

# Human Trafficking in Brazil

*Legal Remedies: advances in national legislation*

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## Legal Remedies: advances in national legislation

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### I. Introduction

Brazil is one of the most influential countries of South-America, being a model of economic growth and development in the region. However, it is still a target of critiques made by international organizations and other States when it comes to fighting human trafficking. The Brazilian government has been questioned about the used definition of human trafficking in its internal legislation given its lack of coherence with international standards of human rights protection.

This scenario is particularly grave because Brazil is a country of origin, transit and reception for international human trafficking, besides having high rates of internal trafficking within the country territory. In 2013 Brazil had 254 documented cases of human trafficking, number which was an increase of 865% compared to 2011.<sup>1</sup>

Between the causes of trafficking in persons in Brazil there is sexual tourism, corruption of public authorities and insufficient laws.<sup>2</sup> Critiques focus mainly on the limited definition of human trafficking, which excludes *trabalho escravo* (forced labor) and a range of conducts punishable inside the human trafficking category.

In this paper I will contrast the Brazilian legislation on Human Trafficking with the international obligations that the country has committed to, as the Palermo Protocol<sup>3</sup> and with the United Nations principles on the right to effective remedy for the victims of

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<sup>1</sup> Ministry of Justice, National Report about Human Trafficking: data of 2013. Brazilia, 2013. Available at: <http://www.dedihc.pr.gov.br/arquivos/File/2015/relatoriotraficodepessoas2013.pdf>.

<sup>2</sup> OIT, Trafficking in persons for purposes of sexual exploitation. Brazilia, 2006. Available at: [http://www.oitBrazil.org.br/sites/default/files/topic/tip/pub/trafico\\_de\\_pessoas\\_384.pdf](http://www.oitBrazil.org.br/sites/default/files/topic/tip/pub/trafico_de_pessoas_384.pdf)

<sup>3</sup> Full text of Palermo Convention is available at <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

trafficking in persons - A/HRC/26/18<sup>4</sup>, which are not binding but provide guidelines in good practices.

For achieving it, I will first indicate the legal framework that is currently in force in Brazil, indicating the international treaties and conventions that the country has ratified. Then, I will provide an overview of the Brazilian federal framework on human trafficking, which will include legislative and political adaptation of the Palermo Protocol in the national framework and the definition of trafficking in persons' criminal offence. Finally, I will set out, through a chart, Brazilian legislation in regard to remedies with the principles on the right to effective remedy for victims of human trafficking as established in the A/HRC/26/18 resolution.

I will conclude that Brazil is not in compliance with its international obligations acquired in Palermo Convention and does not follow the principles on the right to effective remedy for victims of trafficking in persons compiled on United Nations A/HRC/26/18 resolution. I will find that from point of view of the protection of the individual, and over the frame of legal remedies found, the latter is not adequate to ensure access to justice and reparations to victims of human trafficking.

## **II. Legal framework**

### **II.a International Obligations**

Brazil has been proactive in regard to international legal commitment to combat human trafficking and provide adequate remedies to the victims. In January 2004 the country ratified the Convention against Transnational Organized Crime (hereinafter Palermo Convention) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons,

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<sup>4</sup> United Nations Resolution available at:  
<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ListReports.aspx>

Especially Women and Children (hereinafter Palermo Protocol), supplementing the United Nations Convention against Transnational Organized Crime.

In consequence, Brazil is internationally obliged to: (i) legislate to include human trafficking as a crime in its national law; (ii) to prevent, investigate and prosecute offences related to Trafficking in persons and (iii) to take the necessary measures to ensure assistance and protection to human trafficking victims.<sup>5</sup>

## II.b Brazilian legislative and policy efforts

With the intention to comply with its international commitments, Brazil incorporated the Palermo Convention and its Protocol in its legal order through the Decrees n.º 5.016 and 5.017. Those were adopted, with adjustments, in the National Policy to Combat Human Trafficking, that in its turn was approved by the Decree n.º 5.948 of 26 of October of 2006. Although it is not a binding instrument, this policy defines and expands some elements of the concept of human trafficking proposed in the Palermo Protocol.

The National Policy adopted the concept of “human trafficking” as it is stated in the Palermo protocol, which means that the exploitation will include, at least, prostitution or other forms of sexual exploitations; forced services or work; slavery or practices similar to it; and servitude or organ removal.<sup>6</sup>

Describing those elements, Brazilian Policy plan explains that:

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<sup>5</sup> Obligations are stated in articles 5, 6 and 7 of the Palermo Protocol.

