THE VICTIMS OF HUMAN TRAFFICKING AND THE LEGAL REMEDY ISSUE

by

NADINE BLOM

STUDENT NUMBER: 201463865

Submitted in fulfilment of the requirements for the degree of

MAGISTER LEGUM

(LLM)

in

INTERNATIONAL LAW

in the

FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG

Promotor: Prof H.A. Strydom

December 2016
DECLARATION

AFFIDAVIT: MASTER’S STUDENT

TO WHOM IT MAY CONCERN

This serves to confirm that I, ________________________________ (identity number: _______________________), student number: ____________, am an enrolled student for the qualification of ________________________________ with the FACULTY OF LAW and I herewith declare that my academic work is in line with the Plagiarism Policy of the University of Johannesburg which I am familiar with.

I further declare that the work presented in the minor dissertation is authentic and original unless clearly indicated otherwise and in such instances full reference to the source is acknowledged and I do not pretend to receive any credit for such acknowledged quotations, and that there is no copyright infringement in my work. I declare that no unethical research practices were used or material gained through dishonesty.

I understand that plagiarism is a serious offence and that should I contravene the Plagiarism Policy notwithstanding signing this affidavit, I may be found guilty of a serious criminal offence (perjury) that would amongst other consequences compel the University of Johannesburg to inform all other tertiary institutions of the offence and to issue a corresponding certificate of reprehensible academic conduct to whomever requests such a certificate from the institution.

SIGNED AT ______________________ ON THIS _______ DAY OF ____________ 2017.

____________________________________

NADINE BLOM

STAMP COMMISSIONER OF OATHS

Affidavit certified by a Commissioner of Oaths.

Signed and sworn before me after the deponent declared that she is familiar with the contents of this statement and regards the prescribed oath as binding on her conscience and has no objection against taking the said prescribed oath. This affidavit conforms with the requirements of the Justices of the Peace and Commissioners of Oath Act 16 of 1963 and the applicable Regulations published in the GG GNR 1258 of 21 July 1972: GN 903 of 10 July 1998; GN 109 of 2 February 2001 as amended.
# TABLE OF CONTENT

Acknowledgements viii

Abstract ix

List of abbreviations xi

Chapter 1: Introduction 1

Chapter 2: The Characteristics of human trafficking 7

1. Introduction 7
2. Slavery 7
3. Link to slavery 8
4. Link to sex trafficking 9
5. Various forms of trafficking 11
   5.1 Forced labour 12
      5.1.1 Trafficking for forced labour: Bonded labour 12
      5.1.2 Trafficking for forced labour: Involuntary servitude 12
      5.1.3 Trafficking for forced labour: Domestic servitude 13
6. Sex trafficking 13
7. Child trafficking 13
8. Trafficking for organ harvesting purposes 14
9. Factors facilitating trafficking 16
   6.1 Poverty and vulnerability 16
   6.2 Awareness and education 17
   6.3 Increase in regional conflicts 17
   6.4 Online recruitment 19
   6.5 Lack of proper victim identification and protection 19
   6.6 Corruption 20
<table>
<thead>
<tr>
<th>Chapter 3: Essentials of the International Legal Framework</th>
<th>27</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>27</td>
</tr>
<tr>
<td>2. Prohibitions on trafficking of humans</td>
<td>28</td>
</tr>
<tr>
<td>2.1 General human rights instruments</td>
<td>28</td>
</tr>
<tr>
<td>2.2 Specific instruments</td>
<td>29</td>
</tr>
<tr>
<td>3. Affected rights</td>
<td>36</td>
</tr>
<tr>
<td>3.1 The right to life</td>
<td>37</td>
</tr>
<tr>
<td>3.2 The right to liberty and security of the person</td>
<td>39</td>
</tr>
<tr>
<td>3.3 The right to privacy</td>
<td>40</td>
</tr>
<tr>
<td>3.4 The right to physical integrity</td>
<td>40</td>
</tr>
<tr>
<td>3.5 The right not to be subjected to inhuman or degrading treatment or torture</td>
<td>41</td>
</tr>
<tr>
<td>3.6 The right to physical and mental health</td>
<td>46</td>
</tr>
<tr>
<td>3.7 The right to be free from all forms of discrimination</td>
<td>46</td>
</tr>
<tr>
<td>3.8 The right to equality</td>
<td>47</td>
</tr>
<tr>
<td>3.9 The right to marriage</td>
<td>47</td>
</tr>
<tr>
<td>3.10 The right to work</td>
<td>48</td>
</tr>
<tr>
<td>4. Conclusion</td>
<td>49</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 4: The protection of vulnerable groups</th>
<th>50</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>50</td>
</tr>
<tr>
<td>2. Children</td>
<td>50</td>
</tr>
<tr>
<td>3. Women</td>
<td>58</td>
</tr>
<tr>
<td>4. Migrants</td>
<td>67</td>
</tr>
<tr>
<td>5. Refugees</td>
<td>73</td>
</tr>
<tr>
<td>6. Conclusion</td>
<td>76</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 5: State obligations and remedies</th>
<th>77</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>77</td>
</tr>
</tbody>
</table>
2. Select main instruments
   2.1 The International Bill of Rights 78
   2.2 The International Convention on the Elimination of all Forms of Racial Discrimination (1963) 85
   2.3 The Committee on the Elimination of Discrimination against Women 86
   2.4 Convention against Torture (1984) 91
   2.5 Convention on the Rights of the Child (1990) 94
   2.6 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) 106

3. Remedies
   3.1 Recommended Principles and Guidelines on Human Trafficking (2002) 108
   3.2 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) 114

4. Institutional developments

5. Conclusion

Chapter 6: Regional framework
   1. Introduction 121
   2. Regional human trafficking instruments
      2.1 European developments 123
      2.2 Inter-American developments 135
      2.3 African developments 138
      2.4 ASEAN developments 149
   3. Conclusion 153

Chapter 7: South Africa – The legal remedy challenge
   1. Introduction 157
   2. National legal framework
      2.1 TIP Report 160
   3. The Prevention and Combating of Trafficking in Persons Act 7 of 2013 171
3.1 Prevention 173
   3.1.1 Legitimacy and validity of documents 181
3.2 Victim Protection 183
   3.2.1 Protection of children as a special victim category 186
3.3 Prosecution 193

4. Remedies 198
   4.1 Compensation 211
   4.2 Rehabilitation 214
   4.3 Satisfaction 214
   4.4 Guarantees of non-repetition 215

5. The National Action Plan 215

6. Repatriation 217

7. International cooperation 218
   7.1 International Cooperation in Criminal Matters Act 75 of 1996 219
   7.2 Extradition 221

8. Conclusion 222

Chapter 8: Enforcement challenges 224

1. Introduction 224
2. Law enforcement, training and legislative loopholes 225
3. Data collection and the underreporting of crime 230
4. Victim identification and victim assistance 232
5. Language barriers 234
6. Porous borders and corruption 235
7. Awareness 236
8. Lack of political will 239
9. Lack of resources and facilities 240
10. Trans-border cooperation 241
11. Future challenges 243
12. Conclusion 244

Chapter 9: Conclusion and possible solutions 245
ACKNOWLEDGEMENTS

Isaiah 61:1 “To open the eyes that are blind, to bring out the prisoners from the dungeon, from the prison those who sit in darkness”.

I would like to thank the following persons for their invaluable contribution to this dissertation:

To my promotor, Professor Hennie Strydom for his unfailing patience, guidance, support and for igniting a research flame within me. Thank you for teaching me how to set my passion for people in need into motion and to help me make a difference in the lives of those in captivity through my research.

To the UJ Law Librarians, Mrs Lizette van Zyl and Miss Catrin Verloren van Themaat, thank you so much for assisting me always with such promptness, diligence and patience.

To Marieke Roos for your assistance with the technical aspects of my dissertation and for your unfailing support during the late hours of the night.

To Francois Joubert my sincere thanks for being an opener of doors in my life. I am forever indebted to you.

To my son, Adriaan, thank you for unselfishly sacrificing so much during the past 4 years. I love you with all my heart and pray that this may serve as an inspiration to you to always seek the truth, aid those in need and make a substantial difference in the world.
ABSTRACT

The trafficking of human beings has become a global phenomenon and supply factors such as political conflict, natural disasters, the demand for sex and under-aged sex, poverty and vulnerability, lack of awareness and education, food insecurity, lack of employment opportunities, cultural perceptions, the displacement of people and other variables have contributed to the vast escalation of this problem. According to the Global Slavery Index, approximately 45 million people are currently enslaved and with an annual market value of USD 150.2 million, human trafficking has become a focal point of transnational organized crime groups due to its “high profit – low risk” nature. Drugs can be sold only once whereas humans can be “recycled” for various purposes. Trafficking of persons takes place in various regions of the world and in the context of globalisation and the flow of people across borders, states and other international role players face various challenges in the pursuit against trafficking.

Effective prosecution of perpetrators form an essential part of addressing the problem of human trafficking and it is imperative that effective anti-trafficking domestic legal instruments be implemented by states, in accordance with the core values of the Palermo Protocol, covering all forms of trafficking, and providing remedies for trafficking victims. A comprehensive approach should be followed to address this problem and cooperation between not only states but also civil society role players and governments are essential in the pursuit against trafficking in persons. Creating global awareness, eradicating poverty, the identification of victims and potential victims and recognising potential future factors are paramount. Cybercrime, one of the fastest growing areas of crime, has become a significant threat. Transnational organized crime structures use advanced forms of technology to recruit victims and facilitate trafficking globally. South Africa also fell victim to international organized crime and human trafficking due to insufficient border controls, corruption, the cultural use of “placement” of children, the recruitment of boys and men for forced labour and women for the sex industry, the demand for body parts used in traditional healing, the lack of efficient anti-trafficking legislation and children left vulnerable in child headed households due to HIV and AIDS, to name but a few. The Prevention of Trafficking in Persons Act (PACOTIP Act) was only enacted on 9 August 2015 and prosecutors had to make use of a patchwork of legislation for trafficking prosecutions until very recently. The PACOTIP
Act complies with the minimum standards as set out by the Palermo Protocol and forms a comprehensive framework for effective prosecution. However, the effective implementation of the Act remains an obstacle and to overcome it is paramount in South Africa’s pursuit against human trafficking.

This study will analyse the current international legal framework with regards to trafficking in persons. Existing international and regional legal instruments will be explored as well as legal remedies available to victims. The existing legal framework dealing with human trafficking and trafficking remedies in South Africa will be discussed and the adequacy thereof will be examined. Enforcement challenges will be discussed and possible solutions be offered.
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AOP</td>
<td>Action Oriented Paper on Strengthening the EU External Dimension on Action against Trafficking in Human Beings: Towards Global EU Action against Trafficking in Human Beings</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>AU. COMMIT</td>
<td>African Union Commission Initiative Against Trafficking</td>
</tr>
<tr>
<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>COE</td>
<td>Council of Europe</td>
</tr>
<tr>
<td>CPU</td>
<td>Child Protection Unit</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>DSD</td>
<td>Department of Social Development</td>
</tr>
<tr>
<td>EAC</td>
<td>East African Community</td>
</tr>
<tr>
<td>EALA</td>
<td>East African Legal Assembly</td>
</tr>
<tr>
<td>EAS</td>
<td>East African States</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
</tr>
<tr>
<td>ECPAT</td>
<td>End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EU ATC</td>
<td>EU Anti-Trafficking Coordinator</td>
</tr>
<tr>
<td>FBI</td>
<td>Federal Bureau of Investigation</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>HIV/AIDS</td>
<td>Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome</td>
</tr>
<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
</tr>
<tr>
<td>ICAT</td>
<td>Inter-Agency Coordination Group against Trafficking in Persons</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labor Organisation</td>
</tr>
<tr>
<td>IOM</td>
<td>International Organisation for Migration</td>
</tr>
<tr>
<td>IS/ISIL</td>
<td>Islamic State</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum Of Understanding</td>
</tr>
<tr>
<td>MME</td>
<td>Partnership on Migration, Mobility and Employment</td>
</tr>
<tr>
<td>NFN</td>
<td>National Freedom Network</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
</tr>
<tr>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NPA</td>
<td>National Prosecuting Authority</td>
</tr>
<tr>
<td>OAS</td>
<td>Organisation of American States</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>OPCAT</td>
<td>Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>OPCC</td>
<td>Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict</td>
</tr>
<tr>
<td>OSCE</td>
<td>Organisation for Security and Cooperation in Europe</td>
</tr>
<tr>
<td>PACOTIP</td>
<td>Prevention and Combating of Trafficking in Persons Act</td>
</tr>
<tr>
<td>POCA</td>
<td>Prevention of Organised Crime Act</td>
</tr>
<tr>
<td>REC</td>
<td>Regional Economic Community</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>SAPS</td>
<td>South African Police Service</td>
</tr>
<tr>
<td>SOA</td>
<td>Sexual Offences Amendment Act</td>
</tr>
<tr>
<td>SOCA Unit</td>
<td>Sexual Offences and Community Affairs Unit</td>
</tr>
<tr>
<td>TIP Report</td>
<td>Trafficking in Persons Report</td>
</tr>
<tr>
<td>TOC</td>
<td>Transnational Organised Crime</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
</tr>
<tr>
<td>----------</td>
<td>-----------------------------------------------------</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations Refugee Agency</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office for Drugs and Crime</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCTOC</td>
<td>United Nations Convention against Transnational Organized Crime</td>
</tr>
<tr>
<td>UN-DESA</td>
<td>UN Department of Economic and Social Affairs</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
</tr>
<tr>
<td>UN. GIFT</td>
<td>United Nations Global Initiative to Fight Human Trafficking</td>
</tr>
<tr>
<td>UNICEF</td>
<td>United Nations Children's Emergency Fund</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
</tr>
<tr>
<td>UNWTO</td>
<td>United Nations World Tourism Organisation</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
</tr>
<tr>
<td>USD</td>
<td>United States Dollar</td>
</tr>
<tr>
<td>ZAR</td>
<td>South African Rand</td>
</tr>
</tbody>
</table>
CHAPTER 1:

INTRODUCTION

Human trafficking is the fastest growing industry across the globe and according to the Council of Europe, this phenomenon has reached epidemic proportions over the past decade, with an annual market of an estimated USD 150.2 million.\(^1\) According to the Global Slavery Index, released during May 2016, 45.8 million people are currently enslaved globally as a result of either forced labour, commercial sexual exploitation, human trafficking, debt bondage and or forced or civil marriage.\(^2\) The Global Slavery Index 2014 furthermore reported that 35.8 million individuals were entrapped in 167 countries, 20 per cent more than a year ago. The Global Slavery Index 2013 however, reflected that an estimated 29.8 million people were enslaved during 2013.\(^3\) Commentary by the research team responsible for the Slavery Index, the Walk Free Foundation, indicates that the increasing numbers in the most recent Index was not due to the intensification of trafficking, but rather a result of improved methodology which reiterates the fact that slavery, where it was previously hidden in states such as Kosovo, Taiwan, North Korea, Cyprus and South Sudan, it is now exposed. The 2016 edition of the Global Slavery Index indicates that 58 per cent of people living in slavery, resides in a total of five countries: India, China, Pakistan, Bangladesh and Uzbekistan. India has a population of 125 139 596 of which 14 285 700 humans are subject to modern slavery. In Uzbekistan, a state strongly relying on its cotton export for survival, government enforced labour is effected for two months of the year during the annual cotton harvest, leaving an estimate of 1 201 400 of the total population of 30 241 100 enslaved. This chapter aims to illustrate the magnitude of trafficking in persons. The scope of the study will also be discussed at the end of the chapter.

Trafficking often involves and requires other related offences such as corruption and bribery, money laundering, tax evasion, breaching of immigration laws, extortion, assault, forgery of official documents and murder. According to Human Rights Watch,\(^4\) millions of contract workers from Asia and Africa are subject to a wide range of abuses, which includes unpaid wages, confiscation of passports, physical abuse, and forced labor and an estimated 2.4 million domestic workers in the Gulf are

---

\(^2\) The Global Slavery Index 2016 is available online at http://www.globalslaveryindex.org/ (01-06-2016).
\(^3\) The Global Slavery Index 2013 is available online at http://www.globalslaveryindex.org/findings/?gclid=CL7Nkbrinr0CFQkUwwod_IcA5g#overview (13-03-2014).
bonded due to the controversial Kafala system.\textsuperscript{5} Labour ministers from Gulf and Asian states came together during November 2014 to discuss possible solutions for these abuses. Labour law protection, reformed abusive immigration policies, and the promotion of increased dialogue with trade unions and Non-Governmental Organisations were some of the key points raised by the 80 human rights organisations who formed part of the discussions. Women’s rights researcher at Human Rights Watch in the Middle East, Rothna Begum states as follows: “Whether it’s the scale of abuse of domestic workers hidden from public view or the shocking death toll among construction workers, the plight of migrants in the Gulf demands urgent and profound reform. This should include a thorough overhaul of the abusive \textit{kafala} visa sponsorship system”.

The trade in human beings holds immense challenges for international criminal law, international human rights and the global economy and, despite great efforts by international role players all over the globe to combat trafficking, the trade appears to grow annually. Slavery is all about supply, demand and lucrative profits. According to the United Nations Office on Drugs and Crime (UNODC), it is the third most profitable international crime, generating close to USD 32 billion worth of profit in 2011.\textsuperscript{6} It is also the fastest growing crime in the world.

South Africa faces its own challenges in the pursuit against trafficking and in the aftermath of apartheid, the majority of South Africans were left impoverished, uneducated and vulnerable. The socioeconomic impact of HIV/Aids on South Africa should also not be disregarded, leaving thousands of children orphaned, vulnerable and in need of emotional and financial support. The lack of trafficking-specific legislation, corruption, isolation and the need for education and creating awareness are some of the obstacles South Africa had to deal with in its war against trafficking in the post-apartheid era. South Africa fell victim to international organized crime rings as a result of insufficient border control, the demand for body parts used in traditional healing, the lack of efficient anti-trafficking laws and law enforcement training that equips government officials to effectively screen and identify victims. According to the Child Protection Unit (CPU) an estimate of 28 000 child prostitutes were detected in South Africa during 2000.\textsuperscript{7} Due to the lack of a national

\textsuperscript{5} The Kafala system is a “sponsorship law” implemented in the Emirates, giving the employee the right to confiscate the passport of the migration worker, preventing their foreign workers from leaving the country or changing jobs.


\textsuperscript{7} Hepburn and Human \textit{Trafficking Around the World: Hidden in Plain Sight} (2013) 271.
database and the hidden nature of the crime, very little data is available and it remains a challenge to obtain updated statistics on the numbers of human trafficking cases in South Africa.

The main aim of this study is to critically analyze the existing international, regional and national frameworks with regards to human trafficking in order to establish to what extent existing international, regional and national legal frameworks provide remedies for human trafficking victims.

The key problem in relation to existing legal remedies in South Africa, is the fact that the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (PACOTIP Act) has only recently been fully implemented. The Department of Social Development recently approved proposed regulations to the Act and both the state and victims, till very recently, had to make use of inadequate and non-specific remedies, which did not effectively address trafficking crimes, leaving South Africa with very few prosecutions. This dissertation aims to highlight the shortcomings in the current legal-remedy framework and intends to make recommendations with regards to effective prosecution of trafficking crimes. It will also advocate the need for a victim centered approach during the investigative and prosecution process and highlight the importance of creating increasing awareness as a protective measure in order to effectively combat trafficking in persons.

Training of law enforcement on the very recently implemented PACOTIP Act, the appointment of specialized judges, specialized courts, special task units and well-trained government and NGO officials should all be considered a priority in South Africa’s combating agenda. The fight against corruption and the need for transnational cooperation are also paramount in order to effectively combat trafficking in persons in South Africa.

Both internationally and nationally, the victims of these ghastly crimes, struggle to come to terms with the trauma and loss they suffered, trying to recover what they lost during the trafficking process, hardly coping with life as many of these victims suffered grave violations of their dignity, being tortured, raped, exploited, sold and resold. Due to the severe harm and intimidation these victims have endured, they often distrust the justice system which makes prosecution and data collection complex. Hence, the

---

remedies available to trafficking victims remain a challenge not only internationally but also in South Africa.

Various international responses were developed in the global pursuit against trafficking in persons. These responses include the adoption of instruments such as the UN Slavery Convention and the United Nations Convention Against Trans National Organised Crime and the three Protocols Thereto (UNCTOC). The most significant of the protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), also referred to as the Palermo Protocol, sets the international standard with regard to trafficking in persons. The Palermo Protocol also places an obligation on states parties to criminalise human trafficking by means of legislative measures and advises parties to design and implement measures that will provide efficient remedies for trafficking victims. Other applicable international instruments applicable such as human rights treaties will also be dealt with in this dissertation.

On a regional level, instruments such as the Convention on Action against Trafficking in Human Beings (CoE Convention), the Inter American Convention to Prevent and Punish Torture and the Ougadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children and the Declaration on the Fight against Trafficking in Persons were adopted in the fight against human trafficking. In the national context and as mentioned earlier, South Africa recently implemented and enacted trafficking specific legislation which criminalises trafficking in persons. Other applicable instruments such as the Prevention against Organised Crime Act 121 of 1989 and Sexual Offences Act 32 of 2007 will also be discussed in this dissertation.

Human trafficking as a form of transnational crime has become a global challenge and was labeled as such by the League of Nations. Vulnerabilities are caused by push factors such as poverty, globalisation, cultural beliefs, migration fueled by employment shortages and marginalised people which creates opportunities for traffickers to operate with impunity. Governments are struggling globally to design and implement measures and instruments at a sufficiently rapid pace as the crime of trafficking in persons constantly evolves and sophisticated transnational crime rings adapt their recruitment methods. The great speed at which technology advances and the availability of anonymous access to various online platforms furthermore creates an ideal environment for crime rings to operate with great sophistication and at very low cost. The vast number of people enslaved globally, indicates that the challenges with regards to
addressing this phenomenon is overwhelming and the need to address this issue is paramount. The ratification of trafficking specific conventions by states is however not enough. It is crucial for states to develop and implement trafficking specific measures within their own jurisdictions and that these measures be tailormade to address the various forms of trafficking that takes place within their national context. The importance of preventative measures such as awareness programmes and campaigns cannot be emphasised enough in this regard. Educating vulnerable groups and creating awareness with regards to recruitment methods and the risks that accompanies illegal migration is crucial. Effective implementation of existing legal instruments, the investigation of trafficking crimes by skilled law enforcement agencies and the prosecution of perpetrators are pivotal in the pursuit against trafficking. The Palermo Protocol calls for states to follow a victim centered approach at all times when dealing with trafficking in persons cases. The immense trauma victims incur during the trafficking cycle and the need for immediate care cannot be stressed enough. Victims should be made aware of their rights not only with regards to the prosecution process but also when it comes to providing for their basic and emotional needs. This study aims to analyse the current international legal framework with regards to trafficking in persons. Existing international and regional legal instruments will be explored and legal remedies available to victims be discussed. The existing legal framework dealing with human trafficking and trafficking remedies in South Africa and the adequacy thereof will also be examined. Enforcement challenges will be discussed and possible solutions offered.

This study will be based primarily on a literature review, supplemented by interviews with members of the SAPS, members of the National Prosecuting Authority and non-governmental organisations.

Relevant literature on the subjects of human rights and human rights violations and remedies will be utilized and will include textbooks, journal articles, online library sources, case law, human rights reports as well as conference material.

Chapter 1 serves as the introduction to this study, providing an overview of the magnitude of human trafficking as an international challenge and explaining the scope of the study. In Chapter

---

9 No prior authorisation was required by the University of Johannesburg with regards to the interviews convened and hence there is no ethical issue in this regard.
2 a brief overview will be given of the history of slavery, the link between slavery and human trafficking including sex trafficking and the scope and challenges surrounding human trafficking. The various forms of trafficking in persons will also be set out. Chapter 3 will examine the essentials of the international legal framework with regards to human trafficking and the various existing applicable international treaties and other instruments. Chapter 4 will consist of an overview of the protection of vulnerable groups whereas Chapter 5 will provide an overview of state duties, compliance and due diligence and examine the relevant remedies available to trafficking victims. In Chapter 6 the various regional legal instruments will be discussed. Chapter 7 will examine the current national legal instruments relevant to human trafficking. In Chapter 8 various enforcement obstacles will be analyzed. This will include issues such as legislative loopholes, corruption, lack of resources, the necessity of crime intelligence, the role of non-governmental bodies, data collection, inadequate legislation, international cooperation, extraditions and immediate repatriation of victims. Chapter 9 will summarize the main findings made during research on the subject of human trafficking victims and possible solutions will be offered to address the key challenges identified.
CHAPTER 2

CHARACTERISTICS OF HUMAN TRAFFICKING

1. Introduction

Human lives have become nothing more than disposable commodities. Treated as merchandise, humans are sold and resold all over the world for various purposes such as prostitution, pornography, drug muling, organ harvesting, child brides, domestic servitude, labour in mines, sweatshop labour, internet brides, for the purpose of funding terrorism, forced labour purposes, child labour and child combatants. The list is never ending. This chapter aims to provide a concise overview of slavery, the existing link between slavery and trafficking in persons and the various forms of trafficking. A brief overview will also be provided of the various factors that facilitate human trafficking.

2. Slavery

According to Bales:11

“Slavery is a patterned relationship that achieves exploitative ends including appropriation of labour for productive activities resulting in economic gain, use of the enslaved person as an item of conspicuous consumption, sexual use of an enslaved person for pleasure and procreation and the savings gained when paid servants or workers are replaced with unpaid and unfree workers.”

The core characteristics of slavery throughout history, whether it was legal or not, is violence. The slave master or slaveholder controls a slave by using or threatening violence.

“Slavery is about having no choices at all, having no control over your life, and living in constant fear of violence. Violence brings a person into slavery. Many people who become slaves are tricked into it. Many people following a trail of lies walk into enslavement, but what keeps them there is violence. Once enslaved, there are all sorts of ways that slaves are held in slavery – sometimes it is the way the slave gives up and gives into slavery, sometimes it is about the personal relationships that develop between slaves and slaveholders – but the essential ingredient is violence. The second key characteristic of slavery is loss of free will; slaves are under the complete control of someone else. There is no other person, authority, or government the slave can turn to for protection. Slaves must do as they are told, or they will suffer. The third characteristic is that slavery is normally used to exploit someone in some kind of economic activity. No one enslaves another person just to be mean, people are enslaved to make a profit. Most slaveholders


see themselves as normal businesspeople. They have little interest in hurting anyone, in being cruel or torturing people, it is just part of the job. Slavery is about money.” 12

Bales adds that if all the above elements are put together, “[s]lavery is a social and economic relationship in which a person is controlled by another through violence or the threat of violence, paid nothing, and economically exploited.”

3. **Link to slavery**

“In reality, human trafficking has re-emerged only in the sense that it has re-entered public consciousness. Slavery has always been a part of human existence and was not eliminated by the nineteenth century abolition of Trans-Atlantic slavery.” 13

In order to fully comprehend the interwoven connection between the original form of human exploitation, slavery and modern slavery as we know it today, a “bigger picture approach” is needed. There are significant parallels to be drawn between the Atlantic slave trade and human trafficking. The modern “resurfacing” of trafficking in human beings, and of slavery, is said to be linked to the deepening interconnection among states in the world economy, overpopulation (with its consequent production of disposable people), and the victim’s economic and other vulnerabilities.

The interconnectedness of states allows for migration and the flow of people across national borders. Many of these individuals are seeking employment elsewhere, causing them to be vulnerable and in some cases easy targets for smugglers and traffickers. When looking at the role of states with regards to trade relations, it was common for states to open up their borders during the Trans – Atlantic slave trade era in order for them to obtain the services of African slaves, bringing these individuals across international borders. The status quo today is that many states are seeking to protect their national borders in order to regulate the natural flow of people across their borders and this can be placed into context as follows:

> “The successors to those empires, in short-sighted attempts to protect advantages gained through their colonial pasts, now seek to protect their predominance through the erection and maintenance of barriers to the entry of those ‘others. As individuals in labor rich states attempt to cross state borders to access the labor markets of labor-poor states, the border regulation and enforcement systems put in place by states create barriers to their movement, driving them, in many cases, into the arms of human smugglers or traffickers.” 14

---

This was recently confirmed by the former United Nations Special Rapporteur on Trafficking in Persons, Joy Ezeilo, when she stated:

“States are still grappling with integrating a human rights-based approach; child centered approach; and an approach that pays attention to causes and vulnerability factors, including the creation of opportunities for legal, gainful and non-exploitative migration, which is crucial for preventing future trafficking.”

4. **Link to sex trafficking**

During the late nineteenth and early twentieth centuries, a new form of slavery arose in the United States, Europe and also in South Africa and even though slavery initially focused on exploitative labour purposes, it evolved into the trafficking of women for commercial sexual exploitation purposes. In South Africa women was trafficked from Europe to serve as prostitutes or wives for mine workers. African girls were also trafficked to Europe for purposes of prostitution in French ports. During 1810, a Khoikhoi woman, Saartjie Baartman, was at first trafficked to Britain after which she was trafficked to France for the purpose of medical research and exhibition at fairs. She passed away during 1816 at the age of 26.

According to historian Eileen Scully, three interdependent developments can be deemed as the main causes for the increase in “an international traffic in sex workers.” The first set of developments was the abolition of the African slave trade causing the deployment of “non-white indentured labor to now labor-poor plantation economies; “the movement of white males seeking economic opportunities to colonial and Western-dominated enclaves; and the movement of non-white males from newly impoverished rural areas to those same colonial and Western dominated enclaves.” The second set of developments are described by Scully as the movement of white and non-white sex workers seeking

---

economic opportunities and filling “the demand arising from those movements,” as well as the increase in an “universal racialized sexual hierarchy” with white female sex workers at the apex. According to Scully the third set of developments entailed that:

“For some women, in the early days of international sex trade the decision to become sex workers was a result of economic, social and cultural vulnerabilities brought about by far-reaching societal changes, for many Western women, confronting circumscribed choices for professional engagement, the decision to become sex workers overseas was a rational one founded on desire for economic advancement.”

Sex work by white women in the far away colonies escalated since the 1890-1900s and western women seeking economic advancement worked as prostitutes in South America, Asia and the Middle East and rumours existed of organized networks that procured English girls for prostitution purposes in France and Belgium (referred to by Scully as “migratory prostitution”). Scully also indicates that the trade was later taken over by organized groups, evolving into more “coercive, exploitative arrangements”

Today, the overpopulation of states, gross human rights infringements and exploitation of vulnerable people cause the consistent production of disposable people. Human trafficking has become a global crisis furthered by extremely well organized international crime structures and networks managing to elude prosecution for various reasons ranging from ill governed states, lack of law enforcement, the mobility of people, internet, globalization, porous borders, bribes and corrupt officials, transnational deal making, black market transactions and victims too traumatized to testify against their perpetrators, leaving victims with little help. As Shelley puts it: “Yet the consequences for the victims of sexual or labor trafficking are often the same as those in an authoritarian state – an absence of legal rights, a legal system that does not protect the individual, and often frequent and extreme mental and physical abuse of the person.”

---

International cooperation for the mutual extradition of perpetrators are crucial in the fight against trafficking and due to the acceptance of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (2000) (Palermo Protocol),\textsuperscript{25} trafficking is now internationally criminalized and such activities are subject to international prosecution and cooperation.

5. \textbf{Various forms of trafficking}

Various forms of trafficking can be identified and women, men and children are trafficked for various reasons such as agricultural labour, sweatshop factory labor, sex trafficking, child soldiering and domestic servitude to name only a few and according to International Labour Organisation, USD 150 billion is generated globally by the trafficking of forced labourers.\textsuperscript{26}

Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), defines Trafficking in Persons as the—

“recruitment, transportation, transfer, harbouring or receipt of persons, by means of 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.”

Article 3 furthermore defines exploitation as “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour services, slavery or practices similar to slavery, servitude or the removal of organs.”

According to a study undertaken by the University of New England,\textsuperscript{27} two thirds of the calls taken by their National Resource Human Trafficking Centre concerns sex trafficking, in other words 64 per cent of the calls, whereas 22 percent concerned labour trafficking and 11 percent are related to other forms of trafficking. The study furthermore indicates that 3 percent of calls received involved both labour and sex trafficking. The study also indicates that sex trafficking generates USD 3 billion in profits per year.

\textsuperscript{25} The Palermo Protocol was ratified by South Africa on 20 February 2004.

\textsuperscript{26} Zweynert “Modern slavery generates $150 billion in profits globally per year – ILO” 20 May 2014 Thomson Reuters available online at http://news.trust.org/item/20140520074422-2iw/3 (24-08-2016).

According to the Polaris Project “human traffickers can be anyone who is willing to exploit another human being for profit.”

5.1 Forcéd labour

5.1.1 Trafficking for forced labour: Bonded labour

Bonded labour, also known as debt bondage, still remains the most widely used method to enslave individuals. Victims become bonded labourers when their labour is demanded as a means of repayment for a loan or service in which its terms and conditions have not been defined, or in which the value of the victim’s services is reasonably assessed, is not applied toward the liquidation of the debt. The victim’s labour and the worth thereof is usually much greater than the actual “debt” or sum of the “borrowed” funds. Workers in more traditional systems may in some cases even inherit debt and in some cases families remain indebted for generations. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, requires bonded labor to be criminalized as a form of human trafficking under the applicable domestic legislation of states.

5.1.2 Trafficking for forced labour: Involuntary servitude

Involuntary domestic servitude is considered to be a unique form of trafficking as it socially isolates domestic workers and is conducive to nonconsensual exploitation. Often these domestic workers’ workplaces are informal and connected to their off-duty living or “live in” quarters, making it virtually impossible for authorities to obtain access to inspect the private properties where they are harboured. Due to these living conditions, untreated illnesses and widespread sexual abuse are common to this form of human trafficking.

29 According to a report issued by the Director General of the International Labor Organisation, A Global Alliance Against Forced Labor (2005) 10 - 12, 12.3 million people were in forced bonded labour, child labor and sexual servitude.
5.1.3 Trafficking for forced labour: Domestic Servitude

Domestic servitude occurs when a person is coerced and exploited to do domestic work for little or no income. These individuals find themselves scared of being beaten, trapped and locked up in private residences, often having to deal with sexual and emotional abuse, untreated medical conditions, bad living conditions and inhumane working hours, leaving individuals with emotional, and in more extreme cases, also physical scars.32

5.2 Sex trafficking

When an adult is deceived, coerced or forced into prostitution or kept in prostitution by coercion, that person is a victim of trafficking.33 Any person involved in the recruiting, transporting, harbouring, receiving or obtaining of a person for the purpose of sex trafficking, has committed a trafficking crime. A victim’s initial consent to voluntarily participate in prostitution, which later on becomes sex trafficking, is not legally determinative. Thus, if such a person is held in service against their will, either through psychological manipulation or physical force, such a person becomes a trafficking victim and should receive the protection and benefits as set out in the Palermo Protocol and the applicable domestic law of the victim’s own state.34

5.3 Child trafficking

The Palermo Protocol’s article 3 (b) stipulates that the consent of a trafficking victim to the exploitation is irrelevant. According to article 3 (c), “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even when neither of the means as set out in the definition of trafficking as per article 3 (a) is present. The Protocol describes a child as any person under eighteen years of age. According to the United Nations Children's Emergency Fund (UNICEF), approximately 2 million children were subjected to sex trafficking during 2010.35 Various covenants, treaties and protocols obligate the criminalization of commercial sexual exploitation of children and the use of children is

32 Bales and Soodalter The Slave Next Door (2009) 22.
prohibited not only under the Palermo Protocol but also under various domestic laws globally. Sex trafficking has devastating long-term effects on minors such as disease (including HIV/AIDS), malnutrition, social ostracism, unwanted pregnancies, drug addiction, long-lasting physical and psychological trauma and in many cases death.

Forced child labour is a form of work most likely to be harmful to the health and or physical, mental, spiritual, moral or social development of children having a negative impact on their education. According to the International Labour Organisation, during 2010 a total of 246 million children between the ages of 5 and 17 were exploited.\textsuperscript{36} Forms of forced child labour include recruitment for purposes such as pornography, the drug trade, the illegal arms trade, for purposes of acting as child soldiers during armed conflict, and prostitution.

Children can also be exploited for the means of organ removal, illicit international adoption, early marriage, use in begging or as athletes such as child camel jockeys, or recruitment for cults or for the purposes of religious sacrifices.

\textbf{5.4 Trafficking for organ harvesting purposes}

 Trafficking in organs can be described as an organized crime involving the illegal trade of organs by a chain of offenders. The Palermo Protocol includes the removal of organs and the subsequent sale thereof as an end purpose of trafficking.

According to the United Nations Global Initiative to Fight Human Trafficking, organ trade can be subdivided in three broad categories. Firstly, when a victim is deceived or forced by traffickers to give up an organ. Secondly, when a victim formally or informally agrees to sell an organ but is not paid for the organ or paid less than the original price, and thirdly, when a vulnerable person is treated for an ailment (existing or non-existing) and thereupon organs are removed without the victim’s knowledge.


for the purpose of transferring their organs for purposes of profit should be a criminal offence.\textsuperscript{37} The World Health Organisation’s Guiding Principles on Human Organ Transplantation (1991) states that the commercialization of human organs is a violation of human rights and human dignity, whereas the Additional Protocol to the European Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin (2002) prohibits the trafficking in organs and tissue and deriving a financial gain therefrom. It furthermore calls on states to instate appropriate sanctions following such trafficking incidents.\textsuperscript{38}

South Africa is a source, transit and destination country for men, women and children subjected to various forms of trafficking, including sex trafficking and forced labour. Both foreign nationals as well as South African citizens are subjected to trafficking within South Africa. According to the Trafficking in Persons Report 2014 (referred to as TIP Report), South African children are subjected to trafficking mainly within the borders of South Africa. These children are recruited from mostly poor rural areas and brought to urban centers in order to be easily transported between cities such as Bloemfontein, Johannesburg, Cape Town and Durban. South African boys are forced to work in agriculture, begging, food services, criminal activities and street vending whereas girls are recruited for sex slavery and forced labour purposes. The commercial sex trade in areas such as Hillbrow is mainly dominated by Nigerian crime rings while the Cape Town sex trade is mainly run by Russian and Bulgarian crime syndicates. Victims identified during 2014 include foreign nationals from Russia, the Philippines, Taiwan, Thailand, Ghana, Zambia, Zimbabwe, Namibia and the United States. The largest group identified as foreign victims were Thai women and an increased presence of Chinese victims was also noted. According to the TIP Report, during 2014, law enforcement reported that the coercion of sex trafficking victims via forced drug abuse caused “compounded difficulties in rescuing victims”.\textsuperscript{39}

During 2014 the government identified victims from Rwanda, Mozambique, Swaziland, Lesotho, Zimbabwe, the Democratic Republic of Congo, the Republic of the Congo, Cambodia, Russia,

\textsuperscript{37} Article 3(c) of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000) to the UN Convention on the Rights of the Child Article 3 (c ) available online at http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx (13-01-2015).


India, Ukraine, Moldova, Bulgaria and Brazil, all of whom have been recruited in their states for legitimate work in South Africa and were subsequently subjected to hard labour, domestic servitude and forced prostitution. Some victims were also exported to Europe for purposes of forced prostitution.\(^{40}\)

6. **Factors facilitating trafficking**

6.1 **Poverty and vulnerability**

Article 4 of the Palermo Protocol places an obligation on state parties to “take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.” Human trafficking is a transnational crime which takes place across borders. Individuals prone to fall prey to human trafficking are runaway teens, refugees, drug addicts, impoverished and homeless persons, individuals seeking a better life, emotionally vulnerable children and migrants. Traffickers often offer a “better life” by means of education, employment in hotels, salons or even promises of marriage. Many vulnerable individuals fall prey to traffickers because of dire circumstances. One example of such an instance is in the case of natural disasters. Helpless children,\(^{41}\) desperately in need of shelter and food, turn to adults for help. Hungry, fatigued and having lost their parents, these children are left extremely vulnerable. Sex trafficking victims are generally also found or recruited in desperate, hopeless circumstances, seeking a “better” or “safer” environment. A young teen was recently recruited in Cape Town via an online campaign to join the forces of Islamic State (IS), following short on the heels of a British teenager, Sharmeena Begum, recruited via the same method. Begum was identified by IS as a possible recruit in light of her vulnerability due to losing her mother to cancer and the possibility of her father remarrying.\(^{42}\)

---


\(^{42}\) IOL Cape girl stopped from joining IS 6 April 2015 IOL available online at http://www.iol.co.za/news/crimecourts/cape-girl-stopped-from-joining-is-1.1841189#.VSJo8_mUFYG (06-04-2016).
6.2 Awareness and education

Article 9(2) of the Palermo Protocol states that “[s]tate parties shall endeavor to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons”, placing a positive obligation on all state parties to take the necessary steps in order to prevent trafficking. In turn article 9(5) places the obligation on states to “adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”

6.3 Increase in regional conflicts

War zones form ideal settings for the trafficking of human beings due to a variety of reasons. During war periods, the hierarchical roles of masculinity and femininity are emphasized and men are associated with power, force and victory whereas women are perceived as weak, poor and vulnerable. The trafficking of women and children during armed conflict or post-armed conflict is a human rights violation and criminal activity. Factors leading to the trafficking of victims include the economic vulnerability of women and children during conflict, forced displacement, the absence of an accountable justice system and prosecutions leading to the impunity of perpetrators and thriving criminal activities due to weak government responses. Hence, it has been observed that—

“The destruction of communities and economic means of subsistence during war forces women to find alternative income in order to secure family survival. In need of economic perspectives women may decide to migrate abroad, leaving their children behind with other family members. In this situation, women are highly vulnerable to being trafficked. When not directly abducted, women may be deceived and/or forced into prostitution and other enslavement.”43

The absence of effective border control and law enforcement agencies, facilitates the easy transport of victims across the borders of regions and states. Organized crime rings often make use of corrupt military authorities and war lords to obtain access to neighboring states in order to transport victims to destination states. The selling of women and children becomes a substantial source of income

for guerillas, rebels and war lords. Women and children are often forced to leave their homes and are held hostage by criminal groups, forcing them to perform forced labour or to act as combatants. Members of international peacekeeping forces often make use of the services of trafficked women or may even be involved directly or indirectly in the trafficking of victims. Should such a member’s misconduct be discovered, it will lead to immediate repatriation without any charges, leaving the victims without any redress. International legal instruments serving to protect trafficking victims, should be revised and strengthened. According to a report by Sector Project against Trafficking in Women Desk, research is needed in the field of operations, trafficking systems and women’s trafficking experience during and after war, as data is needed in this regard.\(^4^4\)

Many terrorist groups, such as IS, also benefit from trafficking as they kidnap victims during conflict situations in order to obtain funding for the acquisition of weapons.\(^4^5\) The Security Council recently adopted Resolution 2199\(^4^6\) in which the trafficking, abduction, exploitation and abuse of women and children are condemned, encouraging state parties as well as non-state actors in possession of evidence proving Al-Qaida or its members’ involvement in such activities, to bring such evidence to the Council’s attention. In paragraph 18 of the resolution, the Security Council also—

“[r]eaffirms its condemnation of incidents of kidnapping and hostage taking committed by ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida for any purpose, including with the aim of raising funds or gaining political concessions and expresses its determination to prevent kidnapping and hostage-taking committed by terrorist groups and to secure the safe release of hostages without ransom payments or political concessions, in accordance with applicable international law.”\(^4^7\)

The UN’s Analytical Support and Sanctions Monitoring Team (the Monitoring Team), commended in 2014 that reports were received on IS trafficking women and children in local markets. The report also indicates that IS “boasted about this activity in the English-language

magazine *Dabiq*.” The Monitoring Team ends off its commentary by stating that the fact “[t]hat ISIL chooses to engage in human trafficking – essentially slavery – underscores its complete absence of morality.”

### 6.4 Online recruitment

The role of the internet in human trafficking is of extreme importance and should enjoy high priority in all states in their fight against trafficking. The internet gives the power to anyone to become a “faceless” person and recruiters create false Facebook profiles, Twitter accounts and email addresses through which they can correspond freely with potential victims. This can also be referred to as the darker side of globalization. The internet is utilized as a tool of power over trafficking victims and victims are often filmed and photographed by their traffickers and then blackmailed by the traffickers to do as they say or otherwise the explicit content of the victims will be exposed on the internet. According to a study done by the United States Federal Bureau of Investigation (FBI), chances are 100 percent that any person spending a significant amount of time in a chat room will come across a predator.

### 6.5 Lack of proper victim identification and protection

Paramount in the fight against trafficking is the issue of victim protection. Whilst the trafficking offender needs to be prosecuted in terms of trafficking-specific legislation, it is common cause that prosecution without victim protection is unworkable. Article 10 (2) of the Palermo Protocol places an obligation on states parties to “provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons” and prescribes that training must focus on the rights of the victims which includes the right to protection. Human rights and child and gender-sensitive issues are also important factors to be kept in mind when creating training development programmes. Both child and adult victims often fear for their lives after agreeing to testify against their perpetrators. As the legal system often fails victims, they find

themselves back on the streets and in some cases are re-trafficked and re-exploited by the very same traffickers. Language barriers cause tremendous challenges and it is often part of the crime syndicate’s strategy to separate the victims from their states in order to alienate them from all they know. This makes victims even more vulnerable. Chinese women are for instance brought into South Africa with very little or no English skills. Some victims never escape. Others build up the determination to escape either with the assistance of NGO volunteers or they run away on their own. Dressed as prostitutes and desperately fleeing from their perpetrators, they end up at police stations often disorientated, drugged, traumatized and unable to speak English. Law enforcement officials often fail to effectively identify trafficking victims, further traumatizing them by charging them with prostitution, jailing them and treating them like criminals. According to the TIP report, a victim was jailed alongside her suspected trafficker without identification by law enforcers.

According to the 2014 Trafficking of Persons report (TIP report), South Africa has assisted at least 100 trafficking victims. The Department of Social Justice continues to overview thirteen accredited multipurpose shelters which hosted more than 90 victims during 2013 and still continues to provide shelter for trafficking victims.

### 6.6 Corruption

Corruption remains one of the biggest challenges when it comes to the effective implementation of anti-trafficking legislation globally. According to a study carried out in South Eastern Europe, human trafficking cannot take place without the involvement of corrupt officials. Corruption also places an impediment on the political will of states to combat trafficking and corrupt practices interfere with government policies on several instances. Bribes are offered to government officials, border control officers, airline personnel and immigration officers in order to obtain illegal travel documentation and to effectively smuggle nationals over transnational borders. Organized

---

criminals also, in return for excessive bribes, seek immunity from being arrested, prosecuted and sentenced. Hence, members of the police, national prosecuting authority and judges are often targeted by transnational organized crime rings and being offered excessive bribes to turn a blind eye to trafficking crimes. Obtaining or “buying” protection from the state ensures the sustainability of organized crime activities. Corruption is, however, not limited to the implementation level of legislation and can also occur in top government structures. “Grand corruption” is the term used for the form of corruption taking place on the highest levels of government, whereas “petty corruption” can be defined as the payment of sums of money to obtain preferential treatment from a public official in conducting their official profession.\(^56\)

A syndicate transporting victims between Mozambique and South Africa, unveiled by Media 24 during 2010, confirmed the relationship between police corruption and trafficking. Head transporter of the syndicate, Nando Matsingi, indicated that women are smuggled through the Lebombo border post by “friendly police men”.\(^57\) Matsingi furthermore commented on passing through roadblocks: “Don’t worry. It is my job. I go through easily. I do this many times.” In the 2014 TIP report, official complicity in trafficking crimes was found to be a serious problem and part of the recommendations made for the effective combating of trafficking in South Africa, include the investigation and prosecution of officials suspected of being involved in trafficking. The report indicates that several brothels continued to operate in absence of police intervention and that the government failed to prosecute any officials allegedly facilitating trafficking. Stakeholders also indicated that the police fail to “proactively identify sex trafficking victims or pursue investigations” and “police regularly removed alleged victims of sex trafficking from brothels without opening investigations against the perpetrators.”\(^58\) NGO’s furthermore reported that police officers “solicited commercial sex acts from trafficking victims”.\(^59\)

\(^{56}\) Van Dijk and Van Mierlo “Revisiting the link between corruption prevalence and implementation failure in anti-trafficking policies” 2013 International Perspectives in Victimology 8.

\(^{57}\) Swart “Problems surrounding the combating of women and child trafficking in Southern and South Africa” January 2011 Child Abuse Research in South Africa 31.


6.7 Inadequate crime intelligence

Crime intelligence and the analyzing thereof is of utmost importance in the fight against trafficking. Intelligence can be divided into three key areas namely information, intelligence and the analysis of the information or intelligence. According to the UNODC, information is knowledge in its “raw” form whereas intelligence consists of “information that is capable of being understood, information with added value and information that has been evaluated in context to its source and reliability.” Analysis is defined by the UNODC as—

“the resolving or separating of a thing into its component parts, ascertainment of those parts, the tracing of things to their source to discover the general principles behind them and a table or statement of the results of this process.”

As indicated by the UNODC Manual for Analysts, mere collection of data is not sufficient. It is imperative that the information which was collected be properly evaluated before it is acted upon.

In order to successfully prosecute, it is of extreme importance that all possible information with regards to the crime, the crime scene and any surrounding circumstances or events relating to the crime are obtained from all possible witnesses in order to ensure the effective prosecution of the offenders. As indicated by the UNODC:

“The effective use of intelligence is crucial to a law enforcement agency’s ability to combat criminal groups. Intelligence analysis also provides the agency with the knowledge required for effective management of its resources. With appropriate tasking, the products of intelligence analysis can assist in developing strategic plans to tackle current problems and prepare for future anticipated ones.”

The UNODC also reiterates that some criminal groups—

---

“are now moving into new criminal enterprises such as high-technology crime. The explosion of the Internet resources in the last few years has opened new opportunities for financial gain for criminals. This escalation of high-technology crime is a challenging and relatively new arena for law enforcement. Criminal organisations are more sophisticated and dynamic than ever before. The challenge for law enforcement is to be prepared for this increasing sophistication in order to reduce the impact of criminal activities on our communities.”

Advanced expertise is gained by these crime rings, having the capacity to infiltrate all possible levels of society and state structures including government institutions, law enforcement agencies, internet and online facilities, to name only a few. The illicit flow of money from a bank account in one country into a bank account in another country happens on a daily basis. Traffickers also utilize large sums of money in order to recruit victims. Potential victims are scouted online via Facebook and Twitter and after gaining the trust of a victim, the victim is lured into a “model contract” or some form of employment in another country. The victim’s bank account is then used for money laundering, and monies are transferred into his or her account in order to “secure the deal”. The victim acquires his or her own flight ticket by means of these illicit funds and willingly leaves his or her country in search for a better life and opportunities.

6.8 HIV/Aids

The socioeconomic impact of the HIV/Aids epidemic is never ending, leaving behind literally thousands of Aids orphans and child-headed households. According the UNESCO Policy paper “Human Trafficking in South Africa: Root Causes and Recommendations “the links between poverty violence, and trafficking have been compounded by the effects of HIV and AIDS” recently. The report indicates that HIV AIDS leaves families impoverished due to the passing away of parents, the loss of income and the high cost of medical care and funeral costs, causing the rejection and isolation of AIDS orphans. Having limited survival skills or opportunities leaves them especially vulnerable to exploitation and abuse. “Uneducated and unskilled, they

65 Interview with an anonymous young woman from Gauteng recruited in a similar way by an international crime ring on 18 February 2015.
become prey to unscrupulous employers and thence to trafficking. Children are subsequently more exposed to traffickers and trafficking – and ultimately to HIV and may be infected and affected on a larger scale.”

