficking.
- The multi-layered complexities and workload intrinsic to human trafficking investigations and prosecutions necessitates specialisation and dedicated capacity. Proactive, intelligence-led and court-driven investigation strategies must become a standard practice that is paralleled with financial investigations and asset forfeiture.
- Human trafficking as an organised crime demands compulsory integrity testing and vetting of all operational staff, including selected members from civil society and NGOs who participates in operational matters. Mandatory and random drug testing of frontline public officials must be considered, and official complicity in trafficking crimes, including crimes committed against persons in prostitution, must be dealt with decisively. Drug rehabilitation centres and shelters for victims, both men and women, must be properly funded and capacitated.

4.2.2 Protection

- The police should be substantively sensitised on victim handling. This requires comprehensive training and proper understanding on the role they serve. Untrained police officials dealing with human trafficking victims could serve as a deterrent for future victims.
- The Department of Social Development Regulations for the Trafficking Act is not clear with regard to continual after care provisions in cases where victims require long term care. Therefore, in these cases, directives concerning what will happen to victims must form part of legislation to provide clarity and certainty. A long term plan will further ensure that victims do not fall back into circumstances that left them vulnerable to trafficking in the first place.
- The Trafficking Act should state alternatives that would be available to victims who have no home to return to; or if the victim's family members to whom the victim is expected to return were the perpetrators or the accomplices, or if the only place to return to is the place where they have been trafficked.
- Additionally, the State should consider providing long term assistance to victims of trafficking by providing the victim with skills that will enable building a life for themselves. This will prevent them from falling back into the harsh economic realities that they were lured from, thereby also preventing them from being re-trafficked.

4.2.3 Prevention

- Government must prioritize the fight against trafficking in women and children as a political issue that must be part of the governance agenda, given the specificities it entails. This needs to be revisited annually whereby taking into account statistics regarding the root causes of human trafficking.
- Direct Prevention Activities includes education and effective law-enforcement but also involves addressing root causes.
- Direct prevention requires effective partnerships between government, law enforcement and civil society institutions and the clear intent of improving the quality of life of the target groups, namely those vulnerable to human trafficking

- NGOs, local government institutions and law enforcement personnel must work with community leaders through development committees or other existing structures (men and women) to form partnerships to combat trafficking as a manifestation of insecurity; economic empowerment of women and girls which enhance their access to productive resources and markets and ensure sustainable economic mobility; interventions that include visiting high-risk groups: such as young women in rural areas, migrating women, refugee women, uneducated women; enlisting the support of the media to document the means, actions and outcomes of human trafficking; consistent and persistent support to staff engaged in active border monitoring and investigation to ensure their ready access to information and other resources;
- It will be useful for organisations to work with former 'victims' as peer counsellors and spokespersons to support prevention activities. This will give a unique insight on what trafficking practically entails and the consequences thereof.
- Civil society organizations are further encouraged to start community education programmes for the prevention of child abuse and trafficking, whereby children are the main actors of the program. This will consist of awareness-building in schools and other places through arts and culture. By having children play a part in these programs in a manner that they understand, it increases the aim of getting the message across.
- There needs to be thorough, regular, practical training of all elements of the police/judicial system, government officials and border guards. This training will reinforce their capacity to deal efficiently with human trafficking.
- Government needs to develop opportunities and improve access to formal education for women, girls and boys at all levels. Additionally, ensure a link between better education and available job opportunities. The incorporation of gender and human rights concerns like trafficking and awareness and information into informal education activities and into school curricula will further ensure that youth are educated on this issue.

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