<sup>6</sup> Brazil, Article 2, Chapter I, Decree N.º 5.948, 26 of October of 2006. Original text: “A exploração incluirá, no mínimo, a exploração da prostituição de outrem ou outras formas de exploração sexual, o trabalho ou serviços forçados, escravatura ou práticas similares à escravatura, a servidão ou a remoção de órgãos”. Translation: “The exploitation will include, at least, the exploitation of someone’s prostitution or other forms of sexual exploitation, the forced services or work, the slavery or practices similar to it, the servitude or the organ removal.”

- The expression “slavery or other practices similar to it” must be understood as the conduct stated in the art. 149 of Law n.º 2.848, that refers to the reduction of the person to a condition analogous to the slave.<sup>7</sup>
- The intermediation, promotion or facilitation of the recruitment, of the transport, transfer, the harboring of persons with the scope of exploration also configures human trafficking.<sup>8</sup>
- Internal trafficking in persons is the one realized within one member-State of the Federation or between states, but inside of national territory.<sup>9</sup>
- The consent given by the victim is irrelevant for the configuration of trafficking in persons.<sup>10</sup>

It is important to notice, nevertheless, that those peculiarities, although stated in the National Policy, weren't necessarily reproduced in the legislation, and only some of them were adopted in the law through the years.

The Brazilian Penal Code was reformed in 2008 by the Law n.º 11.106 to substitute the gender-exclusively criminal offense of human trafficking, which included only women

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<sup>7</sup> Brazil, Article 2, §3, Chapter 1. Decree N.º 5.948, 26 of October of 2006. Original text: “A expressão “escravatura ou práticas similares à escravatura” deve ser entendida como: I - a conduta definida no art. 149 do Decreto no 2.848, de 1940, referente à redução à condição análoga a de escravo; e II - a prática definida no art. 1º da Convenção Suplementar sobre a Abolição da Escravatura, do Tráfico de Escravos e das Instituições e Práticas Análogas à Escravatura, como sendo o casamento servil”. Translation: "The term "slavery or practices similar to slavery" should be understood as: I - the conduct defined in art. 149 of Decree 2848 of 1940 regarding the reduction to a condition analogous to slavery; and II - the practice defined in art. 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, as the servile marriage. "

<sup>8</sup> Brazil, Article 2, §4, Chapter 1. Decree N.º 5.948, 26 of October of 2006. Original text: “A intermediação, promoção ou facilitação do recrutamento, do transporte, da transferência, do alojamento ou do acolhimento de pessoas para fins de exploração também configura tráfico de pessoas”. Translation: “Intermediation, promoting or facilitating the recruitment, transportation, transfer, accommodation or receipt of persons for exploitation also constitutes trafficking”.

<sup>9</sup> Brazil, Article 2, §5, Chapter 1. Decree N.º 5.948, 26 of October of 2006. Original text: “O tráfico interno de pessoas é aquele realizado dentro de um mesmo Estado-membro da Federação, ou de um Estado-membro para outro, dentro do território nacional”. Translation: “Internal trafficking in persons is the one carried out within a Member State of the Federation or of a Member State to another within the national territory”.

<sup>10</sup> Brazil, Article 2, §7, Chapter 1. Decree N.º 5.948, 26 of October of 2006. Original text: “O consentimento dado pela vítima é irrelevante para a configuração do tráfico de pessoas”. Translation: “The consent of a victim is irrelevant to the configuration of human trafficking”.

as victims, for a new penal type that criminalizes human trafficking for sex exploitation regardless the victims' gender. However, this penal type does not make any reference to the element of consent.

In 2009, new modifications to the Criminal Code were included. The Law n.º 12.015 introduced a differentiation between the international human trafficking from the national one. Nevertheless, it still referred to human trafficking as to the restricted act of sexual exploitation, leaving out other forms of exploitation.

Subsequent to the legislative measures, it was approved the I National Plan to Combat Human Trafficking (I PNETP), that was in force between 2008 and 2010. The Plan followed the spirit of the National Policy and had concrete goals for the implementation of actions in three areas: 1) prevention of trafficking, 2) accountability of the victimizer and 3) attention to victims.

The I PNETP was substituted in 2013, when Brazilian government announced their second National Plan against human trafficking, which is set to run from 2013 to 2016. This three-year initiative includes increased border control and a revision of the penal code.

In summary, we notice that there are several policy plans and legislative acts in regard to human trafficking. However, those dispositions seem to contradict and, because of issues of hierarchy and binding nature between laws and policies, are still inadequate to the international standards related to criminalization.