Other impacts include reduced access to health services, loss of parental love and nurturing, deteriorating housing, school drop-outs, psychological distress, anxiety and separation of siblings in order to take up their responsibility to care for themselves and often their siblings.

According to the UNODC, trafficking is one of the fastest growing transnational organized crimes. Vulnerable girls and women being forced into “unprotected sex acts with multiple partners” according to the UNODC, contributes to the “significant” spread of HIV/Aids.

6.9 Data collection and compilation of national statistics

Efforts to effectively address human trafficking in terms of prevention, protection and prosecution, are hampered by the absence of systematic data collection on national levels. The collection of reliable data is essential in the fight against human trafficking. There is also a global need for more knowledge about this phenomenon in order to increase the protection of victims and potential victims and to effectively combat the crime itself.

Knowledge of the extent of the crime in each specific state is essential in determining the optimal means to combat it in such a state as human trafficking is a fluid and transnational crime, ever changing in a globalised world. Different recruitment methods are used in different parts of the world and interchangeable factors such as belief systems, gender discrimination and cultural diversity, to name only a few, play an important role in the different forms of trafficking. Recruitment practices in the Netherlands, for instance, includes the use of “loverboy recruiters”, where young attractive men seduce vulnerable young girls and persuade them to work as prostitutes. These perpetrators gradually form an emotional bond with a potential victim leading into a romantic relationship. The “romantic” relationship in time evolves into an emotional


manipulative and exploitative relationship and victims are physically harmed and “punished” for their “bad behaviour” in order for the trafficker to remain in control of the victim.

The National Rapporteur on Trafficking in Human Beings indicated that the Dutch government has a responsibility of informing potential victims of the “loverboy” recruitment methods in order to prepare victims for similar situations and to make victims more resilient. Had it not been for an effective data collection system, this information would not have been revealed to the Rapporteur.72

The complexity of this clandestine crime also makes it hard to measure in terms of traditional collection methods. The missing piece in the data collection puzzle, the victims, are very often too afraid to share their experiences with authorities. They fear the possibility of being killed, victimised, re-trafficked and even being prosecuted as they are often deemed as prostitutes by law enforcement authorities, whereas, in reality, they were coerced into trafficking rings and are in fact enslaved. These well-organised trafficking rings, with the assistance of a highly effective network of criminals and corrupt government officials, can easily ascertain the whereabouts of the victim, where after the victim is brought back into the same trafficking ring and punished. Victims also distrust the police and other government officials due to high levels of corruption that are often prevalent in trafficking cases.

7. Conclusion

In this chapter, the links between slavery and trafficking in persons, the factors facilitating trafficking in persons and the various forms of trafficking were discussed. Poverty, a lack of education, unbalanced distribution of wealth, unemployment, armed conflicts, poor law enforcement systems, degraded environment, poor governance, societies under stress, corruption, lack of education and discrimination, increased demand for sex trade and sex tourism are some of the root causes of trafficking in persons. This international crisis is also furthered by extremely well organized international crime structures and networks managing to elude prosecution for various reasons ranging from ill governed states, porous borders, bribes and corrupt officials, transnational deal

---

making, black market transactions and victims too traumatized to testify against their perpetrators. Globalization has also exposed South Africa to international organized crime such as human trafficking and terrorism\textsuperscript{73} and the importance of raising awareness is a key preventative measure to combat trafficking in persons nationally. The empowerment of girls and women in national policies are pivotal and awareness must be raised through mass media and information campaigns in order to decrease vulnerabilities and prevent human trafficking. The following chapter aims to examine the essentials of the international legal framework with regards to trafficking in persons.

CHAPTER 3

ESSENTIALS OF THE INTERNATIONAL LEGAL FRAMEWORK

1. Introduction

Human rights violations take place daily and globally. The mere existence of treaties, declarations and other instruments has not ended human rights abuses. As indicated by Shelton, violations can be linked to variables such as political, economic and social challenges which are often irreparable by law alone and often require extensive efforts by states in order to educate, to alleviate poverty, fight corruption and make a collective effort to protect human rights, not only within their own jurisdiction, but also globally.74

In the previous chapter, the links between slavery and trafficking in persons and the factors facilitating trafficking were discussed. This chapter aims to examine the essentials of the international legal framework with regards to human trafficking and the various existing applicable international treaties, resolutions and conventions. General and specific human rights instruments will also be discussed in this chapter.

Human rights instruments can be categorized as “hard law”, referring to legally binding treaties and “soft law” which makes reference to resolutions, declarations, the general comments of treaty bodies and other texts adopted by the United Nations Human Rights Council. It may also include reports issued by working groups and special rapporteurs.

International treaties and customary law form the backbone of international human rights law whereas other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. By ratifying international human rights instruments, states incur certain responsibilities and obligations. The ratification of a treaty or convention, places an international obligation upon the ratifying state to give effect to the rights reflected in these international treaties through national legislation, policies and

---

programmes. It a state should fail to comply with these obligations, it is compelled to make reparations by means of the implementation of effective legal remedies via legal bodies in order to adequately address human rights violations.\textsuperscript{75}

The international community’s fundamental human rights commitments are mainly reflected in the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1976) (ICCPR) and in the International Covenant on Economic, Social and Cultural Rights (1976) (ICESCR). Reflecting the core values of the Universal Declaration of Human Rights, the ICCPR and ICESCR were adopted in order to give legal force and effect to the human rights commitments as set out in the UN Charter and UDHR. The UDHR, together with the International Covenant on Civil and Political Rights, its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, are collectively referred to as the International Bill of Human Rights. This chapter aims to provide an overview of the applicability of general human rights instruments. The rights and obligations flowing from these instruments will be discussed as well as the relevant state duties, compliance, due diligence and remedies available to victims.

2. **Prohibitions on trafficking of humans**

2.1 **General human rights instruments**

Article 4 of the UDHR prohibits any form of slavery and servitude whereas article 8 of the ICCPR states that:

\begin{enumerate}
  \item No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
  \item No one shall be held in servitude.
  \item No one shall be required to perform forced or compulsory labour.
\end{enumerate}

Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) specifically addresses trafficking and states that “State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

\textsuperscript{75} Dawood v Minister of Home Affairs 2000 3 SA 936 (CC).
2.2 Specific instruments

The Slavery Convention was adopted by the United Nations in 1927 as a preventative measure and in order to prevent forced labour becoming analogous to slavery. The Convention currently holds 99 ratifications and defines 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.” Article 2 furthermore includes a variety of acts under the definition of slave trade and defines slavery as—

“All acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was adopted in 1956 and makes provision for the inclusion of slave related practices such as debt bondage and other practices that are based on gender discrimination against women. It is common cause that debt bondage is used by traffickers to coerce their victims into working off their “debt” after being smuggled into a country by traffickers. According to the Trafficking in Persons Report 2015, millions of victims are working in forced labour situations to “work off” the debt of their ancestors.

Trafficking in persons was identified as a global phenomenon on the rise by the League of Nations and as a result, to combat trafficking, regulations were designed and incorporated in the League of Nations human rights framework in the 1933 International Convention for the Suppression of the Traffic in Women of Full Age. This convention specifically addressed the trafficking and the vulnerability of women and formed the bedrock for later trafficking provisions, as drafted and implemented by the United Nations, identifying trafficking as a gender-based violence. The Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others (1951) then followed, being the first international legally binding instrument that was drafted by the United Nations to combat human trafficking. The Convention was, however, only ratified by 82 member states and had one crucial shortfall: It lacked a definition of trafficking and

76 Article 1(a) and (c).
also failed to identify the elements of trafficking. It came into effect in 1951, and was a legal turning point with regards to the fight against trafficking and set the platform for the more recent and far more comprehensive trafficking-specific framework in the form of the UN Convention against Transnational Organized Crime and the Protocols Thereto (2000) (UNCTOC).

According to the UNCTOC, a crime is transnational if it is committed in more than one state. An organized crime group is defined as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”. Articles 8 and 9 of the convention deal with corruption, indicating that trafficking cannot take place without the assistance of corrupt officials. The convention calls upon states to adopt measures in order to prevent, deter and prosecute corruption, putting a short leash on all corrupt officials. Articles 12 and 14 deal with the seizure and confiscation of proceeds derived from criminal activities, stating that such assets may be identified and seized for the purpose of eventual confiscation. Article 14 specifically addresses the disposal of confiscated proceeds of crime or property, stating that, if so permitted by the state’s domestic law, the confiscated property may be disposed of. Such a state may also, if allowed by its domestic legislation, “give priority to consideration to returning the confiscated proceeds of crime or property to the requesting state party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.” Most importantly, article 14(3)(a) makes provision for the sale of crime proceeds to assist intergovernmental bodies in their fight against transnational organized crime.

The UN Convention of Transnational Organized Crime was furthermore supplemented with three protocols. Of specific relevance to the human trafficking subject is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), also referred to as the Palermo Protocol and the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000).

The United Nations adopted the Palermo Protocol in November 2000. The purposes of the Protocol are set out in the preamble as follows—

“(a) To prevent and combat trafficking in persons, paying particular attention to women and children.
(b) To protect and assist the victims of such trafficking, with full respect for their human rights.
(c) To promote cooperation among State Parties in order to meet those objectives.”

The Palermo Protocol sets the international standard with regards to human trafficking, placing it high on the international agenda, and providing a threefold definition for trafficking by stipulating what needs to be done, how it is to be done and why it is done. Article 3 of the Palermo Protocol declares that—

“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 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 4 sets out the scope of application, stating that “the Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences”. This is also referred to as the “3P” paradigm – prevention, protection and prosecution; a structural framework used by international governments around the world in combating human trafficking. The prevention of trafficking should include preventative measures such as addressing labour demands, alleviating poverty, educating individuals that live in isolated rural areas and adopting and implementing educational measures in the national curriculum of primary schools and high schools with regards to trafficking recruitment methods.

Article 5 of the Palermo Protocol places an obligation on states to put in place legislative and or other measures in order to criminalize human trafficking. Article 6 deals with the assistance and...
protection of trafficking victims, placing an obligation on states to protect the privacy and identity of victims by making legal proceedings which relate to trafficking confidential.

Article 6(2) states that state parties must ensure that their domestic, legal or administrative system contains measures that provide information to victims regarding court and administrative proceedings as well as assistance to enable their views and concerns with regards to criminal proceedings to be aired.

A further obligation is placed on state parties by article 6(3), which addresses the issue of remedies that are to be made available to victims. Paragraph 3 states that—

> “Each States Party shall consider implementing measures to provide for the physical, psychological and social recovery of the victims of trafficking in persons, including in appropriate cases, in cooperation with non-governmental organisations, other relevant organisations and other elements of civil society and in particular, the provision of appropriate housing, counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand medical, psychological and material assistance and employment, educational and training opportunities.”

Article 6(4) then goes further by stating that state parties shall, when applying the provisions of article 6, take into consideration age, gender and special needs of trafficking victims, in particular the special needs of children, including appropriate housing, education and care, whilst article 6(5) places an obligation upon state parties to provide for the physical safety of victims while they are within a party’s territory. Article 6(6) deals with the subject of domestic application, stating that each state party shall ensure that its domestic legal system contains measures that provide victims with the possibility of obtaining compensation for damage suffered.

In terms of article 7, “each state party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently in appropriate cases.” This should be done taking into consideration “humanitarian and compassionate factors”. Victims should be treated as victims, not criminals. When child victims are dealt with, this should also take place with utmost care, taking into account their vulnerability and special needs.

Article 8 deals with the repatriation of victims, stating that the safety of such a victim should form priority where repatriation is concerned and that proper and careful assessment should be done
before a victim is repatriated. Victims should be returned to their states only if this is a safe option and legal alternatives should be provided if their home environment is not adequately safe.

Article 9 places the focus on prevention, and states are obligated in terms of the article to adopt comprehensive measures to prevent and combat trafficking by means of programmes, policies, research, mass media campaigns, multilateral and bilateral cooperation, social, educational and cultural measures and any other measures deemed necessary to combat trafficking. Article 10 states that all law enforcement institutions, immigration facilities and other relevant authorities of states shall cooperate with each other by means of the exchange of information, in accordance with the national policies. Information with regards to the recruitment methods, means of transporting victims, routes and links between individuals and groups must be shared in order to more effectively detect these criminals. Other aspects raised by article 10 include training programmes for law enforcement officers and immigration authorities in order to equip them in not only prevention but also victim identification. These authorities should also be fully informed with regards to gender and child sensitive issues and they must be encouraged to cooperate with other relevant organisations and elements of civil society.

Article 11 very importantly emphasizes the importance of effective border control, stating that parties must adopt legislative and other necessary measures to prevent means of transport such as carriers to be used in the commission of offences. Article 12 deals with security and the control of documents, placing an obligation on states to ensure that all travel and identity documents issued by them are of such quality that it “cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued.”

International organized criminal group activities have become a serious international challenge. Operating across borders, these sophisticated rings have developed crime strategies that enable them to function in a sophisticated yet very harmful manner, and the types of transnational crime is forever changing. Offenders, products, instruments and victims are located and passed through various jurisdictions and the cross-border mobility of people makes the intricate structure of these crime rings hard to deal with, leaving government institutions and authorities who have to combat international organized crime, in dire straits. The vast profits that are derived from transnational crime and the inadequate penalties criminals face when they are caught, makes it worth their while
to operate with impunity. Transnational organized crime affects all countries and it is therefore paramount that states should, by means of bilateral and multilateral agreements, work towards global international cooperation in order to more effectively identify and prosecute offenders. Due to the development of new forms of technology, crimes can increasingly be hidden from authorities, making investigations more intricate and challenging.

According to the United Nations Office on Drugs and Crime Report,\textsuperscript{81} transnational organized crime as defined by UNCTOC, is “any serious transnational offence undertaken by three or more people with the aim of material gain”. The endless list of transnational organized crimes includes human trafficking, migrant smuggling, cybercrime, counterfeit goods trafficking, maritime piracy, firearms trafficking, cocaine trafficking, heroin trafficking and environmental resources trafficking. According to the International Labour Organisation, the total income derived from human trafficking during 2005 was USD 32 billion. The UNODC in its recent report, creates an international context in defining transnational organised crime in explaining that the “unprecedented openness in trade, finance, travel and communication” gave way to economic growth and well-being, setting the stage for criminals identifying opportunities that come with globalisation. Illicit goods are manufactured in one continent and then trafficked across various continents, and sold in a next continent. The UNODC refers to mafias as a transnational problem, indicating that these crime rings have become a real threat to national security, especially in vulnerable, poor countries. Crime and corruption often fueling each other, hinder economic development and prosperity, and far worse, empowers criminals to outsmart the law.

The UNODC advises in its report that a synchronised approach should be followed, in the implementation of effective enforcement mechanisms. The United Nations Convention against Transnational Organized Crime (2000) is the response of the international community to the need for a truly global approach. Its purpose is to promote cooperation, both for the prevention of and for the effective fight against transnational organized crime.\textsuperscript{82} Resolution 2170, adopted by the Security Council on 15 August 2014 places a positive obligation on states to ensure that all


\textsuperscript{82} Article 1 of the Convention.
measures taken to combat terrorism must comply with their obligations under international law and—

“in particular international human rights, refugee and international humanitarian law, and underscoring that effective counter terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort.”

Resolution 1261 also “condemns in the strongest terms the terrorist acts of ISIL and its violent extremist ideology and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law.” The Security Council reaffirms that one of the biggest threats to international peace and security remains terrorism in all its various forms, adding that terrorism is unjustifiable, whether these acts are religiously orientated or not. The Security Council goes further by expressing its concern with regards to the resources obtained by terrorist groups such as IS and other organisations as well as entities associated with Al-Qaida, and calls upon member states to prevent terrorists from kidnappings and hostage-taking. The Security Council underlines the primary responsibility of member states to protect the civilian population on their territories from terrorism in accordance with their obligations under international law with specific reference to women and children affected by the violent and sexual acts of these terrorist groups. The groups make use of advanced communication technologies, the internet and new information for recruitment purposes and states should adopt all possible measures to prevent these crime groups from exploiting technology and other resources to support their terrorist acts. According to Human Rights Watch, more than 2 000 women and children have been taken hostage since the beginning of 2014. These victims also included boys taken hostage to act as child

88 A teenager was recently recruited by IS via social platforms to join IS and was rescued from a British Airways flight on her way to join the Islamic State. An investigation is currently being conducted to establish how she was recruited (Times Live ISIS is here (07-04-2015) http://www.timeslive.co.za/thetimes/2015/04/07/isis-is-here (23-06-2015).
During 2014 Boko Haram insurgents entered the town of Chibok in Nigeria and abducted more than 200 schoolgirls for the purpose of sexual slavery.

Acting under Chapter VII of the Charter of the United Nations, the Security Council in Resolution 1261 condemns, amongst other atrocities, the recruitment and use of children, rape and other forms of sexual violence, forced displacement of members of minority groups, killing and maiming of children, arbitrary detention and attacks on schools and hospitals.

Resolution 2199 was adopted by the Security Council on 12 February 2015 and condemns the abduction of women and children, expressing outrage at the abuse and exploitation of innocent people through rape, sexual abuse and forced marriage. The link between human trafficking, drug trafficking, trafficking of artefacts, the illicit flow of funds and terrorism is evident. Resolution 2199, in paragraph 16, also notes with concern that “the looting and trafficking of cultural objects is one of the sources of financing for the Islamic State in Iraq and in the Levant (IS/ISIL), al-Nusra Front (ANF) and other individuals, groups and entities associated with al-Qaida”. It indicates that “such funding is being used to support recruitment efforts and to strengthen operational capability to organize and carry out terrorist attacks.”

3. Affected rights

The link between human rights and the pursuit against trafficking is evident since the human rights of trafficking victims are affected at different points in the human trafficking cycle. Articles 1(3) and 13 (b) of the Charter of the United Nations and article 2 of the Universal Declaration of Human Rights confirm that the human rights reflected in these instruments are universal with the result that all

91 Africa Check Factsheets & Guides available online at https://africacheck.org/factsheets/factsheet-how-many-schoolgirls-did-boko-haram-abduct-and-how-many-are-still-missing/ (11-12-2016).
93 A recent report released by the United Nations, the UN University report, indicates that ISIL has enslaved an estimated 5 000 people from a Yazidi community. ISIL then utilized social media platforms such as Telegram, and encrypted application, to auction off these trafficked women and girls. Yazidi captives from Iran are also recruited via online magazines and YouTube videos to join ISIL. (Quartz: Human traffickers are using Whatsapp, Facebook and Telegram to sell slaves (11 September 2016) available online at http://qz.com/777152/isil-is-using-facebook-fb-whatsapp-and-telegram-to-sell-slaves/ (12-09-2016).
trafficking victims are entitled to the protection of the full range of such rights. As indicated by Goodman and Alston “The UDHR goes little behind the bare declaration of rights to provide (art. 8) that everyone has the ‘right to an effective remedy by the competent national tribunals’ for violations of fundamental rights.” The ICCPR reaches wider than the UDHR by stating that “states parties agree to ensure to all persons within their territory the rights recognized by the Covenant, and to adopt such legislative or other measures as may be necessary to achieve that goal”. In terms of article 2 of the UDHR, States parties also agree to take all necessary steps in order to ensure that all persons whose human rights have been violated, have an effective remedy and that such remedies, when granted, will be enforced by the competent authorities. The human rights affected during the trafficking cycle will be discussed in the next section.

3.1 The right to life

The Universal Declaration of Human Rights (UDHR) was drafted as a common standard of achievement for all people and all nations by the General Assembly, signaling the deepening of a more progressive global human rights regime and declares that “human rights should be protected by the rule of law”. This human-rights yardstick became authoritative in states which became parties to one or both of the later to follow Covenants. Article 3 of the UDHR states that all persons have the right to life. Article 6 of the ICCPR declares that everyone shall have the right to life and that such right shall be protected by law and that no one can be arbitrarily deprived of his life. In General Comment No. 6 para 1, the HRC categorizes the right to life as “the supreme right”. “Article 6 has both a negative component, as in a right no to be arbitrarily or unlawfully deprived of life by the State or its agents, and a positive component, in that the State must adopt measures that are conducive to allowing one to live.”

99 Article 1 of the Universal Declaration of Human Rights (1948).
100 Article 1 General Comment No 6 (1994) HRI/GEN/1/Rev.1.
Committee (HRC) makes mention of the right to life in paragraph 10 of General Comment 28 and places an obligation on states to report on preventative measures protecting women from practices that violate their right to life such as female infanticide, dowry killings and the burning of widows.¹⁰²

Article 2 of the European Convention of Human Rights (ECHR) declares that every person’s right to life “shall be protected by law”¹⁰³ placing both a positive and negative duty on the State to protect the individual’s right to life. The positive obligation placed on states entails that states must take affirmative measures to protect the right to life whereas the negative duty implies that states are prohibited to commit any acts that will deprive individuals of this right.¹⁰⁴ Article 13 of the ECHR stipulates that “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”¹⁰⁵ In the Öneryildiz v Turkey¹⁰⁶ case, the applicant resided in the slum quarter of Kazi Karabekir in Istanbul, an area surrounded by rubble. The Turkey government failed to comply with certain safety and environmental regulations resulting in a methane explosion which destroyed ten houses including the house of the applicant. The applicant lost 9 family members and suffered household damages during the explosion. The court found that the Turkey Government had violated Article 2 of the ECHR by failing to prevent the explosion and failing to protect the individuals residing in the slums.¹⁰⁷ The court furthermore found that even in circumstances where people were living illegally, the state has a duty to protect such people, as was the case in this instance.¹⁰⁸ The European Court of Human Rights found that the State failed in its duty to take preventive measures protecting those at risk by means of inadequate investigation into the death of the applicant’s relatives.¹⁰⁹ The court indicated that even though the officials were convicted for neglecting their duty, they were not sufficiently penalized for


38
endangering the lives of others.\textsuperscript{110} The ECHR also found that the penalty was inadequate to meet the Turkey government’s obligation to protect in terms of article 2 as it did not punish the authorities for the deaths of the applicant’s family members. The Government also contravened article 13 of the ECHR in failing to provide sufficient remedies to the applicant and the court indicated that “the timely payment of a final award of compensation for anguish suffered should be considered an essential element of a remedy under Article 13 for a bereaved spouse and parent.”\textsuperscript{111}

3.2 The right to liberty and security of the person

Article 1 of the UDHR declares that “[a]ll human beings are born free and equal in dignity and rights” and furthermore states that all persons are born as such with “reason and conscience and should act towards one another in a spirit of brotherhood”. Article 2 of the UDHR states that all persons are entitled to all the rights and freedoms as set out in the UDHR and article 3 states that everyone has the right to life, liberty and security of person. Article 8 of the ICCPR in turn states in relevant part:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3(a) No one shall be required to perform forced or compulsory labour.”

Article 9 of the ICCPR deals with the right to liberty and states that all persons have the right to liberty and security of the persons. In General Comment No.35 the Human Rights Committee highlights that the right to personal security as set out in article 9 places an obligation on States parties to “take appropriate measures to protect individuals whether detained or non-detained, from known threats to life or bodily integrity proceeding from either governmental or private sources.”\textsuperscript{112} Article 11 of the ICCPR declares that no person shall be imprisoned “merely on the ground of inability to fulfil a contractual obligation” and article 12 states that everyone shall be free to leave any country including his own country. Traffickers confiscate the passports of their victims in order to gain control over them. This makes it impossible for the victims to leave the country to which they were trafficked, leaving them trapped, vulnerable and without protection.


\textsuperscript{111} Önerilidiz v Turkey ECHR Application No 48939/99 available online at file:///C:/Users/adria/Downloads/003-1204313-1251361\%20(1).pdf (08-01-2017) 6.

\textsuperscript{112} General Comment No.35 CCPR/C107/R.3 (2013) at para 8.
As they are often foreign nationals, they cannot speak or understand the language of the host state, which leaves them particularly at risk.

### 3.3 The right to privacy

Article 12 of the UDHR states that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to protection of the law against such interference or attacks.” Article 17 of the ICCPR prohibits the arbitrary or unlawful interference with a person’s privacy, family, home or correspondence as well as unlawful attacks on his honour and reputation. It also states that every person has the right to protection against such interference or attacks. In order to protect trafficking victims and their families from further harm, it is paramount that the privacy of victims are protected. The Recommended Principles and Guidelines in guideline 6 stipulates that “[t]here should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial.” Article 11 of the European Trafficking Convention also reiterates that the states parties must “protect the private life and identity of victims”. Failure to protect the victim’s privacy can cause retaliation by traffickers and increase the possibility of intimidation.

### 3.4 Right to physical integrity

Article 10(1) of the ICCPR states that: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” According to the Human Rights Committee, articles 10 and 9 are “closely related.” The Human Rights Committee in General Comment No.21 comments on Article 10 of the ICCPR and highlights the positive obligation it poses on States “towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel,

---

115 See also Article 3 of the UDHR.
116 General Comment No.35 CCPR/C107/R.3 (2013). at para 62
inhuman or degrading treatment or punishment contained in article 7 of the ICCPR.” 117 The humane treatment of all persons whom have been deprived from of their liberty is a “universally applicable rule” 118 which must be “applied without any distinction of any kind, such as race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other status.” 119

3.5 The right not to be subjected to inhuman or degrading treatment or torture

Trafficking victims are often kept in bondage by means of physical torture and ill treatment. Often, when such victims break free, they have been physically and emotionally traumatized and are afraid of retaliation by their traffickers. 120 Article 5 of the UDHR prohibits any form of torture, inhumane and degrading treatment or punishment. Article 7 of the ICCPR states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and by doing so it places an obligation on states to protect also women and children against cruel and inhumane behavior. 121 In General Comment 20, the HRC discusses the aim of article 7 of the ICCPR and emphasises that states have a duty to protect the physical and mental integrity of the individual. It furthermore highlights the duty placed on states to afford “everyone protection through legislative and other measures as may be necessary outside their official capacity or in a private capacity.” 122 The committee furthermore reiterates that the prohibitions included in article 7 are not limited to acts causing physical pain to victims but also extends to acts which cause mental suffering. The committee also reiterates the fact that article 7 of the ICCPR allows for no limitation and that no derogation must be allowed with regards to the provisions of article 7 even in cases of public emergency. 123 In a further observation, the committee notes that no justification or “extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.” 124

117 HRC General Comment No.21 HRI/GEN/1/Rev.1 at 33 (1994) at para 3.
118 HRC General Comment No.21 HRI/GEN/1/Rev.1 at 33 (1994) at para 4.
119 HRC General Comment No.21 HRI/GEN/1/Rev.1 at 33 (1994) at para 4.
121 Article 24 of the International Covenant on Civil and Political Rights.
The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) (CAT) entered into force in 1987 and has, up to date, been ratified by 158 state members. The definition of torture in the Convention reads as follows—

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Article 2 states that all parties have an obligation to effectively prevent acts of torture in any territory under their jurisdiction and should take all legislative, administrative and judicial measures deemed necessary to do so. It also stipulates that no exceptional circumstances, whether threat of war or public emergency, may be invoked as a justification for torture. No order from a public authority or public officer may also be invoked as a justification for an act of torture.

In cases of repatriation, no state shall extradite a person to another state if there are substantial grounds for believing that such a person will be subject to torture or dangerous circumstances. Article 4 obliges all state parties to implement all acts of torture as offences into their criminal legislation and that the penalties for the ghastly torture crimes, will be as grave as the nature of the offences committed.

Article 13 deals with victim assistance and protection and article 14 places an obligation on state parties to ensure that all victims of torture have an enforceable right to “fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.” General Comment No. 3 of the Committee against Torture explains the nature of the obligations placed upon states in terms of article 14 of CAT and that all states parties are required to ensure that victims obtain redress and compensation. General Comment No.3 highlights that according to article 14 of CAT, the right to compensation and redress is “applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment without discrimination of any

---

125 General Comment No.3 of the Committee against Torture CAT/G/GC/3/1 (2012) at para 1.
kind,\textsuperscript{126} in line with the Committee’s General Comment No.2."\textsuperscript{127} The committee furthermore examines “redress” as a term and states that with regards to redress, article 14 “encompasses the concepts of effective remedy and reparation. The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention.”\textsuperscript{128} Paragraph 6 of Comment No. 3 highlights that reparations must be tailormade to each victim’s needs and that it must be proportionate “in relation to the gravity of the violations committed.”

Monetary compensation may also not be a sufficient form of redress and the Committee indicates that monetary compensation alone is inadequate for a State party to comply with its obligations under article 14.\textsuperscript{129} Redress must be “prompt, adequate and fair” and may include pecuniary and non-pecuniary damage resulting from the torture, reimbursement of medical expenses, provision for future medical or rehabilitative expenses, loss of earnings and potential loss due to disabilities caused by the torture as well as “lost opportunities such as employment and education.”\textsuperscript{130} Provision must also be made for legal and specialized assistance and any other costs that may be necessary in a redress claim.\textsuperscript{131}

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2006) (OPCAT) aims to “establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”\textsuperscript{132} It furthermore establishes a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture

\textsuperscript{126} General Comment No.3 of the Committee against Torture CAT/G/GC/3 (2012) at para 1.
\textsuperscript{127} General Comment No. 2 of the Committee against Torture CAT/C/GC/2 (2008) at para 1 addresses the three parts of Chapter 2 of CAT and states that each of the parts “identifies distinct interrelated and essential principles that undergird the Convention’s absolute prohibition against torture”.
\textsuperscript{128} General Comment No.3 of the Committee against Torture CAT/G/GC/3 (2012) at para 2.
\textsuperscript{129} General Comment No.3 of the Committee against Torture CAT/G/GC/3 (2012) at para 9.
\textsuperscript{130} General Comment No.3 of the Committee against Torture CAT/G/GC/3 (2012) at para 10.
\textsuperscript{131} General Comment No.3 of the Committee against Torture CAT/G/GC/3 (2012) at para 10.
\textsuperscript{132} Preamble of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment A/RES/57/1990 (2006).
(hereinafter referred to as the Subcommittee on Prevention) which shall be responsible for carrying out the functions set out in the Protocol.133

The Rome Statute entered into force in July 2002 and even though the Rome Statute does not make provision for trafficking offences per se, references can be found to certain elements of trafficking; for instance enslavement134 and the forcible transfer of children.135 Article 7 prohibits “crimes against humanity” and any of the following acts if such acts are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, imprisonment or other severe deprivation of physical liberty “in violation of the fundamental rules of international law”, enslavement, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and or “any other form of sexual violence of comparable gravity.” Article 7(k) also makes provision for “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. The Rome Statute does, however, set an additional requirement by stating that such a crime must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” in order to qualify as a crime against humanity.136

Article 7 furthermore consists of six elements essential to constitute a crime against humanity. It firstly sets as a requirement that it has to be established whether either one of the following crimes has been committed—

“[M]urder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

133 Article 2(1) of the Preamble to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment A/RES/57/1990 (2006).
134 Article 7(1)(c) of the Rome Statute.
135 Article 6(e) of the Rome Statute.
136 Article 7(1) of the Rome Statute.
Article 7 secondly provides that the act must be an attack directed against any civilian population. Thirdly, the acts must be widespread or systematic in nature and the attack must be pursuant to, or in furtherance of, a state or organisational policy to commit such attacks. The fifth requirement is that the acts must be committed as part of the attack, indicating that there must be a nexus between the acts and the attack and, lastly, article 7 sets as a requirement the awareness by the perpetrators of the fact that the conduct was part of or intended to be part of such an attack.

The Rome Statute defines “enslavement” as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”

Torture is defined as—

“the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”

If a crime however does not comply with all the requirements as set out in terms of article 7, it will not be deemed as a crime against humanity in terms of the Rome Statute.

Article 8 (xxii) deals with war crimes and prohibits “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy as defined in article 7 paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”. Article 8 also prohibits the enlistment and conscription of children under 15 years of age with the purpose of using them in hostilities or employ them as a member of armed forces. Terrorist acts and acts by groups such as ISIS may fall under article 8 of the Rome Statute if such acts involve widespread attacks or are committed in the context of armed conflict. However, the fact that Iraq and Syria are

---

137 This article reflects article 1 of the 1926 Slavery Convention which defines slavery as follows: “(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”

138 Article 2(e) of the 1926 Slavery Convention.
not members of the International Criminal Court remains a barrier.\textsuperscript{139} This issue falls outside the scope of the dissertation.

Article 75 of the Rome Statute makes provision for remedies for victims, stating that “[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”. Provision for asset forfeiture is also made in articles 75 and 109, placing a positive obligation on state parties to give effect to all fines and forfeiture orders in accordance with such a state’s national law. Article 109 states that if a state party is unable to give effect to an order for forfeiture, it “shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.”

3.6 The right to physical and mental health

Article 12 of the International Covenant on Economic, Social and Cultural Rights states that state parties “to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

3.7 The right to be free from all forms of discrimination

Article 2 of the ICESCR declares that state parties must guarantee that the rights set out in the Covenant will be “exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 3 deals with the equal rights of men and women whereas article 5 prohibits the infringement of any of the rights set out in the ICESCR and declares that no restriction upon any of the fundamental human rights set out shall be recognized whether it is restricted by any form of law, regulation, convention or custom.

The International Convention on the Elimination of All Forms of Racial Discrimination (1965) defines racial discrimination as—

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment

\textsuperscript{139} American NGO Coalition for the ICC \textit{Bringing Terrorism under ICC Jurisdiction} available online at http://amicc.blogspot.co.za/2016/11/bringing-terrorists-to-international.html (06-01-2017).
or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

In its preamble, the Convention refers to the fact that the United Nations has “condemned colonialism” and that the Charter of the United Nations is —

“based on the principles of dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organisation, for the achievement of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction.”

Article 2 states that state parties shall condemn all forms of racial discrimination by taking measures to eliminate policies reflecting racial discrimination. It also stipulates that parties undertake not to engage in any practice involving racial discrimination and that such parties shall ensure that all public authorities, national and local public institutions shall act in conformity with the obligations set out in article 2. A further obligation is placed on the member states “not to sponsor, defend or support racial discrimination by any persons or organisation;” as well as the obligation of guaranteeing individuals “full and equal enjoyment of human rights and fundamental freedoms.”

3.8 The right to equality

Article 26 of the ICCPR states that—

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 15 of CEDAW deals with the equality of all genders before the law stating that “they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.” Women shall also be given the right to freedom of choice with regards to domicile and residence.

3.9 The right to marriage

Article 16 of the UDHR states that: “Marriage shall be entered into only with the free and full consent of the intending spouses.” Article 23 of the ICCPR declares that all marriages shall be
concluded out of free and full consent of both spouses. According to the Ministry of Home Affairs in India, it is estimated that 90 per cent of India’s sex trafficking is internal trafficking and mainly for the purposes of sexual exploitation and forced marriages.\textsuperscript{140} A nexus can be found between potential trafficking due to such circumstances as generations of families sell their daughters as brides in order to provide for their financial needs.\textsuperscript{141}

3.10 The right to work

Article 23 of the Universal Declaration of Human Rights states that all persons shall have the right to work in just and favourable working conditions and the right to free choice of employment. Article 23(3) deals with the right to just and favourable remuneration ensuring “an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.” Article 1 of the International Labour Organisation’s Forced Labour Convention (1930) states that all members of the ILO undertake to “suppress the use of forced or compulsory labour in all its forms within the shortest possible period.” The International Labour Organisation’s Declaration on Fundamental Principals and Rights at Work was adopted by the International Labour Conference in June 1998 and states that “all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely—

\begin{enumerate}
  \item[a)] freedom of association and the effective recognition of the right to collective bargaining;
  \item[b)] the elimination of all forms of forced or compulsory labour;
  \item[c)] the effective abolition of child labour; and
  \item[d)] the elimination of discrimination in respect of employment and occupation.\textsuperscript{142}
\end{enumerate}

\textsuperscript{140} US Department of State \textit{Trafficking in Persons Report} (2007) 115.
\textsuperscript{141} Williams and Masika “Editorial” in Masika (ed) \textit{Gender, Trafficking and Slavery} (2002) 56.
\textsuperscript{142} Article 2(a) – (d) of the ILO Declaration on Fundamental Principles and Rights at Work (1989).
4. **Conclusion**

The aim of this chapter was to briefly examine the essentials of the international legal framework with regard to human trafficking and the various existing applicable international treaties, resolutions and conventions. Chapter 3 will consist of an overview of the protection of vulnerable groups which include women, children, migrants and refugees and highlight the relevant instruments that deals with vulnerable groups.
CHAPTER 4:

THE PROTECTION OF VULNERABLE GROUPS

1. Introduction

It is common cause that the vulnerability of people is a contributing factor to trafficking in persons. Poverty, inequality, social conditions that limit individual choices and cause deprivation, human rights violations and limited employment opportunities, creating an ideal environment for traffickers to exploit vulnerable people.\textsuperscript{143} In order to effectively combat trafficking, it is imperative for states to reduce the vulnerability of potential victims as well as the demand for trafficking. Adequate protection for victims and potential victims must be ensured by states, measures be implemented to support those who fell victim to trafficking and efficient prosecution be effected.\textsuperscript{144}

In the previous chapter, the existing international law framework with regards to human trafficking was discussed. This chapter aims to provide an overview of the specific vulnerable groups and their affected rights. The vulnerable groups that will be discuss include children, women, migrants and refugees.

2. Children

Children are especially vulnerable to trafficking and other forms of exploitation due to their reliance on adults for their basic needs and wellbeing.\textsuperscript{145} It is in lieu hereof that children are afforded special rights of care and protection and it is paramount that efficient responses must be

\textsuperscript{143} UN Fact Sheet No 36. Human Rights and Human Trafficking (2014) available online at \url{http://www.ohchr.org/Documents/Publications/FS36_en.pdf} (13-12-2016) 40.
\textsuperscript{145} UN Fact Sheet No 36. Human Rights and Human Trafficking (2014) available online at \url{http://www.ohchr.org/Documents/Publications/FS36_en.pdf} (13-12-2016) 42.
developed with regards to child vulnerability. It is furthermore imperative that a true understanding be formed of why some children become trafficking victims and others not.146

The ILO’s Worst Forms of Child Labour Convention entered into force in 2000 and was ratified by 179 countries including South Africa. Adopted to complement the Convention and Recommendation concerning the Minimum Age for Admission to Employment (1973), this Convention makes mention of the need for time relevant instruments addressing the prohibition and elimination of the worst forms of child labour. The Worst Forms of Child Labour Convention very importantly recognizes that poverty leads to child labour and that a long-term solution should be sought. This must be done through sustained economic growth which would evidently lead to universal education, social progress and poverty alleviation.147 Article 1 declares that all member parties must take immediate action in securing the elimination and prohibition of the worst forms of child labour. Article 2 defines a child as “all persons under the age of 18”. Article 3 deals with the worst forms of child labour which include slavery and practices similar to slavery, the sale and trafficking of children, debt bondage, forced and compulsory labour practices and compulsory labour practices such as the use of child soldiers in armed conflict situations. It also specifies child prostitution and the use, offering or procuring of a child for purposes of prostitution, pornography or production of pornography as a worst form of child labour. Employment conditions that are likely to harm the morals, safety or health of children is also included as a worst form of child labour.

Article 5 deals with the regulation of worker’s organisations and makes provision for monitoring and implementation mechanisms, whereas article 6 deals with the development and implementation of programmes of action in order to eliminate the worst forms of child labour. Article 7 focuses on the effective implementation of the convention by each state party, placing upon such parties the obligation of preventing, creating awareness, educating and effectively identifying victims and potential victims as well as assisting victims. Special emphasis is placed on the special situation with regards to girls. Article 8 places an obligation on state parties

147 Preamble to the Worst Forms of Child Labour Convention (1999).
regarding reciprocal international assistance, enhanced international cooperation and support for “social and economic development, poverty eradication programmes and universal education”.

Article 8 places the focus on immediate and comprehensive action, the importance of free basic education and the need to remove children from harmful labour situations. It also points out that rehabilitation and social integration programmes should be provided for and that the needs of the families of these children must be addressed.\textsuperscript{148}

The UN Convention on the Rights of the Child (1990) (CRC) is one of the most ratified human rights treaties in history with 196 member states being signatories to the convention. The United States, Somalia and South Sudan are non-members.\textsuperscript{149} The CRC General Principles\textsuperscript{150} have the fundamental function of realizing all rights embedded in the CRC whereas the optional protocols serve as a strengthening mechanism and add further unique rights for children.

Article 3 of the CRC places the best interest of the child at the forefront in all instances and actions concerning children. This includes any decisions or actions by private or public social welfare institutions, administrative authorities, legislative bodies and courts of law.

Article 4 places the obligation on all state parties to implement the CRC in applicable domestic legislative, administrative and any other measures.

Article 7 of the CRC makes mention of the right of a child to be named at birth, the right to be immediately registered after birth and the right to know and be cared for by his or her parents. Article 11 deals with the obligation resting on member states to combat illicit transfer and non-return of children abroad as well as the obligation to promote the conclusion of bilateral and multilateral agreements. Article 12 states that every child has the right to be “heard in any judicial

\textsuperscript{148} Para 4 of the Worst Forms of Child Labour Convention.
\textsuperscript{150} UNCRC Guiding Principles are found in Articles 2, 3, 6 and 12 of the Convention on the Rights of the Child. Article 2 stipulates that all rights apply to children without exception and places an obligation on states to protect children against all forms of discrimination and take positive measures that promotes children’s rights. Article 3 states that all actions that concern children shall be taken in full account of the best interest of the child and Article 6 states that every child has the right to life, placing an obligation on states to ensure children’s survival and their development. Article 6 stipulates that the child’s opinion must be heard and that all children have the right to express their opinion and that such opinion must be taken into account in all matters of procedures affecting the child.
and administrative proceedings affecting the child”. Article 13 declares that children shall have the right to freedom of expression and also the right to protection of national security and public order. Article 14 deals with the child’s right to freedom of thought, conscience and religion and Article 15 places an obligation on state parties to recognize the child’s rights to associate freely.

Article 16 forbids the interference, either arbitrary or unlawful, with a child’s privacy or with his or her family’s privacy. It also prohibits the unlawful attack on a child’s honour and reputation. Article 18 places the obligation on states to endeavor to ensure the recognition of the principle that both parents have equal responsibilities for the development and upbringing of a child. Article 19 makes provision for the protection of children from any form of physical and mental violence by state parties and places an obligation on members to take all possible measures to ensure this. This article requires that these measures should include the establishment of social child support programmes that will not only support the child but also the caretakers of the child and it makes provision for prevention, identification, reporting, referral, treatment, investigation and follow up measures. Article 20 deals with the removal of a child from damaging environments and the placing of such a child in foster care or suitable institutions.

Article 21 states that all state parties must permit the system of adoption and see to it that the adoption process shall in all instances be in the best interest of the child and that safeguards and standards existing in national adoption, shall be implemented in cases of inter-country adoptions. Article 21 also very importantly prohibits the gain of improper financial benefits by any person or institution involved in inter-country adoption. Article 22 deals with children seeking refugee status, placing the obligation on state parties to ensure appropriate protection to all children seeking refugee status whether accompanied by his or her parents or unaccompanied. Article 23 deals with disabled children, recognizing that all such children have the right to a dignified, full and decent life.

According to article 24, all children have the “right to enjoyment of the highest attainable standard of health”, which includes the right of access to treatment facilities and rehabilitation of health. In terms of Article 28, all children have the right to education and states are to ensure that this right is recognized. Article 31 makes mention of the child’s right to rest and leisure stating that all children has the right to “rest and leisure, to engage in play and recreational activities appropriate
to the age of the child and to participate freely in cultural life and the arts.” Articles 32 to 37 deals with the economic exploitation of children and the obligations on member parties to protect children from these forms of exploitation.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) (OPCC) condemns the use of children in armed conflict situations, as well as the attack of places that generally have a significant presence of children such as hospitals and schools. It furthermore notes that “the adoption of the Rome Statue of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict...” The OPCC also welcomes the prohibition of forced and compulsory recruitment of children for use in armed conflict by the International Labour Organisation as reflected by the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention (1999). The Protocol further recognizes the special needs of children whom are specifically vulnerable to recruitment by armed forces due to their economic and social status or gender, aforementioned being the root causes of children’s involvement in armed conflict.151

Article 1 places an obligation on state parties to ensure that no armed forces who are younger than 18 shall take part in hostilities. Article 2 prohibits the compulsory recruitment by state parties of any persons under 18 for its armed forces whereas article 4 places a positive obligation on state parties to adopt measures preventing recruitment of children under 18 years of age and to criminalize the practices involving the recruitment of persons under the age of 18 for armed conflict purposes.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2002) (Sex Trafficking Protocol or STP) was created to extend measures that states must take in order to ensure and guarantee the protection of children from being sold, prostituted or exploited for reasons of pornography. The STP furthermore asserts that children have the right to be protected against being economically exploited from performing

any hazardous work or work that may interfere with a child’s education or that may be harmful to the child’s health or physical, mental, spiritual, moral or social development.\textsuperscript{152} The Protocol also expresses concern with regards to the widespread and continuing practice of sex tourism (to which children are extremely vulnerable) and the increase of international child trafficking for the purposes of selling children and for purposes of sexual exploitation. The particular vulnerability of girl children is also recognized and the Protocol highlights the fact that this group is “disproportionately represented among the sexually exploited”.\textsuperscript{153} The STP calls for an increase in public awareness as a mechanism to create greater awareness and to diminish the demand for the sale of children, child prostitution and child pornography and advocates for the importance of reinforcing and strengthening global partnerships across a broad spectrum and improving law enforcement on a national level. The STP not only defines but also prohibits the sale of children, child prostitution and child pornography but also places an obligation on states to make certain acts punishable under their domestic criminal law.\textsuperscript{154} The Protocol also sets out the minimum offences which should be fully covered by states under their criminal or penal law whether such offences were committed domestically or transnationally and on an individual or organized basis.\textsuperscript{155}

The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2011) enables the Committee on the Rights of the Child to carry out functions provided for in the current protocol. The Committee consists of 18 independent experts monitoring the measures undertaken by member states to effectively implement the CRC and its optional protocols. The Optional Protocol furthermore allows individual children to, personally or in a group, submit to the Committee complaints containing violations of their rights as pertained in the CRC.

\textsuperscript{152} Preamble to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002).
\textsuperscript{153} Preamble to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002).
\textsuperscript{154} Articles 1 and 2 of the the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002).
\textsuperscript{155} Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002).
The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (1965) is an international agreement to safeguard intercountry adoptions and is applied to—

“An adoption between on the one hand, a person who possessing the nationality of one of the Contracting States, has his habitual residence within one of these States, or spouses each of whom, possessing the nationality of one of the Contracting States, has his or her habitual residence within one of these States, and on the other hand, a child who has not attained the age of eighteen years at the time when the application for adoption is made and has not been married and who, possessing the nationality of one of the Contracting States, has his habitual residence within one of these States.”

The Convention incorporates four imperative provisions. Firstly, authorities are not to grant an adoption unless such an adoption is in the best interest of the child. Authorities are to carry out a comprehensive investigation with regards to the adopting parents and the child’s family. It is also a prerequisite that such an inquiry be carried out “as far as possible… in cooperation with the public or private organisations qualified in the field of inter-country adoptions” with the assistance of specialized trained and or qualified social workers.

The Convention on the Civil Aspects of International Child Abduction of 1980 acknowledges that—

“The interest of children is of paramount importance in matter relating to their custody, desiring to protect children internationally form the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.”

The aim of the Convention is to affect the immediate return of children whom have been wrongfully removed or retained in any state as well as ensuring that the rights of custody and access under the law of contracting states are effectively respected by other contracting states. Article 2 calls for the use of most expeditious processes when implementing the objects of this Convention.

---

International child abduction continues to grow in light of the increased divorce rates and escalating bi-cultural relationships formed in a globalizing world. Children are often removed from their habitual states of residence by one parent, transplanted into a foreign culture and environment and alienated from their other parent. Many challenges arise for the child such as having to adapt to a new social structure and learning a new language. The Convention aims to combat parental child abduction by means of providing for a framework of co-operation between central authorities and a rapid procedure for the return of the child to her or his country of habitual residence.\(^\text{160}\) It must, however, be noted that a return order in terms of the Convention does not serve as a custody determination nor will any merits be taken into consideration in the process.\(^\text{161}\) A return order under the Convention merely serves as an order to return the child to the jurisdiction of habitual residence where custody and access shall subsequently be determined.

The Hague Convention on the International Protection of Children (1996) serves as a civil-law instrument which aims to protect children who are at risk in cross-frontier situations. Due to globalization, open borders, the constant flow of people from one state to another and the breakdown of cultural barriers, the risks of children being trafficked across borders has increased substantially. The displacement of children due to armed conflict, civil disturbance and natural disasters has also become a major problem and puts children at greater risk in an ever increasing globalizing world.\(^\text{162}\)

The objects of The Hague Convention 1996 are firstly to establish which state has jurisdiction to take measures in order to protect the person (child) or the property of the child. It also aims to determine which applicable law the authorities must apply in exercising jurisdiction and to determine the applicable law with regards to parental responsibility. Article 1(d) makes provision for the “recognition and enforcement of said legal measures” and paragraph (e) deals with cooperation between the authorities of the contracting states which should be established in order to fulfill and achieve the objectives of this Convention. The Hague Convention 1996 applies to all children from the moment of birth until the age of 18\(^\text{163}\) and deals specifically with parental

\(^{160}\) Preamble to the Convention on the Civil Aspects of International Child Abduction (1980).
\(^{162}\) Bales and Soodalter *The Slave Next Door* (2009) 79.
responsibility.\textsuperscript{164} It also regulates the right of custody,\textsuperscript{165} the right to determine a child’s place of residence, rights of access and the right to remove a child from its habitual residence for a limited period of time.\textsuperscript{166} In terms of article 6, refugee children and children who are internationally displaced shall be deemed to resort under the jurisdiction of the state in which such children are present. This will also be the case where children’s habitual residence cannot be established. If a child has been wrongfully removed, the authorities of the state in which the child was habitually resident before such wrongfully removal will keep its jurisdiction until such child has obtained habitual residence in another state.\textsuperscript{167}

3. Women

The obligation on states to protect women against violence, to investigate violations of their basic human rights and to prosecute acts of violence against women are common cause in international law and policy.\textsuperscript{168} The legal duty to provide efficient and effective remedies for violations of women’s rights, proportional to the gravity of the violation,\textsuperscript{169} is also highlighted by the Special Rapporteur on violence against women in her thematic report on reparations,\textsuperscript{170} and it is reiterated in this report that “very little information is available regarding State obligations to provide adequate reparations for acts of violence against women … this aspect of due diligence remains grossly underdeveloped”. The ICCPR and CEDAW will be briefly discussed with regards to women as a specific vulnerable group and their right to be protected against violence, discrimination and other human rights violations.