### **III. Definition of human trafficking and criminal punishments**

As it was mentioned before, the legal definition of trafficking in persons in Brazilian legislation is foreseen in the Chapter V of the Penal Code. The only legal dispositive dedicated to the subject is located under the title of "The pimping and Trafficking in

Persons for Prostitution or other forms of Sexual Exploitation”. Its last legal update was made in 2009.

Although this title includes crimes such as facilitating prostitution or other forms of sexual exploitation, house of prostitution and *rufianismo* (pimping), none of those criminal types are considered human trafficking. It is relevant to highlight that prostitution is legal in Brazil.

The criminal offense of “Tráfico internacional de pessoas para fim de exploração sexual” (International trafficking in persons for the purpose of sexual exploitation) was introduced in 2009 into the legal order, and its *núcleo penal* (criminal core) is characterized as:

Art. 231. To promote or facilitate the entrance, in national territory, of someone that will exercise prostitution or other type of sexual exploitation, or the departure of someone that is going to exercise it in overseas.

Punishment : reclusion, 3 to 8 years.

§ 1º The same penalty will be applied to the person that recruits, entice, or buys the trafficked person, as, having knowledge of this condition, transports, transfers or harbors the person.

In the other hand, other form of trafficking in persons considered in Brazil as such, is the internal/national trafficking with the purpose of sexual exploration:

Art. 231-A. To promote or facilitate the displacement of someone within the national territory for the exercise of prostitution or other forms of sexual exploitation.

Punishment - reclusion, from 2 (two) to 6 (six) years.

According to the law, the penal punishments of internal and international human trafficking should be raised in half if the victims are: under 18 years old; if, because of sickness or mental deficiency, she does not have the discernment to the practice of the act; if the trafficker is an ascendants (father/grandfather, etc.), step mother or father, brother, brother-in-law, partner, tutor or employer of the victim, or if by any other means of law assumed the obligation of care, protection or surveillance of the victim; or if violence, threat or fraud was used as methods of coercion. A fine is also going to be applied if the crime was committed with the purpose of getting economic profit.

Although some of the conditions mentioned above could qualify for trafficking in persons itself in other contexts, in Brazil, those are mere aggravating causes of the crime.

From what we notice in the Criminal Code, Brazilian's definition of trafficking in persons is partially in accordance with the minimum standards proposed in article 3 of the Palermo Protocol<sup>11</sup>. For one side, it does not reach the minimal requirements of the Protocol in regard to purpose, since it only includes prostitution and other forms of sexual exploitation. Nevertheless, it does clearly establishes the actions that are connected to the crime of trafficking in persons, such as recruitment, transfer and harbor. Moreover, it establishes the specific means<sup>12</sup> by which the persons might be exploited, considering it a cause of increase of the penalty, and not only a waiver of the consent.<sup>13</sup>

It is relevant to highlight that the other types of exploitation detailed in the Palermo Protocol, regardless of not being considered trafficking in persons, are punishable crimes.

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<sup>11</sup> Palermo Protocol. Art. 3: "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (...)

<sup>12</sup> Means: 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.

<sup>13</sup> Brazil, Article 2, §7, Chapter 1. Decree N.º 5.948, 26 of October of 2006.

For example, Brazilian law classifies the conduct of slavery work or *trabalho escravo* as a crime against personal liberty, and not as human trafficking *per se*. Nevertheless, it is a punishable crime. The main elements of the criminal conduct relate to the reduction of a person to a condition similar to slavery, which can be done through forced labor or exhaustive periods of work, degrading conditions of work or any restriction of movement due to a debt with the employer.<sup>14</sup>

In the same sense, organ removal is treated through a separate legislation, Law n.º 9.434/1997, which differentiates between types of organ removal to ensure adequate remedies, but none of those types are considered to be under the human trafficking umbrella as defined by Brazilian law.

In the same line, the delivery of a child to a person with doubtful morality (*inidônea*), the kidnapping of children, sale of children or adolescent or to promote or assist the effecting of an act aimed at sending a child or adolescent abroad without observance of the legal formalities or with the purpose of obtaining profit are punishable crimes under the Child and Adolescent Statute.

Finally, the sexual domination by a man – servile marriage, together with kidnapping and false imprisonment and sexual abuse are all crimes, but do not mix with the category of human trafficking.