Article 3 of the ICCPR states that “[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”. In its General Comment No 28, the HRC discusses the importance of equal enjoyment of the Covenant rights by women and men.\textsuperscript{171} In paragraph 3 of General Comment No

\begin{footnotes}
\item Article 3(b) of The Hague Convention on the International Protection of Children (1996).
\item Article 3(b) of The Hague Convention on the International Protection of Children (1996).
\item Article 7 of the Convention on the Civil Aspects of International Child Abduction (1980).
\item Report of the Special Rapporteur on violence against women, its causes and consequences A/HRC/14/22 (2010).
\item HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 17.
\item Report of the Special Rapporteur on violence against women, its causes and consequences A/HRC/14/22 (2010).
\item HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 2.
\end{footnotes}
28, the HRC notes that there is an obligation on states to ensure that individuals enjoy the rights set out in the Covenant and that states are to take all steps necessary in order to guarantee these rights to individuals. According to the HRC, such steps include the “removal of obstacles to the equal enjoyment of such rights, the education of the population and of state officials in human rights and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant”. The Committee goes further by reiterating that states are not only to adopt protective measures but to also positive measures on all levels in order to achieve the equal empowerment of women. A regulatory measure is then also made mention of whereby states are to provide information regarding the actual role women fulfill in society so that the Committee may establish which measures (additionally to legislative measures) have been or should have been taken to give effect to these obligations. The Committee may also ascertain what progress has been made, which challenges were encountered and what steps were taken to overcome them. Due to tradition and history, inequality in the enjoyment of rights by women is abound and the subordinate role of women in various states is, according to the Committee, further illustrated by the high occurrence of abortion of female fetuses and pre-natal sex selection. The equal enjoyment of human rights by women is also to be protected during international armed conflicts and in other vulnerable times such as states of emergency. States are to inform the Committee of all preventative measures taken in order to protect women from abduction and other possible forms of gender based violence.

Article 8(1) of the ICCPR states that “No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited”. In paragraph 12 of General Comment No 28, the HRC states that “[h]aving regard to their obligations under article 8, States parties should inform the Committee of measures taken to eliminate trafficking of women and children within the country or across borders, and forced prostitution.” States must also provide information of the measures that has been undertaken to protect vulnerable groups such as women and children from slavery.

172 HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 3.
175 HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 3.
176 HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 5.
177 HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 8.
and “other kinds of personal service.” Information must also be reported on with regards to where women and children are recruited and which states they are taken from. Receiving states are to provide information on measures taken on a national and international level to prevent the violation of children’s and women’s rights.

The HRC makes mention of the right to life in paragraph 10 of General Comment No 28 and places an obligation on states to report on preventative measures protecting women from practices that violate their right to life such as female infanticide, dowry killings and the burning of widows. The Committee also importantly requests information from states on the impact on women of poverty and deprivation and the threat that such conditions may pose to their lives. The Committee also requests information with regards to the “particular impact” of poverty and deprivation on women, “posing a threat to their lives”.

Article 7 of the ICCPR states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and by doing so places an obligation on states to protect also women and children (article 24 ICCPR) against cruel and inhumane behavior. In General Comment No 20 (1992), the Human Rights committee sets out the aim of the provisions of article 7 of the ICCPR and states that “[t]he aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual”. The HRC places an obligation on states to indicate in their reports how their “legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress”. According to article 7 of the ICCPR states have a duty to afford everyone protection against acts prohibited by the article through legislative and other measures, whether such acts were inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The Committee furthermore indicates that article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.

---

179 HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 12.
180 HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 12.
182 HRC General Comment No 20 (1992) HRI/GEN/1/Rev.1 at para 2.
184 HRC General Comment No 20 (1992) HRI/GEN/1/Rev.1 at para 2.
185 HRC General Comment No 20 (1992) HRI/GEN/1/Rev.1 at para 2.
The Convention on Elimination of All Forms of Discrimination against Women (CEDAW) is an international human rights instrument aimed at eliminating all forms of discrimination against women. It lobbies for the promotion of equal rights between men and women and is firmly rooted in the Universal Declaration of Human Rights.\textsuperscript{186} CEDAW reaffirms the dignity and worth of all humans, brings female humanity into focus and establishes an international bill of rights for women. It furthermore affirms the equality principle and requires all state parties to take “all appropriate measures” to ensure the advancement and full development of women in order to place them on an equal human rights platform, next to their male counterparts.\textsuperscript{187}

The Convention aims to deal with the vulnerabilities caused by the restricted access of women to food, health, education, training and opportunities for employment.\textsuperscript{188} “Women make up the majority of the poor in both developed and developing nations, and they face multiple barriers to accessing social security too, owing to their roles as mothers, careers, informal workers, migrants, and precarious and part-time workers.”\textsuperscript{189} Due to the discrimination women face in the workplace in some states, they are often forced to seek employment in foreign countries and often face clandestine forms of migration, making them an ideal recruit for traffickers.

In its preamble, the Convention makes mention of the continuation of “extensive discrimination against women” despite various available instruments. It emphasizes that—

Discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and humanity.

Articles 1, 2, 3, 5(a) and 15 deal with the equal right of access to justice by both men and women, the adoption of appropriate legal instruments in order to eliminate existing discriminatory policies, the obligation of public authorities and institutions to refrain from engaging in any act that may discriminate against women as well as the equality of both men and women before the law.

\textsuperscript{186} Preamble to the Convention on Elimination of All Forms of Discrimination against Women (1981).
\textsuperscript{188} Preamble to the Convention on Elimination of All Forms of Discrimination against Women (1981).
Article 9 of CEDAW states that—

States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

A women’s legal status is often linked to her marital status, making them dependent on their husbands.\(^{190}\) Article 10 places an obligation on states to put into place appropriate measures to eliminate discrimination against women in order to ensure equal rights with men in the field of education in order to assure the equality of men and women. Article 11 deals with employment equity and the right to work, stating that it is an “inalienable” right. It also states that women have a right to equal employment opportunities, free choice of profession, the right to protective employment legislation and the right to maternity leave with pay. It is common cause that women and girls have a lower social status in Southern East Asian societies and are denied voting rights, economical rights and freedom of choice, expression, and profession. Girls are often used to better the living conditions of families when sold as brides or to traffickers by family members. Such monies are often used as revenues in cases where crops failed or to pay for medical needs of family members.\(^{191}\)

Article 12 of CEDAW deals with the obligation placed on states to take steps to assure equal rights to health care services and declares that appropriate measures must be taken by states to “eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.” CEDAW furthermore underlines the danger of the Acquired Immunodeficiency Syndrome (AIDS) epidemic and its effects on the rights and needs of women in general, and their subordinate position in societies, which makes them more vulnerable to HIV infection and as indicated hereinafter, states are obliged to report on the impact of AIDS on women in their jurisdictions in order to make provision for the needs of infected women and prevent discrimination against such persons in the fight against AIDS. In General Comment No 30,\(^{192}\) the Committee on the Elimination of Discrimination against Women makes mention of the importance of providing essential services


to women in conflict affected areas stating that restrictions on the mobility of these women and their freedom of movement together with the destruction of basic health services, undermine women’s access to health care as guaranteed in article 12 of CEDAW. In is also stated that conflict-related gender-based violence increases the risk of HIV infection and unwanted pregnancies due to sexual violence, resulting in a vast range of physical and psychological consequences for women such as injuries and disabilities.193

According to article 14, an obligation rests upon state parties to identify particular problems faced by rural women and the roles these women play in the functioning and economic survival of their families. State parties are to take “all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development.” Article 15 deals with the equality of all genders before the law. However, CEDAW does not explicitly make provision for women’s right to remedies, reparation and compensation and article 2 (c) only stipulates that states shall ensure the effective protection of women against all act of discrimination and that this shall be done through competent public institutions and national tribunals.194

State parties are to submit a national report to the Committee within one year of ratification and thereafter every 4 years except in cases where the Committee requests them to do so additionally. In the report, state parties are to indicate measures they adopted to implement the provisions of the CEDAW. The Committee discusses these reports with government representatives and makes further suggestions for action by the specific member state.195 General Recommendation No 12 (1989) requires state parties to act in order to protect women against violence of any kind occurring within their family structure, in their work situation or in any area of their social life.196 It furthermore recommends that state parties should include in their periodic reports information about legislation in force to protect women against all forms of violence197 as well as other measures that have been adopted to eradicate violence against women.198 Member states must also

report on the existence of support services for female victims of aggression and abuse.\textsuperscript{199} This recommendation also requires member states to provide statistical data on all violence related incidents against women and on all female victims.\textsuperscript{200}

The Committee then comments on specific articles in the Convention making mention of articles 2 and 3 which establish a comprehensive obligation to eliminate discrimination in all its forms. Paragraph 11 of Comment No 19 (1992) states that—

“[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.”\textsuperscript{201}

Importantly, states are also advised to adopt comprehensive gender-sensitive and rights based migration policies in order to ensure women that come from conflict stricken areas do not fall prey to trafficking.\textsuperscript{202} The Committee furthermore encourages the adoption of bilateral and regional agreements as well as other forms of cooperation in order to protect the rights of trafficked women and girls and, equally important, to facilitate prosecution of trafficking perpetrators.\textsuperscript{203}

A further development was the adoption of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women\textsuperscript{204} which was adopted to create greater public awareness of human rights standards relating to discrimination against women and requires the publication of the Optional Protocol and its procedures by state parties. The preamble to this

\textsuperscript{202} General Recommendation No 30 on women in conflict prevention, conflict, and post conflict situations CEDAW/C/GC/30 (2013) at para 41 (a).
\textsuperscript{203} CEDAW General Comment No 30 (2013) CEDAW/C/GC/30 at para 41(c) and (d).
\textsuperscript{204} The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women A/Res/54/4 (1999).
protocol reaffirms the determination of member states to ensure the “full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms”. 205

General Recommendation No 26 of the Committee on the Elimination of Discrimination against Women aims to “contribute to the fulfilment of the obligations of States parties to respect, protect and fulfil the human rights of women migrant workers”, 206 and states that migrant women, “like all women, should not be discriminated against in any sphere of their life”. 207 The Committee recognises that even though states have control over their borders and territory, and regulate migration, this should be done in accordance with their human rights obligations incurred by their ratification of human rights related treaties. 208

States are obliged to “respect, protect and fulfil the human rights of women throughout the migration cycle. Those obligations must be undertaken in recognition of the social and economic contributions of female migrant workers to their own countries and countries of destination, including through caregiving and domestic work”. 209 The Committee makes reference to three groups of female migrant workers. This includes workers who migrate independently, workers who join their spouses our family members who are already employed as migrant workers and undocumented workers who may fall into one of the above two categories. 210 An obligation is placed on states to take all possible measures to protect women migrant workers against all forms of discrimination. 211 The committee highlights the fact that one half of the global migrant population is made up of women and that factors such as globalization, poverty, gendered cultural

practices, gender based violence and conflict are all causes of women’s migration. The committee furthermore indicates that “Women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence” and that “domestic workers are particularly vulnerable to physical and sexual assault, food and sleep deprivation and cruelty by their employers.” Undocumented women migrant workers are vulnerable to exploitation due to their irregular migration status and may be exploited for purposes of forced labour. They often face, harassment by the police when they are apprehended or denounced, and often face prosecution due to the violation of immigration laws. This leads to the unfortunate placement in detention centers where they fall victim to sexual abuse. The committee makes valuable recommendations which include mandatory awareness training with regards to migrant women workers rights and gender sensitive training for public and private recruitment companies and employers, state employees, immigration authorities, border police and healthcare and social service providers. It also comments that specific focus and attention should be given to undocumented women migrant workers and that their access to legal remedies and justice must be guaranteed during life threatening situations, exposure to cruel and degrading treatment, sexual or physical abuse and when forced into labour. The committee concludes by encouraging states to “ratify all international instruments relevant to the protection of the human rights of migrant women workers, in particular, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

4. Migrants

According to the 2015 UN Migration Report, 244 million international migrants reside worldwide,\(^{218}\) at total of 3.2 per cent of the world’s population. When compared to data of previous years, it is evident that the number of migrants have grown worldwide. During 2000, a total of 173 million migrants was identified globally and 154 million during 1990.\(^{219}\) According to recent statistics, Europe and Asia host close to two-thirds of international migrants globally. Europe remains the most popular destination with 76 million migrants, and Asia second in line, hosting 75 million migrants.\(^{220}\) The ILO Global Estimates on Migrant Workers indicates that close to 150.3 million of the total of 232 million international migrants are migrant workers consisting of 83.7 million men and 66.6 million women.\(^{221}\) Labour shortages and the reluctance of native workers to perform certain forms of employment often becomes “pull” factors which prompt unemployed migrants to seek employment in these countries.\(^{222}\) Many migrants leave their countries in pursuit of improved income and potentially better socio-economic circumstances, hoping to provide better for not only themselves but also their families. Part of their income is often sent to their families,\(^{223}\) enabling them to live a better life. Migrant-sending countries often rely on these “remittances” as this adds substantial growth to the Gross Domestic Product (GDP) of their countries.\(^{224}\)


\(^{224}\) Earnings of more than US$441 billion is sent back to their families by migrants and constitutes more than 10 percent of the GDP of 25 developing countries. See 2016 World Bank Migration and Remittances Factbook available online at https://openknowledge.worldbank.org/bitstream/handle/10986/23743/9781464803192.pdf?sequence=3 (05-12-2016).
Political circumstances, conflict situations, human rights violations and ethnic conflict (also referred to as “push” factors) may also cause individuals to flee from their countries in search of a safer option. All migrants share a common denominator of vulnerability due to their employment in a country of which they are not nationals, causing restricted rights and restricted access to social and legal protection.

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families entered into force in 2003 and aims to protect migrant workers and their families and serves as a guide for the protection and promotion of migrant rights globally. Emphasizing the connection between human rights and migration, the Convention became a comprehensive international instrument with regards to the protection of migrant workers’ rights. The adoption of a Convention by the General Assembly does, however, not create any binding commitment for member states and states only become bound once they have ratified the Convention. The ratifications of the Convention remain low and, if compared to the 196 member states that ratified the CRC, it is evident that the rights of migrant workers are not high on the agenda of the international community. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines a migrant worker as a person who “is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”

Article 11 (1) stipulates that “No migrant worker or member of his or her family shall be held in slavery or servitude.” The Convention also specifically refer to undocumented migrants and considers that these individuals re often “employed under less favourable conditions” stating that they are entitled to basic protection and recognition of their rights as human beings. This provision is of great importance for human trafficking victims who might be stuck in foreign states without their travel documents.

225 Adopted by General Assembly resolution 45/158 of 18 December 1990.
228 Article 35 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families A/RES/45/158.
The Protocol against the Smuggling of Migrants by Land, Sea and Air (2000) was ratified by 112 member states and declares that “effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach including cooperation, the exchange of information and other appropriate measures including socio-economic measures, at the national, regional and international levels.” The Protocol expresses its concern with regards to the significant increase in the activities of organized criminal groups involved in the smuggling of migrants and other related criminal activities, bringing great harm to the states concerned.

According to the International Migration Organisation an estimate of 1 750 migrants have died in the Mediterranean since the beginning of 2015, 30 per cent more than during the whole of 2014.

The Protocol defines the smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or permanent resident.” Article 5 of the Protocol deals with criminal liability, stating that no migrant shall be liable to prosecution under said Protocol for being “the object of conduct” in transnational organized crime activities by crime groups.

In terms of article 7—

[a] state party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that state party shall take appropriate measures in accordance with relevant domestic and international law.

The underlying issues that give rise to the illegal activities of human trafficking and smuggling are often similar. Lack of economic opportunities, vulnerabilities, civil unrest, hope for a better life and political uncertainty, are all factors that contribute to an environment that encourages human smuggling and trafficking in persons. Although there are similarities in the conditions that give rise to trafficking in persons and human smuggling, there are distinct differences in the expectations and treatment of persons being smuggled and the victims of human trafficking. Smuggled migrants willfully leave their countries in search for a better life but are not aware of

229 Preamble to the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000).
230 Preamble to the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000).
232 Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000).
the agendas of their traffickers and often end up as forced labourers and sex slaves far from the continent they expected to be smuggled to.

According to the UNODC there are three differences between trafficking in persons and smuggling of migrants being: the source of profit, transnationality and victimization. Smugglers derive profit from the facilitation of entry or stay in a country whereas in cases of human trafficking, the primary source of profit is also the purposes of trafficking – deriving a source of income through the exploitation of persons. When it comes to the second difference, that of transnationality, migrant smuggling always has a transnational element involving a minimum of two countries and usually entails the facilitation of illegal entry or stay of a person from country X into country Z. In trafficking scenarios, however, internal trafficking or external trafficking may occur. Internal trafficking entails the trafficking of a person within the borders of his or her own country hence no border crossing takes place. External trafficking involves the trafficking of a person from a country of origin via another country (transit country) and into a third country (destination country). Trafficking in persons can also involve the legal transit of a person.233 Regarding the third difference as set out by the UNODC, namely victimization, it can be deemed that migrant smuggling does not always involve such measures in order to obtain submission by the migrant. Migrants often consent to their transit. Other crimes do however occur during their transit such as violence or endangerment. Trafficking victims however, are never deemed to have consented. Even if a victim has granted initial consent it becomes “meaningless because of the means the traffickers used to gain control over them, such as deception or violence”.234 This was highlighted in a recent report by the United Nations Human Rights Office of the High Commissioner in a report on human rights abuses against migrants in Libya issued on 13 December 2016 and titled “Detained and Dehumanised”.235 Due to the breakdown in the justice system of Libya and increased state of impunity, the flow of migrants throughout the state is controlled by criminal

---

gangs, traffickers, smugglers and armed groups. Migrants are exploited for purposes of forced labour and suffer extortion by smugglers, traffickers, government officials and are exposed to torture, unlawful killings, sexual exploitation, arbitrary detention and other human rights abuses. Women migrant workers resort under the category of most exposed and have to tolerate being raped and being exposed to sexual violence. The report indicates that for purposes of the report, the term “migrant is used as an umbrella term to cover the categories of refugee and asylum seekers as well as international migrants in an irregular situation, trafficked persons, smuggled migrants, and other categories, unless specified otherwise.” Migrants are often held in detention centres where there is no registration process, regulation, formal legal process or access to a legal justice system. The conditions in these centres are overcrowded and inhuman and do not provide migrants with adequate sanitation facilities, clean water or food. After being incepted, many migrants are robbed, tortured and or beaten, raped and taken to detention centres where they are subjected to sexual violence, rape, forced labour and torture. A child migrant interviewed in Sicily disclosed that “they beat us with what falls to their hands... it can be a rock, a stick, a brick.” A 17-year-old boy from Guinea furthermore disclosed that he was detained in Tripoli at the Al-Fallah DCIM centre and was sold by the DCIM guards to the smugglers for money, then brought back to the centre and was then resold. His friend was also beaten by the guards at the detention centre as he was too weak to work and could not be sold by the guards for forced labour purposes. Another migrant from Gambia disclosed that while travelling southern Libya, smugglers forced 23 migrants to work as forced labourers on a farm for three weeks where one of the migrants attended to escape because of the ill treatment and harsh working conditions. He was then shot by armed men, sent to a hospital where he survived but he had no travel documents. A smuggler assisted him to stay

in hospital for ten days after which he left for Sabrata. Sexual exploitation is also a common occurrence during the migration cycle and migrant women travelling without male relatives are particularly vulnerable to being forced to work as sex workers. It was reported by migrant men that girls and women were taken away from the detention centres by guards for periods that varied from hours to days and the men believed that the women and girls had been raped and sexually abused.

It has been recorded that during the period commencing on 1 January and ending on 22 November 2016, a total of 168,542 migrants arrived in Italy from Libya. A total of 4,164 died at sea during the migration cycle. In a response to the growing phenomenon of migrant smuggling and trafficking, the EU launched Operation Sophia with its core mandate to “undertake systematic efforts to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers, in order to contribute to wider EU efforts to disrupt the business model of human smuggling and trafficking networks in the Southern Central Mediterranean and prevent the further loss of life at sea.” Operation Sophia was launched in the Mediterranean Sea off the coast of Libya and since November 2016, 101 smugglers and traffickers have been prosecuted by the Italian criminal justice system. A total of 344 boats have also been removed.

Although human trafficking is often a transnational crime that involves the crossing of borders, it is important to note that trafficking victims can also be trafficked within their own countries and communities for various purposes which include domestic servitude and other forced labour forms. Traffickers can move victims between locations within the same country and often sell them to other trafficking organisations.

5. Refugees

Conflict, natural disasters, the collapse of economies and poverty are all factors that have contributed to the displacement of millions of people globally. In Africa, Asia and Latin America millions of people have been displaced, leaving them vulnerable to human traffickers recruiting them for the purposes of forced labour, sexual exploitation and other forms of trafficking. In Syria more than 4 million individuals have fled since 2011 in pursuit of safety and it is predicted that a total of 8.7 million people will be displaced inside Syria in 2016. According to the UN Refugee Agency, there are currently approximately 65.3 million forcibly displaced people worldwide of which 21.3 million are refugees and 10 million stateless. In a report issued by the ILO in 2005, 12 million of the 190 million people living outside their countries of nationality were trafficking victims. Human trafficking is frequently a “feature of armed conflict as well as of post-conflict situations” and individuals are often kidnapped and trafficked by armed groups to provide labour, sexual services or to serve in the military. Peacekeepers often contribute to this ever growing problem and the payments of peacekeeping personnel to brothel owners in the Balkans has created a lucrative business opportunity for organized crime rings in an already fragile state.

The 1951 Convention relating to the Status of Refugees protects the rights of refugees. The Protocol relating to the Status of Refugees followed and was adopted in 1967 by the General Assembly. The Guidelines on International Protection: The application of article 1A(2) of the 1951 Convention and /or 1967 Protocol relating to the status of refugees and to victims of trafficking and persons at risk of being trafficked, was adopted in April 2006 and aim to “provide interpretative legal guidance for governments, legal practitioners, decision-makers and the

250 UNHCR Syria Emergency available online at www.unhcr.org/syria-emergency.html accessed on (12-14-2016).
251 UNHCR Syria Emergency available online at http://www.unhcr.org/figures-at-a-glance.html accessed on (14-12-2016).
255 Article 1A (2)1951 Convention relating to the Status of Refugees available online at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx (12-12-2016).
judiciary, as well as for UNHCR staff carrying out refugee status determination in the field”.\textsuperscript{256} The Guidelines highlight that human trafficking is an ever growing phenomenon and that it is prohibited by international law and that trafficking in persons has been criminalized in the national policies of various states.\textsuperscript{257} It also touches upon the obligations that states have to not only combat trafficking in persons but also to protect and assist trafficking victims.\textsuperscript{258} The Guidelines reiterate the UNHCR’s responsibility to protect stateless persons, refugees, asylum seekers and internally displaced persons against falling victim to human trafficking.\textsuperscript{259}

The Guidelines indicate that the 1954 Convention relating to the Status of Stateless Persons\textsuperscript{260} and the 1961 Convention on the Reduction of Statelessness\textsuperscript{261} establish a legal framework setting out the rights of stateless persons, the obligations of States Parties to avoid actions that would result in statelessness.\textsuperscript{262} The 1954 Convention applies to anyone who is not considered as a national by any State under the operation of its law,\textsuperscript{263} that is, it applies for the benefit of those who are denied citizenship under the laws of any state.\textsuperscript{264} The 1961 Convention places an obligation on states to avoid any conduct that could result in statelessness, forbidding the “deprivation of nationality if this would result in statelessness”.\textsuperscript{265}

It is imperative that, when identifying a trafficking victim, it should be established whether such a person was indeed stateless at the time of his or her recruitment.\textsuperscript{266} Mechanisms must be designed at national level to identify victims and provide for their needs on various levels. States must also ensure that victims are granted access to “fair and efficient asylum procedures as appropriate and to proper legal counselling.”\textsuperscript{267} Children and women require special attention and it is of paramount importance that their needs are provided for. The Guidelines also indicate that there

\begin{footnotesize}
\begin{enumerate}
\item Adopted by a Conference of Plenipotentiaries convened by the Economic and Social Council resolution 528A(XVII) of April 1954 and entered into force on 6 June 1960.
\item Adopted on 30 August 1961 by a Conference of Plenipotentiaries which met in 1959 and reconvened in 1961 in pursuance of General Assembly resolution 896(IX) of 4 December 1954.
\item Article 1(1) of the 1954 Convention relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked.
\end{enumerate}
\end{footnotesize}
should not be a link between the willingness of a victim to testify against her trafficker and the granting of her asylum and that her willingness to provide evidence should not make her a refugee.268

The UNHCR issued a conference paper in October 2009 stating that trafficking in persons entail serious violations of the human rights of its victims and highlight various aspects of interest in the paper.269 The UNHCR reiterates that this body “has been entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees.” It also indicates that returnees, stateless persons, asylum seekers and in certain incidences internally displaced persons form part of its mandate ratio personae.270 Even though the issue of human trafficking and trafficking victims does not form part of its mandate, the UNHCR becomes involved in cases where human trafficking has an impact on “persons of concern to the Office”271 and the UNHCR aims to prevent refugees to become trafficking victims and to address the needs of individuals who have fallen prey to human trafficking. The UNHCR also aims to “ensure that international protection needs of trafficking victims (or those at risk of being trafficked) which may arise as a result of their trafficking experience are properly identified, and to assist States in ensuring that trafficking victims who are without identity documents are able to establish their identity and nationality status in order to prevent them from being rendered stateless, and protect stateless victims from trafficking.”272 The UNHCR reiterates its involvement with regards to prevention measures on an international level by means of the raising of awareness and the dissemination of information among refugee populations and other vulnerable groups.273 The UNHCR regularly visits detention centres and implement border-monitor missions in order to “evaluate the arrival of refugees within mixed migratory flows and help ensure identification of trafficking victims or individuals at risk of being

---

269 UNHCR Human Trafficking and Refugee Protection: UNHCR’S Perspective available online at http://www.unhcr.org/4ae1a1099.html (14-12-2016).
270 UNHCR Human Trafficking and Refugee Protection: UNHCR’S Perspective available online at http://www.unhcr.org/4ae1a1099.html (14-12-2016) at para 1.
271 UNHCR Human Trafficking and Refugee Protection: UNHCR’S Perspective available online at http://www.unhcr.org/4ae1a1099.html (14-12-2016) at para 2.
trafficked”274. The Conference paper advocates for proactive victim protection and assistance, “high level inter-departmental integration of the issue, implementation of National Action Plans and working groups with broad representation of relevant government agencies, and international and national organisations.”275 Increased protection must be provided for displaced persons in countries of origin and transit as displaced people are already at risk for becoming trafficking victims if their basic needs are not met, human rights violated and livelihoods disrupted.276 The paper campaigns for the increase of refugee resettlement places for trafficking victims.277

6. Conclusion

As indicated earlier, it is paramount that states identify vulnerable groups within their jurisdictions and take positive measures in accordance with their international obligations to reduce vulnerabilities and provide adequate protective measures for victims and potential victims. In this chapter an overview of specific vulnerable groups with relation to human trafficking was provided. The following chapter aims to provide an overview of trafficking related state duties, compliance duties and due diligence processes. It also aims to examine the relevant remedies available to trafficking victims.

275 UNHCR Human Trafficking and Refugee Protection: UNHCR’S Perspective available online at http://www.unhcr.org/4ae1a1099.html (14-12-2016) at para 12.
276 UNHCR Human Trafficking and Refugee Protection: UNHCR’S Perspective available online at http://www.unhcr.org/4ae1a1099.html (14-12-2016) 5 at para 12.
277 UNHCR Human Trafficking and Refugee Protection: UNHCR’S Perspective available online at http://www.unhcr.org/4ae1a1099.html (14-12-2016) at para 12.
CHAPTER 5

STATE OBLIGATIONS AND REMEDIES

1. Introduction

In order to fully comprehend the implications brought about by human rights instruments such as the UDHR, ICCPR, and ICSECR, it is imperative to examine the obligations and duties imposed by such instruments as well as the effort states should make to realize these rights. This chapter aims to provide an overview of state duties, compliance and due diligence and examine the relevant remedies available to trafficking victims.

As indicated by Alston and Goodman, the various general human rights instruments set out different state duties and different rights point to different types of duties. A distinction can be made between positive and negative state duties. The right not to be tortured is a clear example of a “hands off right” and placing a negative state duty on the state not to interfere with a person’s physical security, whereas the right to food would place a positive duty on the state. Alston and Goodman also highlights that human rights aren’t static. “They evolve. They broaden or contract over time”. It is important for states to track the expansion of rights and to develop strategies of change to adapt to the ever expanding and changing nature of the duties that international human rights treaties placed upon states. Five categories of state duties can be derived from the existing instruments:

The duty to respect the rights of others, the duty to create institutional machinery to realize the rights as set out in human rights instruments, the duty to protect rights and prevent violations against rights, the duty to provide goods and services to satisfy rights and lastly the

---

duty to promote rights by means of creating awareness, education and to effect a cultural change in certain instances.\textsuperscript{284} The various state duties often overlap and are therefore interrelated.\textsuperscript{285} In the following sections the various state obligations and remedies available to victims with regards to human trafficking will be discussed.

2. Select main instruments

2.1 The International Bill of Rights

Article 8 of the UDHR makes provision for the redress of human rights violations in declaring that: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

Article 2 of the ICCPR however reaches further than the UDHR in providing not only to victims the right to a remedy in cases of violations, but also sets out a remedial structure:\textsuperscript{286}

\begin{quote}
\textbf{1.} Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

\textbf{2.} Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

\textbf{3.} Each State Party to the present Covenant undertakes:

\begin{itemize}
\item [(a)] To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
\item [(b)] To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
\end{itemize}
\end{quote}


Joseph and Castan\textsuperscript{287} indicate that article 2(1) of the ICCPR places an immediate obligation on states to respect and ensure the rights as set out in this section of the ICCPR whereas article 2(2) “provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected.”\textsuperscript{288} It is also averred that “Article 2(1) is fundamental; it is the ‘obligation’ provision that directs States immediately to implement the substantive ICCPR guarantees at the municipal level”\textsuperscript{289}

“The immediacy of the obligation facilitates the justiciability and definition of a State’s ICCPR duties. A State is either fulfilling its obligations or it is not; article 2(1) seems to allow no exceptions. The importance of this immediate obligation becomes apparent when one contrasts the progressive obligation in article 2(1) of the ICESCR. A State under the ICESCR, is required “to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of ICESCR rights”.\textsuperscript{290}

According to Alston and Goodman states must ensure that the rights set out in article 2 are protected by state and non-state actors and that remedies are enforced by means of institutional mechanisms which include normative systems and institutions in order to prosecute violations effectively and impose sanctions on perpetrators.\textsuperscript{291} The duty to investigate human rights violations forms a part of the state duty to provide for a right to remedy.\textsuperscript{292}

“States are obliged to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law in particular those that amount to crimes under international law. States investigations into such allegations must be carried out by independent and impartial bodies and be prompt, thorough and effective. To be in a position to prosecute cases where sufficient evidence exists, States must ensure that their domestic legislation has the necessary legal basis to enable domestic courts to duly exercise jurisdiction over such crimes, in accordance with applicable

\textsuperscript{287} Joseph and Castan \textit{The International Covenant on Civil and Political Rights Cases, Materials and Commentary} (2013) 9.
\textsuperscript{288} Joseph and Castan \textit{The International Covenant on Civil and Political Rights Cases, Materials and Commentary} (2013) 9.
\textsuperscript{289} Joseph and Castan \textit{The International Covenant on Civil and Political Rights Cases, Materials and Commentary} (2013) 9.
\textsuperscript{290} Joseph and Castan \textit{The International Covenant on Civil and Political Rights Cases, Materials and Commentary} (2013) 9.
\textsuperscript{292} Joseph and Castan \textit{The International Covenant on Civil and Political Rights Cases, Materials and Commentary} (2013) 870.
principles of customary and treaty law. States must also prosecute those with responsibility for crimes under international law and duly punish those convicted.”

General Comment No 31 (2004) of the HRC deals with the scope of legal obligations undertaken by parties to the ICCPR and explains that a general obligation is imposed on state parties in terms of article 2 to respect the Covenant rights and to ensure these rights to all individuals within their territory and who are subject to their jurisdiction even if such a person is not situated within the territory of the state. The Committee also makes mention of General Comment No 15 which states that “the enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party.”

According to the Committee, the general rule is that “each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.” The Committee then makes mention of reports indicating that in some cases the rights that aliens are entitled to enjoy under the Covenant, are denied to such individuals or subject to limitations that cannot “always be justified under the Covenant.” The Committee concludes in paragraph 3 of General Comment No 15 that there has been a failure to implement Covenant rights without discrimination when it comes to the rights of aliens by certain states and that states should attend to the position of aliens under their laws. Equally important is the integration of the rights guaranteed in the Covenant into state parties’ legislation in order to more effectively protect aliens. State parties are also obliged to ensure that the provisions of the Covenant and the reflected rights are “made known to aliens within their jurisdiction.”

The Committee also declares that state parties are required to give, in good faith, effect to the obligations under the Covenant and declares that the obligations of the Covenant in general, and article 2 in particular, are binding on every state party.

---

296 HRC General Comment No 15 (1986) HRI/GEN/1/Rev.1 at para 2.
297 HRC General Comment No 15 (1986) HRI/GEN/1/Rev.1 at para 2.
Article 2 of the ICCPR places an obligation on state parties to take all necessary steps to ensure that the provisions of the Covenant and the rights set out in the Covenant, are reflected in their domestic legislation in accordance with their constitutional processes in order to give effects to such rights. The Human Rights Committee in General Comment No 31, highlights the obligations of states towards individuals as “right-holders under the Covenant” stating that “every State Party has a legal interest in the performance by every other State Party of its obligations.” The Committee also highlights that the basic rights of persons are *erga omnes* obligations.\(^{300}\) The Committee furthermore states that violations of any individual’s rights in terms of the Covenant by any state party must be addressed. According to the Human Rights Committee, Covenant obligations should be deemed as a “reflection of legitimate community interests” and states should draw attention to possible breaches and call upon other states to comply with their obligations in terms of the Covenant.\(^{301}\) Special mention is also made of especially vulnerable categories of persons and it is reiterated by the Committee that their rights must be adapted in order to take into account such special vulnerabilities. This is particularly relevant in situations where child victims are involved.\(^{302}\) In General Comment No 31 the Human Rights Committee highlights that states are to adopt legislative, judicial, administrative, educative and any other measures deemed necessary to meet their legal obligations in terms of the Covenant. Interim remedial measures should also be implemented where necessary in order to prevent continuous violations and “to endeavor to repair at the earliest possible opportunity any harm that may have been caused by such violations”.\(^{303}\) The Committee also concluded that awareness levels must be raised among public officials and state agents as well as populations at large with regards to the Covenant.\(^{304}\)

Article 2 also declares that each person “whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity” and furthermore reiterates that states shall ensure “effective remedies for victims whose rights have been violated”.\(^{305}\) This article also indicates that each person claiming a remedy, shall have the right to a remedy to be determined by competent judicial, administrative or legislative authorities and that such authorities shall ensure the enforcement of the remedies when granted.


\(^{305}\) Article 2(3)(a).
In General Comment No 31 the Human Rights Committee discusses this issue and states that victims should have accessible and effective remedies to vindicate their rights. The vulnerability of certain groups of people, in particular children, makes it necessary for such remedies to be appropriately adopted and the special needs of such individuals should be taken into consideration.\textsuperscript{306} The Committee furthermore highlights the fact that states are to establish “appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law” and notes that the enjoyment of the rights set out in the Covenant can be effectively ensured by the judiciaries of states by means of application of comparable constitutional or other provisions of law or by means of interpreting the Covenant in the application of national law.\textsuperscript{307} Mention is made of the role these mechanisms fulfill in giving effect to the obligation of states to investigate allegations of violations promptly, thoroughly and effectively. The Committee notes that “a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy”.\textsuperscript{308}

The Human Rights Committee is also of the view that article 2(3) requires that reparation be made to individuals whose rights in terms of the Covenant have been violated. The Committee states that without reparation to such individuals, the obligation on states to provide an effective remedy for the violations suffered by victims is not discharged.\textsuperscript{309} It then adds further to this obligation by noting that the Covenant “generally entails appropriate compensation” which includes (where deemed necessary) restitution, rehabilitation, measures of satisfaction such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.\textsuperscript{310} In terms of Article 2 (3) (b) of the UDHR, states must “ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy”.\textsuperscript{311} The Right to a remedy for victims of human rights violations is a guaranteed right and a “key component” of the ICCPR. “While a finding of violation of

\textsuperscript{308} HRC General Comment No 31 (2004) CCPR/C/21/Rev.1/Add.13 at para 15.
\textsuperscript{309} HRC General Comment No 31 (2004) CCPR/C/21/Rev.1/Add.13 at para 15.
\textsuperscript{310} HRC General Comment No 31 (2004) CCPR/C/21/Rev.1/Add.13 at para 16.
\textsuperscript{311} Article 2 (3)(b) of the UDHR (1948).
one of the substantive rights in Part III (of the ICCPR) is an important measure of vindication for a victim, article 2(3) obliges states parties to “fix” the situation to the extent possible by providing the victim, or the victim’s survivors, with a remedy”.312

Prevention of the recurrence of a violation of the Covenant forms an integral part of the obligation that rests on states to implement the Covenant. Measures should be adopted under the Optional Protocol to move “beyond a victim specific remedy”, and avoid recurrence of violations. Such measures may entail changes in a state party’s laws or legal practices.313

The Committee furthermore discusses investigations of violations and highlights the fact that states must ensure that perpetrators are brought to justice. In cases where states fail to investigate such violations, this failure could constitute a separate breach of the Covenant as the impunity for violations such as torture, arbitrary killing and enforced disappearance, may contribute to the recurrence of such violations. States are also requested to provide information in their periodic reports on the challenges faced with regards to existing remedies and whether such remedies are effective.314

Article 6 of the ICCPR declares that everyone shall have the right to life and that such right shall be protected by law and no one can be arbitrarily deprived of his or her life. According to Joseph and Castan article 6(1) has a horizontal effect and requires states to ensure that individuals are protected against homicides and intrusions into privacy by non-government entities”.315 The HRC makes mention of the right to life in paragraph 10 of General Comment 28316 and places an obligation on states to report on preventative measures protecting women from practices that violate their right to life such as female infanticide, dowry killings and the burning of widows. The Committee also importantly requests information from states on the impact of women of poverty and deprivation and the threat that such conditions may pose to their lives.317 The HRC also draws the attention of states to their obligations in terms of article 8 of the ICCPR and states that parties are to inform the Committee on all

measures taken in order to eliminate trafficking of women and children and forced prostitution, not only across borders but also within their territories.\textsuperscript{318}

The First Optional Protocol to the ICCPR was adopted to provide the opportunity for individuals whose rights have been violated and who have exhausted all possible domestic remedies, to submit written communications to the HRC.

General Comment No 9 (1998) of the Committee on Economic, Social and Cultural Rights\textsuperscript{319} makes it clear that the domestic application of the Covenants should be done in light of two principles and states that: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” meaning that states should modify their domestic legal framework in order to give effect to their treaty obligations.\textsuperscript{320} The second principle which is also embedded in article 8 of the UDHR, reflects upon the right every person has to “an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.\textsuperscript{321}

The Committee on Economic, Social and Cultural Rights, in General Comment No 9 (1998)\textsuperscript{322} addresses the question as to whether the right to an effective remedy should be interpreted as always requiring a judicial remedy, and concludes that administrative remedies may in some cases be adequate. This will, however, require such remedies to be implemented in good faith by the state, taking into consideration that the remedies should be appropriate, affordable, timely and effective.

The Optional Protocol to the ICESCR (1996) brought a new dynamic to the international protection of human rights. Article 1 of the Protocol recognizes the competence of the Committee on Economic, Social and Cultural Rights to receive and consider communications alleging the violation of economic, social and cultural rights. According to Article 3 of the Protocol, the Committee will not consider a communication unless it has been established that all domestic remedies has been exhausted. Individuals may approach the Committee once they have exhausted the available domestic remedies within their own states. By ratifying the Protocol, states submit themselves to a certain form of international

\textsuperscript{318} HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10 at para 12.
\textsuperscript{320} According to Article 26 of the Vienna Convention on the Law of Treaties (1963): “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Article 27 states that: “A party may not invoke the provisions of its in internal law as failure to perform its internal law as justification for its failure to perform a treaty”.
\textsuperscript{321} Article 8 of the UDHR (1948).
\textsuperscript{322} General Comment No. 9 para 9 (1998) E/C.12/1998/24, CESCR.
accountability, encouraging states to own up to their obligations in terms of the ICESCR. South Africa has not ratified the Optional Protocol to date. The Optional Protocol plays a significant role in combating human trafficking due to the international remedy it makes available for individuals or groups who claim that their economic, social and cultural rights have been violated.

2.2 The International Convention on the Elimination of All Forms of Racial Discrimination (1963)

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), refers to the fundamental obligation of states to eliminate racial discrimination in all its forms and their obligation to guarantee the rights of everyone without distinction as to race, nationality, or ethnic origin or colour. Article 5 refers to civil rights such as the right to marriage and choice of spouse, the right to freedom of movement and the right to leave any country at any time. Article 6 states, and to give effect to the rights as set to in article 5 supra, that all state parties are to ensure that all persons within their jurisdiction are afforded effective protection and remedies in case of human rights violations through tribunals, courts and other state institutions. Article 6 also makes provision for “adequate reparation” for damages suffered as a result of racial discrimination, whereas article 7 deals with effective measures in the fields of teaching, culture, information and education, placing the focus on combating prejudices leading to racial discrimination. Article 14 makes provision for a state party to recognize the competence of the Committee to receive and consider communications from individuals or groups of individuals claiming that they are victims of a violation by such a state party of any of the rights reflected in CERD. It also makes provision for the submission of such a petition only in cases where all domestic remedies have been exhausted. However, an exception is made in cases where the application of the domestic remedies is “unreasonably prolonged”. The receiving state shall, within three months, submit written explanations or clarifying statements to the Committee, indicating the remedy, if any, to be taken by such a state party.
2.3 The Committee on the Elimination of Discrimination against Women (CEDAW)

In General Recommendation No 30 the Committee on the Elimination of Discrimination against Women (CEDAW), scrutinizes the duty of states to protect in conflict and post-conflict situations. This duty includes the duty to exercise due diligence to prevent, investigate, punish and ensure redress for acts of private individuals or entities that impair the rights enshrined in the Convention. The Committee, in General Recommendation No 19 (1992)—

“addressed the interrelatedness of trafficking with women’s economic standard and their vulnerability to armed conflicts and violence: Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking, there are new forms of sexual exploitation … These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and duties.”

The Recommendation furthermore outlines the due diligence obligations of states in protecting women from violence and discrimination, identifies trafficking in persons as gender-based violence and also reiterates that states must, besides implementing constitutional and legislative measures, provide adequate administrative and financial support for the implementation of CEDAW. General Recommendation No 19 (1992) then highlights the fact that states may be held responsible for private acts and must provide compensation if they fail to act with due diligence in order to prevent violations of rights or fail to investigate and prosecute violence.

CEDAW furthermore underlines the danger of the AIDS epidemic and its effects on the rights and needs of women in general, and their subordinate position in societies, which makes them more vulnerable to HIV infection. General Comment No 15 (1990) reports on the necessity of national strategies for the prevention and control of AIDS and recommends raising public awareness with regards to the risk of infection in especially women and children. It also recommends that parties should develop programmes placing the focus on the rights and needs of women and children as well as factors relating to the reproductive roles of women. The Committee states that the

“subordinate role of women and their subordinate position in some societies make them especially vulnerable to the HIV infection;” 327

The Committee furthermore places emphasis on the positive obligation upon member states in terms of article 6 of CEDAW which obliges states to take measures to suppress all forms of trafficking in women, exploitation of women and the prostitution of women. The Committee also explicitly refers to poverty and unemployment causing the increase in trafficking numbers. 328 New forms of sexual exploitation are also discussed such as sex tourism and recruitment of domestic labourers in developing countries, who are then taken to developed countries. Organized marriages between women from developing countries and men from developed countries are also discussed and the Committee states that such practices are incompatible with the equal enjoyment of rights by women. Women are put at risk of violence and abuse through these infringements. The Committee also refers to the vulnerability of prostituted women due to their marginalized status and reiterates their right to equal protection by laws against rape and other forms of violence. 329

Emphasis is subsequently placed on the specific protective and punitive measures needed in war-stricken member states during times of armed conflict, as occupation of territories often lead to increased prostitution, trafficking and sexual assault of women by armed forces. In its General Recommendation No 30 on women in conflict and post-conflict situations, the Committee recommends that redress must be ensured by states for acts by entities or private individuals as part of their due diligence obligations. 330 The Committee also recommends the use of gender-sensitive practices, for example female police officers for investigative processes during, as well as, post conflict.

The Committee on Elimination of Discrimination against Women specifically deals with human trafficking in paragraph 39 of General Recommendation No 30 in stating that trafficking in women and girls increases during and after conflict situations due to high levels of violence, increased militarism and the breakdown of political, economic and social structures. 331 It furthermore highlights the fact that trafficking may occur in cases where third-party countries undertake

---

initiatives to restrict migrant influxes out of conflict stricken areas. Discriminatory, restrictive or sex specific migration policies limits opportunities for girls and women fleeing from conflict situations, increasing their vulnerability to exploitation and trafficking. The Committee also notes that conflict stricken areas often serve as areas of origin, transit and destination and notes that displaced women and girls living in or returning from refugee camps for internally displaced persons, are particularly at risk of being trafficked during their search for livelihoods.

The Committee recommends that states prevent, prosecute and punish trafficking and other human rights violations which take place within their jurisdictions and that no exceptions should be made whether the perpetrators are public authorities or private actors. Specific protection measures should be adopted in order to protect not only displaced persons or refugees, but women and girls in general.332 States are to adopt a “policy of zero tolerance, based on international human rights standards applicable to trafficking and sexual exploitation and abuse, which also addresses national troops, peacekeeping forces; border police, immigration officials and humanitarian actors; and provide them with gender-sensitive training on how to identify and protect vulnerable women and girls.”333

The Committee, in General Recommendation No 30, highlights the fact that perpetrators should be held accountable for human rights violations during armed conflict situations and that it is imperative that these crimes are punished. By doing so, the rule of law is restored and provision is made for remedies available to victims. It is often the case that current justice systems serve more as a deterrent to victims, rather than serving as a remedy. Corruption and the breakdown in police services and judicial structures are two cases in point. It is in light hereof that mechanisms should be designed and put to work in order to protect victims, advance fundamental rights of individuals and to ensure the non-repetition of human rights violations. Various instruments such as truth commissions and hybrid courts can be used for this purpose, in order to either replace dysfunctional judicial systems or to supplement such judicial systems.334

In paragraph 81 the Committee recommends to state parties:

a) That a comprehensive approach to transitional justice mechanisms are ensured which incorporates judicial as well as non-judicial mechanism which should include gender sensitive truth commissions and reparations which promotes women’s rights.

b) That states guarantee women’s access to justice by mandating bodies to address all gender-based violations and by doing so, ensure that substantive justice mechanisms are put in place.

c) To ensure that reconciliation processes do not include blanket amnesties with regards to human rights violations especially in cases of sexual violence against women and girls and also to ensure that these reconciliation processes combat impunity for human rights crimes.

d) To adopt specific measures in order to protect women against any form of discrimination but also to prohibit any form of discrimination when re-establishing the rule of law, legal reform and establishing criminal, civil and disciplinary sanctions.

e) To ensure that women are involved in the design of transitional justice mechanisms in order to guarantee that their experience gained during conflict is included and also that such victims needs and priorities are met and addressed. The participation of these victims in the design of reparation programmes are to be guaranteed by states.

f) To adopt mechanisms which shall encourage women’s collaboration and involvement in transitional justice mechanisms, to ensure the protection of the women’s identities during public hearings and that testimonies are to be taken by female professionals.

g) States should provide effective and timely remedies that are in line with the various types of violations experienced by women and should ensure the provision of corresponding reproductive rights violations, domestic and sexual enslavement, forced marriage and forced displacement, in addition to sexual violence as well as violations of economic, social and cultural rights.

h) Gender-sensitive procedures must be adopted in order to avoid victimization and stigmatization which includes the establishment of special protection units and gender desks in police stations, statements being taken from victims in a sensitive and confidential manner and that equal weight is given to the testimony of women and girls during trials.

---

i) To combat impunity of violations of women’s rights by means of proper investigations, prosecutions and that perpetrators are brought to justice.

j) Criminal accountability should be increased by means of ensuring the independence of the judicial system and by reinforcing the capacity of security, medical and judicial personnel to collect and preserve forensic evidence related to sexual violence in conflict and post-conflict contexts; and enhancing collaboration with other justice systems including the International Criminal Court.

k) To enhance women’s access to justice by means of provision of legal aid, establishment of specialized courts and by ensuring effective protection measures for victims and witnesses, including non-disclosure of identity and the provision of shelters.

l) To engage with informal justice mechanisms and encourage appropriate reforms in order to bring these processes in line with human rights and gender equality standards and to ensure that women are not discriminated against.

An obligation is also placed on states to report to the Committee on the implementation of the legal framework, policy implementations and programmes that have been developed in order to ensure the human rights of women during conflict prevention, in conflict and also in post-conflict situations. States are also to collect and make available sex-disaggregated statistics and trends over time which concern women and peace and security.336

The Optional Protocol to CEDAW was adopted in order to create greater public awareness of human rights standards relating to discrimination against women and requires the publicizing of the Optional Protocol and its procedures by state parties. Article 1 confirms that member states who become parties to the Optional Protocol, recognize the right of the Committee to receive and consider communications under the Protocol. Article 2 provides individuals and groups with a communications procedure and article 3 stipulates that only the communications of parties to the Optional Protocol shall be considered by the Committee. Articles 4, 5, 6 and 7 deal with the various criteria of communications and the communications procedures. It also outlines the process of complaint registration and Committee recommendations.

Article 8 makes provision for an inquiry procedure which allows the Committee to initiate a confidential investigation if a complaint was received by a member state regarding grave or systematic violations by another member state. The Committee may also visit the territory of the state party and any findings, comments or recommendations will be conveyed to the concerned state to which such a state may respond within 6 months. Article 9 makes provision for a follow-up procedure by the Committee as well as remedial efforts taken by the infringing state.

2.4 Convention Against Torture (1984)

The Committee against Torture (CAT), in its General Comment No 3, highlights the various components of the term “redress” as mentioned in article 14 of CAT, stating that—

“redress in Article 14 encompasses the concepts of “effective remedy” and “repatriation”. The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention.”

A victim (whether he or she suffered individually or collectively) should also be considered as such regardless of whether the perpetrator has been identified and prosecuted and the term victim includes dependents of the victim, family as well as individuals who were harmed in the process of intervening to assist a victim or to prevent victimization. The participation of victims is paramount in the redress process and the restoration of the victim’s dignity is the ultimate outcome of redress.

The Committee divides the obligations of state parties to provide redress into two categories, being procedural obligations and substantive procedures. A further matter of great importance is restitution. Restitution in this case—

“is a form of redress designed to re-establish the victim’s situation before the violation of the Convention was committed, taking into consideration the specificities of each case. The preventative obligations under the Convention requires states parties to ensure that a victim receiving such restitution is not placed in a position where he or she is at risk of repetition of torture or ill-treatment.”

---

338 Article 14 of CAT.
With regards to monetary compensation, the Committee highlights that this may not be a sufficient form of redress for a torture victim and that the right to—

“prompt, fair and adequate compensation for torture or ill-treatment under article 14 is multi-layered and compensation awarded to a victim should be sufficient to compensate for any economically assessable damage resulting from torture or ill treatment, whether pecuniary or non-pecuniary. This may include: reimbursement of medical expenses paid and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible, pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment; and lost opportunities such as employment and education. In addition, adequate compensation awarded by state parties to a victim of torture or ill-treatment should provide for legal or specialist assistance, and other costs associated with bringing a claim for redress.”