As to the consent element, Brazilian law establishes that the free consent, in hypothesis of human trafficking, do not exclude the crime. Brazilian doctrine justifies such approach

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<sup>14</sup> Law nº 10.803, 11 of December of 2003. Original text: “Art. 149. Reduzir alguém a condição análoga à de escravo, quer submetendo-o a trabalhos forçados ou a jornada exaustiva, quer sujeitando-o a condições degradantes de trabalho, quer restringindo, por qualquer meio, sua locomoção em razão de dívida contraída com o empregador ou preposto”. Translation: “Art. 149. To reduce someone to a condition analogous to slavery, through subjecting them to hard labor or to exhausting journey, or through subjecting them to degrading working conditions, or restricting their locomotion in any way due to debt incurred with the employer or agent”.

alleging that the necessity of consent should be interpreted through the lenses of possible vulnerability. In other words, Brazilian legislators understood that in cases of human exploitation there is a robust presence of vulnerability. In this sense, the consent could never be considered to be given totally free due to the fragile state of the exploited person. For this reason, the consent is not considered as variable that could decriminalize the illegal conduct.<sup>15</sup>

In its turn, the forced or fraudulent consent are clauses for increase of the punishment, from 5 to 12 years, added to the punishment related to the violence committed.<sup>16</sup> This is different from Palermo Protocol's conception of fraud or coercion, since in the Protocol those elements are considered means for the human trafficking, and in the Brazilian legislation the means are "causas agravantes" (aggravating clauses) but are not needed for the configuration of the crime.

The consent is also irrelevant in the hypothesis of recruitment for forced work, servitude or situation analogous to servitude. Nevertheless, the consent is important when assessing organ removal and smuggling of migrants.

In summary, by comparing Brazilian conception of human trafficking with the definition posed in the Palermo Protocol, we have that, in regard to the conduct, Brazilian law satisfactorily establishes the acts that would entail a condemnation for trafficking in persons. Furthermore, in regard to the means, as it totally ignores any type of possible consent of the victim (to enter into a kind of labor or being exploited)<sup>17</sup> and increases the

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<sup>15</sup> Cíntia Yara Silva Barbosa. Significado e abrangência do "novo" crime de tráfico internacional de pessoas, p.24. Available at: <http://pfdc.pgr.mpf.mp.br/atuacao-e-conteudos-de-apoio/publicacoes/trafico-de-pessoas/significado-e-abrangencia-do-novo-crime-de-trafico-internacional-de-pessoas-perspectivado-a-partir-das-politicas-publicas-e-da-compreensao-doutrinaria-e-jurisprudencial-cintia-barbosa>.

<sup>16</sup> Ela Wiecko V. de Castilho. A legislação penal brasileira sobre tráfico de pessoas e imigração ilegal/irregular frente aos Protocolos Adicionais à Convenção de Palermo, p.10. Available at: [http://6ccr.pgr.mpf.mp.br/pfdc/informacao-e-comunicacao/informativos-pfdc/edicoes-de-2006/maio-2006/seminario\\_cascais.pdf](http://6ccr.pgr.mpf.mp.br/pfdc/informacao-e-comunicacao/informativos-pfdc/edicoes-de-2006/maio-2006/seminario_cascais.pdf)

<sup>17</sup> TRF-1 - ACR: 451 BA 0000451-35.2011.4.01.3311, Relator: DESEMBARGADOR FEDERAL TOURINHO NETO, Data de Julgamento: 26/03/2013, TERCEIRA TURMA, Data de Publicação: e-DJF1 p.293 de 05/04/2013.

penalty when there is threat, violence or fraud, Brazilian legislation goes beyond the protection suggested in the Palermo Protocol and offers greater protection to victims. Nevertheless, as to the purpose, Brazilian legislation seems to not meet the minimum criteria established in the Palermo Protocol, since it only recognizes sexual exploitation as human trafficking. Other types of exploitation are dispersed in the legal order, and even though they are criminal offences, they do not hold the status of trafficking in humans. Having an ordinary status not only diminishes the severity of the penalties, but also denies the magnitude of the issue that is human trafficking in Brazil and directly affect national and international statistics that are used for monitoring and planning combat against human trafficking.

#### **IV. Remedies for victims**

Taking into consideration the current state of the legal framework in Brazil, this section will demonstrate in a chart the level of Brazilian compliance with the Principles on the Right to Effective Remedy for Victims of Trafficking in Persons (UN, A/HRC/26/18). The mentioned chart assess the compliance in levels of rights and obligations, access to the remedies and the remedies provided by the Brazilian State to adults and child victims of human trafficking, in contrast with the guidelines offered by the UN, A/HRC/26/18. As it was mentioned before, only sex exploitation is considered human trafficking in Brazil. When dealing with dispositions that make direct reference to other forms of trafficking, I will compare the guidelines with the compatible and comparable dispositions in Brazilian law. Nevertheless, this will not mean, in any form, that those other exploitations conducts are treated as trafficking in humans.