The provision of full rehabilitative programmes and services is then discussed, based on a victim’s background, history, personality and culture. These programmes and services should be accessible to all victims, regardless of a victim’s ethnicity or status within a vulnerable or marginalized group. Torture victims have a right to the truth and should be assisted in the truth-seeking process. This includes verification of the facts, full public disclosure of the truth if the victim so requires, the search for the whereabouts of the disappeared, reburial of victims’ bodies and an official declaration or judicial decision “restoring the dignity, the reputation and the rights of the victims and persons closely connected with the victim”.

The committee states that “[a] State’s failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State’s obligations under Article 14, as was the case in the Juarez terror”.

The Committee further discusses effective mechanisms for complaints and investigations and access to mechanisms for obtaining redress. Civil proceedings, for instance, should not impose a financial burden upon victims discouraging them from seeking redress. According to paragraph 37 “A crucial component of the right to redress is the clear acknowledgement by the State party concerned that the reparative measures provided or awarded to a victim are for violations of the

---

Convention, by action or omission”, 343 whereas paragraph 38 reiterates that “States parties to the Convention have an obligation to ensure that the right to redress is effective”. 344 The avoidance of re-victimization, obstacles to redress and the UN Voluntary Fund for Victims providing humanitarian assistance to victims are also discussed. States can make voluntary contributions to the UN Voluntary Fund for victims, “irrespective of the national measures taken or contributions made”. 345 With regards to monitoring and reporting, a system shall be established to “oversee, monitor, evaluate, and report” on state parties’ redress measures and rehabilitation services. 346 In their reports to the Committee, states must provide relevant information and be held accountable with regards to:

(a) the number of victims who have sought compensation; 347
(b) measures that were applied in assisting victims immediately after torture; 348
(c) rehabilitation facilities available to victims; 349
(d) measures taken to ensure that no re-victimization takes place; 350
(e) efforts by state parties to ensure that all allegations of torture are effectively investigated; 351
(f) the available “avenues for a victim of torture or ill-treatment to obtain redress, including all criminal, civil, administrative and non-judicial procedures”; 352
(g) legal aid and availability of witness protection; 353
(h) steps taken to implement national, regional and international court judgements, 354 and
(i) safeguards available for the special protection of marginalized or vulnerable groups, including women and children. 355

343 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 37.
344 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 38.
345 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 44.
346 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 45.
347 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46 (a).
348 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46 (b).
349 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46 (c).
350 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46 (e).
351 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46 (i).
352 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46 (k).
353 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46 (l).
354 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46 (m).
355 CAT General Comment No 3 (2012) CAT/C/GC/3/1 at para 46.
2.5 Convention on the Rights of the Child (1990)

Article 3 of the Convention on the Rights of the Child (CRC) places the best interest of the child at the forefront in all instances and action concerning children.\(^{356}\) This includes any decision or actions by private or public social welfare institutions, administrative authorities, legislative bodies and courts of law. Article 4 places the obligation on all state parties to implement the CRC in applicable domestic legislative, administrative and any other systems.\(^{357}\) The Committee comments on article 4 in its General Comment No 5 (2003) by highlighting the fact that states are to devote the maximum amount of available resources in their pursuit to implement the rights of children as set out in the CRC and that states should make the human rights of children a reality by engaging “all sectors of society and, of course, children themselves”.\(^{358}\) The Committee also emphasizes a wide range of measures that must be applied in order to effectively implement the values of the Convention in national legislation “including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels.\(^{359}\)

General state obligations are furthermore set out in General Comment No 16\(^{360}\) and the Committee states that the Convention creates a set of rights for children which impose a certain amount of gravity on states when it comes to the violation of children’s rights as it often have a “long-lasting and severe impact” on the development of children.\(^{361}\) In terms of international human rights law, there are three types of state obligations: to respect, protect and fulfil human rights.\(^{362}\) The obligation imposed on states to fulfil incorporates both an obligation to facilitate and an obligation to provide. The Committee reiterates the fact that states still remain obliged to fulfil their obligations in terms of the CRC even if their functions are delegated or outsourced to a non-profit

---


\(^{360}\) CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 24.

\(^{361}\) CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 24.

organisation or private business.\textsuperscript{363} This means that a state, when it fails to respect, protect and fulfil children’s rights in relation to business activities, will be in breach of its obligations under the Convention.

Articles 32 to 37 of the CRC deal with the economic exploitation of children and the obligations on member states to protect children from these forms of exploitation. General Comment No 16 deals with the obligation states have with regards to ensuring that children’s rights are respected and that states may not directly or indirectly facilitate, aid or allow any infringements of children’s rights. The Committee also states that “there is a particular gravity to violations of children’s rights because they often have a severe and long-lasting impact on child development.”\textsuperscript{364} The Committee further makes mention of the fact that there is no current international legally binding instrument with regards to the business sector’s responsibilities when it comes to human rights.\textsuperscript{365} The Committee does, however, recognize that the duty and responsibility to respect the rights of children reaches beyond the state and state controlled agencies and institutions and also applies to private business enterprises and the private sector. It is therefore imperative that all businesses meet their responsibilities in terms of children’s rights and that states must ensure that this happens. The Committee also states that business enterprises should not “undermine the State’s ability to meet their obligations towards children under the Convention and the Optional Protocols thereto”.\textsuperscript{366} Voluntary actions of corporate responsibility by business enterprises such as social investment, public policy engagements, philanthropy and voluntary codes of conduct can advance children’s rights.\textsuperscript{367} An example of a voluntary action of corporate responsibility by the business sector is the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (the Code), an industry-driven initiative that was undertaken by the tourism industry in order to “provide awareness, tools and support to the tourism industry in order to prevent the sexual exploitation of children”. The Code was developed by the non-governmental organisation

\textsuperscript{363} CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 25.
\textsuperscript{364} CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 26.
\textsuperscript{365} CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 8.
\textsuperscript{366} CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 8.
\textsuperscript{367} CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 9.
ECPAT (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes), in partnership with the United Nations World Tourism Organisation (UNWTO) and several Swedish tour operators after the first World Congress Against Commercial Sexual Exploitation of Children in 1996. It was then spread worldwide through partnerships with the ECPAT network, UNWTO, and UNICEF and has operated as an independent non-profit organisation since 2004.\footnote{Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism available online at http://www.thecode.org/about/ (24-03-2016).
\footnote{Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism available online at http://www.thecode.org/about/ (24-03-2016) 3.}

In terms of the Code, every tourism company that decides to join, must commit to the following six essential steps:\footnote{Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism available online at http://www.thecode.org/about/ (24-03-2016) 3.}

1. Establish a policy and procedures against the sexual exploitation of children.
2. Train employees in children’s rights, the prevention of sexual exploitation and how suspected cases are to be reported.
3. The inclusion of a clause in their contracts in order to state a common repudiation and zero tolerance policy with regards to the sexual exploitation of children.
4. The provision of information to travelers with regards to children’s rights, the prevention of sexual exploitation of children and how tourists should report suspected cases.
5. Support, collaborate and engage stakeholders in the prevention of sexual exploitation of children.
6. Annual reporting on the relevant company’s implementation of the Code.

An Agenda for Action was also accepted by 122 nations who committed themselves in the pursuit against all forms of sexual exploitation of children. The Agenda recommends various means of combatting the commercial exploitation of children, which include co-operation between countries and various sectors of society, criminalizing the commercial sexual exploitation of children, establishing special units within the police, recovery and rehabilitation centres for children, preventive measures in the form of education and actions to ensure that legal measures, plans and programmes are established and carried out. As the tourism industry is represented in most
countries around the world, it covers a wide and important network when it comes to potential child victims of sex tourism.\textsuperscript{370}

Article 32 of the Convention on the Rights of the Child states that member parties must “recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s physical, mental, spiritual, moral or social development.” This means that states are to take educational, social, administrative and legislative steps in order to guarantee the implementation of article 32 in their domestic policies. Such steps would include, for example, setting the minimum age for admission to employment, regulating appropriate hours and conditions of employment, as well as formulating appropriate penalties and other sanctions.\textsuperscript{371}

In General Comment No 16 on state obligations regarding the impact of the business sector on children’s rights (2014), the Committee reiterates the fact that if the state fails to respect, protect and fulfil children’s rights with regards to business activities and operations that have an impact on children, such a state will be in breach of its obligations under the CRC.\textsuperscript{372} The obligation of states to respect the rights of children in terms of the Convention furthermore entails that states should not aid and abet, directly or indirectly, or facilitate the infringement of children’s rights. States also have the obligation to ensure that all actors respect children’s rights in undertaking business activities.\textsuperscript{373} The obligation placed on states to respect the rights of children also entails that a state should not condone, engage in or support abuses of children’s rights when it conducts business with private enterprises or has a business role itself.\textsuperscript{374}

Article 33 of the CRC places an obligation on state parties to protect children from illicit use of narcotic drugs, and to prevent the use of children in illicit drug production, drug trafficking and related substances. In terms of article 34, state parties must protect children from all forms of sexual exploitation and sexual abuse and should do so by implementing all relevant measures to

\textsuperscript{372} At para 25.
\textsuperscript{373} CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 26.
\textsuperscript{374} CRC General Comment No 16 (2013) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 27.
protect children from coercion of a child to engage in sexual activity, the exploitative use of children in prostitution, unlawful sexual practices, pornographic performances and materials. The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (2002) further extends the measures that should be taken by states to guarantee the protection of children from being sold, prostituted or exploited for child pornography.

Article 35 of the CRC obliges state parties to take all possible steps in order to prevent the abduction, sale and trafficking of children for any purpose. Article 37 places an obligation on all state parties to ensure that no child is deprived of his or her liberty in an unlawful manner, or subjected to torture, cruel, inhuman and degrading treatment, capital punishment or lifelong imprisonment.

In terms of article 37(d) each child that is deprived of his or her liberty has the right to prompt judicial assistance and to a prompt decision on any such deprivation of his or her liberty. The Convention does not limit state jurisdiction to violations only within a state’s territory. The Committee has previously urged states to act beyond their territorial borders if the need arises.375 States also incur extraterritorial obligations in terms of article 3 of the Optional Protocol on the sale of children, child prostitution and child pornography, as article 3(1) provides that “[e]ach State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis” and then lists the illegal activities which include the sale of children, the use of a child for the purpose of sexual exploitation, transfer of the child’s organs for profit and so forth. Host states have a primary responsibility to respect, protect and fulfil the rights of children within their territory, whereas home states’ obligations also entail the obligation to respect, protect and fulfil children’s rights in the context of businesses, extraterritorial activities and operations, provided that there is a reasonable connection between the state and the relevant business transaction.376 A further obligation states have is the provision of accessible effective judicial and non-judicial mechanisms that serve as a remedy for children and their families whose

---

375 CRC General Comment No 16 (2014) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 39.
376 CRC General Comment No 16 (2014) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 43.
rights have been violated by business enterprises extraterritorially where there is a reasonable link between the state and the conduct concerned.

Article 38 of the CRC states that parties must ensure that no person younger than fifteen years of age take part in any hostilities. Article 39 deals with the psychological and physical recovery and social re-integration of child victims, obliging members to take all appropriate measures to promote recovery and to place such victims in environments which “fosters the health, self-respect and dignity of the child.” Article 40 deals with child perpetrators and the right of every child having infringed a penal or criminal law, to be treated in a dignified manner, aiming to reinforce the child’s “respect for the human rights and fundamental freedoms of others and that takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.” This article also obliges member states to establish laws and institutions that will establish a minimum age below which children shall be presumed “not to have the capacity to infringe the penal law”. It is often the case that children are forced by traffickers to commit crimes and such children should enjoy protection from being prosecuted. Article 40 furthermore states that—

“[w]henever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. A variety of dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

States incur an obligation in terms of the CRC to monitor progress in the implementation of the Convention regarding the activities and operations of businesses and must include explicit reference to the measures implemented to respect, protect and fulfil children’s rights when drafting and developing their national strategies and action plans for the implementation of the CRC.377 In paragraph 76 of General Comment No 16, the Committee finds that states have a positive obligation to monitor violations of the CRC and its optional protocols. Violations committed by business enterprises as well as their own global operations can be monitored for instance by means of data collection. By doing so, states can identify potential issues and investigate abuses by means of collaborations with civil society and human rights institutions. The Committee also advises

377 CRC General Comment No 16 (2014) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 77.
states to broaden the legislative mandate of national human rights institutions in order to accommodate children’s rights in business. The Committee suggests that this monitoring process can be achieved by means of the Child Rights Impact Assessments and Evaluations\textsuperscript{378} as well as collaborations with parliamentary committees, civil society organisations, professional associations and national human rights institutions.\textsuperscript{379}

During 2013, UNICEF, in collaboration with the Danish Institute for Human Rights, created the Children’s Rights in Impact Assessments Toolkit by means of a consultative process.\textsuperscript{380} The Assessment is continuously updated and serves as a guide and tool for companies when integrating children’s rights into impact assessments. The Children’s Rights in Impact Assessments contains 58 primary criteria specifically created to assist companies in assessing their processes and policies as they relate to their responsibility to respect children’s rights and their commitment to support children’s rights. The Assessment also includes ten children’s rights and business principles as part of its criteria and each business principle is introduced with information on the context and requirements for the primary criteria, including three key areas which includes policy, due diligence and remediation.\textsuperscript{381} Primary criterion 88 of the Assessment sets out the remediation criterion for government and community relations in stating that both role players must inform all “employees, community members, service providers, children and other stakeholders about the grievance mechanism and available channels to report occurrences of risk or impact on children related to community investment projects.”\textsuperscript{382} States and governments must also ensure access to the grievance mechanisms by both children or individuals acting on their behalf which may include government officials, Non – Governmental Organisations and community members. The Assessment advises that states and governments provide a physical space for such means through a Non-Governmental Organisation as well as providing a telephone hotline or online platforms where incidents can be reported. Illiteracy and language barriers should also be taken into

\textsuperscript{378} CRC General Comment No 16 (2014) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 78.
\textsuperscript{379} CRC General Comment No 16 (2014) on state obligations regarding the impact of the business sector on children’s rights CRC/GC/16 at para 82.
consideration. According to Principle 31 of the United Nations Guiding Principles an adequate grievance mechanism should conform to principles of “legitimacy, accessibility, predictability, equitability, transparency and compatibility with rights”.

Criteria to be assessed in terms of the Assessment include processes that should be in place in order to identify and assess risks and impacts related to the minimum age policy within the company’s operations and value chain, training of procurement staff with regards to child labour risks, clear procedures for identifying trafficking, sexual exploitation, debt bondage and forced labour and the communication of the policy to all employees and investigations of potential misconduct by relevant authorities outside the company. The Assessment advises that companies “should consider reporting annually or periodically to internal and external stakeholders on results achieved, dilemmas and challenges faced, and on plans, targets and future commitments.” Companies must also provide for remediation through legitimate processes such as operational-level grievance mechanisms. The Committee also advises that states should undertake direct consultation with children as part of their monitoring obligation in order to obtain children’s views with regards to the impact of businesses on their rights.

According to the CRC Committee, states must also meet their obligations in ensuring that businesses adhere to children’s rights by requiring enterprises to undertake child rights due diligence programmes. This entails the identification, prevention and mitigation of the impact of such businesses relationships globally and their impact on children’s rights. By respecting and supporting the rights of children, businesses will inevitably prevent harm and actively safeguard the best interest of the child. States are also reminded to act by setting an example and all state-owned enterprises should not only initiate child-rights due diligence but also publicly communicate their reports and the impact of their business enterprises on children’s rights. By doing so, companies will be recognising children as rights holders and stakeholders and in the

---

386 CRC General Comment No 16 (2013) CRC/GC/16 at para 62.
process businesses will actively assess and understand the potential and actual impacts of their activities on children. Businesses should also be required by states to publish what measures or precautions they have taken to guarantee that the services they render and goods they produce do not infringe on or violate children’s rights. Examples of such infringements include enslavement or child labour.\(^{387}\)

The Committee highlights the fact that states have an obligation to provide children with effective remedies and reparations for violations of their rights. In Paragraph 30 of General Comment No 16 (2013), the Committee recalls General Comment No 5 which states that “for rights to have meaning, effective remedies must be available to redress violations” and that states should also take heed of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law as adopted by General Assembly Resolution 60/147 of 2005.\(^{388}\)

In terms of these obligations, child sensitive measures (criminal, civil and or administrative) are to be put in place and must be known by children and their representatives.\(^{389}\) Such measures must also be readily available, prompt, accessible and provide sufficient reparation for harm suffered and rights violated. It is imperative that when taking into consideration the form of reparation, it must be kept in mind that children are more vulnerable when it comes to the violation of their rights, and that the harm done, can be irreversible and cause life time damage.\(^{390}\)

The Children’s Rights and Business Principles (the Principles) were developed from the rights reflected in the CRC and recognise the importance of children’s economic, political, civil, social and cultural rights.\(^{391}\) The CRC firmly sets out the rights of children to be protected by states and the Principles contain an outline of the operational framework for businesses to respect and support these rights. In its preamble, the Principles advocate for businesses to respect children’s rights in conducting business activities and business relationships. The Principles also identify a list of actions to be undertaken by business enterprises in order to prevent and address any “adverse

---

\(^{387}\) CRC General Comment No 16 (2013) CRC/GC/16 at para 65.

\(^{388}\) CRC General Comment No 16 (2013) CRC/GC/16 at para 30.

\(^{389}\) CRC General Comment No 16 (2013) CRC/GC/16 at para 30.

\(^{390}\) CRC General Comment No 16 (2013) CRC/GC/16 at para 31.

impact on children’s human rights as well as measures, all business is encouraged to take to help advance children’s rights.”392

The ten principles are set out as follows:

All businesses should.393

1. Meet their responsibility to respect children’s rights and commit to supporting the human rights of children.
2. Contribute towards the elimination of child labour, including all business activities and business relationships.
3. Provide decent work for young workers, parents and caregivers.
4. Ensure the protection and safety of children in all business activities and facilities.
5. Ensure that products and services are safe, and seek to support children’s rights through these products and services.
6. Use marketing and advertising that respect and support children’s rights.
7. Respect and support children’s rights in relation to the environment and to land acquisition and use.
8. Respect and support children’s rights in security arrangements.
10. Reinforce community and government efforts to protect and fulfil children’s rights.

In terms of principle 1, “[a]ll business should meet their responsibility to respect children’s rights and commit to supporting the human rights to children”. Businesses are urged to meet their responsibility in terms of the Principles by issuing a policy commitment which must be approved at the most senior level of the business and also be available on request. Businesses must also, as part of meeting their responsibility with regards to children’s rights, conduct a human rights due

diligence in order to establish the impact of their policies and business dealings on human rights.\textsuperscript{394}

As part of such due diligence processes, businesses must identify and assess any potential or actual impact on children’s rights by consulting with human rights experts as well as children and other relevant stakeholders. It must also be taken into account that girls and boys may face different risks. Where a business identifies that an adverse impact on the human rights of an individual has taken place, such businesses should develop child-sensitive remediation processes.\textsuperscript{395}

As indicated earlier, the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (2002) (STP) was designed to extend measures states should take in order to ensure and guarantee the protection of children from being sold, prostituted or exploited for means of pornography. The STP calls for increased public awareness as a mechanism to create greater awareness and to diminish the demand for the sale of children, child prostitution and child pornography and advocates for the importance of reinforcing and strengthening global partnerships across a broad spectrum and improving law enforcement on a national level. The STP not only defines but also prohibits the sale of children, child prostitution and child pornography and puts an obligation on states to make certain acts punishable under their domestic criminal law.\textsuperscript{396} The Protocol also sets out the minimum offences which should be fully covered by states under their criminal or penal law whether such offences were committed domestically or transnationally or on an individual or organized basis.\textsuperscript{397}

Article 4 places an obligation on a state to take all measures it may deem necessary to establish jurisdiction over the offences when an offender is present in its territory and such a perpetrator is not extradited. Article 9(1) advocates for the adoption, strengthening, implementation and disseminating of laws, administrative measures, social policies and programmes which could possibly prevent the offences reflected in the STP. Awareness must also be promoted by states amongst members of the public and children through all possible appropriate means, which include education and training with regards to preventative measures and harmful effects of offences reflected in the STP. States must furthermore promote community participation and especially the


\textsuperscript{396} Articles 1-2 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2002).

\textsuperscript{397} Articles 3 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2002).
participation of children and child victims in this process by means of education and training programmes both domestically and internationally. The STP also provides protection and assistance to child victims in the criminal justice process with the best interest of the child always at the centre of all forms of judicial treatment by states. States are to ensure that child victims have access to effective procedures in order to obtain compensation for damages from their perpetrators. It is also imperative that all possible measures are taken to socially reintegrate the victims of STP offences and to ensure their “full physical and psychological recovery”. States must submit a report to the Committee on the Rights of the Child which must contain comprehensive information on the steps that the state has taken to implement the provisions of the STP within two years after the STP entered into force for such a state.

The Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011) enables the Committee on the Rights of the Child to carry out functions provided for in the current Protocol. The Committee consists of 18 independent experts monitoring the measures undertaken by member states to effectively implement the CRC and its optional protocols. The Optional Protocol furthermore declares that “Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction or a State party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party:

(a) The Convention
(b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;
(c) The Optional Protocol to the Convention on the involvement of children in armed conflict.”

---

399 Articles 8(1) and 9(4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2002).
Unaccompanied minors are often sent to foreign countries as an “anchor” in order to effect family settlement and in the migration process are then caught into smuggling networks.\(^{406}\) Children are also kidnapped and coerced into sexual or labor servitude and according to Theresa Lore, expert in the field, women and children trafficked for sex is “the fastest growing criminal enterprise in the world”.\(^{407}\) It is imperative that children are protected from exploitative and dangerous situations. The CRC promotes the intervention of states not only in cases where children need to be protected from neglect or exploitation but also places an obligation on states to take the child’s “voice” into consideration and that a child must have the right to express his or her views in the decision making process.\(^{408}\)

Economic migration and the transit of people trying to escape from conflict stricken areas have been “a norm throughout history”.\(^{409}\) In a response to the rise of migration tendencies, in order to set a moral standard with regards to migration, aiming to “foster respect for migrants human rights” and “serve as a guide and stimulus for the promotion of migrants in each country”, the Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families was adopted by the General Assembly in 2003. This is discussed below.

### 2.6 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) aims to protect migrant workers and their families and serves as a guide for the protection and promotion of migrant’s rights globally. In General Comment No 1 (2011),\(^{410}\) the Committee places specific focus on migrant domestic workers, affirming that these individuals are at risk of certain forms of abuse and exploitation due to their dependence on their employer and their isolation. The foreign language component, the lack of a support system, national labour migration laws, restriction on their freedom to leave their workplace and also the fact that often

---


\(^{407}\) See note 34 above. Theresa Lore, senior coordinator for international women’s issue at the State Department as quoted in DeStefano *Smuggling Boom Prompts Nations to Take Action* Newsday A5(1998).


\(^{409}\) Bhabha “Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children” 2000 *The University of Chicago Law School Roundtable* Vol 7 Issue 1 Article 11 279.

\(^{410}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at paras 3-7.
their workplace is their only place of shelter are further contributory factors. The reliance of their families on the remittance that is sent home, also highlights the vulnerability of these migrants.

The Committee also mentions that women migrant domestic workers are at a heightened risk due to possible gender-based violence\(^\text{411}\) and often risk deportation when they seek the assistance of state authorities.\(^\text{412}\) Various role players in the migration cycle contribute to the vulnerability of migrants. Examples include recruitment agencies, labour brokers, and recruitment agencies. Issues include incorrect information being communicated to migrants, with regards to their rights, migrants being lured into paying for fraudulent visas\(^\text{413}\) and the promise of non-existent jobs,\(^\text{414}\) which is often the *modus operandi* of traffickers.

The Committee makes mention of the particular vulnerability of women and girls due to possible sexual and physical abuse whilst in transit.\(^\text{415}\) Migrants are often left stranded without official travelling documents and employment, causing further vulnerability to exploitation and abuse.\(^\text{416}\) The Committee further notes that the withholding of passports by employers and restriction of migrants to move freely, communicate with others or with their family, reinforces isolation and creates further dependence.\(^\text{417}\) Due to the absence of minimum wage laws for migrant domestic workers, employers take advantage of this unregulated situation, often underpaying migrants or not paying them at all.

The Committee also points out the fact that child domestic workers “make up a significant proportion of domestic workers”.\(^\text{418}\) Factors contributing to their vulnerable position are aspects such as separation from their families and support structure, the “near-total dependence on their employers”, their young age and isolation.\(^\text{419}\) The clandestine nature of the working conditions of migrant domestic workers remains a challenge and makes the detection of these abuses quite difficult.

\(^{411}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 7.
\(^{412}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 7.
\(^{413}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 9.
\(^{414}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 9.
\(^{415}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 10.
\(^{416}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 11.
\(^{417}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 12.
\(^{418}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 14.
\(^{419}\) CMW General Comment No 1 (1992) CMW/C/GC/1 at para 14.
3. Remedies

3.1 Recommended Principles and Guidelines on Human Trafficking (2002)

The development of the Recommended Principles and Guidelines on Human Rights and Human Trafficking (the Guidelines) was headed by the United Nations High Commissioner for Human Rights, Mary Robinson420 in lieu of the fact that human trafficking had “moved from the margins to the mainstream of international concern”421 and in order to “provide practical, rights-based policy guidance on the prevention of trafficking and the protection of victims of trafficking”.422 The Guidelines were developed by means of a “wide-ranging, informal consultation process involving individual experts and practitioners as well as representatives of the United Nations agencies and programmes and other intergovernmental organisations working on trafficking related issues.”423 The Guidelines were transmitted to the UN Economic and Social Council in 2002 and have been integrated into various legal policies and texts and also serve as annexes to regional and international treaties which include the Palermo Protocol.424 The Guidelines aim to “promote and facilitate the integration of human rights perspectives into national, regional and international anti-trafficking laws, policies and interventions.” In her foreword to the Guidelines, the former High Commissioner urges member states and intergovernmental organisations to make use of these Guidelines in their own pursuit against trafficking and the protection of the rights of trafficking victims.425 The document consists of 11 guidelines, supplementing the existing gaps in the Organized Crime Convention and the Palermo Protocol and making it an important source for domestic policymaking. The Guidelines establish a framework for corporate responsibility with

422 Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline foreword by High Commissioner for Human Rights Mary Robinson.
regards to human rights and suggests human rights due diligence as an optional mechanism for businesses to respect human rights.

Guideline 1 deals with the obligation of states to promote and protect human rights by ensuring that measures are adopted for the purpose of preventing and combating human trafficking in persons. Such measures include consulting with judicial and legislative bodies, national human rights institutions and civil society role-players to assist states with the adoption, implementation and review of anti-trafficking legislation, policies and programmes. It also discusses the development of national plans of action to combat trafficking, declaring that this process should take place via the construction of partnerships between governmental institutions with the intention to not only build links but also to assist trafficking victims and to combat trafficking more effectively. This Guideline also makes mention of mechanisms to be established in order to monitor the impact of anti-trafficking legislation on the human rights of victims.

Guideline 2 focusses on the identification of trafficked persons and traffickers, pointing out that—

“[t]rafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and / or deception throughout or at some stage in the process – such deception, force or coercion being used for the purpose of exploitation.”

This Guideline very importantly states that the failure to effectively identify a trafficking victim is “likely to result in a further denial of that person’s rights” and that states are obliged to ensure effective victim identification. Guideline 2 further discusses due diligence, stating that states are “obliged to exercise due diligence in identifying traffickers, including those who are involved in controlling and exploiting trafficked persons.” Guidelines and procedures must be developed in order for authorities to more effectively detect human trafficking. The training of these relevant authorities is paramount in combatting human trafficking as it will improve victim

identification. Measures must also be implemented to ensure that migrants and potential migrants are made aware of the potential dangers and consequences of trafficking.

Guideline 3 deals with the research, analysis, evaluation and dissemination of trafficking cases, stating that the media plays a very important role in creating public awareness of human trafficking and potential recruitment methods. Guideline 4 discusses the importance of ensuring an adequate legal framework, adding that “[t]he lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonise legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards.” Legislative provision must be made for “effective and proportional criminal penalties” and additional penalties should be applied to trafficking offences with aggravated circumstances such as trafficking in children and offences “committed by or involving complicity by State officials”. Guideline 4 also discusses the confiscation of the instruments and proceeds of trafficking, stating that such proceeds must be used to benefit trafficking victims. Guideline 4 also advocates for the establishment of a compensation fund for trafficking victims, utilising the confiscated assets to finance the fund. Other points raised are the protection of victims by summary deportation, the provision of legal information and the right to assistance in a language a victim understands as well as social support to meet the immediate needs of trafficking victims. The rights of victims to initiate civil claims against their traffickers must also be “enshrined in law” according to this guideline.

Guideline 5 makes provision for an adequate law enforcement response in order to impact more effectively on the combating of trafficking. As the cooperation of trafficking victims play an

---

446 Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 5.
evident role in the response to human trafficking, individuals are often unable to report traffickers due to the absence of effective protection mechanisms. The involvement of officials in trafficking is a factor contributing to the reluctance of victims to report. Investigators should be made aware of their responsibility to ensure the safety of a trafficking victim by means of effective training measures. They should be made aware of the special needs of victims, especially women and children and also be well-informed about the possibilities surrounding the incentivising of victims who decide to come forward:

“Sensitizing police, prosecutors, border, immigration and judicial authorities, and social and public health workers to the problem of trafficking and ensuring the provision of specialized training in identifying trafficking cases, combatting trafficking and protecting the rights of victims.”

Guideline 6 discusses the protection of and support for trafficked persons, stating that “[t]he trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.” It goes further by stating that the immediate and social needs of victims must be met via partnerships between the state and non-governmental organisations and victims should receive access to safe shelter, primary healthcare, counselling, and assistance in voluntary return to their countries, if and when possible. It furthermore adds that “the provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings.”

Guideline 7 discusses prevention strategies aimed at preventing trafficking and urges that prevention measures implemented by states should take into account demand as a root cause. The Guideline further states that—

“[s]tates and intergovernmental organisations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and

---

prejudice. Effective prevention strategies should be based on existing experience and accurate information.\textsuperscript{456}

Guideline 8 takes a look at special measures for the protection and support of child victims, stating that

“[t]he particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions.”\textsuperscript{457}

Guideline 9 covers access to remedies by trafficking victims and states that all victims have an international right to “adequate and appropriate remedies”.\textsuperscript{458} As trafficking victims are often isolated from the outside world, they are unaware of these remedies, and need to be informed of the “availability of obtaining remedies, including compensation, for trafficking and related exploitation”.\textsuperscript{459} States, intergovernmental and non-governmental organisations should inform victims of their enforceable right to “fair and adequate remedies” of a criminal, civil and administrative nature.\textsuperscript{460} The relevant organisations should also provide information to victims with regards to the procedures to be followed in order to obtain remedies.\textsuperscript{461}

Guideline 10 deals with the obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel, stating that:

“[t]he direct or indirect involvement of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic personnel in trafficking raises special concerns. States, intergovernmental and non-governmental organisations are responsible for the actions of those working under their authority and are therefore under an obligation to take effective measures to prevent their nationals and employees from engaging in trafficking and related exploitation.”\textsuperscript{462}

States must also ensure the thorough investigation of all trafficking allegations and related exploitation and appropriate sanctions must be applied to personnel found to have been involved in trafficking.

The last Guideline, Guideline 11, very importantly, focusses on the cooperation between states and regions in the fight against trafficking, stating that the cooperation between states is paramount in the

\begin{footnotesize}
\textsuperscript{456} Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 7.
\textsuperscript{457} Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 8.
\textsuperscript{458} Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 9.
\textsuperscript{459} Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 9.
\textsuperscript{460} Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 9 at para 1.
\textsuperscript{461} Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 9 at para 2.
\textsuperscript{462} Recommended Principles and Guidelines on Human Rights and Human Trafficking Guideline 10.
\end{footnotesize}
successful combatting of trafficking. Guideline 11 also states that a strengthened national response often results in traffickers moving to other jurisdictions and that “cooperation is particularly critical between countries involved in different stages of the trafficking cycle.”

The Guideline suggests that labour migration agreements are adopted by countries with the potential inclusion of minimum work standards, model contracts and modes of repatriation in accordance with existing international standards. The Guideline also encourages states to enforce all such labour migration agreements in the global fight against trafficking and related exploitation. The development of cooperation arrangements is also of paramount importance in order to ensure the “rapid identification of trafficked persons including the sharing and exchange of information in relation to their nationality and right of residence.”463 Other valuable suggestions include the implementation of mechanisms464 facilitating the exchange of information concerning traffickers465 and their methods of operations as well as the development of procedures and protocols for the conduct of proactive joint investigations by law enforcement authorities of different concerned states.466 Judicial cooperation between states is a highly valuable suggestion and would mean that common prosecution methodologies could be used in joint investigations and judicial processes relating to trafficking and related offences.467

International cooperation with regards to the confiscation of trafficking proceeds is also suggested by Guideline 11 and states that such “cooperation should include the provision of assistance in identifying, tracing, freezing and confiscating assets connected to trafficking and related exploitation.”

Other suggestions include the exchange of information,468 experience relating to the implementation of assistance and return and integration programmes with a view to maximizing impact and effectiveness. Cooperation between Non-Governmental Organisations and other civil society organisations in countries of origin, transit and destination should also be encouraged since it could ensure support and assistance to trafficked persons who are repatriated.469

---

3.2 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) was adopted by the General Assembly during November 1985 in resolution 40/34. In its preamble, the General Assembly acknowledges that—

“the victims of crime and the victims of abuse of power and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders,”

The Declaration was designed to “assist Governments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power”. The Declaration calls on states to take the necessary steps to “curtail victimisation” and to “implement social, health (including mental health), educational, economic and specific crime prevention policies to reduce victimization and encourage assistance to victims in distress.” The Declaration furthermore places obligations on states to review existing legislation, establish means of detecting, prosecuting and sentencing those guilty of crimes, to promote disclosure of relevant information in order to expose official and corporate misconduct, prohibit abusive practices and develop ways and means of providing recourse for victims where national channels may be insufficient. The Declaration also creates the obligation of accountability, stating that member states are to report to the General Assembly

---

periodically on the implementation of the Declaration as well as measures taken by states with regards to implementation.479


The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (The Model Strategies) were adopted by the General Assembly in its resolution 2014/18 in July 2014.480 In its resolution, the General Assembly recalls the UDHR, ICESCR, ICCPR, COC, other relevant international treaties, regional treaties and the various international “standards and norms in the field of prevention and criminal justice” and acknowledges the intrinsic value of role-players such as the UN High Commissioner of Human Rights, the UNODC, and the Special Representative of the Secretary-General on Violence against Children.481 The General Assembly—

> “strongly condemns all acts of violence against children, reaffirms the duty of the State to protect children from all forms of violence in both public and private settings, and calls for the elimination of impunity, including by investigating and prosecuting, with due process, and punishing all perpetrators.”482

The General Assembly then highlights the fact that children are in aid for special care, safeguards and legal protection due to their mental and physical development and that they “face particular vulnerabilities”.483 The resolution furthermore emphasizes that children whom come into contact with the criminal justice system, whether it be as victims or offenders, should be treated in a “child sensitive manner and with respect for their rights, dignity and needs”.

According to the UNODC, the Model Strategies were developed in order to “support a comprehensive, system-wide and strategic approach, in the field of crime prevention and criminal

---

justice, to effectively prevent and respond to violence against children." The Model Strategies also defines the responsibility of the criminal justice system together with child protection and other role players and agencies to prevent violence against children and to respond to the latter. The Model Strategies were developed in order to find more effective methods of protecting children from violence and to improve the efficiency and effectiveness of the criminal justice system in its response to violence against children. The Model Strategies calls upon criminal justice institutions to improve their efforts to prevent violence against children and to enhance their responses once the violations are brought to their attention. It also highlights the importance of the criminal justice system and the responsibility that rests on this system to prevent and respond to violence against children. The Model Strategies very importantly emphasize the —

"complementary roles of the justice system on the one hand, and the child protection, social welfare, health and education sectors, on the other, in creating a protective environment and in preventing and responding to violence against children." It further looks at “the vulnerability and the specific risks of violence faced by unaccompanied children, migrant children and children who are refugees or asylum seekers,” the risk of violence against children committed by children, the risk of exploitation of children by criminal groups such as terrorist entities and violent extremist groups during armed conflict and the offering of children for purposes of child prostitution. It lobbies for a knowledge-based approach by means of data collection, analysis and dissemination as well and using this data collection process as a welcome opportunity to inform civil society, mobilise the academic community and criminal justice agencies and involve the various sectors in a constructive dialogue. Two further points of importance addressed by the Model Strategies are the enhancing of the capacity of the criminal

---

justice system and applying the “best interest of the child” principle during law enforcement and prosecution activities.\textsuperscript{494} The Model Strategies furthermore states that victims of violence are entitled to have access to fair, prompt and equitable redress mechanisms and accessible procedures for seeking and obtaining compensation.\textsuperscript{495} In this chapter the current international law regime with regards to human trafficking was discussed.

4. Institutional developments

The Inter-Agency Coordination Group against Trafficking in Persons (ICAT) was formed by the United Nations as a response to Resolution 2006/27 of the United Nations Economic and Social Council (ECOSOC).\textsuperscript{496} This resolution called for increasing cooperation between intergovernmental agencies in order to strengthen “technical assistance provided to countries in the area of human trafficking”.\textsuperscript{497} A resolution by the UN General Assembly in March 2007 placed emphasis on the importance of minimising the “gaps and overlaps” in the anti-trafficking pursuit of intergovernmental agencies.\textsuperscript{498} The UN Secretary-General was also requested to adopt measures which would “enhance cooperation and coordination and facilitate a holistic and comprehensive approach by the international community to the problem of trafficking in persons.”\textsuperscript{499} The General Assembly, in its resolution, also highlighted the obligation on states in exercising due diligence to prevent, investigate and prevent trafficking and to also ensure that victims are protected by not leaving perpetrators unpunished.\textsuperscript{500} Member states were also encouraged to improve cooperation between countries of origin, transit and destination especially among members of the police service, prosecutors and social authorities in order to more effectively combat human trafficking.\textsuperscript{501}

\textsuperscript{494} General Assembly Resolution A/C.3/69/L.5 (2014) 8 at para 7 (b).
\textsuperscript{495} General Assembly Resolution A/C.3/69/L.5 (2014)1 6 at para 20(i).
\textsuperscript{496} Economic and Social Council Resolution (2006/27).
\textsuperscript{497} ICAT (The International Legal Frameworks concerning Trafficking in Persons available online at http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf (04-04-2016).
In its first paper, ICAT recognises the need for reliance on various sources of international legal instruments in order to effectively combat trafficking. It does, however, state that this need has found little “practical expression”.\textsuperscript{502} The paper reiterates the low conviction rate on a global scale and states that human trafficking is too often a “crime committed with impunity”.\textsuperscript{503} Prosecution by states is a priority and an effective response is needed in order to counter this heinous crime. The paper also makes mention of the challenges with regard to the detection, investigation and prosecution of trafficking offences by police when it comes to “vice crimes” such as prostitution (especially in states where prostitution is criminalised).\textsuperscript{504} It further states that in some cases violations of labour law, human rights violations of especially migrants and violations of children’s rights “may not as rigorously be pursued because of limitations in police capacity or expertise, or because they are the responsibility of another ministry with its own priorities”.\textsuperscript{505} This is often a challenge where trafficking victims report to the police and are subsequently deported without the opportunity to seek regress for the violations of their human rights.

The paper makes mention of states not paying adequate attention to their obligation in terms of the relevant trafficking conventions and instruments and then makes mention of the Palermo Protocol not being “particularly strong” in the sense that the Protocol merely makes suggestions in terms of victim support.\textsuperscript{506} There is, however, no obligation on states to give effect to these measures in national legislation which creates a “lack of awareness” with regards to states’ obligations under existing legal instruments.\textsuperscript{507} The importance of collection, analyses and comparison of case law is noted in the paper and, according to ICAT, must be done in order to establish what is effective.

\textsuperscript{502} ICAT \textit{The International Legal Frameworks concerning Trafficking in Persons} available online at http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf (04-04-2016).
\textsuperscript{504} ICAT \textit{The International Legal Frameworks concerning Trafficking in Persons} available online at http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf (04-04-2016) 2 at para 2.1.
\textsuperscript{505} ICAT \textit{The International Legal Frameworks concerning Trafficking in Persons} available online at http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf (04-04-2016) at para 2.1.
\textsuperscript{506} ICAT \textit{The International Legal Frameworks concerning Trafficking in Persons} available online at http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf (04-04-2016).
\textsuperscript{507} ICAT \textit{The International Legal Frameworks concerning Trafficking in Persons} available online at http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf (04-04-2016).
when prosecuting traffickers since it will “enhance national legislative development, and encourage harmonisation and the identification of good practice.”

The paper also highlights that the lessons—

“suggest that, in the course of a criminal investigation and prosecution, not only is the protection of the victim’s right in principle but also right in practice as it is not effective to prosecute the traffickers without placing the protection and assistance of victims at the heart of the intervention.”

Other challenges made mention of victims’ enforceable rights to receive immediate protection and support, which rights are often not enforced or recognised by states. The right of victims to return to their country of origin is then discussed with specific reference to the affirmation of this right by the International Covenant on Civil and Political Rights. This specifically applies to victims who find themselves in countries of which they are not citizens. The paper makes reference to General Comment No 6 of the Committee on the Rights of the Child in mentioning that state parties to the Convention of the Rights of the Child should, when considering the return of the child to its country of origin, adhere to the best interest of the child principle. The Committee suggested a prior risk assessment by authorities in order to establish what would be in the best interest of the child when it comes to the return of the child to his or her country of origin. This should be done in order to avoid possible victimisation as it often happens that a victim who has been trafficked is returned to the dangerous environment from which it was trafficked and to the person who sold the child. This “re-victimisation danger” was previously pointed out in various international legal instruments, as well as in the Recommended Principles and Guidelines on Human rights and Human Trafficking. The paper concludes by highlighting the fact that the reliance by states on a “narrow interpretation” of their obligations in terms of the Palermo Protocol.

---

511 CRC General Comment No 6 on the treatment of unaccompanied and separated children outside their country of origin (2006) CRC/GC/2005/6/1 at paras 27 and 84.
512 CRC General Comment No 6 on the treatment of unaccompanied and separated children outside their country of origin (2006) CRC/GC/2005/6/1 at paras 27 and 84.
is not an adequate response in the pursuit against trafficking.\textsuperscript{514} It is imperative that efforts are made by states to—

“ensure better understanding of the coherence between human rights law, refugee law, labour law and other relevant bodies of law and the need to bring diverse but complementary instruments to bear on the trafficking challenge, not only as reference tools but as an international framework that needs to be implemented on the ground.” \textsuperscript{515}

The measures suggested by the ICAT paper should be applied, strengthened and made more effective in order to combat trafficking successfully and provide and improve the protection trafficking victims are entitled to. The monitoring and evaluation of these steps are furthermore imperative in establishing which processes, measures and policies are most effective and which ones are less helpful in the pursuit against trafficking.

5. Conclusion

This chapter provided an overview of state duties, compliance duties, due diligence and the obligation upon states with regards to combating human trafficking. The relevant remedies available to trafficking victims and the importance of institutional measures were furthermore highlighted. In the next chapter, the regional legal framework and trafficking related regional instruments will be discussed.

---


CHAPTER 6:

REGIONAL FRAMEWORK

1. Introduction

Regional human rights systems have played a significant role in the sphere of human rights.\footnote{Alston and Goodman International Human Rights – The Successor to International Human Rights in Context: Law, Politics and Morals (2013) 889.} The existing regional arrangements also provide a framework for better understanding the various mechanisms, institutions and techniques which can be implemented to protect and promote human rights and to combat trafficking in persons.\footnote{Alston and Goodman International Human Rights – The Successor to International Human Rights in Context: Law, Politics and Morals (2013) 889.} These regional human rights systems provide a general normative framework applicable to the human trafficking phenomenon and were designed in parallel to the already existing UN instruments.\footnote{Lopez-Bermudez “Creating and Applying Human Rights Law” in Shelton (ed) The Oxford Handbook of International Human Rights Law (2013) 901.} As indicated by Alston and Goodman, “[t]he European and Inter-American systems have innovative institutions and processes; the African system has distinctive norms; and Arab and Asian initiatives are at an embryonic point”.\footnote{Alston and Goodman International Human Rights – The Successor to International Human Rights in Context: Law, Politics and Morals (2013) 889.} This chapter aims to briefly discuss the applicable regional legal instruments and institutions with regard to trafficking in persons.

Founded in 1949, the primary aim of the Council of Europe (CoE) was to create a “common democratic and legal area throughout the European continent that would ensure respect for human rights, democracy and the rule of law.”\footnote{Lopez-Bermudez “Creating and Applying Human Rights Law” in Shelton (ed) The Oxford Handbook of International Human Rights Law (2013) 901.} The European Convention on Human Rights (ECHR), adopted in 1950,\footnote{47 CoE member states are parties to the Convention.} is deemed as one of the most advanced human rights protection instruments globally.\footnote{Lopez-Bermudez “Creating and Applying Human Rights Law” in Shelton (ed) The Oxford Handbook of International Human Rights Law (2013) 901.} According to Alston and Goodman, it is also seen as the first—
“comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights systems; it has generated a more extensive jurisprudence than any other part of the international system; and it now applies to almost 25 per cent of the nations in the world.”

The Organisation of American States, founded in 1948, was designed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.”

Even though the Inter-American system was inspired by the European system, it differs structurally from the latter. Providing the general framework of the inter-American system, the American Declaration of the Rights and Duties of Man was adopted in Colombia in April 1948. The human rights framework is embedded in the 1969 American Convention on Human Rights. This instrument furthermore establishes the Inter-American Court of Human Rights.


This chapter is not intended to deal in general with regional human rights systems. Instead it will highlight the most important human trafficking instruments at the regional level, examine regional anti trafficking initiatives and discuss possible solutions.

The adoption of the Palermo Protocol resulted in a clear definition of human trafficking as a crime, a definition that is now accepted by not only the international community, but also regional, governmental and non-governmental organisations around the world. It is also the most important international instrument relating to trafficking and sets out the minimum obligations of states in relation to the combatting of trafficking in human beings.

2. Regional human trafficking instruments

The Special Rapporteur on trafficking in persons, especially women and children, submitted a report to the UN General Assembly dated 4 May 2010, analyzing relevant regional and sub-regional responses with regards to trafficking in persons. The main motivation for this effort was to “highlight good practices and initiatives that promote a human rights-based approach to combating human trafficking”. This report will be used as a guide to provide an overview of current anti-trafficking mechanisms and of past successes and future challenges where applicable.

2.1 European developments

A perfect case in point of a human rights based trafficking mechanism is that of the CoE, focusing on the prevention of trafficking in persons and the prosecution of trafficking offenders. It is unique in the sense that it is the sole international treaty that places the rights of the victims at the very heart of its trafficking agenda. The CoE has furthermore been raising awareness with regards to trafficking in persons ever since the late 1980’s and adopted the CoE Convention on Action against Trafficking in Human Beings (CoE Convention) during 2005. This Convention came into force in 2008 and is the only “comprehensive treaty focusing on the protection of victims of trafficking”. The subcommittee of the CoE Parliamentary Assembly is also involved in the fight against trafficking and


530 Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 8 at para 36.

adopted a Handbook for Parliamentarians on the CoE Convention. The CoE Convention is also open to adoption by states even if such parties are not members of the Council of Europe.

The European Union increasingly indicated that trafficking in persons formed an integral part of its agenda and adopted Council Framework Decision 2002/639/JHA in 2002 followed by an action oriented paper.

This Council Framework Decision indicates that it is of paramount importance for human trafficking to be addressed not only by individual state action but also through a—

“comprehensive approach in which the definition of constituent elements of criminal law common to all Member States, including effective, proportionate and dissuasive sanctions, confines itself to the minimum required in order to achieve those objectives at the European level. It also indicates that the work done by international organisations such as the United Nations must be “complimented by that of the European Union.”

Paragraph 8 of the Council Framework Decision deals with the necessity of introducing sanctions on perpetrators that are—

“sufficiently severe to allow for trafficking in human beings to be included within the scope of instruments already adopted for the purpose of combating organized crime such as Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from the crime and Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.”

Article 7 of the Council Framework Decision sets out the obligations of member states with regards to victim protection and assistance, placing emphasis on the extreme vulnerability of child victims and places an obligation on states to implement policies and measures that will provide “appropriate assistance” to the child victim and the victim’s family.

533 Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 8 at para 36.
During 2005 the EU Council approved the “Plan on best practices, standards and procedures for combating and preventing trafficking in human beings”, adopting an integrated human rights-based approach and placing the focus on the protection and assistance of victims of human trafficking. Core values of the plan included the implementation of appropriate referral mechanisms, early victim identification, appropriate governmental coordination structures to coordinate and evaluate national policies, member states actively pursuing policies reinforcing the criminalisation of human trafficking, protection of potential victims at both national, regional, EU and international level and specialised prevention strategies specific to vulnerable groups such as women and children. The plan also makes mention of member states and EU institutions continuing to cooperate with relevant international organisations at a national level and where necessary building relationships with relevant international and Non-Governmental Organisations. With regard to regional prevention, the plan sets out the need for protection and assistance to victims as well as the safe return and secures reintegration of trafficking victims.

---

In December 2005, the Council called for action-oriented papers or AOP’s in order to set out firstly an analysis of the human trafficking issue, to clarify the EU’s objectives in this regard and draw information with regard to human trafficking from the EU institutions.

The Council also called for the AOP’s to summarize current action by the European Commission and member states and also to identify what needed to be done at “political, technical and operational levels in order to meet the EU objectives.” The Action Oriented Paper on Strengthening the EU External Dimension on Action against Trafficking in Human Beings: Towards Global EU Action against Trafficking in Human Beings (AOP) was adopted during November 2009, stating that trafficking in human beings connects the EU with third countries, forcing the EU to proactively come to light with a comprehensive approach in its human trafficking strategies. It furthermore emphasises that human trafficking is one of international organised crime’s main sources of income and being a cross-border illegal activity brings forth the need for cooperation between the EU and third countries. The Paper refers to trafficking in human beings as a form of international crime, driven by profit. It also states that traffickers constantly alter their methods and the environment they work in. Current existing trafficking environments include sexual exploitation, forced labour and other forms of exploitation such as begging, petty crime and even the removal of organs for transplantation purposes.

The aim of the AOP includes the continuous development of EU internal anti-trafficking policy, the strengthening of the commitment and coordinated action of the EU and its member states to prevent and


fight trafficking. This should be done through partnerships and enhanced cooperation, putting in place preventative, protective and supportive measures for victims by means of EU relations policy, programming activities with third countries, regions and organisations at the international level and the constant revision and updating of the AOP.

In a response to these developments, the Stockholm programme was adopted by the European Union in December 2009, affirming that inspite of —

“important achievements in the area of freedom, security and justice Europe still faces challenges. These challenges must be addressed in a comprehensive manner. Further efforts are thus needed in order to improve coherence between policy areas. In addition, cooperation with partner countries should be identified.”

The EU then moves forward by stating that the time has come for a new agenda in order to enable the EU and its members to not only build on past achievements but also meet future challenges. The Stockholm programme was adopted in the light of this background, setting out the EU’s multiannual programme for the period 2010 until 2014. The Stockholm programme deals with international organised crimes such as trafficking, terrorism, migration policies, the European Union’s priorities for areas of justice and peace and security. The Stockholm programme states that “Well-managed migration can be beneficial to all stakeholders” but also indicates that states have to “guarantee security for their citizens. Integrated border management and visa policies should be construed to serve these

---

goals. This journal recommends, *inter alia*, the design of an internal security strategy for the EU, advises the EU to consider establishing an EU Anti-Trafficking Coordinator (EU ATC) and calls for the adoption of new legislation on combatting trafficking. It also calls upon Europol, with the support of member states, to step up support for the gathering of information and strategic analysis, in cooperation with the countries of origin and of transit. Another point of concern expressed by the Commission, is the need for measures that will make border checks more efficient, particularly in cases of child trafficking.

On 4 July, a project report was issued by the EU, summarising the objectives, activities, general recommendations and follow-up actions for the implementation of the AOP. General recommendations include the need for greater in-depth evaluation of the impact of anti-trafficking initiatives, comprehensive national plans of action addressing all forms of human trafficking, the political will to put theory into practice and enforcement of relevant laws.

Taking cognisance of the Stockholm Programme’s recommendations and wanting to improve their efforts to build a comprehensive anti-trafficking policy, the EU Commission appointed an EU Anti-Trafficking Coordinator during March 2011. The tasks of the EU ATC include, amongst others,

---

improving the coordination and coherence between EU institutions, EU agencies, member states, third countries and international actors.\textsuperscript{566}

The European Parliament and Council of the European Union issued a directive on 5 April 2011, stating that trafficking in human beings is a serious crime and gross violation of fundamental human rights and that trafficking in human beings is a priority for the Union and its member states.\textsuperscript{567} “This Directive is part of global action against trafficking in human beings, which includes action involving third countries as stated in the Action-oriented Paper.” The Directive advocates for “action in third countries of origin and transfer of victims, with a view to raising awareness, reducing vulnerability, supporting and assisting victims, fighting the root causes of trafficking and supporting those third countries in developing appropriate anti-trafficking legislation.”\textsuperscript{568} It also lobbies for a victim centered approach, stating that victims should be protected from prosecution and punishment for criminal activities.\textsuperscript{569} It also recognizes the “gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes” and states that for this reason a gender perspective should be followed.\textsuperscript{570} It furthermore emphasizes that measures should include actions covering criminal law provisions, victim support and victims’ rights during criminal proceedings, prevention and monitoring of implementation as well as prosecution of offenders.\textsuperscript{571} An important issue furthermore raised by the directive is the issue of recent developments in trafficking. The directive seeks to adopt a broader definition of trafficking which includes forced labour, forced begging, exploitation of a person to commit pick-pocketing, shop-lifting, the removal of organs, drug trafficking and other similar

activities.\textsuperscript{572} It also states that when it comes to children committing such activities, consent should never be considered valid.\textsuperscript{573} It then goes further, setting out the preventative measures member states should establish in their national policies, such as the appointment of anti-trafficking coordinators.\textsuperscript{574}

The Directive also declares the Union’s commitment to the “prevention and fight against trafficking in human beings, and to the protection of the rights of trafficked persons” and notes that Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings and the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings were adopted in pursuit of fighting trafficking in persons.\textsuperscript{575} The Directive declares that the Stockholm programme aims to establish “an open and secure Europe serving and protecting citizens.”\textsuperscript{576} The Directive advocates for the adoption of other measures as well, which include the design of “general common indicators of the Union for the identification of victims of trafficking, through the exchange of best practices between all the relevant actors, particularly public and private social services.”\textsuperscript{577} The Directive also emphasises that “full use should be made of existing instruments on the seizure and confiscation of the proceeds of crime, such as the United Nations Convention against Transnational Crime and the Protocols thereto, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and other relevant instruments.”\textsuperscript{578} With regard to remedies available to victims, the Directive states in article 12 that victims are ensured to have access to legal counselling without delay as well as legal representation which shall include representation for


\textsuperscript{575} Council Framework Decision 201/220/JHA of 15 March 2001 on victims standing during criminal proceedings. This Decision establishes a list of victims’ rights during criminal proceedings which includes the right victims have to protection and compensation.


purposes of claiming compensation for the damages such victims had suffered. Such legal representation and counselling shall also be free of charge as per article 12 of the Directive. In terms of article 12(3) victims shall also receive sufficient protection after individual risk assessment and shall have access to witness protection programmes or other similar measures if such measures are “in accordance with the grounds defined by national law or procedures”. The Directive also specifically deals with child victims and according to article 14(1) child victims shall receive long and short term physical and psycho-social support in order to assist with their recovery, after being individually assessed in order to ascertain each child victim’s special circumstances, the child’s views, needs and concerns. Access to education shall also be provided by member states to child victims and the children of victims who are assisted in accordance with article 11 of the Directive and their own national law. Article 17 of the Directive states that “Member states shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.”

A communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions was adopted on 19 June 2012 defining the EU Strategy towards the Eradication of Trafficking in Human beings 2012-2016. Setting the scene of the human trafficking landscape, it elaborates on trafficking-specific statistics and sets out EU action on trafficking. Key priorities are identified such as focusing on concrete measures that would add value and complement the work done by governments thus far. The communication highlights that the responsibility for addressing trafficking does, however, lie with the member states and indicates that the purpose of the communication is to indicate how the Commission intends to support the member states in their combating efforts. Five priorities are highlighted, namely: (a) identifying, protecting and assisting victims; (b) stepping up the prevention of trafficking; (c) increased prosecution of traffickers; (d) enhanced cooperation among key actors; and (e) increased knowledge relating to all forms of trafficking in human beings.

---

The communication also campaigns for a multi-disciplinary coherent policy, which requires the involvement of a more diverse group of actors than before. These actors should include border guards, police officers, immigration officials, public prosecutors, lawyers, members of the judiciary and court officials, social and safety inspectors, social and youth workers’ organisations, trade unions, employers’ organisations, temporary job agencies, recruitment agencies, consular and diplomatic staff, etc. These actors should be trained to effectively identify and assist victims. The EU and ILO joined forces during 2008 in order to establish trafficking indicators. This was done by means of the Delphi method. The Delphi method serves as a methodology whereby data is extracted by means of two consecutive electronic surveys completed by a wide range of experts, which includes members of civil society, international organisations, academic experts, trade unions, labour inspectorates, judiciaries, non-governmental organisations, police force members and government officials. A consensus is then reached on the various means of trafficking and the information gathered utilized in the field of victim identification and capacity building.

Another challenge addressed by the communication is the need for victims to be informed of their rights and the need for assistance in exercising these rights. The European Commission met this challenge during April 2013 when it issued “The EU rights of victims of trafficking in human beings”. This document serves as a tool for trafficking victims, defining concepts such as “victim”, “child victim”, “perpetrator” and “third country national”. It further explains victims’ rights ranging from emergency assistance, health care, labour rights, the possibility of claiming compensation to the right of access to

justice and a lawyer. The document provides an overview of rights based on the Charter of Fundamental Rights of the European Union, EU directives, framework decisions and European Court of Human Rights case law. Children are also discussed and reference is made to the particular vulnerability of children to re-trafficking and victimisation. Member states are urged to—

“strengthen child protection systems for trafficking situations and ensure that where return is deemed to be in the child’s best interest, the safe and sustainable return of children to the country of origin, in and outside the EU, and prevent them from being re-trafficked.”

In the meantime, the EU continues its pursuit against human trafficking and keeps on seeking partnerships with other states sharing this goal and the EU engaged Balkan countries to slow the tide of human trafficking from the Middle East, Africa and Asia by providing additional support for refugees who legally arrive in EU states. Approximately 4 400 persons were relocated to EU member states during 2012. According to the EU, criminal networks’ operational bases must be destroyed, which necessitates cooperation and partnerships with countries of origin and transit of immigrants.

The Organisation for Security and Co-operation in Europe (OSCE) is a pan – European body and is recognized under Chapter VIII of the United Nations charter as a regional institution. Consisting of 57 participating states, the OSCE was designed as a primary instrument for early warning, crisis management, conflict prevention and post-conflict rehabilitation. The OSCE follows a comprehensive and cooperative approach to security and creates a landscape for political negotiations, decision making in the fields of conflict prevention, early crisis management, post-conflict rehabilitation and early warning systems. The core values of the OSCE are reflected in the Helsinki Final Act (1975), Vienna Concluding Documents (1989) and the Copenhagen Concluding Documents (1990).
The OSCE puts the political will of participating states into practice through its multiple field missions and has been addressing human trafficking as part of its agenda since 2000. The OSCE Action Plan to Combat Trafficking in Human Beings was adopted by the Permanent Council in July 2003 in order to provide member states with a comprehensive toolkit to effectively implement their combating efforts. The Action Plan also makes provision for a follow-up mechanism which in turn campaigns for coordination between individual participating states with other international organisations as well as the OSCE structures. Adopting a multidimensional approach to combating trafficking in human beings, the OSCE aims to address this worldwide phenomenon with a comprehensive approach which includes the prevention of trafficking in human beings, the protection of victims and the prosecution of perpetrators. Recommendations are also made to participating states, relevant OSCE structures, bodies and field operations on how to best deal with all the various aspects of the problem. The Action Plan furthermore makes provision for the drawing of existing regional experience gained through the implementation of such concrete initiatives and measures as undertaken by the Stability Pact Task Force on Trafficking in Human Beings in South Eastern Europe. The Action Plan reiterates the fact that those responsible for the crime must be brought to justice, effective preventative measures must be carried out, and victim assistance should be done in a humanitarian and compassionate manner. The OSCE furthermore states that origin countries should formulate policies that address the root causes of trafficking in persons and that political and social – economic stability should be fostered in order to reduce migration which is escalated by immense poverty.

The Action Plan includes implementation recommendations such as the adoption of legislative

595 The first Ministerial Council Decision on enhancing the OSCE’s Efforts to Combat Trafficking in Human Beings was taken on 28 November 2000 in Vienna MC (8). DEC/1.
measures in order to criminalise human trafficking as per the definition of the Palermo Protocol, the inclusion of attempting to commit trafficking in the definition of trafficking as a criminal offense, participating as an accomplice as well as organising or directing other persons to commit trafficking.\textsuperscript{603} It also makes provision for the criminal, civil and / or administrative liability of legal persons.\textsuperscript{604} Member states are prompted to adopt legislative measures in order to effectively penalize trafficking of persons as well as to undertake awareness campaigns in co-operation with civil society and Non – Governmental Organisations.\textsuperscript{605}

2.2 Inter-American developments

The Inter-American system monitors, guarantees and ensures the implementation of human rights in the 35 independent countries of the America’s which form the Organisation of American States.\textsuperscript{606} The Organisation of American States (OAS) is a collaboration among members which supports regional cooperation to promote good governance, strengthen human rights, foster peace and security, expand trade and address the complex problems caused by poverty, drugs and corruption.\textsuperscript{607} Two important OAS bodies – the Inter-American Commission on Human Rights (Commission) and the Inter-American Court of Human Rights (Court) along with a number of other OAS bodies – have mandates that directly impact human rights policies and, more specifically, human trafficking policies in the region.\textsuperscript{608} However, the OAS member states adopted additional specialized treaties such as the Inter American Convention to Prevent and Punish Torture (1985), the Inter-American Convention on the Prevention Punishment and Eradication of Violence against Women (1994), the Inter-American Convention on International Traffic


\textsuperscript{606} International Justice Resource Centre Inter-American Human Rights System available online at http://www.ijrcenter.org/regional/inter-american-system/ (09-20-2016).


The two most important OAS committees for human trafficking issues are the Committee on Juridical and Political Affairs which deals with human rights issues and the rights of migrants, and the Committee on Hemispheric Security, which is responsible for transnational organised crime and more specifically human trafficking. In 2005, the Committee on Hemispheric Security issued a Summary of Recommendations for the Proposed Plan of Action against Transnational Organized Crime containing recommendations relating to human trafficking. During 2006 the OAS created a specialised body, within the Department for the Prevention of Threats against Public Security, called the Anti-Trafficking in Persons Section. The mission of the Section is to facilitate the exchange of information, provide training and promote anti-trafficking policies in a way that assists the efforts of member states to prevent and combat trafficking. It incorporates human rights, social policy and transnational crime aspects in its work, making it evident that the OAS views trafficking primarily as a problem of crime and public security and only secondarily as a problem of human rights, economic development or unsafe immigration.

The OAS General Assembly, also during 2006, adopted a resolution on “Hemispheric Efforts to Combat Human Trafficking in Persons: Conclusions and Recommendations of the First Meeting of National Authorities on Trafficking in Persons.” The resolution is comprehensive and recognises that trafficking violates the human rights of victims and affects society at large.

After a lengthy drafting process, the Work Plan against Trafficking in Persons in the Western Hemisphere was adopted by the OAS General Assembly in June 2010, urging OAS member

---

615 OAS Work Plan against Trafficking in Persons in the Western Hemisphere AG/RES. 2551 (XL-O/10).
states to reinforce the effective implementation of the United Nations Convention against
Transnational Organised Crime and its Protocols616 and to—

“reaffirm their commitment to combat the crime of trafficking in persons by means of a
comprehensive approach that takes into account the prevention of trafficking, the prosecution of its
perpetrators, the protection and assistance to its victims and respect for their human rights, in
accordance with domestic law, and strengthening of international cooperation in the area.”617

The Work Plan calls for the implementation of comprehensive anti-trafficking policies by member
states,618 the early identification of especially vulnerable groups including indigenous persons and
the measures to protect such groups from becoming trafficking victims.619 It also calls for the
implementation of adequate protection systems for children,620 the development of preventative
measures,621 information exchange and cooperation amongst officers and other authorities.622
Other important goals include the adoption of awareness initiatives in receiving member states,623
the adoption of strategies designed to cope with the evolution of trafficking crimes624 and the
strengthening of domestic policies and laws in order to address corruption and trafficking.625

In a report issued in February 2014 by the Secretariat for Multidimensional Security Pursuant to the Work
Plan to Combat Trafficking in Persons in the Western Hemisphere October 2012 – January 2014, the
General Secretariat highlights the necessity of strengthening international and horizontal cooperation in
its fight against human trafficking.626 It also reports that the General Secretariat devoted its efforts to
strengthen cooperative ties with other international organisations and agencies and that this was

---

616 Preamble to the OAS Work Plan against Trafficking in Persons in the Western Hemisphere AG/RES. 2551 (XL-
O/10) at para 5.
617 Preamble to the OAS Work Plan against Trafficking in Persons in the Western Hemisphere AG/RES. 2551 (XL-
O/10) at para 6.
618 Chapter 1 of AG/RES. 2551 (XL-O/10) at para 1.
619 Chapter 1 of AG/RES. 2551 (XL-O/10) at para 3.
620 Chapter 1 of AG/RES. 2551 (XL-O/10) at para 4.
621 Chapter 1 of AG/RES. 2551 (XL-O/10) at para 4.
622 Chapter 1 of AG/RES. 2551 (XL-O/10) at para 6.
623 Chapter 1 of AG/RES. 2551 (XL-O/10) at para 9.
624 Chapter 1 of AG/RES. 2551 (XL-O/10) at para 12.
625 Chapter 1 of AG/RES. 2551 (XL-O/10) at para 17.
626 Permanent Council of the OAS Report of the Secretariat for multidimensional security pursuant to the work plan
to combat trafficking in persons in the Western hemisphere (October 2012-January 2014) available online at
done in order to better link and coordinate its activities and to make the OAS part of the international agenda to prevent and combat trafficking in persons.\textsuperscript{627}

A further OAS development that relates to victim protection is the “Guidelines for the Repatriation of Trafficking Victims”, a toolkit developed by the OAS containing an interactive CD Rom, training manual and video and designed for the purpose consular officers and diplomats trafficking related training.\textsuperscript{628} The OAS also undertakes various training initiatives and law enforcement officials, public security officers, diplomats, consular officers and various members from civil society and government ministries were trained in assessing and analysing various trafficking scenarios in order to gain knowledge with regards to trafficking victims profiles. Gender and age specifically formed part of the identification indicators. During 2009, nine Latin American countries integrated the OAS training material on human trafficking into their diplomatic curriculas.\textsuperscript{629} In Uruguay, more than 7 000 peacekeepers were trained on the prevention of trafficking in persons during 2009. Various ministries in Ecuador also implemented a protocol for victim assistance and identified the responsibilities of every institution.\textsuperscript{630}

While both the OAS General Secretariat and the member states have made significant strides in implementing the Work Plan against Trafficking in Persons in the Western Hemisphere, there is an even greater challenge and commitment to moving forward in preventing and combating this crime which affects thousands of people in the region.\textsuperscript{631}

\section*{2.3 African developments}

Taking cognizance of human trafficking as a growing global phenomenon, the Regional Economic Communities of the AU (RECs) developed anti trafficking initiatives as early as 1990 and 2000.

\textsuperscript{627} Permanent Council of the OAS Report of the Secretariat for multidimensional security pursuant to the work plan to combat trafficking in persons in the Western hemisphere (October 2012-January 2014) available online at http://scm.oas.org/doc_public/ENGLISH/HIST_14/CP32235E07.doc (04-09-2014).

\textsuperscript{628} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 12 at para 58.

\textsuperscript{629} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 13 at para 66.

\textsuperscript{630} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 13 at para 667.

\textsuperscript{631} Permanent Council of the OAS Report of the Secretariat for multidimensional security pursuant to the work plan to combat trafficking in persons in the Western hemisphere (October 2012-January 2014) http://scm.oas.org/doc_public/ENGLISH/HIST_14/CP32235E07.doc (04-09-2014).
These initiatives include the Libreville Common Platform of Action to the Sub-Regional Consultation of the Development of Strategies to Fight Child Trafficking for Exploitative Labour Purposes in West and Central Africa, the Declaration of Action against Trafficking of the Economic Community of West African States (ECOWAS) and the Maputo Consensus and Plan of Action to prevent and respond to trafficking.\textsuperscript{632}

In an additional response to trafficking in persons, the AU adopted the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children November 2006. The Ouagadougou Action Plan is a declaration of the will and joint intent of the African Union and the European Union and their member states to enhance their efforts to fight trafficking with its specific focus on women and children from Africa.\textsuperscript{633} It provides specific recommendations to be implemented by the Regional Economic Communities (RECs) and member states based on the legal and political basis at regional, continental and global level.\textsuperscript{634} It further upholds and reinforces the international and regional legal instruments on human rights particularly the conventions on trafficking in person, elimination of discrimination of women, and protection of the rights of the child.\textsuperscript{635}

It declares the joint intent of the AU and the European Union to enhance their efforts to combat trafficking and proposes a three-pronged strategy.\textsuperscript{636}

1) Prevention of trafficking;

2) Protection of victims of trafficking; and

3) Prosecution of those involved in the crime of trafficking and related forms of abuse.


\textsuperscript{635} Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children available online at https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/ouagadougou_action_plan_to_combat_trafficking_en_1.pdf (06-12-2016) 2.

The Ouagadougou Action Plan also mobilises members to create special anti-trafficking units within their domestic law enforcement organs and to establish special focal points. It advises that direct communication channels should be created between focal points in different countries and special units and that joint training will be given to border patrol officers.\(^637\)

These regional initiatives were followed by the launch of the African Union Commission Initiative Against Trafficking (AU. COMMIT) on 16 June 2009. AU. COMMIT (in partnership with several United Nations agencies) aims at curbing both the supply and demand for human trafficking. The Campaign included the production of television advertisements, the distribution of 1 000 copies of the Ouagadougou Action Plan, of 1 000 T-shirts with the slogan “AU. COMMIT: Stop Trafficking” and of 1 000 copies of pamphlets, pins, posters, etc. In line with the three main strategies of the Ouagadougou Plan of Action, the AU. COMMIT Campaign was implemented in three phases, focusing in 2009-2010 on prevention of, and response to, trafficking, in 2010-2011 on protection of victims and in 2011-2012 on prosecution of traffickers.\(^638\)

The second Action Plan 2011-2013 of the Joint Africa-EU Strategy, and in particular the Partnership on Migration, Mobility and Employment (MME), calls for more action to combat trafficking in persons.\(^639\) In addition, the AU Plan of Action on Drug Control and Crime Prevention (2007-2012), adopted by the AU Assembly in January 2008, provides for the coordination of activities to fight human trafficking, to protect victims and prosecute offenders.\(^640\)

After the 7th Annual Joint Consultative Meeting between the African Union Peace and Security Council and the European Union Political and Security Committee in Brussels held on 15 May 2014,\(^641\) the parties condemned terrorism in all its forms. A need for greater international and

---

\(^{637}\) Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 11 at para 52.

\(^{638}\) Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 14 at para 73.


regional cooperation was expressed in order to dismantle Boko Haram, its affiliates and its funders. The parties also supported the intentions of the UN Security Council in its efforts to take appropriate measures in this regard. The parties also recognised the urgent need to “tackle the serious problem of organized transnational crime involving illicit trafficking and smuggling in human beings, drugs and weapons.” They also renewed their intention of continuing to implement the Action Plan.

The East African Community (EAC) was established by the Treaty for the Establishment of the East African Community (the Treaty)\(^{642}\) which was ratified by the original three member states being Uganda, Kenya and Tanzania and entered force on 7 July 2000. The Republic of Burundi and Republic of Rwanda acceded to the Treaty on 18 June 2007 and the Republic of South Sudan followed suit by ratifying the Treaty during April 2016.

The EAC is one of the most rapidly growing economic regions globally, making it mutually beneficial for member states to increase cooperation in various spheres. The total population of the combined member states of the EAC amounts to 158 million people with an urban population of 22 per cent and a GDP of USD 169.5 billion. The EAC is committed towards an East African Federation, highlighting the determination of the East African member states’ leaders and citizens to create a sustainable and influential East African economy and political region.\(^{643}\) The EAC aims to protect human rights in its region and is “committed to promoting and protecting human rights in accordance with the African Charter of Peoples Rights” as provided for in article 6 of the Charter which states that—

“[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”.

The Council of Ministers adopted the Plan of Action on Promotion and Protection of Human Rights in East Africa (EAC/CM 15/ Decision 36)\(^{644}\) and by doing so, provided a foundation for


policy making and the development of strategies and measures that would address the promotion and protection of human rights in the EAC region. The EAC Plan of Action on Human Rights (Plan of Action) was adopted in May 2008 and is guided by the Treaty for the Establishment of the East African Community. The Plan of Action *inter alia* reinforces the principles of human rights as reflected in the Universal Declaration of Human Rights (1948), the African Charter on Human and Peoples’ Rights on the establishment of the African Court of Human Rights and People’s Rights (1998) and the Treaty for the Establishment of the East African Community (1999).\textsuperscript{645}

Activities envisaged by the Plan of Action include the development of training measures for human rights role-players and agencies as well as for judges, judiciaries, policy makers, civil society and legislators. It also advocates for the establishment of national human rights institutions which are “compliant with the Paris Principles and where institutions exist, to strengthen them in line with these Principles”.\textsuperscript{646} It calls for annual meetings to be held by the heads of national human rights commissions in order to exchange information, experience and views and also to share progress on human rights experience. Other activities include the development and review of best practices reviews on the promotion and protection of human rights in the EAC region.\textsuperscript{647}

The African Union expanded the AU. COMMIT Campaign to the EAC region during December 2010 and Director Mayiyegun stated that:

“[m]any African States are yet to ratify the Trafficking in Persons Protocol and or fully implement it with specific legislation in their respective domain and today I urge our IGAD and EAC Member States to galvanize your commitments to this cause, also by ratifying the mentioned Protocol and to

join us in implementing the Ouadadougou Action Plan in addressing this crime, in securing justice for victims on and from our continent, and in ending impunity for traffickers.\textsuperscript{648}

The AU. COMMIT campaign was officially launched for the EAC during December 2011 and an operationalisation workshop was held directly thereafter in order to demonstrate regional commitment with regards to the need for immediate anti-trafficking legislature.\textsuperscript{649}

The East African Legal Assembly (EALA) passed a resolution on 20 August 2016 to call for urgent action to prevent trafficking in persons and to protect victims of the Crime of Trafficking in Persons and Prosecution of Perpetrators of Trafficking in Persons in the East African Community.\textsuperscript{650} It acknowledged the grave human rights violations caused by human trafficking, the root causes of trafficking such as vulnerability due to unemployment, harmful traditional practices such as child sacrifices, displacement of persons, greed and corruption as well as the necessity for cooperation among states to effectively combat trafficking in persons in noting that all EAC member states have signed the Palermo Protocol and the UNTOC.\textsuperscript{651} The Council urged EAC member states to enforce comprehensive anti-trafficking policies and legislation that reflect the Palermo Protocol in order to prevent trafficking in persons, protect victims, prosecute trafficking offenders and advance cooperation between various role-players in order to implement anti-trafficking measures in EAC partner states.\textsuperscript{652} The Council also—

\begin{quote}
“operationalized Article 27 of the Treaty for Establishment of the East African Community and concludes a protocol to extend the jurisdiction of the East African Court of Justice to handle human rights cases which encompass trafficking in persons”\textsuperscript{653}
\end{quote}


\textsuperscript{650} Resolution of the East African Legislative Assembly EALA/RES/3/5/2015.

\textsuperscript{651} Resolution of the East African Legislative Assembly EALA/RES/3/5/2015 2.

\textsuperscript{652} Resolution of the East African Legislative Assembly EALA/RES/3/5/2015 2 at para 1.

\textsuperscript{653} Resolution of the East African Legislative Assembly EALA/RES/3/5/2015 3 at para 5.
Other issues addressed by the Council include the development of a policy to guide regional mechanisms aimed at “undertaking an annual assessment of the problem of human trafficking in the EAC region”, as well as the increased oversight by member states of overseas recruitment agencies and the implementation of adoption laws. States are also urged to keep record of nationals and to assist trafficking victims. The root causes of trafficking such as poverty and inequalities must also be addressed by member states, according to the Council.

The East African Gender Equality and Development Bill was recently proposed in order to make provision for gender equality, protection and development in the EAC Community. The bill reflects article 6(d) of the Treaty for the Establishment of the EAC which states that there shall be no discrimination against any person on grounds of gender. The bill furthermore highlights that the contribution by both genders in the integration process is “fundamental as are the obligations of Partner States to their commitments under the various instruments and Protocols”. Focus is also placed on “emerging threats such as human trafficking of women, men and children, globalisation and HIV / AIDS.”

During 2009, the SADC member states gathered to discuss trafficking in persons within the SADC region and a ten-year national action plan was adopted to address this international crisis. The Plan was aimed at the development and implementation of national policies to combat trafficking in persons as well as to promote cooperation between member states. The regional plan of action prioritises issues such as regional training for law enforcement, social workers, judges and custom and immigration officials as well as the development and implementation of national policies. It also focusses on

---

increasing regional cooperation between member states and other regional and international partners in order to effectively address the increasing issue of human trafficking effectively.

The International Labor Organisation’s Protocol on Forced Labour (1930) was supplemented during 2014 in order to effectively suppress forced labour and the Convention 29\textsuperscript{661} and Recommendation 203 to the Forced Labour Convention adopted in June 2014.\textsuperscript{662} These supplementary measures aim to strengthen—

“national policies and plans of action with time-bound measures using a gender- and child sensitive approach to achieve the effective and sustained suppression of forced or compulsory labour in all its forms through prevention, protection and access to remedies, such as compensation of victims, and the sanctioning of perpetrators”.\textsuperscript{663} Recommendation 203 also advocates for member states to develop programmes that would lessen discrimination as this “heightens vulnerability to forced or compulsory labour”.\textsuperscript{664}

The ILO issued a Draft Report on Forced Labour and Human Trafficking in the Southern African Development Community\textsuperscript{665} during its sub-regional conference held in Zambia on the Ratification and Implementation of the new ILO Protocol on Forced Labour during November 2015. The report serves to provide data and information with regards to human rights violations in the 15 SADC member states and aims to report on the successes and progress made by member states with regards to “eradicating forced labour and combatting human trafficking, and to identify further efforts that need to be undertaken in order to achieve measurable progress in the implementation of obligations under the ILO Forced Labour Convention 1930 (No.29) and the Abolition of Forced Labour Convention, 1957 (No.105).”\textsuperscript{666} It furthermore indicates that the SADC members face various regional challenges which include and

\textsuperscript{661} Article 1(1) of Convention No.29 stipulates that every member state that ratifies the Convention undertakes to “suppress the use of forced or compulsory labour in all its forms within the shortest possible period”.
human trafficking and forced labour and indicates that it is imperative to identify the causes of forced labour practices.667 Another important aspect highlighted in the report is the increased loss of economic opportunities and the displacement of communities due to the “incorporation of local businesses into transnational supply chains.”668 The report also makes mention of the evolution of coercion methods used to recruit victims of forced labour highlights and that only states that has implemented relevant legal frameworks and measures in place can adequately address human trafficking and forced labour issues.669 The report identifies indicators that can aid states to identify the presence of forced labour. This includes isolation, deception, abuse of vulnerability, restriction of movement, excessive overtime, debt bondage, withholding of wages, physical and sexual violence, abusive working and living conditions, intimidation and threats.670 The report indicates that even though increased cooperation exists in the SADC region, action is needed with regard to the vulnerability of people due to migration, discrimination and stigmatisation. According to the report, urgent preventative and protective measures must form priority in order to effectively address forced labour abuses.671 It also notes that political will should be demonstrated by member states willing to act under their obligations and that this can only be done by “dedication of fully-fledged institutions and resources”.672 The report concludes by indicating that even though SADC faces various challenges in order to meet their obligations in terms of Convention No 29, progress has been made in countries such as Zambia and Swaziland.673 A lack of data is furthermore

identified as a key area that needs to be addressed.\textsuperscript{674}

The SADC issued a baseline report in July 2016\textsuperscript{675} which was compiled “from data gathered from government departments and relevant stakeholders in Member States, as well as regional and international organisations working in the field of trafficking in persons.”\textsuperscript{676} The findings of the report show that the majority of countries in the SADC region is source and transit countries whilst some are primarily destination countries hosting trafficking victims from the SACD region. The report also highlights that the regional response with regards to trafficking in persons is “inadequate without comprehensive national legislation criminalising the practice”\textsuperscript{677} and makes mention of the fact that 13 of the 15 SADC Member States have enacted trafficking specific legislation. Enforcement however remains a challenge and the report calls for the skills enhancement of “key service providers”\textsuperscript{678} as a pivotal component of the regional response in effectively combating human trafficking. The report also “underscores the importance of continued public awareness raising on the crime of trafficking in persons, targeted specifically at vulnerable and remote population groups.”

The Economic Community of West African States (ECOWAS) was founded in 1975 by 15 countries in order to create a “borderless region where the population has access to its abundant resources and is able to exploit it through the creation of opportunities under a sustainable environment”.\textsuperscript{679} Other values include the design of an—

“integrated region where the population enjoys free movement, have access to efficient education and health systems and engage in economic and commercial activities while living in dignity in an atmosphere of peace and security. ECOWAS is meant to be a region governed in accordance with the principles of democracy, rule of law and good governance.”


\textsuperscript{676} Trafficking in Persons in the SACD Region: a baseline report available online at http://www.sadc.int/files/3514/7505/0085/SADC_Baseline_Report_Low_Resolution.pdf (05-02-2017) ii.

\textsuperscript{677} Trafficking in Persons in the SACD Region: a baseline report available online at http://www.sadc.int/files/3514/7505/0085/SADC_Baseline_Report_Low_Resolution.pdf (05-02-2017) ii.

\textsuperscript{678} Trafficking in Persons in the SACD Region: a baseline report available online at http://www.sadc.int/files/3514/7505/0085/SADC_Baseline_Report_Low_Resolution.pdf (05-02-2017) ii.

\textsuperscript{679} ECOWAS About ECOWAS available online at http://www.ecowas.int/about-ecowas/basic-information/ (20-09-2016).
The ECOWAS heads of states issued the Declaration on the Fight against Trafficking in Persons on the 21st of December 2001, stating their deep concerns with regards to the increase of human trafficking in the West African sub-region as well as the increase of external trafficking in persons from member states to other parts of the world. The declaration emphasis is that in order to effectively combat trafficking in persons, a “comprehensive international approach” is needed not only in host countries but also in transit and destination countries. It also declares that traffickers must be prosecuted and victim’s human rights should be recognised and protected. The declaration calls, on member states to ratify and implement the African Charter on the Rights and Welfare of the Child and also prompts member states whom have ratified the UNTOC and Palermo Protocol to “sign or ratify these instruments at the earliest possible time”.

The declaration furthermore calls on member states to take all necessary measures as a matter of urgency, to criminalise trafficking as an offence and to design and implement measures in order to care for victims and repatriate all nationals whom have fallen victim to trafficking whether it be within the ECOWAS territory or outside the ECOWAS sub-region. The declaration urges member states to adopt comprehensive policies, programmes and all other needed measures in order to effectively combat and prevent trafficking in persons and also to protect trafficking victims from further victimisation. Awareness should be created through all possible media platforms in order to educate potential victims, families and the general population. Training must also be provided for law enforcement officials, prosecutors, judges and other officials who may be involved in the law enforcement process. The declaration advocates for the establishment of anti-trafficking units “within law enforcement agencies and within the prosecutorial services, with a special view to fight the involvement of organized criminal groups.”

---

The ECOWAS Plan of Action against Trafficking in Persons was issued by the ECOWAS Secretariat in Dakar during December 2001, outlining the priorities set out by the ECOWAS member states that needed to receive attention during 2002-2003. This included, amongst other things, that states that have not done so, should ratify and implement the ECOWAS Convention A/P1/7/93 on Mutual Assistance in Criminal Matters and the ECOWAS Convention A/P1/9/94 on Extradition.683

The United Nations Office on Drugs and Crime issued the Assistance for the Implementation of the ECOWAS Plan of Action against Trafficking in Persons during December 2006, in order to—

“strengthen the capacity of the ECOWAS Secretariat and its member states in implementing the ECOWAS Plan of Action, particularly as it relates to assessment of existing national legislation and the drafting of new legislation in response to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.”684

In 2009 a Regional Policy for Protection and Assistance to Victims of Trafficking in Persons in West Africa was adopted by the ECOWAS Ministers in order to secure the establishment of an environment that would offer support to trafficking victims and also provide them with access to victim assistance and protection.685

2.4 ASEAN developments

The Association of Southeast Asian Nations (ASEAN) was established during August 1967 when the ASEAN Declaration was signed by Indonesia, Malaysia, Philippines, Singapore and Thailand. Cambodia joined during 1999, Myanmar and Laos in 1997, Vietnam during July 1995 and Brunei Darussalam in January 1984. ASEAN can be categorised as an increasingly pivotal actor in the global economy as its combined GDP came to USD 1.5 trillion during 2011 and if deemed as a single political entity, would rank as the ninth largest economy globally.686 The establishment of the ASEAN human

---

685 Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 15 at para 76.
686 ASEAN member states available online at http://asean.org/asean/asean-member-states/ (24-09-2016).

688 ASEAN About ASEAN available online at http://asean.org/asean/about-asean/overview/ (24-09-2016).

689 ASEAN Charter available online at http://asean.org/asean/asean-charter/ (24-09-2016).

690 ASEAN Charter http://asean.org/asean/asean-charter/ (24-09-2016)
The ASEAN Human Rights Declaration was adopted on 18 November 2012, consists of norms and institutions and provides a cognitive and structural dimension to the ASEAN human rights system.\textsuperscript{691} The Declaration aims to contribute to the “process of norm generation, especially in the political-security pillar, which promotes democracy, human rights, and good governance in ASEAN.”\textsuperscript{692}

The East Asia Summit was established in 2005 by 18 countries in the Asia-Pacific region in order to “further the objectives of regional peace, security and prosperity” as well as to allow “the principal players in the Asia-Pacific region to discuss issues of social interest and concern in an open and transparent manner at the highest level”.\textsuperscript{693} Member states include the ten ASEAN member states as well as Australia, China, India, Japan, New Zealand, the Republic of Korea, the Russian Federation and the USA.\textsuperscript{694} The ASEAN Convention Against Trafficking in Persons, Especially Women and Children was adopted by ASEAN members in November 2015. This Convention recognises trafficking in persons as a violation against human rights, an offence to the dignity of human beings and recalls the—

“purpose and principles of the Charter of the United Nations, the Universal Declaration on Human Rights, the Charter of the Association of Southeast Asian Nations, the United Nations Convention against Transnational Organized Crime, and where applicable, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and other international agreements and resolutions of the United Nations on the eradication of trafficking in persons, in the promotion and protection of human rights fundamental freedoms, fair treatment, rule of law and due process;”\textsuperscript{695}

The Convention reaffirms ASEAN member states commitment to the ASEAN Charter when it comes to an effective response in accordance with “comprehensive security, to all forms of transnational crimes and transboundary challenges”.\textsuperscript{696} The Convention furthermore reflects the Palermo Protocol in defining trafficking in persons and following the three P’s approach in order to combat trafficking.\textsuperscript{697}

\begin{itemize}
\item \textsuperscript{691} Clarke “The evolving ASEAN human rights system: The ASEAN Human Rights Declaration of 2012” 2012 \textit{Nw. J. Int'l Hum. Rts}.
\item \textsuperscript{692} Clarke “The evolving ASEAN human rights system: The ASEAN Human Rights Declaration of 2012” 2012 \textit{Nw. J. Int'l Hum. Rts}.
\item \textsuperscript{693} MEA \textit{About EAS} available online at http://www.mea.gov.in/aseanindia/about-eas.htm (06-12-2016).
\item \textsuperscript{694} MEA \textit{About EAS} available online at http://www.mea.gov.in/aseanindia/about-eas.htm (24-09-2016).
\item \textsuperscript{695} ASEAN Convention Against Trafficking in Persons, Especially Women and Children available online at http://www.asean.org/storage/2015/12/ACTIP.pdf (24-09-2016) 1.
\item \textsuperscript{696} Asean Convention Against Trafficking in Persons, Especially Women and Children available online at http://www.asean.org/storage/2015/12/ACTIP.pdf (24-09-2016) 1.
\item \textsuperscript{697} Article 1 of the Asean Convention Against Trafficking in Persons, Especially Women and Children available online at http://www.asean.org/storage/2015/12/ACTIP.pdf (24-09-2016) 3.
\end{itemize}
It commits to:

“a. Prevent and combat trafficking in persons, especially against women and children, and to ensure just and effective punishment of traffickers;

b. Protect and assist victims of trafficking in persons, with full respect for their human rights; and

c. Promote cooperation among the Parties in order to meet these objectives.”

The Convention calls for higher penalties in cases where aggravating circumstances are present such as where the offence “exposed the victim to a life threatening illness, including HIV/AIDS” as well as where the offence involves multiple victims, if the crime involves “serious injury or death of the victim or another person, including death as a result of suicide;” and also aggravating penalties in cases where the offence “involves a victim who is particularly vulnerable such as a child or a person who is unable to fully take care of or protect himself or herself because of a physical or mental disability or condition” as well as an offender who committed a trafficking crime “in the performance of his or her public duties.”

The Convention also urges states to criminalise the laundering of proceeds of crime, corruption, and obstruction of justice. Other aspects touched on is cross-border cooperation, the control and validity of documents, preventative measures, victim protection, repatriation of victims, law enforcement and prosecution, confiscation and seizure, international cooperation, exchange of information by states, extradition and international cooperation for purposes of confiscation. The Convention also makes

---


699 Article 3(c) of the Asean Convention Against Trafficking in Persons, Especially Women and Children available online at [http://www.asean.org/storage/2015/12/ACTIP.pdf](http://www.asean.org/storage/2015/12/ACTIP.pdf) (24-09-2016) 8.

700 Article 3(d) of the Asean Convention Against Trafficking in Persons, Especially Women and Children available online at [http://www.asean.org/storage/2015/12/ACTIP.pdf](http://www.asean.org/storage/2015/12/ACTIP.pdf) (24-09-2016) 8.


702 Article 3(b) of the Asean Convention Against Trafficking in Persons, Especially Women and Children available online at [http://www.asean.org/storage/2015/12/ACTIP.pdf](http://www.asean.org/storage/2015/12/ACTIP.pdf) (24-09-2016) 8.

703 Article 3(g) of the Asean Convention Against Trafficking in Persons, Especially Women and Children available online at [http://www.asean.org/storage/2015/12/ACTIP.pdf](http://www.asean.org/storage/2015/12/ACTIP.pdf) (24-09-2016) 8.


specific provision in article 14(13) for member states to ensure that their domestic legal systems “contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered” and article 14(14) that such member states shall “make provisions for appropriate funds to be allocated, including where applicable, establishing national trust funds, for the care and support of victims of trafficking in persons.”

The ASEAN member states recently issued a declaration after its 11th Summit in Vientiane in September 2016, upping its coordinated efforts in their pursuit against trafficking in persons and as a response to migrants in crisis. Concern was expressed by leaders with regard to the—

“large global displacements of people caused by conflict and crises, including the high numbers of displaced women and children as well as the tragic loss of life at sea and the abuse and exploitation of people. Of particular concern are those who are in vulnerable situations, at the hands of people smugglers, perpetrators and accomplices of human traffickers.”

The ASEAN leaders furthermore agreed at the summit to adopt the 2014 Protocol to the Forced Labor Convention of the International Labor Conference which “seeks to look into human trafficking cases for sexual exploitation citing the growing international concern that requires urgent action”. Another paramount declaration, the Vientiane Declaration on Transition from Informal Employment to Formal Employment towards Decent Work Promotion in ASEAN was issued by the ASEAN leaders after its 28th and 29th summits held during September 2016 in order to more effectively regulate employment and to combat labour exploitation. The Minister of Foreign Affairs Saleumxay Kommasith of Laos confirmed that these two declarations would be

3. Conclusion

In concluding her report, the UN Special Rapporteur on trafficking put forward several recommendations and suggests a more coordinated approach by the various regions when it comes to the fight against trafficking in persons. It is of great importance that regional organisations make great effort in the area of data collection in order to establish the magnitude of trafficking and to develop efficient policies and

708 Asia News EAS Countries Escalate Fight Against Human Trafficking available online at http://asianews.world/content/eas-countries-escalate-fight-against-human-trafficking-28166 (24-09-2016).
design effective measures to combat the trafficking of humans.\footnote{Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 19 at para 104.} It is advised that a “solid foundation to build from, such as a Convention, an MOU or a declaration, followed by a comprehensive regional workplan”.\footnote{Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 20 at para 105.} The special rapporteur also recommends that a regional monitoring body should be established to review implementing actions by states with regards to normative instruments and anti-trafficking workplans and that such body should also make recommendations to states.\footnote{Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 23 at para (g).} Other aspects touched upon is data collection and it is recommended that—

“Regional organisations, because of their broader perspective, could take a leading role in collecting data in order to gain a clearer understanding of the root causes, factors in countries of destination facilitating trafficking, current trends with regard to victims, traffickers and criminal networks, their modi operandi, travel routes and different forms of exploitation.”\footnote{Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 22 at para (e).}

The lack of funding, regional institutions and regional mechanisms often fall short of legal and technical support which makes it challenging for countries to “mainstream international human rights standards into their anti-trafficking laws”.\footnote{Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 22 at para 132.} The UN special rapporteur recommends that national governments should provide for sufficient budget allocations in order to implement national anti–trafficking plans that stems from the regional anti-trafficking mechanisms. She also highlights that the international community should support regional institutions and mechanisms by means of providing financial assistance to countries whom are in the process of developing human rights-based anti-trafficking strategies.\footnote{Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 20 at para 110.} Other important recommendations include the promotion of an “effective prosecutorial and judicial response, with a victim centered approach” providing “specialized training to law enforcement officials (particularly police, prosecutors and judges)”,\footnote{Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 20 at para 111.} the facilitation of regional training courses and
the development and improving existing curricula for training on a national level, training assessments,\textsuperscript{719} the promotion of gender sensitive responses in order to “adequately address the needs of both women and men as victims”\textsuperscript{720} and the establishment of contacts and partnership with the tourism sector in order to create ways and means to raise awareness on trafficking for the purposes of sex tourism.\textsuperscript{721} Research is also needed with regards to the increasing use of communications technologies by traffickers when recruiting victims and recommendations should be made, based on studies, of how states can respond to these challenges.\textsuperscript{722} It is paramount that financial and technical support be provided to states to enable them to advance public awareness with regards to trafficking in persons. Public awareness campaigns must be pursued by regional mechanisms and this should be done by means of partnerships with the media, civil society and international organisations.\textsuperscript{723} It is further recommended that school curriculums should be adapted to integrate human trafficking information to raise awareness.\textsuperscript{724} Regional guidelines should also be developed on recruitment methods of migrant workers and bilateral cooperation between sending and receiving countries be enhanced so that the working conditions of migrants can be improved\textsuperscript{725} and migrant and vulnerabilities be reduced in source areas.\textsuperscript{726} The development of protective guidelines with regards to victim identification, medical and psychosocial assistance to victims, rehabilitation, access to shelter and repatriation is also recommended and it is reiterated that such guidelines be designed “in line with the standards set out in international instruments and guidelines”.\textsuperscript{727} Victims’ rights to redress and victim compensation is furthermore discussed in the report and it is advised that regional mechanisms be put in place that will make it possible and safe for victims to exercise their

\textsuperscript{719} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 21 at para 119.
\textsuperscript{720} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 21 at para 120.
\textsuperscript{721} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 21 at para 123.
\textsuperscript{722} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 21 at para 122.
\textsuperscript{723} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 21 at para 124.
\textsuperscript{724} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 22 at para 125.
\textsuperscript{725} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 22 at para 126.
\textsuperscript{726} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 22 at para 127.
\textsuperscript{727} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 22 at para 129.
right to legal remedies.\textsuperscript{728} Victims should be ensured of full protection\textsuperscript{729} and mechanisms should be implemented to provide compensation to victims by means of the confiscation of perpetrators assets or by means of any other possible mechanisms.\textsuperscript{730} Regional anti-trafficking mechanisms should, at all times, follow a human rights-based approach and it is paramount that the fight against trafficking in persons on a regional level should be done by means of a coordinated approach, based on good practices, complementaries and synergies for joint work between regions.\textsuperscript{731}

In this chapter an overview was provided on trafficking related regional legal instruments. Past successes were discussed and the need for a combined regional response and bilateral cooperation to effectively combat trafficking was highlighted. The next chapter aims to analyse the current national legal framework with regards to human trafficking, discuss remedies available to trafficking victims as well as provide a brief overview of steps taken as a national response to the challenge of human trafficking.

\textsuperscript{728} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 23 at para 135.
\textsuperscript{729} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 22 at para 136.
\textsuperscript{730} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 23 at para 137.
\textsuperscript{731} Report to the UN General Assembly submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo GE.10-13211(E) (2010) 20 at para 106.
CHAPTER 7:

SOUTH AFRICA – THE LEGAL REMEDY CHALLENGE

1. Introduction

The Republic of South Africa not only hosts a wide variety of cultures and ethnic groups but also provides shelter to refugees, migrants and displaced persons from other countries. Having a GDP four times the size of its neighbouring countries, South Africa is a destination to many nationalities in addition to drawing thousands of tourists into its borders. It also makes it easier for traffickers to lure victims to South Africa with promises of “a better life”. Whereas the previous chapter provided a brief overview with regards to regional anti trafficking responses, this chapter aims to discuss the national anti trafficking response. Various measures taken by the South African government in compliance with international obligations will be discussed with specific focus on the obligations to prevent, protect and prosecute.

According to the Global Slavery Index 2016, South Africa consists of a total population of 54 954 000 and the number of enslaved people in South Africa amounts to 248 700. The vulnerability of countries is of great importance when it comes to assessing the prevalence of slavery within jurisdictions. In assessing a country’s vulnerability, this measure utilises variables including civil and political protection, economic, health and other social rights, personal security, refugees and conflict. South Africa’s vulnerability ratio when it comes to slavery amounts to 45.87/100. According to Gallager, the “final vulnerability score” of a state is established by calculating the average sum of the variables for each category and thereafter averaging the four vulnerability scores.

---

South Africa fell victim to international organised crime due to insufficient control over its borders, corruption, the cultural use of “placement” of children where children are sent to stay with extended families in order to create better opportunities for a child,\textsuperscript{735} the demand for body parts used in traditional healing, the lack of efficient anti-trafficking laws and training, children left vulnerable in child-headed households due to HIV and Aids, unregistered children and the recruitment of boys and men for forced labour and women for the sex industry, to name but a few. The IOM reported during 2003 that South Africa hosts 13 major trafficking routes\textsuperscript{736} and according to the Child Protection Unit (CPU), an estimated 28 000 child prostitutes were detected in South Africa during 2000.\textsuperscript{737} Knowing the extent of human trafficking in a state is essential in determining the optimal means to combating it. However, due to the clandestine nature of the trafficking in persons and the lack of a central data collection system in South Africa until recently,\textsuperscript{738} it remains a challenge to obtain updated statistics on the numbers of human trafficking cases in South Africa. The national legal framework, until very recently, also fell short of trafficking-specific legal instruments to effectively prosecute human trafficking offenders and legislative measures that would render suitable remedies and sufficient compensation to trafficking victims. This chapter aims to examine the current national legal instruments utilized with regards to human trafficking.

2. National legal framework

The Constitution of the Republic of South Africa, 1996 reflects the values as set out in the relevant international instruments and places an obligation on the national government to protect human rights.\textsuperscript{739} Section 10 of the South African Bill of Rights states that: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

Section 12 aims to protect freedom and security of a person by stating that:

“Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free

\textsuperscript{736} Annual Human Rights Reports Submitted to Congress by the US Department of State (Vol 31) 512-526.
\textsuperscript{737} Hepburn and Human Trafficking Around the World: Hidden in Plain Sight (2013) 271.
\textsuperscript{738} “Poor countries, from which victims are most likely to originate, are also least able to collect accurate data”. From Smit Sex Trafficking: Trends, Challenges, and the Limitations of International Law (2011) 279.
from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.”

Section 13 prohibits any form of slavery, servitude and forced labour. Section 7(2) of the Constitution places an obligation on the state to respect, protect, promote and fulfil the fundamental rights of all South African citizens, placing a positive duty on the state to not only respect but also to protect the human rights which are so deeply embedded in the South African Constitution. These rights as set out in the Bill of Rights, also apply to victims of trafficking and people who are vulnerable to trafficking.

In the absence of veritable anti-human trafficking legislation in South Africa, the prosecution of trafficking offences was based on a patchwork of judicial instruments consisting of the Constitution, the Children’s Act,740 the Prevention of Organised Crime Act,741 the Basic Conditions of Employment Act,742 the Immigration Act,743 the Extradition Act,744 the International Cooperation in Criminal Matters Act745 and the common law, amongst others. The Sexual Offences and Related Matters Act (SOA) prohibits sex trafficking of children and adults whereas section 284 of the Children’s Act prohibits the sex trafficking of children. Section 284 of the Children’s Amendment Act 38 of 2005 also prescribes five years’ life imprisonment for the use, procurement, or offer of a child for slavery, the use of a child for commercial sexual exploitation or use of children to commit crimes. Section 286 of the Children’s Act places an obligation on the government to assist children who fell victim to trafficking and section 287 makes provision for parents forfeiting their parental rights over a child if such a parent was involved in the trafficking of a child. A duty is also placed on health professionals, officials, police and social workers dealing with child victims and a positive duty is placed upon such persons by section 288 to refer the child victim to a social worker for an assessment and investigation. Section 43 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) prohibits forced labour of children and the employment of children under the age of 15. Any person who employs a child younger than 15 will be guilty of an offence.