<b>U.N. Principles</b>	<b>Brazilian Legislation</b>
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<p><b>I. Rights and Obligations</b></p>	<p><b>Brazilian does not have a dedicated Anti-Trafficking Law, therefore the right to an effective remedy for the victims of trafficking in persons is spread throughout existing legislation. However, the National Policy and the II National Plan<sup>18</sup> are the current applicable policies for the issue. The first one is a legislative measure that establishes directives to be followed by political compromises of Brazilian State through the National Plan. Those commitments include to prevent and repress human trafficking, as it is to guarantee the necessary assistance and the promotion of rights of the victims. Therefore, it complies with the rights and obligations, as follows:</b></p> <ol style="list-style-type: none"> <li>1. According to the Arts. 7 and 8, IX of the National Policy and art. 1 of the Inter-ministry Decree n. 634/2013, Brazil approves a National Plan which shall prevent and repress trafficking in humans, accountability to the victimizers and remedies to the victims. The remedies should be legal, social, health, house, social reinsertion, family reinsertion, specific needs and intimacy protection.</li> <li>2. Brazilian law ensures that both citizens and non-citizens have access to remedies when the violation occurred in national territory (art. 3, III of the National Policy). Moreover, this protection is extended to nationals that are overseas (Art.4, VII of the National Policy). Also, the remedies foreseen in the National Policy include measures for restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.</li> <li>3. Victims are able to claim those remedies through criminal (Art. 231 Brazilian Criminal Code) and civil (Arts. 927 and 402-405 and 944 – 954 of the Civil Code) and constitutional (Art. 5, V and X and 12 Federal Constitution) legal procedures.</li> <li>4. The National Policy (art. 3, II) directly expresses that the right to an effective remedy will be provided respecting the prohibition of discrimination on any ground.</li> <li>5. Besides mentioning substantive rights to remedy, such as health care, housing, etc., the National Policy also describes some procedural rights that are necessary for the victim to access the remedies, such as consular assistance Regardless the migratory situation of the person (art. 7, II) or a National Call-Complaint (art. 8, IX, b) As to a human rights-based approach, the National Policy mentions humanized treatment for victims (art. 8, I, a), the respect for human dignity (art. 3, I), guarantee of human rights (art. 3, IV), besides a series of measures based in human rights (art. 8, IX).</li> <li>6. The promotion of interstate international cooperation through bilateral and multilateral manners is expressly foreseen in art. 4, II and 8, II, (a) of the National Policy. Furthermore, cooperation between national and international police and legal international cooperation are also predicted in art 6, I and II.</li> </ol>
<p><b>II. Access to the right to a remedy</b></p>	<ol style="list-style-type: none"> <li>7. Brazilian legislation complies with the responsibility of provide and facilitate access to remedies under international law, as we see below: <ol style="list-style-type: none"> <li>a) Since human trafficking is a criminal offence established in the Criminal Code, the victims should use the criminal procedure in order to get a conviction of the perpetrator and the remedies. The criminal judge shall fix a minimal value for the reparation of the damage done (art. 387, IV Processual Criminal Code), and this value can be argued through a civil proceeding. The criminal judge can also enact an order to provide special protection for the victim (multidisciplinary attention, especially in areas such as psychologic, legal and health – art 201 § 5, Processual Criminal Code). In its turn, through the civil proceeding the victim has the possibility to claim compensation in order to repair the harm suffered. Those measures can be material and/or moral damage, as it can include a demand for lost profit.</li> <li>b) The objective number 2.D12 of the National Plan explains that it is one of the goals of the Plan to publish a Manual for operators of networks and services of combating the trafficking with procedures as to identify, police and report.</li> </ol> </li> </ol>

<sup>18</sup> Brazil. National Justice Secretary. II National Plan for the combat of trafficking in persons. Brasília, Ministry of Justice, 2013.

- c) **No information was found.**
- d) There is no federal disposition that mentions a period of assistance that will be given to the victim. While a criminal procedure is pending, the victim can stay in the country with a permission. Moreover, the victim can apply for a permanent permit in Brazil, that will have one year of validity (art. 16, Law n.º 6.815/80). One month before the expiration date, the victim shall inform if he or she wishes to stay in Brazil. However, the duration of the support that she will receive will depend of the institutions that are available in the state that the victim is.
- e) According with art. 3, II and art. 7, II and VI, the access to remedies shall be provided regardless the migratory status of the victim. This includes consular, special needs, medical, psychological, social and legal assistance. Furthermore, the victims can search for free legal advice with University's clinics, NGO's, the Public Defender's Office and the Public Prosecutor' Office.
- f) Although there is no dispositive that protects human trafficking victims from criminalization, prostitution is not a criminal offence in Brazil.
- g) As it was explained previously, the non-citizen that is in situation of vulnerability may apply for a permanent permit in Brazil. The petition must be submitted to the Ministry of Justice by the Public Prosecutor that is leading the case of the victim.
- h) Articles 3, II and 8, X (e) and (g) of the National Policy, and the goal 3.A.4 of the National Plan, are dedicated to promote dialogue and capacitation of public authorities to gender-sensitivity and non-discrimination
- i) Despite the fact that art. 3, II of the National Policy states that integral protection and assistance will be given to direct and indirect victims, regardless their collaboration in judicial procedures, the Processual Criminal Code (art. 201 § 1) still presupposes collaboration of the offended in the criminal procedure.
- j) The National Policy states that the victims shall have their intimacy and identity protected (art. 7, VII) and, once the victims are refuged by the State, they shall be granted security ( art. 8, V, (b)).

A. Restitution:

- 8. There is no specific provision on this regard. Nevertheless, it is a basic and fundamental principle of Brazilian Constitution and Criminal Law that returns the victim to the status quo.
- 9. Restitution measures on the Anti-Trafficking legislation include the subsequent:
  - a. **Under the legislation there is no a specific provision on this regard.**
  - b. Article 7, V of the National Policy explicitly provides that the institutions and authorities under the specific guidelines of victims' assistance shall promote family and community reunification.
  - c. **No provision on this regard.**
  - d. The victim can apply for a permanent permit in Brazil, that will have one year of validity (art. 16, Law n.º 6.815/80). One month before the expiration date, the victim shall inform if he or she wishes to stay in Brazil.
  - e. There is no legislative disposition about documentation. However, this can be asked through a civil and/or administrative process.
  - f. As part of the guidelines for victims assistance, the National Policy provide victims social reintegration with full access to work.
  - g. Social reinsertion of the victims is an essential concerns of the National Policy, as it mentions it as an area to be strengthen in several levels, such as with other states, with the own victim's conditions and as part of the training that authorities should receive.
  - h. There is no specific provision on return of property, since it must be part of the claims on the law suits.

**B.Compensation**

### III. Forms of the right to remedy

10. Art. 5 of the Federal Constitution establishes the right to a response, which shall be used as legal basis by victims when pursuing the required law suits in order to obtain the adequate compensation for the damages suffered. The right to a response includes the compensation that must be proportional to the damage, plus indemnity for material, moral and image damage.

11. Forms of compensation:

- a. Damages for physical and mental harm (intimate and psychologic suffering) can be claimed before civil judges.
- b. Damages for lost opportunities -including employment, education and social benefits- can be claimed under civil law suits. The reparation is based in one probability (the opportunity) and one assurance (lost).
- c. There is no specific provision about who is covering the costs of transportation and housing. However, any damage can be claimed under a civil lawsuit. Furthermore, the housing and provisional shelter will be provided by the government (art. 7, II of the National Policy).
- d. Material damages and loss of earnings, including loss of earning potential, and lost income can be claimed by victim under the civil procedure. Due wages might be claim under a labor law suit.
- e. Non-material damages can be claimed through civil law suit. (Art. 186 c/c 927 of the Civil Code)
- f. The reimbursement of legal fees and other costs will be done through the ruling of each lawsuit. Also, the victim can declare *hiposuficiência* (poverty), which will be decided upon his or her financial situation, and if considered valid will exempt her from any legal fees.
- g. Article 201, §5 of the Criminal Processual Code establishes that the judge will recommend the victim to multidisciplinary attention, especially in sociopsychology, legal assistance and health, at the expense of the victimizer or the State.
- h. Any other costs or losses incurred by the victims should be claimed under civil or criminal law suits.

12. States shall ensure that laws, mechanisms and procedures are in place to enable victims of trafficking in persons to have access to compensation, including:

- a. Although slavery does not hold the status of a human trafficking offence, labor lawsuits, with the assistance of the Labor Public Prosecutor, and civil lawsuits, with assistance of the Public Defender's Office can be charged.
- b. Criminal procedures will ensure the victims the possibility of being awarded the minimal referent to the damaged caused by the illicit act. If they find that insufficient, they can take the criminal decision to civil courts and make the adjustments. Those damage reparations are owed to the victim independently from any fines.
- c. **No provision was found in this regard.**
- d. Currently there is a proposal to be approved by the Senate that will establish that money or goods that were apprehend from the trafficking in persons will be used exclusively in the attention that shall be provided by the victims..
- e. There is no specific provision regarding enforcing reparation judgments. Nevertheless, under the criminal procedure there is a specialized judge to supervise the implementation and compliance of the sentence.