The Prevention of Organised Crime Act of 1998 (POCA)746 is sometimes used in combination with the

740 Act 38 of 2005.
741 Act 121 of 1998.
742 Act 75 of 1997.
744 Act 67 of 1962.
745 Act 75 of 1996.
SOA to add additional charges such as racketeering, money laundering and criminal activity. As indicated earlier on, section 71 of the SOA prohibits the sex trafficking of adults and children and prescribes an imprisonment sentence of 20 years for sex trafficking offences, an insufficient penalty for such a serious offense. POCA makes provision for the institution of civil proceedings by means of an *ex parte* application for a confiscation order, a restraint order or forfeiture of the proceeds of the unlawful criminal activities. Such an order shall be made if the court finds, on a balance of probabilities, that the property concerned is an instrumentality of an offence or if such property is the proceeds of unlawful activities. POCA provides the means to effectively tackle the asset bases of criminal enterprises and also makes it a crime to transfer monies derived from human trafficking and related criminal offences into “legitimate” channels in an attempt to disguise the origin of such funds. There are, however, still a number of prosecution challenges such as the need for specialised courts and judges, corrupt and uninformed police, border control and immigration officers and the need for specialised training on all government levels on how to deal with trafficking victims and trafficking as a crime.

### 2.1 The TIP Report

The Trafficking in Persons (TIP) Report is the US government’s “diplomatic tool to engage foreign governments on human trafficking.” It is also the world’s most complete analysis of governmental anti-human trafficking efforts and represents an updated, comprehensive look at the landscape and scope of trafficking. The US Government utilizes the TIP Report “to advance anti-trafficking reforms, to combat trafficking and to target resources on prevention, protection and prosecution programs.” International organisations, foreign governments, and non-governmental organisations use the TIP report as a tool to examine where resources are most needed. Freeing victims, preventing trafficking, and bringing traffickers to justice are the ultimate

---

goals of the report.

In the TIP Report, the Department of State places each country onto one of three tiers based on the extent of their government’s efforts to comply with the minimum standards for the elimination of trafficking, found in section 108 of the Trafficking Victims Protection Re-authorization Act of 2013 (TVPA). Tier 1 is the highest ranking any country can obtain and Tier 3 the lowest.

During 2009, the US Department of State placed South Africa on the Tier 2 watch list which meant that South Africa was perceived by the US as a country with a government which did not fully comply with the TVPA’s minimum standards, but is making significant efforts to bring itself into compliance with those standards.

Tier 2 placement also means the following:

a) The absolute number of severe forms of trafficking is very significant or is significantly increasing;

b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or

c) the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.

After being placed on the Tier 2 watch list, South Africa prioritised the completion of the Prevention and Combating of Trafficking in Persons Act. Honoring its commitments in terms of the Palermo Protocol and aiming to reflect the core values of the Palermo Protocol in national legislation, President Zuma signed the Prevention and Combating of Trafficking in Persons Act (PACOTIP) on 29 July 2013.

---

755 Act 7 of 2013.
The recommendations in the TIP report (2014)\textsuperscript{756} included the promulgation and implementing of anti-trafficking regulations and suggested increasing awareness among all levels of government officials as to their responsibilities in terms of the anti-trafficking act and related provisions under the Sexual Offenses and Children’s Amendment Act.\textsuperscript{757} The report furthermore urged that law enforcement and social service providers use a victim-centered approach when interacting with potential victims\textsuperscript{758} and that such officials need to recognize that initial apparent consent is irrelevant.\textsuperscript{759} According to the 2014 TIP Report, in South Africa—

“[l]aw enforcement generally failed to screen women and LGBT persons in prostitution for trafficking indicators, treating them as criminals and often charging them with prostitution and other violations.”\textsuperscript{760}

This applies both to border control screening and victim identification by the South African Police Service. It is often the case that victims are labelled as prostitutes and/or illegal immigrants, and deported to their states without being identified as trafficking victims. According to the 2014 TIP report, government officials failed to identify 75 Indonesian seamen as trafficking victims during 2013 abandoned by the captains of ships they were working on. They were sent home by the South African government and bypassed immigration without passports reflecting that they were deported, which would allow them to work as seamen in future.\textsuperscript{761} It is of extreme importance that members of the South African Police Service, border officials and immigration officers are properly trained on how to screen and identify trafficking victims.\textsuperscript{762} Taking a statement from the victim is the very first step in the remedy chain, and it is of vital importance that the victim is

\textsuperscript{760} Traffickers, under false pretenses of “a better life”, often recruit victims and promise them employment in a foreign country, which results into deemed consent to leave their states willingly. However, far from the truth and reality, victims are convinced of a better life with legitimate employment and hence willingly travel to such a destination country, only to find that they have been trafficked once arriving in the host country and walking into a trafficking ring.
treated with dignity. Sex trafficking victims are mostly drug induced, disorientated, and emotionally traumatised when arriving at a police station. Female victims are also often distrustful of male persons due to their trafficking circumstances and it is preferable that female police officers comfort the victim and obtain statements victims. In order to ensure effective prosecution, it is of paramount importance that as much as possible information is obtained from the victim. Should the victim not understand or speak English, the services of a translator should be called in.

According to the report, anti-trafficking training for all SAPS officials should be institutionalised and employers that use forced labour should be prosecuted. Other comments in the report include the provision of interpreters who can assist victims in obtaining care, the certification or establishment of additional care centers for the assistance of male trafficking victims and the implementation of formal procedures to compile national statistics on trafficking cases, which is also done for other crimes. In order to combat trafficking effectively, it is of great importance that border control officers are trained to identify victims effectively.

The ideal position is that the Department of Home Affairs is notified immediately of such a person’s presence in the country in order to establish whether he or she was legally or illegally brought into South Africa. The NPA is closely involved from the inception of this process. Proper assessment of such persons is crucial to determine their various needs as they are traumatised, confused and often cannot speak English or one of the national languages of South Africa, highlighting the victim’s vulnerability. Once it has been established that such a person is a victim of trafficking, the victim is moved to a non-governmental organisation shelter or haven for protection and immediate needs such as food and shelter. These non-governmental organisations (NGOs) face various challenges with regard to meeting the victim’s immediate needs. Anonymity and safety are imperative during their assessment and placement at a safe house and cognisance must be taken of the victim’s rights and needs in terms of the international framework, as well as

---


163
the existing national legal framework.\textsuperscript{767}

The 2015 TIP Report, in its introduction, once again makes mention of South Africa as a source, transit and destination country for men, women and children who are subjected to forced labor and sex trafficking.\textsuperscript{768} The report indicates that the largest number of victims are from South Africa and that children are recruited from impoverished rural areas to city centers such as Cape Town, Bloemfontein, Durban and Johannesburg.\textsuperscript{769} These recruits are then exploited for purposes of sex trafficking, domestic servitude, criminal activities, street begging, forced street vending and agriculture. Children with disabilities are also very often used for street begging.\textsuperscript{770} In some of the villages of the Western Cape and Eastern Cape, the customary use of \textit{ukuthwala} causes girls as young as 12 to be forced to marry adult men.\textsuperscript{771} According to the 2015 TIP report, the commercial sex trade in South Africa is mostly dominated by Nigerian syndicates,\textsuperscript{772} and NGOs in the Western Cape indicated in 2014 that there was an increase in Voodoo rituals being used to coerce victims into trafficking.\textsuperscript{773} According to the report, child prostitution is organised by local crime rings. Bulgarian and Russian crime syndicates operate in the Cape Town sex trade and sex trafficking of Asian men and women are run by Chinese nationals.\textsuperscript{774} South African nationals are trafficked to Asia and Europe, albeit to a lesser extent. They are then forced into drug smuggling, prostitution or domestic servitude by crime rings.\textsuperscript{775} The report makes mention of Thai women being the largest “identified foreign victim group” and that it was reported by officials that Chinese victims were on the rise. According to research conducted by UNICEF, pull factors include demand for organs and body parts, adoption trade, trafficking for the means of sex tourism, child soldier recruitment and the need for low-skilled labor.\textsuperscript{776} According to the UNICEF report, the South African government does not yet fully comply with the minimum standards for the elimination of trafficking but has taken steps to do so and has increased efforts to investigate and prosecute trafficking

\textsuperscript{767} Data collected during a telephonic interview on 22 May 2014 with the NPA Advocate who deals with human trafficking in South Africa.
The 2016 TIP Report\textsuperscript{777} very much resembles the 2015 TIP Report, save for the following aspects:

- An increase in the amount of Nigerian sex trafficking victims and domestic servitude victims of which many were recruited by means of voodoo rituals (juju).
- NGOs reported that an estimate of 10-15 forced labor trafficking victims disembark in Cape Town every month.
- The South African Government and NGOs have reported an increase in Bangladeshi and Pakistani citizens subjected to forced labour by their own nationals.
- Official complicity, which includes SAPS complicity, is a great concern as various sex trafficking locations continue to operate despite the fact that South African Police officials have been informed of such operations.

According to the 2015 TIP report, South Africa remains a Tier 2 country in lieu of the fact that the South African government “does not fully meet the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so.”\textsuperscript{778} The report makes mention of the promulgation of the Trafficking in Persons Act which makes provision for the criminalisation of all forms of human trafficking, and which “mandates a coordinated government program to prevent and combat trafficking, requires consolidated reporting of trafficking statistics, and outlines victim assistance measures.”\textsuperscript{779} The report also indicates that the South African government made efforts in finalising and implementing regulations for the PACOTIP Act which include victim identification, referral measures, and training of officials. Law enforcement efforts were also increased and 11 trafficking perpetrators were convicted during 2015, whereas only 3 perpetrators were convicted during 2014 according to the US Department of State 2014 \textit{Trafficking in Persons Report – South Africa}. The report furthermore indicates that victim shelters assisted 103 victims during 2015 under the watchful eye of the Department of Social Development (DSD), 41 more than the previous year.\textsuperscript{780} However, procedures to identify trafficking victims among vulnerable groups were not implemented by officials and illegal immigrants and women in

prostitution were left unassisted.\textsuperscript{781} Labour trafficking offences were also not addressed by government and a “serious lack of capacity and widespread corruption among the police force hindered anti-trafficking law enforcement efforts.”\textsuperscript{782} The report also highlights the fact that perpetrators involved in major international crime syndicates were not “systematically” prosecuted and that these syndicates are responsible for most of the sex trafficking in South Africa.\textsuperscript{783}

Recommendations for South Africa include the amendment of the PACOTIP Act to such an extent that penalties are more stringent and hence more sufficient and that judges should be restricted by the PACOTIP Act to impose fines instead of awarding prison sentences.\textsuperscript{784} The report also recommends that efforts should be increased to “investigate, prosecute and convict traffickers especially labor traffickers” under the PACOTIP Act and that training of law enforcement officers and social service officials should continue in order for them to be equipped to implement the PACOTIP Act and that officials should be held accountable for implementing the training that they received. Officials suspected of complicity must be investigated and prosecuted and social services officials and law enforcement officers must be verified in terms of using a victim-centered approach when dealing with potential victims.\textsuperscript{785} Initial consent is irrelevant and this aspect should be made evident to such officials dealing with trafficking victims.\textsuperscript{786} Other recommendations include the prosecution of employers responsible for forced labor and the screening of vulnerable groups as well as of potential deportees and women in prostitution for possible trafficking indicators.\textsuperscript{787}

Further recommendations include the “replication of the coordinated anti-trafficking law enforcement and victim referral mechanisms of KwaZulu-Natal and Western Cape” in all other provinces.\textsuperscript{788} Interpreters must also be provided to assist victims “in obtaining care, cooperating with law enforcement, and testifying in court”.\textsuperscript{789} The 2016 Report also recommends anti-trafficking training for diplomatic personnel and troops who are currently deployed in other

countries and that formal procedures should be implemented in order to compile national statistics on trafficking victims assisted and traffickers who are prosecuted.790

South Africa ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 on 20 February 2004. The Palermo Protocol sets out the international standard with regard to human trafficking, providing a threefold definition for trafficking by stipulating what needs to be done, how it is done and why it is done. The Palermo Protocol is furthermore universally recognised as the primary international codification of trafficking in persons and calls for a 3 P’s approach when dealing with trafficking in persons. The 3 P’s approach consists of prevention, prosecution and the protection of trafficking victims. The main aim of the Palermo Protocol is to prevent human trafficking, paying particular attention to women and children, prosecute perpetrators and protect and assist human trafficking victims. It also aims to promote international cooperation between member states, ensuring that they meet their objectives in terms of the Protocol. By signing and ratifying anti-trafficking conventions, protocols and other relevant international instruments, South Africa incurred certain obligations such as the design and implementation of effective anti-trafficking policies and legislation, criminalising human trafficking and other associated offenses.

In the case of Velasquez Rodriguez v Honduras,791 the Inter-American Court of Human Rights sets out the duty resting upon governments to develop not only proper legislative measures but also to implement appropriate and effective enforcement structures in order to protect their citizens from damaging acts. In this case, the court made it evident that governments, in fulfilling their obligations when it comes to human rights violations, must take positive action. The court goes one step further by adding that, should states allow groups or private persons to act with impunity and not step in to protect their citizens, it shall be deemed as a failure to comply with their obligations to protect the human rights of their nationals. It is the task of domestic legal systems to provide a complete judicial system and to ensure the enforcement of such a system. In the Cotton Fields case792 the Inter-American Court assessed

792 Gonzalez et al. (Cotton Field) v Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgement, Inter-Am. CT. H.R. (Ser.C) No.205 (16 Nov 2009) at para 2.
Mexico’s obligation to prevent the violation of the right to personal integrity and the right to life. The Court furthermore assessed if sufficient preventative measures were taken by the state to protect victims’ rights and in this regard the Court allowed itself to be guided by state parties’ due diligence obligations to take preventative measures in order to prevent individual right violations. It stated as follows:

“The due diligence standard has long been part of international law and was incorporated into General Recommendation 19 of CEDAW and later DEVAW, to expand State accountability to include VAW by private actors (in addition to State actors) in the private or public sphere, thus placing upon the State the duty to prevent, investigate, punish and provide compensation for all acts of VAW wherever they occur.”

The Court reached the following conclusion with regard to the nature and scope of a state’s due diligence obligation:

“States should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. The prevention strategy should also be comprehensive; in other words, it should prevent the risk factors and, at the same time, strengthen the institutions that can provide an effective response in case of violence against women.”

According to international standards, when it comes to the anti-trafficking policy orientations of states are categorised as follows: prevention and deterrence, law enforcement and prosecution of traffickers, and protection and rehabilitation of trafficked persons. The South African government, in order to increase its pursuit in the combating of trafficking in persons, launched certain anti-trafficking initiatives which include, *inter alia*, the establishment of a Trafficking Desk and the establishment of a helpline for reporting trafficking in persons. These initiatives were set out in a Report issued

---

793 CEDAW General Recommendation 19 stipulates that “[s]tates may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”.

794 Violence against women.


796 Gonzalez case op cit at para 258.


by the South African Law Reform Commission on August 2008. The Report was divided into the following five chapters: (1) the introduction, (2) the current legal position, (3) the prosecution of traffickers and other role-players, (4) the protection of victims of trafficking in persons, and (5) the prevention of trafficking in persons.\textsuperscript{799}

The Report is titled “Trafficking in Persons” and states that:

“Trafficking in persons has become one of the most lucrative businesses today with linkages spread around the world. Trafficking in persons involves the trading of persons as commodities by various means and is often connected to organised crime. Various factors contribute to the trafficking of persons. These include poverty, lack of economic opportunities, war, natural disasters and political instability.\textsuperscript{800} South Africa is regarded as a country of destination for victims of trafficking. There have been sporadic reports of the trafficking of South Africans to other parts of the world. South Africa is also a transit point for trafficking operations between developing countries and developed countries. South African women and children are trafficked internally for purposes of commercial sexual exploitation, domestic work and other forms of labour. It is important to note that foreigners who have been trafficked to South Africa may be re-trafficked within the borders of South Africa.”\textsuperscript{801}

According to the report, the lack of reliable statistics with regards to the number of trafficking incidents, the clandestine nature of the crime and—

“the lack of a coordinated response to the problem makes it difficult to provide reliable statistics. It is therefore difficult to give an accurate overview of the extent of the problem within South Africa and across it borders. The determination of the extent of the problem is also complicated by the fact that it is sometimes difficult to distinguish between trafficking in persons and smuggling in persons. It is further complicated by the fact that not all reported cases of trafficking in persons can be recorded as such.”\textsuperscript{802}

As indicated earlier, the South African Law Reform Commissions report sets out the relevant anti-trafficking measures taken by the South African Government in order to meet its obligations and effectively combat trafficking in persons.\textsuperscript{803} These initiatives included, amongst other things, the forming of a Human Trafficking Desk within the South African Police Service Organised Crime Unit in order to coordinate all trafficking issues received from the various provinces, various

investigations that were conducted, the offices from the Minister for Safety and Security and the National Commissioner and to provide training to members of the organised crime unit and especially the investigators of trafficking cases. Monthly progress reports were required in order to monitor trafficking investigations.\textsuperscript{804} Other initiatives include the establishment of the Sexual Offences and Community Affairs (SOCA) Unit, a task team—

“comprised of persons representing the following government departments and organisations: the Human Trafficking Desk within the Organised Crime Unit of SAPS, Port of Entry Policing within SAPS, the Department of Home Affairs, of Social Development, of Labour and of Justice and Constitutional Development, the International Organisation for Migration, Molo Songololo\textsuperscript{805} and the United Nations Office on Drugs and Crime”\textsuperscript{806}

The Task team furthermore developed the National Strategy to Prevent and Respond to Human Trafficking for Sexual Purposes and established a webpage to reflect the efforts by the South African Government to combat human trafficking.\textsuperscript{807} Care Centres were also established in the light of the unusual “high levels of sexual violence against women and children, especially rape”.\textsuperscript{808} These care centres, named the Thuthuzela Care Centres (TCCs), aim to improve “the process of reporting and prosecution of rape and other sexual offences in a dignified and caring environment” and also seek to “lessen the trauma of sexual violence and to reduce secondary victimization of survivors by providing professional medical care, counseling, access to dedicated investigators and prosecutors all under one roof”.\textsuperscript{809}

The main purpose of the South African Law Reform Commission Report on Trafficking in Persons however was to set out the final recommendations for law reform with regards to the issue of

\textsuperscript{805} Molo Songololo is a non-governmental organisation that was established in 1997 to promote the rights nd protection of children. It operates at national, provincial and local community levels and interacts with role-players at regional and international levels. Molo Songololo also serves as a designated child protection organisation as prescribed by the Children’s Act and primarily focusses on children and youths that reside in rural and urban communities aged between 10 and 17 years. About MoloSongololo available online at \url{http://www.molosongololo.com/our-mission} (28-12-2016).
trafficking in persons. A draft trafficking Bill accompanied the Report as Annexure D and the Law Reform Commission recommended that the proposed trafficking legislation should “criminalise the act of trafficking in persons and should provide for an appropriate sentence”. Various role players contributed to the final Act and commentary received from various platforms which included civil society, the UNODC, the South African Human Rights Council, the SOCA Unit, the Department of Social Justice and the IOM, to name a few, was taken into consideration when the Act was finalized.

3. The Prevention and Combating of Trafficking in Persons Act 7 of 2013

In order to effectively combat human trafficking, and as a national response to its international obligations incurred by ratifying the United Nations Convention on Transnational Organized Crime and its protocols, and in order to create a national structure for the combatting of human trafficking, the Prevention and Combating of Trafficking in Persons Act (PACOTIP Act) was signed by President Zuma on 29 July 2013 and enacted on 9 August 2015. Aiming to reflect the core values of the Palermo Protocol in national legislation, the Act defines trafficking in humans and reaches slightly wider than the Palermo Protocol by addressing forms of trafficking which are specific to South Africa such as the trafficking of body parts and the customary practice of ukuthwala. The three P’s approach – Prosecution, Protection and Prevention, as set out in the Palermo Protocol, are also incorporated in South Africa’s anti-trafficking legislation.

In the preamble of the PACOTIP Act, cognisance is taken of the push factors of trafficking by stating that the “search for improved socio economic circumstances and the demand for the services of victims of trafficking” are contributing factors, leaving people vulnerable to trafficking. Concern is furthermore expressed with regards to the rise in human trafficking, especially trafficking in women and children.

---

813 "Ukuthwala” initially originated from the Xhosa people and is a traditional practice whereby young girls are abducted and sold off into marriage – often with the consent of their parents. A modern interpretation of this practice is that men abduct young virgin girls for marriage and sex, sometimes as young as eight years old.
814 Preamble to the Prevention and Combating of Trafficking in Persons Act 7 of 2013.
The Act makes mention of the fact that trafficking is not regulated by common and statutory law and reiterates that the Bill of Rights in the South African Constitution—

“enshrines the right to human dignity, equality, the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, and not to be treated in a cruel, inhuman or degrading way, the right not to be subjected to slavery, servitude or forced labour and the right of children to be protected from maltreatment, neglect, abuse or degradation.” 815

The preamble then moves on to South Africa’s obligations in terms of international agreements such as the Palermo Protocol and the duty it places on South Africa to combat and eradicate trafficking in persons.816 The purpose of the PACOTIP Act as stated in the long title of the Act is:

“To give effect to the Republic’s obligations concerning the trafficking of persons in terms of international agreements; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to provide for penalties that may be imposed in respect of the offences; to provide for measures to protect and assist victims of trafficking in persons; to provide for the coordinated implementation, application and administration of this Act; to prevent and combat the trafficking in persons within or across the borders of the Republic; and to provide for matters connected therewith”. The act was designed in order to ensure that services are made available to victims of trafficking, that provision would be made for the coordinated implementation, application and administration of the Act would be ensured, effective enforcement measures be provided and a draft national policy framework would be developed in order to effectively combat trafficking in a “coordinated manner.” 817

The objectives of the PACOTIP Act reflect article 4 of the Palermo Protocol which sets out the scope of application of the Palermo Protocol, stating that —

“the Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.” 818

This is also referred to as the “3P” paradigm – prevention, protection and prosecution,819 a structural framework used by governments around the world in combating human trafficking. This is dealt with in the sections that follow.

815 Preamble of The Prevention and Combating of Trafficking in Persons Act 7 of 2013.
817 Long title of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.
818 Article 4 of the Palermo Protocol.
819 Article 2 of the Palermo Protocol.
3.1 Prevention

According to the Palermo Protocol, the prevention of trafficking involves policy making by states by means of the implementation of preventative measures.\textsuperscript{820} This should include alleviating poverty and vulnerability of persons,\textsuperscript{821} educating individuals that live in isolated rural areas about trafficking and recruitment methods,\textsuperscript{822} adopting and implementing educational measures in the national curriculum of primary schools and high schools with regards to trafficking recruitment methods,\textsuperscript{823} addressing labour demands in order to eliminate vulnerability\textsuperscript{824} and training of law enforcement officers.\textsuperscript{825} Article 9 of the Palermo Protocol places the focus on prevention and obliges states to adopt comprehensive measures to prevent and combat trafficking by means of programmes, policies, research, mass media campaigns, multilateral and bilateral cooperation, social, educational and cultural measures and any other measures deemed necessary to combat trafficking.

During the consultative process, the South African Law Reform Commission received submissions from Childline SA, various workshop participants and the Department of Social Development with regards to the proposed provisions in the draft Bill relating to public awareness. Suggestions included \textit{inter alia} that sub clause 2(a) of the Act to “refer to all members of the community with specific reference to rural communities”.\textsuperscript{826} This submission was integrated into section 41 (2)(b) of the PACOTIP Act and reads as follows:

“The programmes or other measures referred to in subsection (1) (d) must –
(a) Include appropriate measures aimed at reaching rural communities;
(ii) where possible, be provided in a language understood by the persons at whom they are directed and;
(iii) be reviewed every second year in order to determine their effectiveness.”\textsuperscript{827}

\textsuperscript{820} Article 9 of the Palermo Protocol.
\textsuperscript{821} Article 9(4) of the Palermo Protocol.
\textsuperscript{824} The 2016 TIP Report highlights the fact that the South African government did make “efforts to reduce the demand for commercial sex but did not make any efforts to reduce the demand for forced labor.” The government did also not initiate any anti-trafficking training to its peacekeepers prior to their deployment on international missions, peacekeeping missions or for diplomatic personnel.
\textsuperscript{827} Section 41(2) (a) (i)-(iii) of Act 7 of 2013.
Other contributions by participants during the consultative process included the raising of awareness amongst members of the public with regards to human trafficking in order to enable them to identify trafficking situations, identify perpetrators and report trafficking incidents to the authorities.\textsuperscript{828} The extension of awareness programmes to hospitals and prisons were also suggested in order to make victims of trafficking who were hospitalised or jailed aware of their rights and to understand that the crimes they committed during their captivity had been committed “as a result of their situation as victims”.\textsuperscript{829} Contributors campaigned for the extension of public awareness programmes to other countries and it was suggested that the Department of Finance must ensure that money is made available for public awareness programmes.\textsuperscript{830}

Section 41(d) of the PACOTIP Act stipulates that “public awareness programmes or other measures” should be established and designed to—

“(i) inform and educate members of the public, especially those who are vulnerable or at risk of becoming victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking, and South African citizens or permanent residents who apply for South African passports or who depart abroad, on issues relating to trafficking in persons including;

(aa) common recruitment techniques used by traffickers;

(bb) practices used to keep victims of trafficking in exploitative situations;

(cc) the forms of abuse to which victims of trafficking may be subjected; and

(dd) organisations, institutions or law enforcement agencies that may be approached for assistance or information.”\textsuperscript{831}

The International Organisation for Migration (IOM), issued a report with recommendations regarding the prevention of human trafficking in South Africa. These include:

(a) awareness campaigns with the primary focus on rural areas with the main purpose to inform

\textsuperscript{831} Act 7 of 2013.
South African citizens about internal trafficking;\(^\text{832}\)

(b) a nationwide child registration programme which makes provision for the issuing of identification documents;

(c) the expansion of the current school curriculum to make provision for education with regards to human sexuality, sexual violence, substance abuse and human trafficking;

(d) more visible policing of sex trafficking and sex crimes with extra “sensitivity to potential internal trafficking”; and

(e) NGO community-based watch programmes to report the rise of new child-headed households or the entrance of recruiters in neighborhoods.\(^\text{833}\)

With regards to (e) above, the IOM campaigns for the South African government to invest in rural development programmes in order to create more sustainable communities in rural areas and urges that measures should be taken in order to create a “systematic procedure for those who encounter a victim of trafficking in order to ensure adequate assistance to victims and more accurate documentation of the crime”.\(^\text{834}\) It also indicated that research is needed in order to “Assess the vulnerabilities of individuals between the ages of fifteen and eighteen and determine specific vulnerabilities of those that leave school” and the link between childhood sexual abuse and the “susceptibility of being trafficked into commercial sexual exploitation” because of childhood abuse must also be examined.\(^\text{835}\)

Children often fall prey to traffickers recruiting new victims via social networks.\(^\text{836}\) According to the Pew Research Center for Internet, Science & Technology during 2015, 24 per cent of teens spent their time online “almost constantly” and 92 per cent of teens are reported going online on a daily basis. The most popular social network platforms teens visit is Facebook (71 per cent), Instagram (52 per cent) and Twitter (33 per cent). A 14 year old Indonesian girl was abducted by a 24 year old perpetrator after accepting a Facebook friend request from an unknown man out of

\(^{832}\) Internal trafficking is also referred to as domestic trafficking and refers to the trafficking of individuals within the borders of their own country.


\(^{836}\) The Telegraph Facebook used to “enslave” people trafficking victims available online at http://www.telegraph.co.uk/news/uknews/crime/11253089/Facebook-used-to-enslave-people-trafficking-victims.html (16-12-2016).
curiosity. After an online grooming process a meeting was setup. The girl met the man without
knowledge or consent of her parents and was abducted close to her home after getting into the
perpetrators van after choir practice. She was then taken to a house where she was raped and
drugged repetitively. In Indonesia 27 Facebook related abductions where reported during 2012
alone. According to an International Report by ECPAT International between 40 000 to 70 000
children are involved in trafficking, prostitution and pornography. According to the Pew Report,
Hispanic and African-American youth are more frequent online users than white teen users in the
US. The internet and social media networks are increasingly being used globally by international
organised criminal networks for a variety of purposes which include the recruitment of children
for illegal adoptive purposes, advertising of commercial sexual services, buying and selling of
victims and communication with potential clients and other networks. The internet creates
unrestricted opportunities for traffickers to lure victims by means of dating sites, luxurious job
offers such as modeling opportunities, teaching jobs, acting jobs and other promising
opportunities. The internet offers a broad spectrum of employment platforms and educational
opportunities across the world. Dating sites, spam mail and chat rooms are a few of the channels
through which potential victims are recruited and digital cameras and recorders that can track
report the user’s behavior are freely available. Unsuspecting persons are entrapped by perpetrators
by means of page jacking and mouse trapping. It is common cause that social platforms are
used by traffickers and brokers to groom and befriend potential victims.

The deep dark web is an alternative internet platform not easily accessible by search engines such
as Yahoo, Google and Mozilla Firefox and which mostly contains flight schedules, government

837 USA Today Facebook used to kidnap, traffic Indonesian girls available online
http://www.usatoday.com/story/news/world/2012/10/29/facebook-used-to-kidnap-traffic-indonesian-
girls/1665321/(16-12-2016).
838 USA Today Facebook used to kidnap, traffic Indonesian girls available online at
http://www.usatoday.com/story/news/world/2012/10/29/facebook-used-to-kidnap-traffic-indonesian-
girls/1665321/(16-12-2016).
839 Pew Internet Teens Social Media Technology (09-04-2015) http://www.pewinternet.org/2015/04/09/teens-social-
840 The Telegraph Facebook used to “enslave” people trafficking victims available online at
http://www.telegraph.co.uk/news/uknews/crime/11253089/Facebook-used-to-enslave-people-trafficking-
victims.html (16-12-2016).
841 Page jacking is a method used to misdirect internet users in order for them to land up on the page created by
organised trafficking websites where they can be recruited by perpetrators.
842 Mouse trapping is an internet technique used to build websites that make it impossible for users to leave a
website by means of for instance the popping up of various advertisements or by relaunching of the website in a
window which is hard to close.
and bank databases, spam lists and information that needs to be stored.\textsuperscript{843} The deep dark web contains private networks such as the Onion Router or Tor, enabling anonymous file sharing of various users under several different protocols. These private networks are popular amongst perpetrators as they require their own internet browser in order to gain access and provide complete anonymity when browsing.\textsuperscript{844} This is achieved by the masking of the internet user’s IP address by means of a series of volunteer servers across the globe which causes the masking of such user’s digital footprint and making it almost impossible to track down such a user.\textsuperscript{845} By browsing via these “onion routers” access can be gained to Hidden Wiki, which can be described as the homepage of the Tor dark net. Hidden Wiki contains advertisements of service providers such as hitmen, computer hackers and terrorist organisations. It also contains a wide offering of pornography, people for sale, organs for sale and a variety of drugs. Silk Road, another online black-market and dark net market, was closed down by the FBI after the developer of the site, Ross William Ulbricht, was successfully prosecuted in the New York Southern District Court.\textsuperscript{846} A large amount of traffic on Hidden Wiki comes from the child pornography community and it was recorded that as from October 2001 the total number of views on the child porn section in Hidden Wiki named “Hard Candy” consisted of 2 055 701 views.\textsuperscript{847}

The Electronic Communications and Transactions Act\textsuperscript{848} (ECTA) aims, amongst other things, to regulate the use of electronic communications and transactions and to prevent abuse of information systems.\textsuperscript{849} Electronic communication systems are used globally, and also in South Africa, for the recruitment of children for trafficking purposes.\textsuperscript{850} This platform is also used for the distribution

\textsuperscript{843} Wingler \textit{The Deep Dark Web} available online at https://shaunswingler.com/2013/05/03/the-deep-dark-web/ (29-06-2016).
\textsuperscript{844} Wingler \textit{The Deep Dark Web} available online at https://shaunswingler.com/2013/05/03/the-deep-dark-web/ (29-06-2016).
\textsuperscript{845} Wingler \textit{The Deep Dark Web} https://shaunswingler.com/2013/05/03/the-deep-dark-web/ (29-06-2016).
\textsuperscript{847} Wingler \textit{The Deep Dark Web} https://shaunswingler.com/2013/05/03/the-deep-dark-web/ (29-06-2016).
\textsuperscript{848} Act 25 of 2002.
\textsuperscript{849} South Africa also became a signatory to the first international cybercrime treaty, the Council of Europe’s Convention on Cybercrime (2001). One of the objects of the Convention is the promotion of development of cybercrime related criminal policy in order to protect members of society and also to further international cooperation between states.
\textsuperscript{850} The Hawks issued a press release on 23 December 2016, warning children to be vigilant of whom they befriend online. Hawks spokesperson Brigadier Hangwani Mulaudzi indicated that children connect with traffickers online “where they promise young girls holidays with them and take them to brothels where they drug and exploit them”.

177
of pornographic images of victims which may be sent by traffickers via electronic communication systems, stored on computer systems and shared with clients or pedophiles via file sharing systems such as Dropbox or WeTransfer or by uploading such images onto the deep dark web where images can be obtained by clients.\footnote{Wingler \textit{The Deep Dark Web} https://shaunswingler.com/2013/05/03/the-deep-dark-web/ (29-06-2016).}

Section 18(1)(a) and section 9(2) of PACOTIP Act places a preventative obligation on airway carriers and states that a carrier who, “on reasonable grounds, suspects that any of its passengers is a victim of trafficking, must immediately report that suspicion to a police official for investigation.” Failure to comply with section 9(2) is a criminal offence. This section reflects South Africa’s obligations in terms of article 11 of the Palermo Protocol which emphasizes the importance of effective border control, stating that parties must adopt legislative and other measures to prevent means of transport such as carriers to be used in the commission of offences. Tiny Hands, an international Non-Governmental Organisation, is currently driving a pilot interception project at OR Tambo international airport in order to try and identify victims and potential victims whilst still at the airport and Save the Children International assisted in training 60 border officials. The National Freedom Network has also conducted information sessions at Lanseria Airport in order to inform air carrier personnel about human trafficking and to create awareness.\footnote{An airhostess on a Comair flight recently successfully identified two child victims of 4 and 7 years old respectively who were in the presence of a suspected trafficker. The children seemed drugged and terrified and the person who presented himself as the “father” of the minor children acted abruptly and aggressively towards the children. She immediately brought it to the attention of the flight captain who notified the authorities. The flight captain held the flight back and the perpetrator was taken into custody by the authorities (interview with Comair airhostess conducted on 22 July 2016.)}

A consistent training program is yet to be instated for all border control officials. The National Freedom Network (NFN) is a collaborative organisation of role – players in South Africa working together to address the issue of human trafficking. The NFN works to connect and interact with other partners to exchange information, share resources and best practices, and develop professional contacts in the counter-human trafficking field and the following information was

---

Missing Children spokesperson Rose Mac Kinnon contributed to the press release by indicating that children “should be aware of who they speak to online and on social media. They should not trust anyone that they speak to on social media”. Citizen \textit{Be careful who you befriend online, Hawks warn children} available online at \url{http://citizen.co.za/news/news-national/1382145/be-careful-who-you-befriend-online-hawks-warn-children/} (28-12-2016).
gathered in an email interview with the National Network Coordinator of the NFN. The NFN just completed a human trafficking film title “Unthinkable” which will be released to schools soon in order to increase awareness. The Department of Social development is the government institution responsible for training of law enforcement and social work officials. A training initiative to train prosecutors nationwide on human trafficking, was also undertaken by the National Prosecution Task Team and the Department of Health in Gauteng headed up training sessions for medical personnel through its Continuous Medical Education sessions. The South Africa Police Service is currently in the process of designing its internal training program. The NFN, in order to speed up this training process, proposed a national training program on human trafficking for all 142 South African police stations nationally, but has had no feedback from the SAPS for 2 years.853

Article 10 of the Palermo Protocol deals with law enforcement training,854 indicating that it should be prevention orientated, focusing on the protection of victims’ rights, the protection of victims against their traffickers, as well as the prosecuting of perpetrators. Special attention must be given to children’s needs, human rights and gender-sensitive issues.855 Cooperation between non-governmental organisations, other organisations and elements of civil society must also be encouraged during these training initiatives.856 Training programmes must be designed for law enforcement officers and immigration authorities in order to equip them in not only prevention but also victim identification.857 These authorities should also be fully informed with regard to gender and child sensitive issues and they must be encouraged to cooperate with other relevant organisations and elements of civil society. According to the 2014 TIP report, the South African “government increased efforts to prevent human trafficking through awareness raising campaigns in schools and efforts to coordinate national anti-trafficking policies and planning”.858

853 Based on an interview with the National Freedom Network South Africa on 2 June 2016. Also see http://nationalfreedomnetwork.co.za (05-02-2017) for more information on the National Freedom Network.
854 Article 10(2) of the Palermo Protocol.
856 Article 10 of the Palermo Protocol at para 2.
857 Article 10 of the Palermo Protocol at para2.
The 2016 TIP Report advises that the South African government makes “sustained efforts to prevent trafficking”\(^859\) and that the Department of Justice “supported awareness-raising efforts including an information kiosk at Johannesburg’s international airport for passengers and airport staff on identifying trafficking victims”.\(^860\) An amount of ZAR 2.7 million was awarded during the 2014-2015 fiscal year towards anti-trafficking training and awareness raising. The national task team furthermore coordinated six provincial task teams which were overseen by the National Prosecuting Authority and the Department of Justice and various task teams initiated awareness-raising campaigns. The provincial task teams, during national child protection week, conducted 17 awareness-raising events at 51 schools, reaching approximately 34,410 primary school learners, 1,100 teachers and 1,200 parents.\(^861\) The Department of Home Affairs also initiated roadblocks close to border crossing points during national human trafficking week where vehicle spot inspections were conducted and anti-trafficking flyers were distributed.\(^862\)

Even though the 2016 TIP Report indicates that South Africa has been making efforts to increase awareness with regards to trafficking in persons, more should be done in order to increase awareness raising efforts by means of mall campaigns, roadshows,\(^863\) television and radio campaigns. Parents should be informed about the dangers of the internet and the dangers of online social media especially in light of the recent online recruitment of a 15-year-old Capetonian teenager who was recruited to join the Islamic State organisation.\(^864\) Billboard campaigns should be undertaken in order to create awareness and warnings about recruitment methods should be put out. It would also be of great help if the dangers of trafficking and recruitment methods could be


\(^{863}\) A dance production titled “Empty Promises” was recently created by Marijda Kamper and Walter Strydom from the University of the Free-State’s Drama Department in order to create awareness with regard to the dangers surrounding human trafficking. The production furthermore places focus on female objectification, an aspect that runs parallel to human trafficking and the vulnerability of women. During the performance, flyers were made available to the audience containing emergency contact details to assist trafficking victims and community members whom are in need of assistance – Gateway News Empty Promises: The anti-trafficking dance production taking Bloemfontein by storm available online at http://gatewaynews.co.za/empty-promises-the-anti-trafficking-dance-production-taking-bloemfontein-by-storm/ (08-10-2016).

\(^{864}\) Pressreader Muslim group shocked at claims ISIS lured teen available online at http://www.pressreader.com/south-africa/the-witness/20150409/281603828984266 (8-10-2016).
included in the national curriculum of primary schools. Although efforts have been made by the South African Government and civil society to create public awareness with regards to human trafficking, not nearly enough has been done to educate potential victims and the public.

3.1.1 Legitimacy and validity of documents

According to article 10 of the Palermo Protocol, states have an obligation to ascertain if travel documents of persons crossing international borders belong to the person concerned or to others and also to establish whether people traveling without such documents are perpetrators or trafficking victims.\textsuperscript{865} Article 11 of the Palermo Protocol places an obligation upon commercial carriers, transportation companies and the owners or operators of any means of transport, to establish whether the passengers they carry, are in possession of the required travel documents necessary for them to enter the receiving state. States are also to establish which types of travel documents were used or attempted to be use in order to cross international borders for trafficking purposes\textsuperscript{866} and what the means and methods of organised criminal groups are when recruiting and transporting victims.\textsuperscript{867} This assists in establishing the links between criminal groups and individuals and the routes used by syndicates.\textsuperscript{868} It is also pivotal information that must be gathered in order to develop possible measures in detecting criminal groups.\textsuperscript{869}

Section 6 of the PACOTIP Act regulates the handling and legitimacy of documents, stipulating that—

“any person who has in his or her possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in facilitating or promoting trafficking in persons is guilty of an offence.”\textsuperscript{870}

In terms of section 28 of PACOTIP, if a state, who is a party to the Palermo Protocol or a party to a trafficking agreement, requests the Department of Home Affairs to verify the legitimacy and the validity of identity or travel documents, the Department of Home Affairs must do so within a reasonable time.

\textsuperscript{865} Article 10 (1)(a) of the Palermo Protocol.
\textsuperscript{866} Article 10 (1)(b) of the Palermo Protocol.
\textsuperscript{867} Article 10 (1)(c) of the Palermo Protocol.
\textsuperscript{868} Article 10 (1)(d) of the Palermo Protocol.
\textsuperscript{869} Article 10 (1)(d) of the Palermo Protocol.
\textsuperscript{870} Section 6 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
Article 12 of the Palermo Protocol deals with security and the control of documents, placing an obligation on states to ensure that all travel and identity documents issued by them, are of such quality that they “cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued”. This places an obligation on South Africa, and more specifically the Department of Home Affairs, to regulate the process of issuing visas, identification documents and birth certificates. The Prevention and Combating of Corrupt Activities Act\textsuperscript{871} criminalises the giving or offering of an “undue benefit” as well as the acceptance or solicitation of such an advantage by an official. In a recent case investigated by the Hawks, a Home Affairs Department official of Beit Bridge border post was arrested during May 2016 along with 14 other public officials on charges of fraud and corruption.\textsuperscript{872} In another incidence a police officer was charged for issuing an affidavit to a foreign national without the presence of the deponent and received an undue benefit of R1 200 for doing so.\textsuperscript{873} Corrupt officials and the issuing of false passports and visas form a very distinct part of the trafficking process. The Prevention and Combating of Corrupt Activities Act makes provision for penalising corruption by specific persons, including prosecutors, judicial officers, public officers and “any person”.\textsuperscript{874}

During 2014, the Department of Home affairs increased efforts to combat and prevent child trafficking by implementing new visa legislation requiring all minors to travel, in addition to their passport, with an unabridged birth certificate indicating the particulars of both parents when entering and exiting the borders of South Africa.\textsuperscript{875} This was, however, revised during 2015 due to tourism-related issues. An Inter-Ministerial Committee on Immigration, headed by deputy president Cyril Ramaphosa, issued a report with certain proposed amendments. The amended allowances\textsuperscript{876} require South African children who travel through South African borders to have the identification of parents and citizen details printed in their passports. Unabridged birth certificates are not a requirement for entry or exit any longer and parental consent affidavits will

\textsuperscript{871} Act 12 of 2004. See in particular sections 3(1), 4, 8, and 9.
\textsuperscript{874} Section 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
\textsuperscript{875} Parliamentary monitoring group available online at https://pmg.org.za/committee-meeting/20952/ (08-10-2016).
\textsuperscript{876} Brand SouthAfrica.info South Africa Visa Amendments http://www.southafrica.info/travel/south-africa-visa-amendments-261015.htm#.V_kBIPi97IU (08-10-2016).
suffice. International visitors must, however, provide original birth certificates or certified copies of required documents during their visa applications. The Department is also showing efforts in curbing documentation and identity fraud and is focused on issuing all South Africans with proper ID cards, aiming to make it impossible for traffickers to swap the pictures on the ID card as is currently the case with the green ID books.

### 3.2 Victim protection

Article 6 of the Palermo Protocol makes provision for the assistance and protection of trafficking victims. Article 6(1) places an obligation on states to protect the privacy and identity of trafficking victims and to further give effect to this obligation by making all legal proceedings relating to their trafficking confidential. Article 6(2) of the Palermo Protocol states that state parties must ensure that their domestic, legal or administrative systems contain measures that provide information to victims regarding court and administrative proceedings as well as assist victims to air their views and concerns with regards to criminal proceedings. Article 6(4) of the Palermo Protocol then goes further stating that states parties shall, when applying the provisions of article 6, take into consideration age, gender and special needs of trafficking victims, in particular the special needs of children, including appropriate housing, education and care whilst Article 6(5) places an obligation upon states parties to provide for the physical safety of victims while they are within such national’s territory.

With regard to complying with the protection obligation as set out in the Palermo Protocol, South Africa’s PACOTIP Act makes provision for such victim protection. Section 19 of the PACOTIP Act makes provision for a police official, to whom a report has been made of the trafficking occurrence, to refer the adult trafficking victim to an accredited organisation within 24 hours and then to notify the provincial department of social development of such a person. A police official must also, should it be reasonable to do so, assist the victim in obtaining medical treatment and

---

879 Act 7 of 2013. See in particular section 19(7)(a).
to transport such person to a place of temporary safe care at an accredited organisation.

A victim can also be taken into protective custody by the South African Police Service upon request of the accredited organisation if needs be and the organisation can apply for this measure to be taken only as a means of last resort.\(^{880}\) If, after the assessment of a victim it is established that the person is indeed a victim of trafficking, a letter of recognition shall be issued by the provincial head.\(^{881}\)

Section 19(5)(c) also makes provision for the police official dealing with the matter to inform the victim of her or his right to apply for a visitor’s visa in order to remain within the territory of the Republic of South Africa for recovery purposes and a reflection period in terms of section 15 if he or she is a not a national of South Africa.\(^{882}\) Section 16(1)(a) of the PACOTIP Act stipulates that a visitor’s visa may be issued in terms of the Immigration Act—

“to a victim of trafficking if that person is present in the Republic and has agreed in writing to cooperate with the law enforcement prosecuting authorities in the investigation of and the prosecution of a case of trafficking in persons, as the case may be.”

The Director-General of Home Affairs may only issue a visa to a trafficking victim if the National Commissioner of the SAPS or the National Director of Public Prosecutions confirms in writing that the person’s presence in the country is required for the purposes of the police investigation or criminal prosecution.

The PACOTIP Act stipulates that when it must be decided whether a trafficking victim should be prosecuted for a crime, the state prosecutor must first consider whether such an offence was committed as a direct result of the person’s position as a victim of trafficking\(^{883}\) and if so no criminal prosecution shall be instituted against such a person, unless authorized by the Director of Public Prosecution.\(^{884}\) Section 22(2) however also makes provision for a prosecutor to apply for postponement during criminal prosecution of a person, if the prosecutor suspects that the person is a victim of trafficking. Section 22(3) makes provision for the withdrawal of a criminal prosecution or discharge of the trafficking victim if the prosecutor “is satisfied that the offence

\(^{880}\) Act 7 of 2013. See in particular section 19(9).
\(^{881}\) Act 7 of 2013. See in particular section 19(10).
\(^{882}\) Act 7 of 2013. See in particular section 19(5)(c).
\(^{883}\) Section 22(2) of Act 7 of 2013.
\(^{884}\) Section 22(4) of Act 7 of 2013.
was committed as a direct result of the person’s position as a victim of trafficking.” The South African Law Reform Commission took the prosecution of trafficking victims and the immunity of victims to criminal prosecution into consideration state as follows:

“victims of trafficking should not be criminally liable for any migration-related offence, prostitution or any other criminal offence that is a direct result of their situation as victims of trafficking. However, the Commission felt that automatic immunity from prosecution may lead to abuse of the criminal justice system in that anyone who e.g. is arrested for a trafficking-related offence such as illegal entry could claim to be a victim of trafficking in order to avoid arrest and prosecution”.

With regard to the obligation to protect trafficking victims, government responses and past successes in this regard include a programme by national government where the government successfully protected at least 100 trafficking victims during 2013. The Department of Social Development also continued overseeing 13 accredited multipurpose shelters and facilitated funding in this regard. Funding included provision for rehabilitation from drug abuse for victims, counseling, accommodation and reintegration services. At least 20 child victims were reported and assisted and both adult and child victims were prohibited from leaving shelters unless accompanied by an NGO representative. A Mpumalanga task team was established during 2013 comprising of government agencies and NGOs, modeled after those in Gauteng, Western Cape and KwaZulu-Natal, coordinating protective services and shelters for victims. Victim protection secures the victims emotionally and physically, making it possible for victims to come forward and testify against their perpetrators, which in turn resulted in successful prosecutions. Various helplines were established in South Africa by non-governmental and other organisations in order for trafficking incidents to be reported and for victims to obtain assistance and protection.

According to the National Coordinator of the Anti-Human Trafficking division of the Salvation Army, the Salvation Army’s anti-trafficking helpline receives an average of eight calls per month. She explains that

---


887 Obtained during an email interview with national coordinator of the anti-human trafficking division of the Salvation Army on 29 June 2016.
the reporting process involves completing an incident form provided to the Salvation Army by the National Freedom Network. The form is then forwarded to the case manager who works closely with the SAPS and the Hawks. Past successes include the recent rescue of 16 girls during July 2016 by the Hawks. Four perpetrators (pimps) were arrested and the Hawks are currently searching for the owner of the property.\textsuperscript{888}

The Department of Social Development called for comments on draft regulations published by the Department in Government Gazette 38542 of March 2015 relating to the Prevention and Combating of Trafficking in Persons Act. These regulations under section 43(4) of the Act were promulgated on 23 October 2015 in Government Gazette 39318 and make provision for accredited social service institutions which will be responsible to assist with the reporting of trafficking, the identification of victims and the assessment of victims. Places of safety are also provided for in the regulations, as well as measures that must protect child trafficking victims. A minimum standard is furthermore prescribed that originations must comply with when working with victims.\textsuperscript{889} These regulations will be discussed in the following section.

3.2.1 The protection of children as a special victim category

Children of all ages often fall victim to trafficking due to poverty, family break-ups, violence or other dysfunctionalities, low levels of education, lack of job opportunities, and family pressure or the sense of responsibility to provide for their families.\textsuperscript{890} In South Africa, the following trafficking push factors were specifically identified:

(a) Poverty;
(b) gender-based violence or discrimination;
(c) HIV / Aids (orphans) and the breakdown of families;
(d) non-enforcement of a normative framework; and
(e) the non-availability of an effective normative framework (until recently).\textsuperscript{891}

\textsuperscript{889} Goliath “Protecting victims of human trafficking – Is South Africa doing enough?” April 2016 De Rebus 22.
\textsuperscript{890} Kane and Saghera Trafficking in Children for Sexual Purposes (UNICEF 2001) 5.
Children are also often promised marriage, employment or academic opportunities as a reward for sexual exploitation by truck drivers and others are exploited as child labourers on farms in South Africa. Children from Lesotho, Swaziland and Mozambique have been recorded to be used as sex slaves locally. According to Molo Songololo, children are trafficked into South Africa from Southeast Asia and the United States and are employed by escort agencies and massage parlors. Others are exploited as camel jockeys and beggars in Saudi Arabia and the Gulf States. According to Warria, Nel and Triegaardt, children are being trafficked in Africa for purposes of child soldiers, labour exploitation and sexual exploitation and even though victims are of both genders, trafficking amongst boy victims has increased.

The identification of child victims is crucial in the fight against trafficking. The PACOTIP Act defines a child as “a person under the age of 18 years”. Section 39 of the PACOTIP Act places an obligation on the Director General of Social Development to submit an annual report on all instances of abuse and deliberate neglect where children are concerned. This annual report should also contain all findings by a children’s court that a child was indeed in need of care and protection due to the deliberate neglect or abuse of the child. The Child Care Act stipulates that the best interest of the child is paramount in all matter concerning minor children.