#### C. Rehabilitation and recovery

With respect to rehabilitation and recovery:

13. Art. 7, I, II, III, IV and V and Arts. 8, III, IV, V, VI, VII of the National Policy creates the obligation for the State to provide rehabilitation through psychological, labor, social, educational, medical, labor and legal assistance.

14. Although the National Policy states that assistance will not be conditioned to cooperation with legal prosecutions (art. 3, III), the Criminal Code conditions the criminal complaint and the financial restitution that could further be granted to the cooperation of the victim.

**D. Satisfaction:**

Satisfaction: Brazilian State shall promote the capacitation of professionals to the prevention and repression of the trafficking in persons, and fort the attention of the victim ( Art. 4, IX of the National Policy). It will also guarantee the access of the media and society to the situation of human trafficking in Brazil and the efforts made to combat it. (Art. 4, XIII)

15. Brazilian legislation does not include symbolic reparations to victims of human trafficking.

16. Satisfaction measures include:

- a. There is no legal provision in this regard.
- b. Article 4, XIII guarantees the full and public disclosure of information related to the combat of trafficking in persons. On the other hand, the victim of human trafficking may request to be included in the Victims and Threaten Testimonies Protection Program, regulated by the Law n.º 9.807/99 and the Decree n.º 3.518/00.
- c. **There is no provision in this regard.**
- d. **There is no provision on this regard.**
- e. Persons liable for trafficking in persons can be sanctioned under criminal, civil and/or labor law.

**E. Guarantees of non-repetition:**

17. Even though Brazilian law does not share the concept of no-repetition, the National Policy foresees several measures related to the implementation of public policies that shall promote the non-repetition, such as security, access to protection programs, health, education, labor and housing.

- a. There are specific units inside the Federal Police that are in charge of investigation and repression of human trafficking, which increases the effectiveness of the combat to trafficking in persons. ( Art. 8, I, f, p and q)
- b. The law offers the victim of human trafficking the possibility to apply to a temporary or permanent residence status.
- c. According to the Articles 4, 5 and 8 of the National Policy, the State shall develop programs and public policies dedicated to strengthen cooperation between states and institutions, as well as improving the effectiveness of criminal investigation and police action.
- d. **There is no particular provision on this regard.**
- e. The II National Plan, in its article 4.A.7, expresses the governmental efforts to investigate and analyze the relation between human trafficking and work, race, ethnicity, gender and conflict.
- f. The II National Plan foresees several initiatives that will be focused on the research and analysis of information regarding causes, specific vulnerabilities of certain groups and border issues related to human trafficking.
- g. In several occasions the National Policy mentions the incentive partnerships and cooperation between governmental and non-governmental actors to promote several aspects of the prevention of human trafficking and assistance to victims.
- h. The National Policy ensures protection to professionals that act in the combat to trafficking in persons and that, due to its functions, are threatened or at risk. (Art. 8, IX, d)

18. Additionally, in the case of children Brazilian law establishes that:

- a) The National Policy establishes that is governed by the principles of the integral protection of the child and adolescent. (Art. 3. Parágrafo único) In its turn, the best

<p><b>IV. Right to Remedy for Child Victims of Trafficking</b></p>	<p>interest of the child principle is established in the Federal Constitution, article 227, and it permeates the Child and Adolescent Statute. Finally, the Haia Convention of 1980 is directly applicable in Brazil, which also suggests the best interest of the child.</p> <ul style="list-style-type: none"> <li>b) The Child and Adolescent Statute has some provisions that assess the right to information of the child. However, there is no specific provision dedicated for victims of human trafficking.</li> <li>c) There is no specific provision in this regard. There are general guarantees related to legal guardian and legal advisement in the Child and Adolescent Statute.</li> <li>d) Although all the measures related to education, housing and legal advising established in the National Policy are applicable to children, the only specific provision remits to the child's entitlement to family and community reinsertion ( Art. 7, V of the National Policy).</li> <li>e) The National Policy declares that public policies shall include the theme of human trafficking in the capacity building of the Child and Adolescent Counseling and Tutelary Counseling (art. 8. IX, e). It also promotes the articulation of efforts to combat child and adolescent trafficking in borderlands. ( Art.8, IX, f)</li> </ul>
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#### **IV. Cases of trafficking in humans in Brazil**

For purposes of this academic paper I searched for concrete cases that would exemplify how victims of trafficking in human are rewarded remedies by Brazilian justice. Several obstacles emerged in doing this research.

First, there is no common jurisprudence database in Brazil. In this sense, and considering that trafficking persons in Brazilian law is a federal crime, it would imply searching in the database of each Court. There is one Federal Tribunal for each federal state of the country, each one with their own work methodology and search mechanism (some of them do not allow search without the number of process or without login permission).

Second, the criminal justice is only entitled to condemn the accused, but do not provide any other remedies for the victims. Sometimes it could condemn a minimal amount of material damage through a calculation made in day-fine.

In consequence, to find the detailed cases with a list of remedies that were provided for the victim would entail searching through civil cases, which are also affected by the problem of multiple databases. The difference is that in civil cases the plaintiff can initiate the action in the place where the wrong action occurred, or in the place of the residence

of the plaintiff or of the perpetrator, which means that there is no guarantee that the city of the decision of the criminal case will be the same where the civil case is going to transact. For this, it is extremely difficult to find the civil actions that refer to the found criminal condemnations for human trafficking.

Since trafficking in persons is a crime of public interest, the most effective research method would be through checking the database of the Public Ministries. However, permission for access is needed.

Finally, neither administrative nor constitutional courts in Brazil have jurisdiction over reparations or condemnation of human trafficking cases.

Having all the above mentioned in consideration, the best tool for finding cases of human trafficking in Brazil seems to be UNODC Case Law Database. Through this mechanism I was able to find 88 cases related to human trafficking in Brazil. Nevertheless, all of them are criminal judgments, which do not include any remedies for the victims besides the punishment of the perpetrator and, in some cases, day-fines. For these reasons, I considered the found cases irrelevant for the purposes of the paper.

## **V. Change in the way: Law n.º 7.370**

The project of Law n. 7.370/2014, which was already approved by the Chamber of Deputies and is still pending the Senate's approval, aims to strengthen the legislation related to human trafficking.

One of the main changes proposed is related to the scope of the concept of human trafficking in Brazil, which will include, besides sex exploitation, illegal adoption, organ removal, servitude and *trabalho escravo* (slavery work).

Other improvements can be resumed as:

- The minimal sanction will be 4 years, instead of the current 3 years;

- The victims of human trafficking shall be granted unemployment insurance, regardless their migratory status;
- Victims will be granted legal, social and health support, besides being received in a provisory shelter;
- The text of the proposal highlights that measures shall be taken to avoid second victimization during the attention care and investigative and judicial procedures;
- As to preventive measures, the law affirms that it shall be educative campaigns for diffusing information and alerting citizenship;
- Finally, the judges will have the possibility to freeze the property of those that are being prosecuted for human trafficking and, if they are condemned, to choose the destination of the goods, products and values that were restricted.

As we can see, this project of law, that is yet to be approved in Brazilian Congress, has the potential to adequate the national legislation to the international standards. Besides complying with Palermo's provisions, this legislative reform will provoke a structural change in the national framework, creating coherence between policy and law.

## **VI. Conclusions**

The criminal, labor and civil Brazilian legislation does not follow the juridical paradigm stated by the Palermo Protocol, which Brazil committed to respect. The national legal framework does not translate accurately the repression, prevention and attention to victims that the Palermo Protocol and other international instruments, such as the UN Principles, requires.

Although since the ratification of the Protocol, Brazil has improved its legislation, there are still several gaps in the legal order, and furthermore, some contradictions with the international standards.

As it was explained before, the definition of human trafficking in the National Policy (Decree n° 5.948/2006), despite making direct reference to the Palermo Protocol, ignores the element of consent – which can be positive for victims, but also lead to a lack of means to identify real victims in the practice.

The newest legislation updates, articles 231 and 231-A of the Criminal Code, at the same time extends and restricts the scope of trafficking in human established in the Protocol. In one hand, it is restricted to sexual exploitation, ignoring other forms of exploitation that should be acknowledged the status of human trafficking. On the other hand, both articles criminalize the trafficking for prostitution, even if it is autonomous and/or voluntary – which goes further the Palermo Protocol.

Although several forms of exploitation are not entitled as trafficking in persons, they are criminalized throughout Brazilian legislation. I believe that including those forms of exploitation would benefit the victims and stand up for the gravity of its nature.

All the above critiques, together with the lack of coherence of Brazilian's policy plans and legislation could be potentially solved with the approval of the project of Law 7.073/02. It is a well-constructed project that aims to foster Brazil's compliance with the Palermo Protocol, and it is strongest step that Brazil would take in regard to the combat of trafficking in persons since the signature of the Protocol.