In a recent report to the UN Committee on the Rights of the Child by the Alternate Report Coalition - Children’s Rights South Africa (ARC-CRSA), an alliance of organisations that invests in the realization of children’s rights in South Africa during Augusts 2016, the Coalition indicated that the possibility of establishing a Children’s Ombud “to ensure a complaints mechanism dedicated to children’s rights” is

895 On 24 July officers of the SAPS were on patrol duty when they stopped a suspicious truck speeding in the Boitekong area. Constables Manganyi and Sikuza positively identified 57 children in the back of a windowless truck as potential trafficking victims. After trying to ascertain from the driver of the truck what the status was of the children and not obtaining a satisfactory reply from the three adult occupants including the driver of the truck, the driver and his two companions were arrested for human trafficking. It was then established that the children were undocumented Malawian nationals and undocumented. The National Freedom Network placed the children in a place of safety where they are currently assessed and treated. The Malawian embassy assisted them with language interpretation when the children were rescued. IOL Row brews over human trafficking case available online at www.iol.co.za/news/crime--courts/row-brews-over-human-trafficking-case-2054380 (8-08-2016).
897 Nel v Byliefeldt and Another 2015 ZAGPPHC 386.
an aspect that has been pondered upon for years but never received adequate attention. The report notes that such a structure harbors immense “potential strength, independence, capacity” to “promote and protect children’s rights”. According to the ARC-CRSA, it is pivotal that such a structure be enabled with “corresponding authority, independence and resources”.

Section 18 of the PACOTIP Act authorizes a police officer and/or a social worker to remove a child if necessary and place such a child in a place of safety, should the child be in need of care and protection. The assessment of each child trafficking victim by a provincial department of social development is also provided for in terms of section 18 of the PACOTIP Act and the information received from the SAPS is essential in establishing if an assessment should be done. The details of the officer reporting the victims must be indicated in a dedicated register. The assessment must be done by a designated social worker appointed by the provincial department of social development and is done in order to establish whether or not the child is a victim of trafficking and in need of care and protection and in some instances whether it is safe for the child to be returned to his or her parents and whether the child is in need of care or protection in terms of section 155 of the Children’s Act. Section 36 of the PACOTIP Act stipulates that—

“[i]f a children’s court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child, the court may (a) suspend all the parental responsibilities and rights of that parent, guardian or other person; and (b) place that child in temporary safe care in terms of section 152 of the Children’s Act, pending an inquiry by a children’s court”.

Section 36(2), however, states that “any action taken by a children’s court in terms of subsection (1) does not exclude a person’s liability for committing any offence under Chapter 2” of the PACOTIP Act.

The social worker responsible for the assessment of the child victim must also comply with sub-regulation 4 in preparing a report which must be presented before the children’s court within 90 days of

900 Act 7 of 2013. See in particular section 18(4)(a).
901 Act 7 of 2013. See in particular section 18(4)(c).
902 Act 7 of 2013. See in particular section 18(6).
903 Act 7 of 2013. See in particular section 18(6).
904 Act 7 of 2013. See in particular section 26(5).
the investigation after which the court shall make a decision on the child’s future. The court may find
that the child should be placed in care within the Republic for the duration of the court order and a copy
of the order must be handed to the investigating police official as well as the prosecutor in charge of the
specific case. The competency of a child to testify in a criminal case is regulated by section 192 of the
Criminal Procedures Act which states “[e]very person not expressly excluded by this Act from
giving evidence shall, subject to the provisions of section 206, be competent and compellable to
give evidence in criminal proceedings.” Children are also often called as witnesses in human
trafficking trials and it is of paramount importance that a victim-centered approach is followed when
victims are prepared for court proceedings. It can be a very intimidating experience for child victims to
take part in court proceedings. The court proceedings per se, their fears of having to face their abuser and
testifying about traumatic experiences such as rape and abuse, often cause the re-traumatisation of
victims. As the testimony of these victims is crucial in obtaining evidence and for effectively prosecuting
perpetrators, extra care should be taken in order to ensure that child victims are protected, that they feel
safe and that their special needs are taken care of. Section 153(3) of the Criminal Procedure Act makes
provision for in camera court hearings in the case of minors at the special request of parents or guardians.

Court support and court preparation also play an important role in preparing child victims for the
prosecution process and adds to the protection of the witnesses. Court support occurs when a trained
and experienced volunteer acts as a facilitator and confidant of the child victim, accompanying the child
throughout the court proceedings; for instance, holding the child’s hand throughout the trial, asking for
breaks when necessary and acting as a source of support to the victim and the victim’s family after the
court proceedings. Court preparation, on the other hand, addresses the child’s potential lack of
understanding of the judicial process, and explains the role his or her testimony will play therein. It is
aimed at limiting trauma and re-victimization and evidently leads to better outcomes. Part of court
preparation would include showing the courtroom to the child victim before the proceedings commence,
and explaining the reason for the questions that will be asked and why it is important to tell the truth.

Court preparation should also be undertaken by highly trained persons with knowledge and experience

---

905 Act 21 of 1977.
906 Davis and Scaffy “Young witnesses: Experiences of court support and court preparation” 2004 Acta
Criminologica.
907 Davis and Scaffy “Young witnesses: Experiences of court support and court preparation” 2004 Acta
Criminologica 17.
in how to deal with child victims as many law enforcement officers, attorneys and judges are not qualified and experienced to fulfil this function effectively. Children should also be prepared that, should they not be able to answer a question, it is acceptable to say “I don’t know” or “I can’t remember.” According to a study done by Davis and Scaffy amongst child interviewees, children’s tenacity “on the witness stand and the measure in which they are prepared for criminal justice proceedings, are often the only hope for conviction.” This study also suggests that a child friendly room must be available for court preparations, that food and drinks should be provided for child witnesses and their families, that family support is offered to the close family of child victims, and that intermediaries must have the authority to make the court process and questions more understandable for child victims; for example, to break up long multifaceted questions into shorter questions child victims can understand. An interview with a State Advocate dealing with human trafficking prosecutions illustrates that various forms of court preparation can be useful in the case of child victims. In a recent case, a child victim, initially too traumatised to testify, after two years of not being able to speak about her traumatic experiences as a trafficking victim, became friends with a Pointer dog and during her session with the dog became relaxed and started to trust the state prosecutor. The victim eventually, and due to her friendship with the dog, managed to open up about her traumatic experience to the prosecutor. The child successfully testified in court and her abuser was sentenced to eight lifelong sentences.

As crime can make a child feel helpless and lost, victims should also be allowed to make choices with regard to court proceedings and their role therein. The right of the child to give evidence should be protected and giving them the choice to testify adds to the protection of this right. In the Khumalo case, the child victims were given the choice to either testify by means of an intermediary, or in person. The children opted to testify in person, wanting to face the perpetrator. Due to the court preparation of the children, the team working on the case and the children’s quality of testimony, Khumalo received 42 life sentences and 270 years’ imprisonment. He however later appealed against the sentence in the light of the fact that he was not informed by his legal team that a sentence of life imprisonment could be imposed, should he be convicted. The appeal succeeded and his sentence of life imprisonment was replaced by

---

908 Davis and Scaffy “Young witnesses: Experiences of court support and court preparation” 2004 Acta Criminologica 18 -29.
909 Davis and Scaffy “Young witnesses: Experiences of court support and court preparation” 2004 Acta Criminologica 17.
910 Informative interview with NPA state prosecutor on 13 October 2016.
twenty years’ imprisonment.\footnote{Khumalo v S 2014 AD 504.}

Regulation 4 of the PACOPTIP Act calls for a similar assessment in case of an adult trafficking victim. Regulation 5 makes provision for the issuing of a letter of recognition to adult persons who have been found to be victims of trafficking.\footnote{Section 4 (1) of Regulation No 1006 issued by the Department of Social Development makes provision for the issuing of a letter of recognition to a trafficking victim. A letter of recognition is issued in terms of Section 19 of the PACOTIP Act 2013 and certifies that the person indicated on the document has been assessed in terms of section 19(8) of the PACOTIP Act and been declared a victim of human trafficking. The letter indicates from which date the letter is effective, is nontransferable and issued by the provincial head of the department of Social development. It is handed to the victim and copies of the letter handed to the investigating police official and prosecutor of the case.} This letter must be issued by the provincial head after an assessment was done as referred to in regulation 3 in terms of section 19(10) of the Act. The provincial department of social development must ensure that the victim is handed such a letter and the investigating police official and prosecutor of the case are to be provided with copies of the letter. Regulation 5 also makes provision for the withdrawal of a letter of recognition and for the victim to respond to the letter of withdrawal within 14 days of notice of the withdrawal. Provision for appeal and application for condonation for late appeal against the letter of withdrawal is also made in regulation 6. The remainder of the regulations focus on the accreditation and funding of nongovernmental organisations providing services to trafficking victims. It also places an obligation on the provinces to regulate these organisations and sets out certain guidelines, norms and standards to be followed when it comes to nongovernmental organisations dealing with trafficking victims.

Regulation 16 of the PACOTIP Act also makes provision for an accredited organisation to draw up a plan as referred to in section 28(2) of the Act in terms of which the needs of a victim are identified and how the organisation plans to meet such needs.

Other regulations include the notification of the child’s parent or guardian immediately after the child has been identified but this must be done “subject to considerations of safety and security of the child.”\footnote{Government Gazette No 39318 9 23 October 2015 available online at \url{http://www.justice.gov.za/legislation/notices/2015/20151023-gg39318 rg10513_gon1006_TIP-Regulations.pdf} (05-06-2016) Section 4(b).}

An investigation must also be conducted by the designated social worker to obtain information regarding the circumstances that caused the trafficking of a child\footnote{Government Gazette No 39318 9 23 of October 2015 available online at \url{http://www.justice.gov.za/legislation/notices/2015/20151023-gg39318 rg10513_gon1006_TIP-Regulations.pdf} (05-06-2016) Section 4(a).} and the investigation must include ascertaining
the child’s “parental circumstances including parental characteristics, mental stability, maturity, physical or emotional impairment, substance and alcohol abuse, capabilities, temperament, employment status, and level of support given to the child.”915 Other aspects to be considered is the child’s family circumstances with regards to family violence, dependency, marital status and inappropriate discipline916 and also environmental circumstances such as homelessness, isolation, poverty and mobility of the parents.917 Any possible risk that the child may be exposed to and gender related needs must also be investigated.918 After the assessment the designated social worker must compile a report and present it to the Children’s Court within 90 days of the investigation.919 The Children’s Court must then determine whether the child needs protection and care and can issue an order placing “a child in care within the Republic for the duration of the court order and a copy of the said order must be handed to the investigating police official and the prosecutor dealing with the matter.”920

South Africa faces various challenges in its pursuit against human trafficking such as the ignorance of health care workers, legal enforcement authorities and courts, porous borders, vulnerabilities and disposable people, shortage of skilled staff, the lack of a collective national database, corruption and internet access by thousands of uneducated individuals and especially minor children, to name only a few. Victims should be treated as victims, not criminals. When child victims are dealt with, this should also take place with utmost care, taking into account their vulnerability and special needs.

3.3 Prosecution

In order to effectively combat human trafficking, it is essential that trafficking-specific national legal instruments are designed and effectively implemented in order to act not only as a deterrent but also make the effective prosecution of perpetrators possible. The UN Convention against Transnational Organised Crime (UNCTOC) and its three protocols “effectively complement each other”\(^{921}\) and was ratified by South Africa on 20 February 2004.\(^{922}\)

Article 11 (1) of UNCTOC \(^{923}\) requires state parties to ensure that applicable and severe sanctions are imposed upon human trafficking perpetrators. As indicated by Kruger—

> “punishment that fails to take the seriousness of the crime of human-trafficking into consideration does not deter perpetrators. While the Palermo Protocol lacks direction on the severity of sentences to be imposed, a provision in the Convention does make it compulsory to impose sanctions that take into account the gravity of that offence.”\(^{924}\)

It is common cause that the Palermo Protocol “comprises the international community’s response designed to introduce a truly global approach to the combating of human trafficking”.\(^{925}\) The Protocol also deals “comprehensively with trafficking in persons, irrespective of the age or gender of victims, and covers all forms of trafficking”.\(^{926}\) Article 5 of the Palermo Protocol places an obligation on states to put in place legislative and or other measures in order to criminalise human trafficking and prosecute perpetrators. As mentioned earlier, the PACOTIP Act was designed as a national response to trafficking in persons and to give effect to South Africa’s obligations in terms

---


\(^{923}\) The UN Convention against Transnational Organized Crime and the Protocols Thereto (2000).


of various international agreements which includes the United Nations Convention against Transnational Organized Crime and more specifically the Palermo Protocol.

Article 3 of the Palermo Protocol determines that—

“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 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.”

Although the word “sexual exploitation” is left undefined in the wording of the Protocol, the travaux préparatoires to the Palermo Protocol explains that this was done intentionally, leaving it to states to define “sexual exploitation” within the context of their own domestic legal system and that states are to decide for themselves whether sex work is a form of sexual exploitation or labour.927

Section 4(1) of the PACOTIP defines trafficking in persons as—

“[a]ny person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of—

a) a threat of harm;

b) a threat or use of force or other forms of coercion;

c) the abuse of vulnerability;

d) fraud;

e) deception;

f) abduction;

gh) kidnapping;

h) the abuse of power;

i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person’ or

j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage,

aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.”

---

Article 4(1) of the PACOTIP Act makes provision for the criminalisation of trafficking in persons and sets out the “means”, “purpose” and “acts” of trafficking according to the general framework of a criminal offence. South Africa’s Trafficking Act complies with the definition of the Palermo Protocol and international standards in defining trafficking in persons and even goes further by including kidnapping and a threat of harm as part of the definition of trafficking in persons. It is also notable that the PACOTIP Act includes in its definition that the intended harm may be aimed at “the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation.”928 As indicated by Kruger, this phrase was not included in the initial draft Prevention and Combating of Trafficking in Persons Bill as published during May 2009 by the Department of Justice and Constitutional Development.929 It was, however, inserted by the Office of the Chief State Law Advisor before the Bill was submitted for certification purposes. Kruger suggested that the legislature should consider to amend the phrase “an immediate family member of the person trafficked”, to read “a threat of harm to that person or an immediate family member of that person” as part of the definition of trafficking. This suggestion was taken into account by the legislator, and section 4(1) now makes provision for “a threat of harm aimed at either the person or an immediate family member of that person”,930 providing a protective measure to victims and their families. This is an important addition to the Act as family members of trafficking victims are often intimidated by traffickers with threats of harm to the victim’s family members, should the victim not submit to the demands of the traffickers.

Section 4(2)(a) and (b) of the PACOTIP Act furthermore stipulates that—

“[a]ny person who adopts a child, facilitated or secured through legal or illegal means; or concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence.”

Article 3 of the Palermo Protocol stipulates that “[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or

928 Section 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
930 Section 4(1) of Act 7 of 2013.
services, slavery or practices similar to slavery, servitude or the removal of organs;” whereas Chapter 1 of the PACOTIP describes exploitation as follows:

a) All forms of slavery or practices similar to slavery;
b) sexual exploitation;
c) servitude;
d) forced labour;
e) child labour as defined in section 1 of the Children’s Act;
f) the removal of body parts;\(^{931}\) or
g) the impregnation of a female person against her will for the purpose of selling her child when the child is born.

The PACOTIP Act definition once again complies with the Palermo Protocol, and reaches wider than the Protocol as it makes provision for the impregnation of a female person against her will for the purpose of selling her child when the child is born.

In terms of section 5 of the PACOTIP Act, a person who “intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence”. In the case of \textit{S v Makesh Mansaur},\(^{932}\) the accused was charged with trafficking in persons for the purpose of sexual exploitation. The accused recruited the complainant in Thailand for prostitution in South Africa and the complainant was aware of this as she had financial troubles in Thailand and came to South Africa in order to earn more money. The accused, however, took away the complainant’s visa and passport after accommodating and harbouring her, indicating that he would return them as soon as she has “paid off her debt” – hence she became an illegal foreigner in South Africa. She had to pay back R60 000 in “debt” to the accused. The accused pleaded guilty but committed suicide before the sentence was given.

\footnotesize
\(^{931}\) A 28-year-old women was arrested on 1 July 2016 in connection with human trafficking. She was allegedly involved in the kidnapping of a 4-year-old albino boy, Maneliswa Ntombela, who had gone missing on 21 June in the Emanguzi area. Maneliswa Ntombela was allegedly trafficked for the purposes of selling his body parts to a sangoma and is still missing. Jacarandafm \textit{Police arrest woman for human trafficking, child still missing} available online at \url{http://www.jacarandafm.com/news/news/police-arrest-woman-human-trafficking-child-still-missing/} (09-09-2016).

Article 3(b) of the Palermo Protocol states that consent of a victim of trafficking to the intended exploitation is irrelevant. The PACOTIP Act adopts article 3(b) of the Protocol in section 11(1)(a) by stating that if a child has consented to the “intended exploitation or the action which was intended to constitute an offence”, it is not a defense to a trafficking charge.

Article 3(c) of the Protocol states that “[t]he 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”. The means referred to above include the threat of using force or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability or 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. Other offences include the possession, destruction or tampering with documents such as identification documents and passports or benefitting financially or otherwise from a trafficking victim’s services. Furthermore, the following will also constitute an offence:

(a) any person that should reasonably have known that property was used to facilitate trafficking and failed to report such knowledge to a member of the SAPS,

(b) an electronic communications service provider who failed to take reasonable steps to prevent “the use of its service for the hosting of information”, and

(c) a carrier who “transports a person within or across the borders of the Republic who knows that the person is a victim of trafficking or ought reasonably to have known”.

Article 8(1)(a) of the PACOTIP Act prohibits the intentional lease or sublease of any form of accommodation, room, house, building or establishment for purposes of facilitating trafficking. If a person does lease or sublease such a property, room or establishment used for the facilitation or promotion of trafficking, and ought to have reasonably have been aware of the purposes for the

---

933 Article 3(d) of the Palermo Protocol defines a child as a person under the age of 18 years and so does the PACOTIP Act.
934 Act 7 of 2013. See in particular section 6.
935 Act 7 of 2013. See in particular section 7.
936 Act 7 of 2013. See in particular section 8(1).
937 Act 7 of 2013. See in particular section 8(2)(a).
938 Act 7 of 2013. See in particular section 9(1).
lease, such a person will be guilty of an office. The Act reaches even wider and states that such a person who “becomes aware or ought reasonably to have known or suspected that it is being used to facilitate or promote trafficking in persons and fails to report that knowledge to a police official” will also be guilty of an offence.

Section 13(1) of the PACOTIP Act sets out the penalties to be awarded; the most severe being life imprisonment and/or a fine not exceeding ZAR 100 million. The 2016 TIP Report criticises this provision by stating that the ability of judges to impose fines rather than prison time when perpetrators are sentenced, should be restricted as only imprisonment would ensure that perpetrators are sufficiently penalised and that penalties are stringent enough.939

Section 18(1) of the PACOTIP Act stipulates that “[d]espite any law, policy or code prohibiting the disclosure of personal information, any person who knows or ought reasonably to have known or suspected that a child is a victim of trafficking must immediately report that knowledge or suspicion to a police official for investigation”. Section 19 deals with reporting and dealing with an adult victim of trafficking and, similar to section 18(1), section 91(1)(a) states that a duty rests on all persons who are aware of a person being trafficked, to report such trafficking incident to a police official for investigation, despite any law, policy or code prohibiting the disclosure of personal information.

4. Remedies

“A right without a remedy is no right at all”.

- Lord Denning940

The need for reparation for human rights violations is common cause when it comes to human rights violations.941 It is also paramount that such international remedies filter through to the national level, the purpose being to “make good the injury caused to persons or property by a wrongful act.”942

“When an unlawful act is attributable to the State, international responsibility emerges immediately from this act as a consequence of the violation of international law and, attached to it, the duty to provide reparation and to cease the consequences of such violation.”

However, redress for victims of human rights violations and consistent provisions on appropriate remedies remain a challenge.

As discussed earlier, one of the key components of the ICCPR is the right to a remedy for victims of human rights violations. Article 2(3) of the ICCPR provides victims with the right to a remedy “determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.” South Africa ratified the ICCPR in 1998 and submitted its initial report to the Human Rights Committee in 2016. The Committee welcomed the submission of the report, however noting that it was 14 years overdue. The Committee also highlights that South Africa should “consider taking measures to give full legal effect to the Covenant under domestic law, and make more vigorous efforts to raise awareness about the Covenant and the Optional Protocol among judges, lawyers, prosecutors and the public at large. In the event of a violation of the Covenant, the State Party should ensure access to an effective remedy, in accordance with article 2(3).

Resolution 60/147 was adopted by the General Assembly on 16 December 2005 and recognises that “in honouring the victim’s right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field.” The General Assembly also concurrently adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

---

944 See Chapter 4 page 86.
945 Article 2(3)(b).
946 HRC Concluding observations on the initial report of South Africa CCPR/C/ZAF/CO/1 at para 1.
947 HRC Concluding observations on the initial report of South Africa CCPR/C/ZAF/CO/1 at para 2.
948 HRC Concluding observations on the initial report of South Africa CCPR/C/ZAF/CO/1 at para 6.
949 Preamble to General Assembly resolution 60/147 of 16 December 2005.
Humanitarian Law (Basic Principles and Guidelines) by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005.\textsuperscript{950}

The General Assembly advises states to take into consideration the Basic Principles and Guidelines and to—

“bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general.”\textsuperscript{951}

In the preamble to the Annex of the Basic Principles and Guidelines, the General Assembly reaffirms that—

“victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims.”\textsuperscript{952}

The General Assembly also reiterates the principle of state duties such as the duty to prosecute perpetrators in accordance with international law and the obligation to create complementary national legal frameworks and highlights that a victim-centered approach should be followed by the international community.\textsuperscript{953} Paragraph 1 of General Assembly resolution 60/147 adopts, \textit{inter alia}, the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law. States are also required to ensure that their national legal frameworks comply with their international law obligations through the integration of international human rights law and international humanitarian law into their national policies and to adopt relevant and efficient administrative procedures which are efficient and shall “provide fair, effective and prompt access to justice.”\textsuperscript{954} States are also obliged to make “available adequate, effective, prompt and appropriate remedies, including reparation, and to ensure “that their domestic law provides at least the same level of protection for victims as that required by their international obligations.”\textsuperscript{955}

\begin{flushleft}
\textsuperscript{950} General Assembly resolution 60/147 of 16 December 2005 at para 1.  
\textsuperscript{951} General Assembly resolution 60/147 of 16 December 2005 at para 2.  
\textsuperscript{952} Preamble to General Assembly resolution 60/147 of 16 December 2005 Annex.  
\textsuperscript{953} Preamble to General Assembly resolution 60/147 of 16 December 2005 Annex.  
\textsuperscript{954} General Assembly resolution 60/147 of 16 December 2005 at para 2(b).  
\textsuperscript{955} Article 1(a)-(e) of General Assembly resolution 60/147 of 16 December 2005 Annex. 
\end{flushleft}
In terms of article 3, the General Assembly furthermore places a preventive obligation on states and urges states to take “appropriate legislative and administrative and other appropriate measures to prevent violations.”\(^{956}\) States are also obliged to undertake impartial, prompt, thorough and effective investigations and to take action against perpetrators in terms of both international and domestic law.\(^{957}\) States are furthermore obliged to cooperate with each other as well as with international judicial organs during the investigative process and during prosecutions.\(^{958}\) Universal jurisdiction should also be incorporated by states in cases where such jurisdiction is dictated by an applicable treaty or in terms of other international law obligations.\(^{959}\) In terms of article 5, statutes of limitations shall also not apply to gross human rights violations and crimes under international law if so provided for in an applicable treaty.\(^{960}\)

States must provide victims of human rights and humanitarian rights violations with efficient access to justice which must also be equal. Effective remedies must also be provided to victims in terms of article 3(d). Article 4 deals with the duty of states to investigate gross human rights violations and perpetrators must be prosecuted and punished. Even though the Basic Principles and Guidelines refer explicitly to gross violations of international human rights law and serious violations of international humanitarian law, this does not exclude victims of human rights violations who does not fall under this category. Principle 26 of the Basic Guidelines and Principles states that—

“[n]othing in these Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Principles and Guidelines are without prejudice to special rules of international law.”

It is also paramount for states to take note that the terms “gross” and “serious” do not only refer to violations committed on a massive scale, in accordance with a policy or a systematic pattern.

\(^{956}\) Article 3(a) of General Assembly resolution 60/147 of 16 December 2005 Annex.

\(^{957}\) Article 3(b) of General Assembly resolution 60/147 of 16 December 2005 Annex.

\(^{958}\) Article 4 of General Assembly resolution 60/147 of 16 December 2005 Annex.

\(^{959}\) Article 5 of General Assembly resolution 60/147 of 16 December 2005 Annex.

\(^{960}\) Article 5 of General Assembly resolution 60/147 of 16 December 2005 Annex.
According to Van Boven, \(^{961}\) “the word ‘gross’ qualifies the term ‘violations’ and indicates the serious character of the violations but that the word ‘gross’ is also related to the type of human right that is being violated.”

In terms of article 6 of the Basic Principles and Guidelines, \(^{962}\) victims are to be treated in a humane manner, their dignity and human rights must be respected and states must take appropriate steps to guarantee the safety, psychological well-being and privacy of such victims and their families. Victims who suffered violence and trauma must be specially considered and receive special care to avoid the re-traumatisation of such a victim during the criminal justice process. \(^{963}\) According to article 7 all victims have the right to:

(a) Equal and effective access to justice;
(b) Adequate, effective and prompt reparation for harm suffered;
(c) Access to relevant information concerning violations and reparation mechanism.

Article 8 provides victims of gross violation of international human rights law “equal access to an effective judicial remedy as provided for under international law.” Other victim’s rights include the right to access to administrative and other bodies, modalities and mechanisms conducted in terms of national laws. In terms of article 8, states incur the obligation to conduct “fair and impartial proceedings” in their domestic laws and must

“(a) disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law; (b) take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims; (c) provide proper assistance to victims seeking access to justice; (d) make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.”


\(^{962}\) Article 6 of General Assembly resolution 60/147 of 16 December 2005 Annex at para 10.

\(^{963}\) Article 6 of General Assembly resolution 60/147 of 16 December 2005 Annex at para 10.
States must also create and develop measures and procedures to “allow groups of victims to present claims for reparation and to receive reparation, as appropriate in terms of Article 8 (13)”. Article 8(14) very importantly makes mention of the provision of prompt, effective and adequate remedies for gross human rights and humanitarian law violations and reiterates that such remedies should “include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.”

Article 7 advocates for “adequate, effective and prompt reparation” in order to “promote justice by redressing gross violations of human rights law or serious violations of international humanitarian law.”964 In terms of the Basic Principle and Guidelines, the term “reparation” refers to a wide range of measures that can be applied in order to respond to a threatened or actual violation of a person’s human rights and entails both the “substance of the relief as well as the procedure through which it may be obtained”.965 According to article 9, reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims or acts or omissions which can be attributed to the State and which constitute gross violations of international human rights law or serious violations of international humanitarian law.966 “In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”967

Principle 24 of the UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (The Impunity Principles) deals specifically with victims rights to justice and stipulates that efficient measures should be taken by states with regards to criminal justice and should ensure that perpetrators be prosecuted and punished accordingly. Principle 24 furthermore regulates prescription restrictions and stipulates that

“[p]reservation – of prosecution or penalties-in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are

964 Article 7 of General Assembly resolution 60/147 of 16 December 2005 Annex at para 11.
966 Article 9 of General Assembly resolution 60/147 of 16 December 2005 Annex at para 15.
967 Article 9 of General Assembly resolution 60/147 of 16 December 2005 Annex at para 15.
by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for the injuries.\textsuperscript{968}

According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,\textsuperscript{969} “victims” are described as:

1. persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term “victim” also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.

Reflecting the values of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and mirroring South Africa’s obligations in terms of the Declaration, the Victims Charter of South Africa\textsuperscript{970} (The Victims’ Charter), promotes justice for victims of crimes in South Africa and consolidates the rights and obligations that applies to victims and crime survivors in South African context.\textsuperscript{971} According to the introduction of the Victims Charter, this instrument—

“Can be traced back to the National Crime Prevention Strategy, 1996 as well as the National Victim Empowerment Programme 1998. Both the strategy and the programme focuses on the important role victims should play within the criminal justice system. The Victims Charter presents a rights framework for services provided under the Victim Empowerment Programme (VEP).”

The Victims’ Charter is “consonant”\textsuperscript{972} with the South African Constitution,\textsuperscript{973} and affirms that the Government is committed to implement reformatory justice measures of a restorative purpose within the criminal justice sphere in order to “protect and promote the rights of victims in compliance with


\textsuperscript{969} General Assembly Resolution 40/34 of 29 November 1985 at paras 1-2.

\textsuperscript{970} The Victims Charter of South Africa was approved by the Cabinet in 2004.


\textsuperscript{972} The Victims Charter of South Africa was approved by the Cabinet in 2004.

\textsuperscript{973} South African Constitution Act 108 of 1996.
international obligations under international human rights systems”. The Charter recognises the severe impact of crime on victims, the effect it has upon the rights of victims and reiterates that victims' rights should be balanced against the rights of the perpetrators in order to ensure the “centrality of victims” and minimising possible secondary victimization. The Charter furthermore states that the current legal framework should make provision “for victim’s recourse when standards are not met.” The Charter reaffirms the right of victims to be treated with fairness and respect to their dignity and privacy by all levels of government and places an obligation on all service providers, court officials, prosecutors, police officials to minimize any possible inconvenience that could possibly be caused to victims. Chapter 2 deals with the right of victims to offer information during the criminal investigation process and trial, provides victims with the right to participate in criminal justice proceedings, creates an additional opportunity to make a further statement should the victim feel that the first statement was incomplete and to attend a parole hearing and submit written input after applying to do so to the Chairperson of the Parole Board. Chapter 3 deals with victims' rights to receive information which includes the right to be informed of his rights and chapter 4 deals with the right of victims to be protected against fear, corruption, harassment, tampering and abuse. It also makes provision for victims to be placed in a witness protection programme and the right to stay anonymous in case any media publications with regards to the trial. In camera proceedings are also made provision for by this chapter and it may be ordered that a trial be held in camera. Chapter 5 provides victims with the right to request assistance which includes social, health and legal assistance as well as counselling assistance and services. And provides victims with the right to request the services of a language interpreter. In the case of sexual offences, domestic violence and child support or maintenance matters, victims have the right to have

such proceedings take place in specialised courts. Reasonable steps must be taken in all instances by service providers to accommodate victims in this regard and treat them “in a sensitive manner”.  

Chapter 6 of the Victims Charter very importantly deals with victims right to compensation and states that victims have “the right to compensation for loss of or damage to property suffered as a result of a crime being committed against” a victim. “Compensation” in terms of Chapter 6 of the Victims Charter refers to “an amount of money that a criminal court awards the victim who has suffered loss or damage to property”. The victim also has the right to institute a civil action against an accused, should the court not grant a compensation order, as will be the case where damages are problematic to quantify in financial terms. The clerk of the court will assist victims with the enforcement of such order. According to Chapter 7, victims have the right to restitution where they have been “unlawfully dispossessed of goods or property” or where victims property have been damaged unlawfully. Restitution in this regard also refers to the right to have goods or property repaired that was unlawfully damaged in order to restore such property or goods to the condition it was in prior to the committed offence. Victims also has the right to assistance of the clerk of the court when enforcing the right to restitution.

The Department of Social Development drafted and implemented the National Policy Guidelines for Victim Empowerment during July 2009. These guidelines provide a framework for inter-departmental and intersectoral collaboration. It also provides for the integration of effective institutional arrangements, setting a platform for managing victim empowerment. In his foreword to the Guidelines, the South African Minister of Social Development, Minister Skweyiya stated that—

“through these National Policy Guidelines, victims will be empowered through more and better services, as well as improved co-ordination. … The implementation of these National Policy

---

Guidelines is indeed a core part of the government’s commitment to ensuring a better life for … the most vulnerable.”

The Guidelines place the Department of Education (primary, secondary and tertiary levels) on the forefront with regard to the protection of learners from crime and violence within school environments and oblige schools to assume a supportive role when it comes to scholars falling victim to crimes as a result of events occurring in and outside school environments. The SAPS, in turn, should provide professional, accessible and sensitive service to the victims of crime and violence during the reporting and investigation of crimes.

The Department of Justice and Constitutional Development, including the National Prosecuting Authority (NPA), shall be responsible for ensuring that “victims of crime and violence and witnesses are treated professionally and with dignity and respect during court proceedings to facilitate optimal participation in the criminal justice process.”

The Guidelines also provide possible entry and exit points for victims, indicating the various pathways through criminal justice and associated systems.

The flowchart below, which forms part of the training manuals utilized by the NPA when training law enforcement officers, indicates typical pathways through the criminal justice and other associated systems, illustrating how provision of facilities such as private interviewing rooms and professional services by professional respectful personnel can impact positively on the victim and on her or his empowerment. These are, however, mere examples and victims may enter the system at different entry points, following different routes, depending on particular circumstances.

---

in each trafficking scenario. For instance, a scholar may enter the system through counselling by a school therapist or social worker, whilst a trafficking victim who works on the streets may enter the system with the help of an NGO or a Rape Crisis Centre official. The guidelines also make provision for a three-yearly financial policy implementation plan by each government department in conjunction with relevant civil society organisations.993

Figure 1: Pathways through the criminal justice and associated system.

According to the Basic Guide and Principles (principle 18), each individual circumstance must be taken into consideration according to the proportionality of the gravity of the human rights violation and circumstantial merits.\textsuperscript{994} Full and effective reparation must be provided for and the following forms of reparation should be included: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.\textsuperscript{995} Restitution should aim to restore victims to the situation they were in prior to the human rights violations and must include: “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”\textsuperscript{996}

South Africa ratified the UNCTOC and its protocols in 2004. Article 11 (1) of UNCTOC\textsuperscript{997} places an obligation on the South African government to ensure that applicable and severe sanctions are imposed upon human trafficking perpetrators. The implementation of the PACOTIP Act in 2015 was a significant step in the right direction, complying with the Palermo Protocol by criminalising all forms of human trafficking irrespective of the victim’s gender or age,\textsuperscript{998} providing a legal remedy to trafficking victim’s and setting a severe penalty of ZAR100 million or life imprisonment as a maximum fine for trafficking offences.\textsuperscript{999} The PACOTIP Act furthermore complies with the Palermo Protocol in the sense that it does not require an element of transnationality or the involvement of organised criminal groups in its definition of trafficking as a form of crime.\textsuperscript{1000}

Article 5(2) of the Palermo Protocol requires that domestic legislation of state parties criminalise human trafficking as a principal criminal offense and also that the involvement of a person in human trafficking should constitute a criminal offense. In terms of section 10 of the PACOTIP Act, involvement includes any attempt to commit a trafficking offense\textsuperscript{1001} or perform any act aimed at participating in trafficking,\textsuperscript{1002} any person who—
“incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit,” or (c) conspires with any other person to commit, an offence under this Chapter is guilty of an offence.”

The PACOTIP Act also effectively addresses the aspect of consent-based offences in both child and adult trafficking cases and section 11 (1) (a) of the Act states that the consent of a victim does not constitute a valid defence to human trafficking as an offence. In S v Jezile the court had to decide whether consent by a trafficked child, or consent by a person who has authority over such a child, establishes a valid defence on charge of human trafficking. A fourteen year old girl was forced into marriage by her family for which they received an amount of ZAR8 000 for lobola (a customary law dowry) from Jezile, a man much older than the minor child. The girl ran away at various instances after which she was returned to Jezile by her family. The girl was held captive by the defendant and repeatedly raped by him. The defendant raised the defence of an arranged marriage and the tacit consent of the minor’s family to the human trafficking charges he faced. The court rejected his defense and the defendant was convicted for human trafficking in terms of the transitional antitrafficking provision in the Sexual Offences and Related Matters Amendment Act 32 of 2007. He received a 22 year sentence on the charges of human trafficking and rape which was confirmed on appeal. 

“this case sets a clear precedent to the effect that a person having authority over a child cannot validly consent to the child being trafficked into a forced marriage. Once the state proves the elements of the human-trafficking offence, the offender will be convicted despite cultural practices which may be acceptable in some communities. As regards this issue, it is noteworthy that section 4(2)(b) of the Trafficking Act contains a new provision that will expand the prosecution’s reach in cases of forced marriage. This section criminalizes the conclusion of a forced marriage with the purpose of exploiting the unwilling party. A stringent penalty of a maximum fine of ZAR100 million or imprisonment for life, or both, may be imposed in terms of this provision or conviction.”

Section 14 of the PACOTIP Act stipulates that the court must consider a list of aggravating factors before sentencing offenders. This list includes the impact of the trafficking offence on the victim, the nature and significance of the perpetrator during the trafficking process, whether any form of organized crime was involved in the trafficking process and whether the victim was a child and was mentally ill or physically

1003 Section 10 (1)(b) of Act 7 of 2013.
1004 Section 10 (1 (c) of Act 7 of 2013.
1005 Act 7 of 2013.
1006 S v Jezile 2015 JDR 0566 WCC.
1007 S v Jezile 2015 JDR 0566 WCC at paras 1,2 and 106.
1008 S v Jezile 2015 JDR 0566 WCC at paras 51.
disabled. In the case of State v Matyiti\textsuperscript{1010} the court highlighted that sentences must be appropriate and “also needed to be victim centered”.\textsuperscript{1011}

4.1 Compensation

Article 6 of the Palermo Protocol states that—

“each States Party shall consider implementing measures to provide for the physical, psychological and social recovery of the victims of trafficking in persons, including in appropriate cases, in cooperation with non-governmental organisations, other relevant organisations and other elements of civil society and in particular, the provision of appropriate housing, counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand, medical, psychological and material assistance, and employment, educational and training opportunities.”

Article 6 of the Palermo Protocol makes provision for domestic legal systems to implement measures providing trafficking victims the possibility of obtaining compensation for damages suffered during their trafficking experience. Article 6(6) deals with the subject of domestic application, stating that each state party shall ensure that its domestic legal system contains measures that provide victims with the possibility of obtaining compensation for damage suffered.

The Basic Guidelines and Principles make provision for victim compensation and states that provision should be made for all “economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

\begin{itemize}
  \item[(a)] Physical or mental harm;
  \item[(b)] Lost opportunities, including employment, education and social benefits;
  \item[(c)] Material damages and loss of earnings, including loss of earning potential;
  \item[(d)] Moral damage;
  \item[(e)] Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.\textsuperscript{1012}
\end{itemize}

\textsuperscript{1010} State v Matyiti 2011 1 (SACR) 40 SCA at para 16.
\textsuperscript{1011} Kruger “Towards a sharp prosecution sword to combat human trafficking: Comparing the new South African counter-trafficking law with international prosecution standards” 2016 Comparative and International Law Journal of Southern Africa Volume 49 Issue 1 82.
\textsuperscript{1012} General Assembly resolution 60/147 of 16 December 2005 at para 20(a)-(e).
The provision for payment of compensation can be deemed as compensation which should cover all damage suffered by the trafficked victim that can be assessed in order to fully compensate such a victim. A distinction can be made between moneys paid by means of compensation and moneys paid for alternative purposes such as psychological treatment or physical treatment. As indicated by the phrase “compensation”, such payments shall be deemed as compensatory payments and be calculated by assessing the damage suffered by the injured party. In the Velasquez Rodriguez case it was held that “it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered”. According to Van Boven

“Monetary compensation is intended to remedy the damage suffered by the injured party as a result of the breach, to the extent that money can do this. The appropriate heads of compensation can vary according to the type of breach, the behavior of the parties and other factors. Compensation awards include material losses (loss of earnings, pension, medical and legal expenses) and non-material or moral suffering (pain and suffering, mental anguish humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter calculated on the basis of what is fair in all the circumstances.”

Section 29(1)(a) of the PACOTIP Act addresses the issue of remedies and compensation and states that provision for compensation may be made by a court “on its own accord or at the request of the victim of trafficking or the prosecution, in addition to any sentence which it may impose in respect of any (trafficking) offense.” Compensation may include that the person who was convicted of a trafficking crime, is ordered to pay compensation to a victim for any damage, destruction or loss of property or money, any possible injuries which include physical and psychological injury, loss of income or support, as well as being infected with a life-threatening disease. In terms of Section 29(1)(b) such compensation will include all reasonable expenses “expected to be incurred” in relation to the possible damages discussed above. Section 29(2) makes provision for a victim to initiate a civil action against the perpetrator in cases where the

1016 Act 7 of 2013. See in particular section 29(1)(a).
1017 Act 7 of 2013. See in particular section 29(1)(a)(i)–(iv).
compensation needed exceeds the jurisdiction of the magistrate’s court and the amount that a magistrate’s court can award.\textsuperscript{1018}

With regards to compensation to the state, section 30 of the PACOTIP Act stipulates that the court may make an order “for payment by the convicted person or the carrier” of any amount necessary for the state to care for, accommodate, transport, return and repatriate the victim of the offence.\textsuperscript{1019} Such payment shall be made to the Criminal Assets Recovery Account which was established in terms of the Prevention of Organized Crime Act. Such an order for payment to the Criminal Assets Recovery Account will have the effect of a civil judgement of a magistrate’s court.\textsuperscript{1020}

South Africa has previous experience dealing with human rights violations and reparations when the Truth and Reconciliation Commission was established during the 1990s after the fall of the apartheid regime. The Promotion of National Unity and Reconciliation Act made provision for the “granting of reparation, and the rehabilitation and the restoration of the human and civil dignity of victims of violations of human rights”.\textsuperscript{1021} The Truth and Reconciliation Commission made it clear that “the right of victims of human rights abuse, is well established in international law” and that “it is not sufficient to award ‘token’ or nominal compensation to victims”.\textsuperscript{1022} Victims should form the centre of any reparation efforts made in order to redress human rights violations, whether it is compensation, restitution, rehabilitation, satisfaction or guarantees of non-repetition. This principle is also firmly embedded in the UN Principles and Guidelines on the Right to a Remedy and Reparation, being a “victim-oriented” document.\textsuperscript{1023}

As an anonymous survivor stated:

“Be victim centered, not case centered. We know you want to get the bad guy(s) but without your victim / survivor, you have nothing. You cannot interview her as if she were a suspect, even though she has information essential to you building your case.”

\begin{footnotes}
\textsuperscript{1018} Act 7 of 2013. See in particular section 29(2).
\textsuperscript{1019} Act 7 of 2013. See in particular section 30.
\textsuperscript{1020} Act 7 of 2013. See in particular section 30(1)(d).
\textsuperscript{1021} Act 34 of 1995.
\end{footnotes}
“You have to understand how trauma affects not just behavior, but memory... You will not get the
“perfect statement”, in chronological order... you need to give them time and you need to be a safe
person for them to figure out how to formulate that information that they can then later provide to
you... if you establish that safety and trust.”1024

4.2 Rehabilitation

According to article 21 of the Basic Principles and Guidelines, rehabilitation must include social
and legal services as well as medical and psychological care. As rehabilitation of victims is a
pivotal aspect in the healing process of victims, it is paramount that state parties shall support the
funding of trafficking specific rehabilitation centres and that these services shall be provided to
victims at no expense. Rehabilitation also includes hospitalization, surgeries, labouring, traumatic
rehabilitation, diagnostic procedures and mental health.1025

4.3 Satisfaction

According to principle 22—

“[s]atisfaction should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such
disclosure does not cause further harm or threaten the safety and interest of the victim, the
victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent
the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children
abducted, and for the bodies of those killed, and assistance in the recovery, identification
and reburial of the bodies in accordance with the expressed or presumed wish of the
victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the
rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

1024 Smith Trafficking survivor interviewing victims of human trafficking: Survivors offer advice available online at
2014).
1025 Smith Trafficking survivor interviewing victims of human trafficking: Survivors offer advice available online at
2014).
Judicial and administrative sanctions against persons liable for the violations

Commemorations and tributes to the victims;

Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.”

4.4 Guarantees of non-repetition

The guarantee of non-repetition serves as a preventative measure as well as amounts to a form of redress. It is aimed at role-players who often commit violations such as law enforcement officers, military personnel, prison personnel and security services. Principle 23 of the Basic Principles and Guidelines states *inter alia* that guarantees of non-repetition should include the “strengthening of the judiciary”, ensure that military and security forces are effectively controlled and that all “civilian and military proceedings abide by international standards of due process, fairness and impartiality”.

It is furthermore important that the quantum of reparations awarded to victims is sufficient to make a meaningful and substantial impact on the quality of their lives. The Commission considered the five categories of reparation as part of satisfaction, namely: redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition.\(^{1026}\) As Shelton clearly puts it:

“Furthermore, how does one assess degrees of suffering in order to provide for different awards of reparation? Certain individuals can withstand horrendous long-term torture and remain relatively healthy and functional while other individuals may be permanently debilitated as a result of a single act of violence.”\(^{1027}\)

5. The National Action Plan

The South African Law Reform Commission initiated an integrated “National Action Plan” Conference in Durban during 2009, the main aim being to join forces by government departments, civil society and international organisations as well as to improve their alignment as well as cooperatively pursue private efforts in combating trafficking. A task team was established and the


development of the National Action Plan was discussed. During 2013 the TIP Report criticised South Africa for not having released or implemented the National Action Plan to date.\textsuperscript{1028} The 2015 TIP Report again made mention of the fact that South Africa was lingering in implementing an updated National Action Plan\textsuperscript{1029} whereas the 2016 Report omits any commentary on the National Action Plan.\textsuperscript{1030}

In order to express its commitment to effectively combat trafficking in persons, South Africa recently released an Anti-Trafficking Action Plan which sets out specific goals and objectives to advance South Africa’s anti trafficking efforts. The Anti-Trafficking Action Plan for South Africa was released in September 2016 in accordance with recommendations by the 2016 Trafficking in Persons Report and sets out the Anti-Trafficking Action Plan to be pursued by South Africa to eliminate and fight human trafficking. It summarizes the priorities to be focused on as follows:\textsuperscript{1031}

1. Anti-trafficking laws will be amended in order to ensure sufficiently stringent penalties and also restricting the possibilities of judges imposing fines instead of prison time when trafficking perpetrators are sentenced.
2. Efforts to investigate, prosecute and convict perpetrators in terms of PACOTIP shall be increased. Special focus will be placed on labor traffickers.
3. Continuous training will be provided for social service officials and law enforcement officers and such individuals shall be held accountable for implementation of the training they receive.
4. Officials suspected of trafficking complicity shall be investigated and prosecuted.
5. A victim centered approach shall be used by all social service providers and law enforcement officials when interacting with potential trafficking victims and they shall furthermore recognize that initial consent is irrelevant.
6. Employers using forced labor shall be prosecuted.
7. Vulnerable groups, potential deportees and women in prostitution shall be screened for

\textsuperscript{1031} Information obtained in an email received from the NFN South African on 28 July 2016 after the NFN representative attended a workshop held by the Minister of Justice and Correctional Services.
trafficking indicators.

8. Anti-trafficking law enforcement and victim referral mechanisms of KwaZulu-Natal (KZN) and Western Cape will be replicated in all provinces.

9. Interpreters will be provided to assist victims in obtaining care, cooperating with law enforcement and testifying in court.

10. The availability of drug rehabilitation services will be extended.

11. Additional shelters will be established and certified for male victims.

12. Anti-trafficking training will be provided for diplomatic personnel and troops deployed abroad.

13. Formal procedures will be instituted to compile national statistics on traffickers who are prosecuted and victims who have been assisted.

6. Repatriation

In terms of article 7 of the Palermo Protocol, “each state party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently in appropriate cases”. This should be done taking into consideration “humanitarian and compassionate factors”. Article 8 of the Palermo Protocol specifically deals with the repatriation of victims, stating that the safety of such a victim should be a priority where repatriation is concerned and that proper and careful assessment should be done before a victim is repatriated. Victims should be returned to their states only if this is a safe option and legal alternatives should be provided if their home environment is not adequately safe.

Section 17 of the PACOTIP Act makes provision for the assistance of a foreign trafficking victim by the National Commissioner of the SAPS or the National Director of Public Prosecutions to apply for permanent residence in terms of the Immigration Act if, as “a result of that victim’s assistance he or she may be harmed or killed if he or she is repatriated to his or her country of origin or the country from where he or she has been trafficked.”

The 2016 TIP Report notes that the immigration provisions in terms of sections 15, 16 and 31(2)(b)(ii) have not been promulgated yet which is still the status quo.
The purpose of a visitor’s visa is for the victim to remain in South Africa for a recovery and reflection period not exceeding three months, which may be extended once for a period of 3 months. This reflection period provides the trafficking victim with the opportunity to access programmes provided by accredited organisations and also to “make informed decisions regarding his or her cooperation with law enforcement and prosecuting authorities in the investigation and prosecution of a case of trafficking in persons.”

7. **International cooperation**

Human trafficking, as a form of transnational organised crime, takes place across the borders of various states and jurisdictions. Mechanisms are used by organised crime rings to elude law enforcement and prosecution and governments and criminologists need to explore fresh avenues of international cooperation in order to receive information, pinpoint trends, to police effectively and to analyse risks. Through international cooperation, comprehensive anti-trafficking strategies can be obtained.

The Palermo Protocol stipulates that states shall “cooperate with one another by exchanging information, in accordance with their domestic law.” Article 10 of the Palermo Protocol emphasises that all law enforcement institutions, immigration facilities and other relevant authorities of states shall cooperate with each other through the exchange of information, in accordance with national policies. Information with regards to the recruitment methods, means of transporting victims, routes and links between individuals and groups must be shared in order to more effectively detect these criminals. Article 11 of the Palermo Protocol in turn stipulates that “State Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication”.

In order for states to effectively combat this borderless crime, international cooperation is of paramount importance. International cooperation between the requestor and requested states is regulated by public international law and can be divided into primary cooperation and secondary cooperation. Primary cooperation includes procedural cooperation, requiring states to take over

---

1032 Section 15(b) of Act 7 of 2013.
the partial procedure of another state. It also includes the seizure of fixed assets and property as well as other forms of enforcement. Secondary cooperation includes assistance with investigations and extradition of fugitives. It does, however, not involve the transfer of procedural responsibilities. Primary and secondary cooperation is divided into six categories: extradition, mutual legal assistance, the transfer of criminal proceedings, the transfer of prisoners, the seizure and forfeiture of assets and the recognition of foreign criminal judgments.

7.1 International Cooperation in Criminal Matters Act 75 of 1996

It is common cause that all forms of crime must be investigated and that perpetrators must be tried and punished for unlawful conduct. However, due to globalisation and a growing borderless international community, one of the major challenges in the fight against transnational crime remains the exercising of criminal jurisdiction, especially in cases where the perpetrator is outside the borders and jurisdiction of the state in which the crime was committed.

The International Co-operation in Criminal Matters Act facilitates the mutual execution of sentences and compensatory orders. It also makes provision for the confiscation and transfer of the proceeds of the crime between South Africa and foreign states. This Act is essential for the combating of human trafficking as it enforces international judicial cooperation between South Africa and other states with regards to prosecuting perpetrators.

Section 10 of the International Co-operation in Criminal Matters Act 75 of 1996 (ICCM) is aimed at mutual legal assistance and at facilitating “the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign States and to provide for matters connected therewith.” The Act makes provision for a court to issue a letter of request, requesting a foreign state to obtain the required evidence as stated in the letter of request and the examination of a person who is in a foreign state and the “attendance of such person cannot be obtained without undue delay, expense or inconvenience”. Such a letter of request shall be issued to be used in the related investigation with regards to a related offense. In order to obtain such a letter, it must be proved that reasonable

---

1035 Act 75 of 1996.
1036 Section 2(1) of the International Co-operation in Criminal Matters Act.
grounds exist for believing that an offence was committed in the Republic or that it is necessary to assess whether such an offense was committed, it must be submitted and proven that an investigation is being conducted with regards to the offence and that it is necessary and in the interest of justice for the information to be obtained from such a person in a foreign state. The Act also makes provision for the sending of a letter of request directly to a court or tribunal in order to exercise jurisdiction in the place where the evidence must be obtained, in cases where the matter is urgent.

The Act regulates the recording of proceedings at such an examination in terms of a letter of request for purposes of gathering evidence and states that an accurate record must be held of the examination proceedings according to formal procedures normally followed by the requested state. It also makes provision for the recording of any possible refusal by the witness to answer any questions, the producing of any evidence by the witness such as a document, object and book as well as the video recording of such proceedings. All video recordings of the examination proceedings shall—

“form part of the record of the proceedings at the examination and may be referred to by the court or tribunal before which the evidence obtained by the letter of request is tendered, to determine any fact regarding—

i) the manner in which the examination was concluded; or

ii) the conduct and demeanor of the witness while giving evidence.”

Section 5(1) also states that all evidence obtained in terms of a letter of request shall be regarded as evidence under oath if the witness was “properly warned to tell the truth” and all such evidence shall also be allowed as evidence at any subsequent proceedings if “each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings” in terms of section 5(2)(a).

Section 8(2) makes provision for a witness to be subpoenaed to appear as a witness in proceedings. The Act thus makes provision for mutual assistance and enables South Africa, as

---

1037 Section 2(2)(b) of the International Co-operation in Criminal Matters Act.
1038 Section 4(a) of the International Co-operation in Criminal Matters Act.
1039 Section 4(1)-(2) of the International Co-operation in Criminal Matters Act.
1040 In Thatcher v Minister of Justice and Constitutional Development, Sir Mark Thatcher was subpoenaed in terms of section 8(2) of the ICCM for purposes of gathering evidence in South Africa with regards to a failed coup d'état in
a requesting state to, issue a letter of request to a foreign state for the collection of evidence in such a state with regards to a criminal offence, criminal proceedings or to obtain information with regards to a criminal investigation.

Section 11(12) states that—

“[n]o witness residing in a foreign state and who attends a court or tribunal in the Republic shall, while so attending, be liable to be arrested in the Republic on any civil warrant for debt or on a criminal charge for the commission of an offence incurred or allegedly committed in the Republic, before his or her arrival in the Republic for the purpose of his or her attendance of such court or tribunal.”

Section 37(1) of the PACOTIP Act stipulates that the President may enter into an agreement with any state with regard to any matter relating to human trafficking irrespective whether such a state is a party to the Palermo Protocol. Section 37(2) does, however, place a restriction on subsection 1 by stating that no agreement may be in conflict of any of the Palermo Protocol provisions. The President may, however, in terms of section 37(4), agree to any revocation or amendment of such agreement and in terms of subsection 4, no such agreement will be of force until Parliament has approved it.

7.2 Extradition

Mutual legal assistance and extradition form a very important part of any international pursuit against trafficking. However, the need for effective transnational criminal justice should always be weighed against state sovereignty and territorial integrity. The United Nations Organised Crime Convention stipulates that:

“Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.”

The Palermo Protocol however declares in its preamble that—

---

Equatorial Guinea. Thatcher held that testifying would infringe on his right to silence or prejudice any extradition proceedings against him. At the time of the subpoena being issued, Sir Thatcher was on bail in South Africa with regard to charges of financing the coup attempt. The court rejected Thatcher’s arguments.

“effective action to prevent and combat trafficking in persons, especially women and children, 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, including by protecting their internationally recognized human rights.”

The Constitutional Court in President of the Republic of South Africa v Quagliani, sets out the nature of extradition, stating that it involves a request by one state to another for the delivery of an alleged perpetrator to the requesting state, the purpose of the delivery of such person being for prosecution and sentencing purposes in the territory of the requesting states.\textsuperscript{1042} The Court also made mention of the presence of a third element, namely state sovereignty and emphasised that extradition functions “at the intersection of domestic law and international law”.\textsuperscript{1043} According to Article 16 of the United Nations Organized Crime Convention, “State Parties shall seek to conclude bilateral and multilateral agreements to carry out or enhance the effectiveness of extradition.”\textsuperscript{1044} The Convention also stipulates that:

“Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegations.”\textsuperscript{1045}

8. Conclusion

On sight value, it can be stated that South Africa has complied with its international obligations codified in the Palermo Protocol and provided a national legal instrument to combat trafficking in Persons in South Africa. The PACOTIP Act was adopted to reach even wider than the Palermo Protocol in order to make provision for specific human trafficking offences applicable to the national context. Various measures were designed by the South African Government to effectively combat human trafficking and the recently designed National Action Plan must now be implemented. Immense challenges surfacing in an ever changing world of technology cause crime rings to operate on various platforms with great sophistication. Push factors such as poverty, corruption, globalisation, cultural beliefs, shortage of employment and marginalised people causes extreme

\textsuperscript{1042} President of the Republic of South Africa v Quagliani 2009 2 SA 466 (CC).
\textsuperscript{1043} President of the Republic of South Africa v Quagliani 2009 2 SA 466 (CC).
vulnerabilities and creates opportunities for traffickers to operate with impunity, making the enforcement of legal instruments a challenge. In this chapter, the current national legal framework with regard to human trafficking and remedies available to victims were discussed. The next chapter aims to identify the enforcement challenges relating to combating trafficking in persons.
CHAPTER 8:
ENFORCEMENT CHALLENGES

1. Introduction

In order to effectively combat the trafficking of humans, it is of paramount importance that a combined strategy is followed and the Palermo Protocol creates a comprehensive anti-trafficking strategy in setting out the three P strategy parameters: Prevent, Prosecute and Protect. Preventative measures must be taken by states in order to educate not only individuals but also law enforcement officers about the newest tendencies with regard to trafficking, recruitment methods, as well as the importance of victim identification and a victim-centered approach when dealing with victims as effective prevention is deemed as the most effective long-term strategy in the fight against trafficking. In this chapter, various enforcement obstacles will be analysed. Issues such as legislative loopholes, corruption, lack of resources, the necessity for crime intelligence, the role of non-governmental bodies, data collection, inadequate legislation, international cooperation, extraditions and immediate repatriation of victims will be briefly discussed and challenges will be highlighted.

Law enforcement, the prosecution of perpetrators, international cooperation as well as cooperation between the private and public sector are of utmost importance when looking at prosecution as one of the three anti-trafficking pillars in terms of the Palermo Protocol. Mutual cooperation, bilateral and multilateral agreements regulating the gathering of intelligence and evidence, agreements for the sharing of evidence by the requested states and the extradition of criminals in order to be prosecuted and punished should all form part of a combined strategy against trafficking.

Victim protection and meeting the needs of victims are furthermore of utmost importance and, as indicated by the Palermo Protocol, a “comprehensive international approach” must be followed “that includes measures to prevent such trafficking, to punish the traffickers and to protect the
victims of such trafficking, including by protecting their internationally recognized human rights”.\textsuperscript{1046} Victims have the right to protection “with full respect for their human rights;”\textsuperscript{1047} respect for their privacy and identity,\textsuperscript{1048} the right to physical safety,\textsuperscript{1049} the right to appropriate housing,\textsuperscript{1050} the right to information with regards to court proceedings\textsuperscript{1051} and the right to compensation for damages suffered.\textsuperscript{1052} Provision must also be made for victims’ basic medical, psychological and material needs\textsuperscript{1053} and needs in terms of employment, education and training.\textsuperscript{1054} In the aftermath of trafficking, victims must be placed in a safe environment, be protected against victimsation and revictimisation and receive psychological counseling and debriefing in order to learn to deal with the trauma they have suffered.

2. \textbf{Law enforcement, training and legislative loopholes}

Effective implementation and enforcement of legal measures is essential in the pursuit against trafficking. Inefficient law enforcement leads to a “culture of impunity” according to the UN Special Rapporteur on the sale of children, child prostitution and child pornography.\textsuperscript{1055} The Special Rapporteur also highlights the fact that the demand for sexual exploitation and sexual exploitative services such as child prostitution are facilitated by this “culture of impunity”. The 2014 TIP highlights the fact that perpetrators involved in major international crime syndicates were not “systematically” prosecuted and that these syndicates are responsible for most of the sex trafficking in South Africa.\textsuperscript{1056} The recommendations in the TIP Report (2014)\textsuperscript{1057} furthermore suggest increasing awareness among government officials as to their responsibilities in terms of the PACOTIP Act and related provisions under the Sexual Offenses Act and Children’s Amendment Act, highlighting

\begin{itemize}
\item \textsuperscript{1046}Preamble to the Palermo Protocol.
\item \textsuperscript{1047}Preamble to the Palermo Protocol 2(b).
\item \textsuperscript{1048}Article 6(1) of the Palermo Protocol.
\item \textsuperscript{1049}Article 2(5) of the Palermo Protocol.
\item \textsuperscript{1050}Article 3(a) of the Palermo Protocol.
\item \textsuperscript{1051}Article 6(2)(a) of the Palermo Protocol.
\item \textsuperscript{1052}Article 2(6) of the Palermo Protocol.
\item \textsuperscript{1053}Article 3(c) of the Palermo Protocol.
\item \textsuperscript{1054}Article 3(d) of the Palermo Protocol.
\item \textsuperscript{1056}US Department of State 2015 \textit{Trafficking in Persons Report – South Africa} available online at \url{https://www.state.gov/documents/organisation/243561.pdf} (20-08-2014) 309.
\item \textsuperscript{1057}Available online at \url{http://www.state.gov/documents/organisation/226848.pdf} (20-08-2014).
\end{itemize}

225
that law enforcement and social service providers must apply a victim-centered approach when interacting with potential victims and that state officials need to recognise that initial apparent consent is irrelevant.\textsuperscript{1058} The recommendations also propose that anti-trafficking training for all SAPS officials should be institutionalised and that employers that use forced labor should be prosecuted.\textsuperscript{1059} According to the 2015 TIP report, labour trafficking offences were not addressed by government and a “serious lack of capacity and widespread corruption among the police force hindered anti-trafficking law enforcement efforts”.\textsuperscript{1060} The 2016 TIP Report recommends that efforts should be increased to “investigate, prosecute and convict traffickers especially labor traffickers”\textsuperscript{1061} under the PACOTIP Act and that training of law enforcement officers and social service officials should continue in order to equip such officers to effectively implement the PACOTIP Act.\textsuperscript{1062} In the Concluding Observations in respect of South Africa’s initial report under the ICCPR, the Human Rights Committee indicated that South Africa must make continuous efforts “to prevent and eradicate trafficking in persons and take the measures neccessary to outlaw and hold responsible labour brokers involved in the expoitation of workers in violation of articles 7 and 8 of the Covenant (ICCPR).”\textsuperscript{1063} Recommendations in the 2016 TIP report suggested amendments to the PACOTIP Act, so that penalties for human trafficking offenses can be more stringent,\textsuperscript{1064} sufficient

\textsuperscript{1058} Traffickers often recruit victims under false pretenses of “a better life” with promises of employment in a foreign country. Such victims then consent to leave their country in search of improved living conditions, unaware of the fact that they are lured into a trafficking situation and only realize this once they arrive in the host country and walk into a trafficking ring.

\textsuperscript{1059} Many fishermen are trafficked on vessels from South Asia to Cape Town for forced labour purposes. One victim anonymously provided the Guardian with information, stating that he and his crewmates were treated like animals on board vessels. Their passports were taken away and they were not allowed access to their labour contracts. According to maritime attorney Alan Goldberg, the Department of Home Affairs does not effectively regulate the docking of vessels and the conditions on board the vessels. A spokesman of Department of Home Affairs in South Africa was unresponsive to requests for information, only indicating that the Department of Home Affairs “inspects every single ship that comes to port.” Attorney Alan Goldberg confirmed that in his 20 years working at the port he has never witnessed the Department of Home Affairs doing daily checks. He also indicated that the South African border and port officials need better training. See The Guardian Bid for freedom: rescuing trafficked fishermen as they dock in Cape Town available online at https://www.theguardian.com/global-development/2016/aug/11/rescuing-trafficked-fishermen-cape-town-south-africa-slave-like-conditions (15-08-2016).


\textsuperscript{1063} HRC Concluding observations on the initial report of South Africa CCPR/C/ZAF/CO/1 at para 32.

and that judges be restricted by the PACOTIP Act to impose fines instead of awarding prison sentences.\textsuperscript{1065}

Kruger also identifies the following key concerns with regards to the PACOTIP Act:

1. The PACOTIP Act does not explain certain key concepts such as “coercion, transportation and exploitation”, leaving these concepts open to various different interpretations and causing legal uncertainty which may hamper the prosecution process.\textsuperscript{1066}

2. The PACOTIP Act fails to “explicitly distinguish between trafficking in adults and trafficking in children, as is required by the Palermo Protocol”.\textsuperscript{1067} The Palermo Protocol specifically “waives the means definitional components in child trafficking and requires only the other two components – the prohibited action and the exploitative purpose to be present to constitute trafficking in persons.\textsuperscript{1068} Waiving “means” as an element of crime places a lighter evidentiary burden on the state to prove trafficking as an offence in child trafficking cases.

Officials should also be held accountable for implementing the training that they received when working in their various spheres and with potential victims.\textsuperscript{1069} Officials suspected of complicity must be investigated and prosecuted. Social service officials and law enforcement officers should be focused on a victim-centered approach when dealing with potential victims and be trained to establish whether the case before them is a trafficking case or a case of prostitution. Initial consent by the victim is irrelevant in trafficking cases and this aspect should be made clear to officials.

\textsuperscript{1065} A very recent case before the Johannesburg Magistrate’s Court has proven that judicial authorities are sometimes prepared to act more firmly in human trafficking cases. On 16 August 2016 three Nigerian nationals appeared before the Johannesburg Magistrate’s Court for alleged involvement in human trafficking. Magistrate Vincent Ratshibvumo refused bail, stating that victims were treated inhumanely, having to eat human faeces and drink human urine and when they refused they were beaten up. See SABC News http://www.sabc.co.za/wps/portal/news/main/tag?tag=Prostitution (17-08-2016).

\textsuperscript{1066} Kruger “Towards a sharp prosecution sword to combat human trafficking: Comparing the new South African counter-trafficking law with international prosecution standards” 2016 \textit{Comparative and International Law Journal of Southern Africa} Volume 49 Issue 1 76.

\textsuperscript{1067} Kruger “Towards a sharp prosecution sword to combat human trafficking: Comparing the new South African counter-trafficking law with international prosecution standards” 2016 \textit{Comparative and International Law Journal of Southern Africa} Volume 49 Issue 1 78.

\textsuperscript{1068} Kruger “Towards a sharp prosecution sword to combat human trafficking: Comparing the new South African counter-trafficking law with international prosecution standards” 2016 \textit{Comparative and International Law Journal of Southern Africa} Volume 49 Issue 1 78.

\textsuperscript{1069} US Department of State 2016 \textit{Trafficking in Persons Report – South Africa} available online at https://www.state.gov/documents/organisation/258876.pdf (20-08-2014) 341.
dealing with trafficking victims. Other recommendations by the 2016 TIP Report include the prosecution of employers responsible for forced labour, the screening of vulnerable groups as well as potential deportees and women in prostitution for possible trafficking indicators. Interpreters must also be provided to assist victims in obtaining the necessary care they need, assistance with regards to cooperation with law enforcement and when giving their testimony in court. The availability of drug rehabilitation services for trafficking victims must be extended and additional shelters for male victims should be established and certified. The 2016 Report also recommends anti-trafficking training for diplomatic personnel and troops who are currently deployed in other countries and that formal procedures should be instituted in order to compile national statistics on trafficking victims assisted and traffickers who are prosecuted.

The collection of information and intelligence also forms an integral part of law enforcement globally. Intelligence is crucial in order to acquire information about a certain person and activities of criminal groups and perpetrators in order to enable governments to respond effectively. Intelligence gathering is a great challenge in various states due to a lack of resources. As intelligence gathering techniques are often intrusive, it is necessary for strict regulation of intelligence gathering tactics. Intelligence exchange and the ability to share intelligence is crucial in the global pursuit against trafficking and the information gathering system of national law enforcement agencies must be able to change swiftly as transnational crimes evolve. Intelligence also consists of unconfirmed allegations and not facts, making the safekeeping of this information of paramount importance. Other information gathering measures such as camera surveillance is very expensive and also strictly regulated by most states. It is therefore crucial that enforcement officers that utilise such methods are thoroughly trained with regards to the relevant legislation concerning the use and misuse of electronic surveillance measures. Undercover operations seem to be highly effective in the fight against transnational organised crime but also pose great challenges for the law enforcement officers who take part in these undercover operations as it put

---

not only their own lives but also the lives of their families at risk if the crime rings succeed in obtaining information in order to establish their identities. When it comes to undercover operations using the internet and web, as indicated earlier on, crime rings and perpetrators can easily hide their IP addresses for privacy purposes. This makes it hard for law enforcement to detect.\footnote{1074} As money and profit lie at the core of transnational organised crime and human trafficking, it is important that the money trail be followed in these cases in order to disrupt the criminal activities of these organised crime rings.\footnote{1075}

“The operation of a criminal organisation may generate a vast amount of wealth, but at the same time, a vast number of problems. The generated cash is neither easy to hide nor to utilize. Sudden use of unexplained wealth may raise suspicion. Investigators may easily establish a link between cash illicit activities and their perpetrator. It is thus necessary, for criminal organisations to, (1) erase the link between crime and the money, (2) erase the link between the money and its new owner, and finally (3) shelter the profits from possible confiscation.”\footnote{1076}

Article 2(e) of the UN Transnational Organized Crime Convention defines proceeds of crime as “any property derived from or obtained, directly or indirectly, through the commission of an offence”\footnote{1077} whereas article 2(f) stipulates that “Freezing or seizure shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.”\footnote{1078} Property is defined as “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets.”\footnote{1079} This can include vehicles, airplanes, cash, financial securities, and buildings\footnote{1080} and may also include “economic entities that are themselves susceptible of becoming money laundering machines including casinos, hotels, restaurants and cinemas.”\footnote{1081} Various states utilise such seizures for funding law enforcement responses or other transnational

organised crime programmes and policies. The challenge here, however, is that this method can motivate law enforcement officials to pursue the wealthy criminals instead of the most dangerous perpetrators in order to ensure that the state receives more financial means for purposes of funding their law enforcement programmes and policies.\textsuperscript{1082} Asset forfeiture requires cross-agency relations and a certain level of expertise which is not always obtainable.\textsuperscript{1083}

3. Data collection and the underreporting of crime

The low priority given to trafficking in states by national authorities contributes to the existing challenge of data collection. The compilation of national statistics on trafficking cases, as is also done for other forms of crime, is of great importance. Trafficking in persons is a clandestine and often underreported crime due to a wide spectrum of reasons which include inexperience by law enforcement officers to identity the crime,\textsuperscript{1084} uninformed members of the public, and the fear of victims that their traffickers might take revenge and that they might have to re-experience the trauma, sexual and other physical forms of violence, psychological violence and emotional shock. The dynamics between the trafficker and the victim go hand in hand with anxiety, confusion and conflicting alliances which often causes victims not to report their perpetrators or the crimes committed against them.\textsuperscript{1085} Victims also often form an emotional bond with traffickers due to the manipulative psychological techniques of traffickers and may even in some cases feel sorry for their trafficker. Some victims also suffer from Stockholm syndrome, “a psychological phenomenon wherein hostages experience and express empathy and positive feelings for their captors”.\textsuperscript{1086} All the above-mentioned factors as well as fear of revictimization contribute to the underreporting of the crime of trafficking by victims. Collecting data from foreign trafficking

\textsuperscript{1086} See Chapter 6 page 177.
\textsuperscript{1086} Stockholm Syndrome is a form of psychological manipulation which reduces the victim’s likelihood of acting out against the trafficker. It may also lay the groundwork for a more complex trauma reaction in victims. Available online at http://europa.rs/images/publikacije/02-Human_Trafficking.pdf (31-12-2016) 70.
victim’s is also problematic as many victims are deported as illegal immigrants or extremely frightened of testifying.\textsuperscript{1087}

According to the Human Rights Committee South Africa still “lacks proper identification and referral mechanism for victims of trafficking in persons”.\textsuperscript{1088} Because of its hidden nature, and due to lack of a central data collection system, it remains a challenge to obtain updated statistics on the numbers of human trafficking cases in South Africa. The absence of an effective anti-trafficking national legal framework till very recently, made it difficult to trace human trafficking cases. In an interview with a state advocate in charge of human trafficking prosecutions in Gauteng,\textsuperscript{1089} it was indicated that the South African Police National Computing System till very recently did not make provision for human trafficking as a form of crime on the South African Police national software system. This meant that when a victim arrived at a police station asking for help and reporting that he or she is a trafficking victim, they were often sent away by the officer, indicating that there is no such crime as trafficking. This changed with the very recent implementation of the outstanding regulations by the Department of Social Development.\textsuperscript{1090} Regulation 16 of the PACOTIP Act places an obligation on NGOs to, on a quarterly basis, collect information from trafficking victims such as the purpose for which the victims were trafficked, the countries from which victims have been trafficked, the number of South African citizens or permanent residents who are victims of trafficking and who have accessed an NGO programme, countries to which victims have been trafficked, the methods used to recruit and transport trafficking victims, methods and routes used for trafficking victims to and from the Republic, the methods used to keep victims in exploitative situations, as well as the types of travel documents that victims have used to cross the borders of South Africa and how these documents were obtained. The abovementioned information should be included in an annual report and must be submitted to the Director-General of Social Development upon request. The Director-General must then in return provide an annual report to the Director-General of Justice and Constitutional Development containing the information received.

\textsuperscript{1087} Available online at https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-1.pdf (31-12-2016).
\textsuperscript{1088} HRC Concluding observations on the initial report of South Africa CCPR/C/ZAF/CO/1 at para 32.
\textsuperscript{1089} Interview held on 15 January 2015 with National Prosecution Authority State Advocate who chose to stay anonymous.
\textsuperscript{1090} Information obtained during an interview on 13 October 2016 with a state prosecutor in Cape Town whom chose to stay anonymous.
South Africa launched a National Human Trafficking Resource Line during October 2016 which was designed to serve as a data collection hub, gathering information from callers reporting trafficking occurrences. The National Human Trafficking Resource Line (0800 222 777) was launched in order to provide not only a helpline but also a support tool. The helpline can be utilised by persons wanting to report a case, law enforcement officials and social workers in need of guidance or services for victims, non-governmental organisations needing to make a referral or partner with other civil society role-players, as well as community members who have questions or would like to leave a tip-off. All calls made to this number will be traced and data will be collected in order to compile trafficking statistics.

4. Victim identification and victim assistance

Victim identification and the under-identification of victims are a global challenge. Victims are often trapped by fear and due to the torture they were exposed to by their traffickers, victims tend to keep quiet about their traumatic experiences. Migration of individuals across borders, unaccompanied migrant minors, refugees and asylum seekers often become trafficking victims to traffickers who agree to smuggle them from one state to another. The secretive nature of trafficking and how this crime is conducted also make victim identification a major challenge. The grooming and isolation of victims by their traffickers form an essential part of the trafficking process and is done by traffickers in order to gain psychological control over their victims. As discussed earlier, poverty and vulnerability are two major contributing factors when it comes to the recruitment of trafficking victims. Children are especially prone to receiving gifts and luxuries they would never be able to own or have in their current socio-economic circumstances. The relationship between a child and his or her trafficker is often developed by the grooming of the child by the trafficker, by means of expensive gifts such as the most recent cellular telephones, brand clothing and even fast food such as McDonalds or Burger King.

\[1091\] Writer hereof attended the launch at Hillsong Church by the National Freedom Network in Cape Town during October 2016 where this information was revealed.

\[1092\] See Chapter 3 page 77.

\[1093\] See Chapter 3 page 77.

Enjoyment of these “luxuries” often creates positive feelings in the victims towards the traffickers, making it hard for them to report the perpetrators to the authorities. As Warria puts it “the relationship that the child has with the trafficker is based on perverse and skewed loyalties.”

Another very real challenge are cases where children are trafficked by family members: “The problems that subsequently arise from children being trafficked by family members is that they are difficult to identify, quantify, rescue, provide victim or social assistance to, and they are excluded from policies and laws.”

Cultural taboos and stigmas also cause especially child victims to remain silent about the abuse they went through and victims are also often held drugged when in captivity and can seldom remember the necessary details in order to give a comprehensive statement to officials, making their testimonies unreliable. This aspect can be very frustrating to law enforcement officials and it is of paramount importance that a victim-centered approach is followed and victims be placed in a safe environment as a matter of priority where they are to receive counselling and debriefing. Once the victim regains his or her trust and has undergone a rehabilitation process, he or she can begin to consult with law officials in order for officials to gather information needed for effective prosecution.

A further challenge seems to be the lack of awareness of trafficking among social workers and police officials, making initial identification a great challenge and even though officials might know the definition of trafficking as indicated by the PACOTIP Act, they still face difficulties with applying the definition in practice. The 2016 TIP Report recommended the “replication of the coordinated anti-trafficking law enforcement and victim referral mechanisms of KwaZulu-Natal and Western Cape” in all other provinces as well as the certification of established care centers for the assistance of male trafficking victims and the implementation of formal procedures. In its Concluding Observations on South Africa’s initial report the Human Rights Committee indicated that

---

1098 See Chapter 6 page 221.
1099 See Chapter 7 page 229.
South Africa should “step up its efforts to identify and protect persons who may be vulnerable to human trafficking and establish a nationwide identification and referral system for victims of trafficking.”\textsuperscript{1101}

5. **Language barriers**

Language barriers seem to pose a great challenge in the effective combatting of trafficking. The 2014 TIP Report highlighted this issue by recommending that provision be made for interpreters who can assist victims. According to A21 South Africa, an anti-trafficking nonprofit organisation advocating for the rights and protection of victims and the prevention of human trafficking through awareness and education\textsuperscript{1102} a great shortage is still experienced with regards to competent interpreters. A21 is the only organisation in South Africa with a database of accredited interpreters in Thai, Mandarin, Chinese, Tagalog, Spanish, Zulu, French and Ndebele.\textsuperscript{1103} Foreign trafficking victims are often not understood or struggle to express themselves and explain what exactly they went through as they can either not speak English fluently or at all and cannot be sufficiently understood by law enforcement officers and court officials. In a recent case in Cape Town an application was brought in order to stop court proceedings due to an incompetent Mandarin court interpreter. A Chinese man, Jiang Wang, and his co-accused, Yiting Wong, were found guilty of human trafficking for sexual exploitation purposes as well as for owning a brothel. The defense team launched an application to stop proceedings before sentencing could take place, due to the incompetence of the interpreter. The defense held that the interpreter had made 140 serious errors whilst translating during the trial. The defense furthermore held that the accused persons were found guilty due to the faulty interpretation of the testimonies before the court and that it was not a fair trial.\textsuperscript{1104}

A lack of trust in police officials is often a challenge experienced by law enforcement officials. A cyber professor in London recently developed a software application called “You have a voice” in

\textsuperscript{1101} HRC Concluding observations on the initial report of South Africa CCPR/C/ZAF/CO/1 at para 33.
\textsuperscript{1102} A21 was founded by Christine Caine, a minister of Hillsong Church in the United States of America. Available online at http://www.a21.org/ (31-12-2016).
\textsuperscript{1103} Obtained during an email interview with a representative of the A21 Campaign in South Africa on 12 October 2016.
order to help counter this problem.\footnote{Reuters USA Trafficking Apps http://www.reuters.com/article/usa-trafficking-apps-idUSL5N0YC25B20150521 (15-08-2016).} It enables victims to describe the traumatic experiences they went through in their native language by using this application. The application then poses certain questions to the victims about the trauma they experienced and the victims can answer by speaking to the application, at their own pace. The developer, Duane Dunston, indicated that “[t]he whole idea behind this technology is to communicate with victims in their native language as a gesture of compassion, safety and hope”.\footnote{Reuters USA Trafficking Apps http://www.reuters.com/article/usa-trafficking-apps-idUSL5N0YC25B20150521 (15-08-2016).} Dunston is currently working with his students to develop the application to include the 10 most widely spoken languages including Spanish, Mandarin, French and Arabic.\footnote{Reuters USA Trafficking Apps http://www.reuters.com/article/usa-trafficking-apps-idUSL5N0YC25B20150521 (15-08-2016).}

6. Porous borders and corruption

Border control is one of the key issues when it comes to the pursuit against trafficking. The training of border control officials is essential in order to educate such persons with regard to identifying potential victims and the correct procedures to follow after a victim has been identified. A border official at Heathrow Airport was recently involved in the investigation of a case against a trafficker who trafficked close to 40 young Nigerian girls through Heathrow Airport. The woman received a 22 year prison sentence.\footnote{The Guardian Britain must Address Root Causes of Trafficking from Nigeria to Europe https://www.theguardian.com/global-development/2016/aug/12/britain-must-address-root-causes-sex-trafficking-nigeria-to-europe?CMP=fb_a-global-development_b-gdnglobaldev (15-08-2016).}

Lack of sufficient border patrols has caused various migrants from neighbouring states to illegally enter the territory of South Africa, leading them into trafficking situations. Traffickers, well aware of the border security issue, smuggle migrants through the borders of the Republic with promises of a better future in exchange for payments by illegal immigrants. Head of law enforcement at the Department of Home Affairs, Amanda Ledwaba, mentioned at an IOM workshop during 2008 that 90 per cent of illegal border crossings into South Africa take place with the assistance of officials and police officers.\footnote{Hepburn and Simon Human Trafficking Around the World: Hidden in Plain Sight (2013) 274.} According to Carol Bews, assistant director of Johannesburg Child Welfare,
corruption is a challenge in other branches of law enforcement, such as the SAPS, as well. She indicated at an anti-corruption workshop in the Southern African Development Community (SADC) that there was collusion of the SAPS with regard to brothels where victims were exploited and forced to have sex with customers and that such brothels “will never be raided by police because the police are in collusion with these brothels. They themselves go in and receive sexual services.”

7. Awareness

Awareness plays a key role in the prevention of human trafficking and global efforts are made by states in order to create more awareness. Potential awareness efforts include for instance adopting World Trafficking day, an event held on 30 July every year by states who are committed to create awareness in their jurisdictions. Zimbabwe recently launched their National Plan of Action coinciding with the adoption of the Blue Heart Campaign, doing so simultaneously with the commemoration of the Word Day against Trafficking of Persons. Potential awareness efforts include educating the community regarding recruitment methods, online safety, verification of all overseas job opportunities by means of certified labour recruitment companies and media (billboard, broadcast media printed media and roadshows). One of the major challenges when it comes to creating awareness is reaching rural communities. Community awareness is a crucial factor especially in African countries where, for instance, traditional healers still form a very important part of the belief system of African people. It is paramount that community awareness should be raised with regard to muti murders and the fact that trafficked organs are often used for muti by traditional healers. The Committee on the Elimination of Racial Discrimination (CERD) also recently raised its concern with regards to harmful traditional and cultural practices such as ukutwhala which can contribute to child marriage. Even though CERD welcomed the South

1113 See note 930 above.
African Law Commission’s work in the field of *ukuthwala*\(^{1114}\) and the design of appropriate legal measures to prosecute perpetrators, the committee noted that it is concerned about the fact that *ukuthwala*\(^{1115}\) is often not reported by rural residents, which leads to impunity of perpetrators.\(^ {1116}\) CERD also recommends that South Africa:

“conduct educational campaigns in rural communities and areas where practices such as *Ukuthwala* are prevalent in order to end this practice, provide information to victims on access to judicial remedies and encourage reporting of cases.”\(^ {1117}\)

The Committee also requested the South African government to provide the Committee with information on measures taken by the government “following the South African Law Reform Commission’s investigation to end *ukutwhala*, the impact of these measures, and statistical data on the numbers of cases of *ukutwhala* reported, prosecutions, and convictions of perpetrators”.\(^ {1118}\)

Not nearly enough has been done in South Africa in terms of educating individuals on the dangers of trafficking, the recruitment methods or the sanctions applied to a trafficking perpetrator. Of further utmost importance is the awareness that needs to be created through mass media by means of billboards, television, newspapers, flyers, roadshows and events. Due to the advanced recruitment methods of organized crime rings, individuals in South Africa should constantly be made aware of the operating methods of these rings. One example is the “no experience needed” advertisements that can be found in most newspapers all over South Africa. These advertisements are being used by the traffickers to recruit job seekers. Awareness should be created through the

---

\(^{1114}\) Concluding Observations on the fourth to eighth periodic reports of South Africa CERD/C/ZAF/CO/4-8 (2016) at para 2.

\(^{1115}\) Three men appeared in the Mthatha Magistrates Court on 10 January 2017 for their alleged forceful marriage to a 15 year old minor under the auspices of “Ukuthwala”. Two of the men, aged 71 and 50, are the girl’s grandfathers. They were charged with human trafficking after allowing a 26 year old to “marry” and attempted to rape the 15 year old girl. The three men successfully applied for bail and their next court appearance will be on 2 March.


\(^{1117}\) Concluding observations on the fourth to eighth periodic reports of South Africa CERD/C/ZAF/CO/4-8 (2016) at para 17.

\(^{1118}\) Concluding observations on the fourth to eighth periodic reports of South Africa CERD/C/ZAF/CO/4-8 (2016) at para 17.
mass media with regards to the various recruitment methods used by traffickers in order to educate children as well as adults.

Law enforcement officials such as border control personnel, members of the police, immigration officers, prosecutors and judges should also be trained on how to screen a trafficking victim. The immediate repatriation of a victim by the host state causes various prosecution, reparation and remedy challenges. It is of immense importance that these victims are assisted and protected by trained professionals after being freed from their trafficking situation. The experiences of the victims remain paramount in establishing the modus operandi of the trafficking rings and in developing appropriate and effective policies in order to combat trafficking.

Children and parents also need to be made aware of the various forms of recruitment that takes place both online and in everyday life. Human Trafficking education should be provided in preschool, middle school and high school in order to create awareness amongst children with regard to trafficking recruitment methods and how to be safe while surfing online.1119

Possible solutions include the development of preventative and awareness applications for handheld devices. Traffickcam is a new application (app) developed by the social action organisation, the Exchange Initiative,1120 and researchers affiliated with the University of Washington. The application makes it possible for tourists to photograph their hotel rooms and anonymously upload these images onto a database utilized by law enforcement agencies to establish the whereabouts of victims and perpetrators. This database is continuously updated and early testing of the application indicated that the application is 85 per cent accurate in indicating the location of the correct hotel under the top 20 search results.1121 This application makes it

---

1119 The Trafficking Free Community Project is a US developed training programme developed in order to assist schools to educate children and also measure and evaluate whether they grasp the concepts and know how to act and react in trafficking circumstances. It strives to reduce the vulnerability of children and provides long and short-term solutions through intervention processes. See http://www.fdfi.org/human-trafficking-education-curriculum.html (17-08-2016).

1120 Exchange initiative is an organisation based in the United States that empowers “people and organisations with resources, knowledge and networks to help fight sex trafficking”. Its mission is to “promote global awareness of sex trafficking while sparking real action at the local level”. Available online at http://www.exchangeinitiative.com/our-work (31-12-2016).

possible for law enforcement to effectively trace victims within a short time span and investigate criminal activities in the tourism trade more effectively. Even though the application is currently only used in the US, it would be a possible solution for the tourism industry in South Africa to develop a similar application in order to create awareness and assist with the prosecution process.

Human Scanner is a software programme and scanning device conceptualised by the author of this dissertation. It is aimed at barcoding families at large scale sporting events, in shopping malls and at other tourist attractions. The concept of Human Scanner is to temporarily barcode print every parent or guardian who accesses a sporting event or shopping mall accompanied by a child, to have a corresponding barcode imprinted on the pulse of the parent or guardian and the accompanying child. Whenever the child leaves the sporting event or mall, the buzzer of the human scanner will buzz. The adult will then not be allowed to leave the event or mall with the child as the barcode does not correspond. Security will then establish who the person is and why the person does not have a corresponding barcode. The concept is in the early stages of development but could function as a preventative measure and form of deterrence at large events and shopping malls.

8. **Lack of political will**

Globalisation has created a more interconnected global economy and made the acquisition of services, goods and financing easier and more accessible. Globalisation furthermore makes it easy for individuals to migrate and travel across the globe in search of work opportunities and improved living conditions for their families and themselves. Globalisation has also been a contributing factor of transnational organised crime. Various illicit activities take place across the borders of various states, making it a challenge for national jurisdictions to detect and combat without proactive partnering between states as well as the public, private and civic sectors.

As indicated by Brady “the growth in TOC (Transnational Organised Crime) has resulted in the recognition of a need for a two-pronged approach from law enforcement, an international and a national response”.

---

“Where there has been little resistance in accepting the need for a shared, cohesive, collaborative, international response, the shift in national responses appears to have been less consistent from country to country. An integral national and international response has provoked resistance by many law enforcement agencies as it represents a significant challenge to traditional approaches by which OC (organized crime) is viewed and placed. There are a number of potential reasons for this, including differing availability of resources, skills, experiences, and knowledge. In addition, the political will and commitment to tackling TOC differs considerably from country to country. Such resistance to change is dangerous, given the extent of the damage TOC can do to a nation. TOCs are diverse and require considerable, complex responses.”

Political will and the commitment of governments to pro-actively combat the trafficking of humans is paramount in the global pursuit against trafficking. Two states that recently renewed their commitments in raising awareness and combatting trafficking is Guatemala and Zimbabwe. According to the UNODC, Guatemala recently launched the Blue Heart campaign where the Blue Heart Pact was signed by officials. Government representatives and diplomats attended the ceremony and this gesture earmarked the renewed commitment by Guatemala to “tackle human trafficking” and according to the UNODC, “[a] parallel launch took place in the city of La Antigua, aiming to promote the full involvement of local municipalities in the activities carried out in the context of the campaign”. The Zimbabwean government also, during the same period, launched their National Plan of Action simultaneously adopting the Blue Heart Campaign. The Blue Heart Campaign is a global initiative that aims to create greater global awareness with regards to human trafficking, its impact on society and the necessity of the combatting of trafficking in humans.

9. Lack of resources and facilities

According to the A21 campaign, regarding safe houses and the provision of a safe environment for trafficking victims, it is often the case that existing safe houses do not efficiently provide for

---

the needs of trafficking victims.1128 The existing safe houses mostly make provision for victims of domestic abuse, and according to the A21 campaign, the housemothers and other victims that reside in safe houses do not fully comprehend the amount of trauma that trafficking victims have suffered. It is of great importance that provision is made by the South African government for establishing trafficking-specific safe houses in all provinces. Another challenge is the non-existence of trafficking safe houses exclusively for men. According to the A21 campaign, a great number of men have been rescued from forced labour trafficking circumstances as well as domestic servitude and drug trafficking.1129

10. Trans-border cooperation

The UNODC Executive Director, Yury Fedotov, recently acknowledged that the global community is currently facing the greatest refugee and migrant crisis since World War II and confirmed that humanitarian crises and armed conflict expose those civilians who are “caught in the crossfire to increased risk of being trafficked for sexual exploitation, forced labour, organ removal, servitude and other forms of slavery”.1130 He furthermore confirmed that the later to be released Global Report on Trafficking in Persons would indicate the nexus between refugee influxes from Syria and Eritrea and human trafficking. Fedov highlighted the fact that in order for the international community to combat this heinous crime, it is paramount that governments not only ratify the UN Convention against Transnational Organized Crime and its protocols on migrant smuggling and human trafficking, but also show “greater willingness to use mutual legal assistance and extradition to ensure that the alleged criminals cannot escape justice by simply crossing borders”.1131 The former United Nations Secretary Ban Ki-Moon, also recently emphasised the importance of strengthening partnerships and coordination in order to terminate the suffering and sorrow of all trafficking victims including those subjected to slavery, servitude, forced labour or

1128 Obtained during an email interview with a representative of the A21 Campaign in South Africa on 12 October 2016.
1129 Obtained during an email interview with a representative of the A21 Campaign in South Africa on 12 October 2016.
bonded labour: “With solid partnerships and a clear approach, we can ensure the criminals are brought to justice.”

Extradition and trans-border cooperation form an integral part of the pursuit against transnational organised crime as these crimes often take place in various countries globally. This was recently proved by a global investigation which led to the rescue of 386 children and 248 adults from a pornography ring in Canada. After an intensive seven month long investigation, more than 45 terabytes of data were seized by police which was distributed to more than 50 countries globally which includes Sweden, Australia, Greece, Mexico and Spain. Inspecting officer Beaven-Desjardins indicated that what was alarming is that many of the perpetrators were individuals who worked or closely interacted with children. This included three foster parents, nine doctors, six law enforcement personnel, 40 school teachers and nine pastors. She also indicated that “an indispensable aspect to the success of the operation and the rescue of 386 children was the expansive cooperation between Toronto police and organisations worldwide. This confirms that when we work together regardless of the borders that divide us we can successfully take down those who not only prey on our most vulnerable but also profit from it”.

The necessity for criminals to be prosecuted gave way to various international extradition treaties that regulate the extradition of intelligence, information and criminals from requested states to requesting states. However, state sovereignty still remains a great challenge in the effective implementation of extradition treaties and conflicting claims often play a significant role in this regard. Extradition and the execution thereof remains a question of comity and the execution of sovereign discretion in the United Kingdom, for example, remains with the Secretary of State. Another challenge occurs where a state is requested to extradite a perpetrator to a requesting state where the perpetrator will not be guaranteed the same human rights guarantees as

1136 See note 1115 above.
1137 Stanbrook and Stanbrook Extradition: Law and Practice (2000) at paras 8.05 and 9.43.
in the requested state’s jurisdiction. A third issue is where the perpetrator runs the risk of capital punishment. The Constitutional Court found in the *Tsebe* Case that it was unconstitutional to extradite foreign nationals if it would entail that they face the death penalty in the requesting state.\footnote{Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others (2012) (5) SA 467 CC 1017.} Where a conflicting claim appears between states, the matter shall be dealt with through diplomatic channels in order to try and minimize the administrative and political burden that rests upon states when it comes to extradition.

**11. Future challenges**

In order to effectively combat the transnational crime of human trafficking, it is important to proactively attempt the identification of possible future factors that will have an influence on the development of the crime. Cybercrime is one of the future challenges identified by Interpol.

“Cybercrime is a fast-growing area of crime. More and more criminals are exploiting the speed, convenience and anonymity of the Internet to commit a diverse range of criminal activities that know no borders, either physical or virtual, cause serious harm and pose very real threats to victims worldwide. In the past cybercrime was committed mainly by individuals or small groups. Today, we are seeing highly complex cybercriminal networks bring together individuals from across the globe in real time to commit crimes on an unprecedented scale.”\footnote{Interpol Cybercrime available online at https://www.interpol.int/Crime-areas/Cybercrime/Cybercrime (31-12-2016).}

According to the 2016 Internet Organised Crime Threat Assessment (IOCTA) recently issued by Europol, cybercrime is a “significant threat” and “trafficking in human beings to terrorism, are becoming increasingly cyber-facilitated”. The assessment also reports that:

“Other cross-cutting issues, such as the growing misuse of legitimate anonymity and encryption services and tools for illegal purposes pose a serious impediment to detection, investigation and prosecution of criminals.”\footnote{Europol IOCTA 2016 Internet Organised Crime Threat Assessment available online at file:///C:/Users/adria/Downloads/europol_iocta_web_2016.pdf (31-12-2016).}
The IOCTA furthermore reports that forums on the Darknet facilitating the exchange of child sexual exploitation material have grown as well as self-generated indecent material and “content derived from the growing phenomenon of live-distant child abuse”.1141

The Situation Report on Trafficking in human beings in the EU reflects on online activity by criminal groups and states that:

“The global development of online infrastructures has made the Internet a crucial tool for human traffickers, and it is likely to become more significant in the future. Online interaction facilitates several aspects of human trafficking and exploitation; targeting of potential victims; access to personal data; arrangement of logistics and transportation; recruitment through social media, chat forums and other websites; advertisement of victims; their exploitation and surveillance. On the other hand, both victims and traffickers leave permanent digital traces on the Internet which can support law enforcement investigations.”1142

12. Conclusion

Increasing poverty and the decreasing of living standards will cause an up rise in illegal immigration which in its turn will also increase human trafficking.1143 Other facilitating factors are social tolerance also described as “a lack of public awareness” which causes a “more permissive environment for certain crimes”,1144 and “high profits vs. low risks”.1145 In this chapter certain enforcement obstacles relating to human trafficking were identified. The next chapter aims to offer possible solutions to these challenges.

1141 Interpol Cybercrime available online at https://www.interpol.int/Crime-areas/Cybercrime/Cybercrime (31-12-2016).
CHAPTER 9:

CONCLUSION AND POSSIBLE SOLUTIONS

1. Introduction

In order to effectively combat transnational organised crime and, more specifically, the trafficking in persons globally, it is imperative that a comprehensive strategy be followed by all role players involved. The United Nations Sustainable Development Goal 16.2 calls for an end to be made of human trafficking and all violence against children. Other targets incorporated in the Sustainable Development Goals include implementing effective measures against trafficking in persons (Goal 8.7) and the elimination of violence against women and girls. Direct Action by states to give effect to these targets are also underpins in the Sustainable Development Goals. In order to address the various challenges brought about by transnational organised crime, states should identify possible solutions to counter trafficking in persons and such solutions must be effectively implemented. Whereas the previous chapter identified certain enforcement challenges with regards to human trafficking, chapter 8 aims to summarize the main findings made during the research process and offers possible solutions in order to address the key challenges identified.

The ratification of international trafficking-specific conventions by states, necessitates the compliance with international obligations incurred by such conventions. The Palermo Protocol is a universally recognised treaty and is deemed as the primary international law instrument when it comes to trafficking in persons. Up to date, 157 countries have adopted the convention and 157 have signed the Palermo Protocol. As indicated earlier, the Palermo Protocol calls for a 3 P’s approach consisting of prevention, prosecution and the protection of trafficking victims. When it comes to prevention, the Protocol urges member states to create increased awareness within their jurisdictions in order to prevent and effectively combat human trafficking. This must be done by means of mass media campaigns as well as economic and social initiatives. States are urged to develop and implement preventative, cooperative and other relevant measures by means of comprehensive national policies and programmes in order to prevent and combat human trafficking and protect trafficking victims from re-victimisation, especially child and female victims. Creating awareness furthermore concerns the education of nationals and law enforcement
officers with regard to recent recruitment methods used by syndicates to lure victims into trafficking situations. Awareness campaigns should be driven via broadcast media, print media as well as via online media platforms. Governments should increasingly explore new ways and means to reach not only the vast number of individuals that reside in overcrowded cities, but endeavour to reach out to rural communities residing in far off villages. Roadshows should be undertaken by governments in order to create awareness and handouts be given to the leaders and spokespersons of such communities and these individuals should be equipped to transfer the information to other members of the community. Handouts should be translated into as many languages as possible in order to have the widest possible reach within rural communities as well as in cities consisting of high density of people due to urbanisation.

Joint cooperation as an additional form of prevention, should include mutual cooperation not only between states on an international and regional level, but also cooperation between the public sector, private sector, civil societies and communities. The Palermo Protocol and more specifically article 9(3) states that “policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organisations, other relevant organisations and other elements of civil society”.

Article 9(5) furthermore emphasises the importance of states taking or strengthening “measures including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking such as poverty, underdevelopment and lack of equal opportunity.” Mutual cooperation between states is of paramount importance and states must commit to the exchange of investigative information, trafficking recruitment methods, new trafficking routes and other important information in order to form not only global strategies and regional strategies but also national strategies in order to more effectively detect trafficking tendencies and effectively prosecuting perpetrators. Data collection and the collection and exchange of data and intelligence between states should also be a priority as this crime often commences within the jurisdiction of one state and continues in the jurisdiction of another state, or states.
Increasing global awareness efforts to advance mutual cooperation was recently illustrated by the United Nations, the European Union and the International Organisation for Migration under joint initiative called “The Global Action to Prevent and Address Trafficking in Persons and the Smuggling of Migrants (GLO.ACT).” GLO.ACT is a joint initiative that commenced during 2015 and in terms of which the European Union and the United Nations Drugs and Crime Office initiated and implemented, in partnership with the International Organisation for Migration, an inter-cooperative response to trafficking in persons and the smuggling of migrants. The partnership aims to deliver assistance to fifteen selected states across Latin America, Asia, Africa and Eastern Europe and aims to assist trafficking victims, governmental authorities, civil society organisations and smuggled migrants. The objectives furthermore include assisting the selected states to develop and implement “comprehensive national counter-trafficking and counter-smuggling responses”.

According to GLO.ACT, a dual prevention and protection approach has been designed and adopted and six key responses were identified which are linked to the following outcomes: (a) capacity building; (b) strategy and policy development; (c) legislative assistance; (d) assistance and support to children among victims of trafficking and smuggled migrants; (e) protection and assistance to trafficking and smuggled migrants; and (e) regional and trans-regional cooperation.

South Africa joined the GLO.ACT initiative during September 2016, making it the fifteenth country to form part of this global action plan. Home Affairs Minister Malusi Gigaba stated that “[t]hrough its work with member states all over the world, it is able to co-develop international best practices and partner with countries to implement these. Therefore, we welcome South Africa’s inclusion in the GLO.ACT programme, as a priority country”. He furthermore highlighted that it was pivotal to work with South Africa’s regional and immediate neighbours in order to reinforce “our collective capacity to combat human trafficking and people smuggling”.

Minister Gigaba also indicated that South Africa was currently in the process of developing legislative measures regulating migrant smuggling and mentioned that 57 children and young adults were rescued from the South African Police Service whilst being smuggled from Malawi to South Africa. According to Minister Gigaba the children were paid between ZAR 2 000 and ZAR 2 500 for coming to South Africa and indicated that the majority of people smuggled to South Africa was brought here for forced labour, forced marriages, drug mules and to be sexually exploited. Minister Gigaba campaigned for regional cooperation and reiterated that improved training for immigration and law enforcement personnel was pivotal as well as the strengthening of security measures and service delivery of ports of entry. Other aspects raised were the need for data collection and research in order to better “understand the scale of the problem and local / regional dynamics” as well as the need for intelligence sharing and coordination of efforts among relevant agencies. The strengthening of international partnerships with other countries in the region and beyond were also highlighted by the Minister whilst addressing EU representatives and the media. At this stage the GLO.ACT joint initiative will run until 2019.

The second P of the three P’s approach calls for the prosecution of trafficking crimes. It is common cause that the mere existence of legal instruments does not ensure the effective combating of crime. The effective implementation and enforcement of legal measures should be a priority in the pursuit against transnational organised crimes. Governments should aim to design, adopt and implement all-inclusive national legal frameworks, ensuring that measures are put into place to effectively combat human trafficking and prosecute traffickers and to prosecute corrupt officials that are involved in facilitating trafficking. Suggested solutions include the screening of officials placed in key positions such as immigration, consular offices, customs and vice squads. Such positions should also be placed under intense supervision and job rotation. Allegations of misconduct by anti-trafficking officials should enjoy high priority and should add weight to the integrity of anti-trafficking policy implementation. The Preventions and Combating of Corrupt Activities Act (Corrupt Activities Act) makes provision for the criminalization of corruption. Section 3 of the Act formulates corruption as an offence for anyone who either gives or receives any form of

---


gratification to any other person in order to act in any manner that amounts to the illegal exercise of any duties. The Act also makes provision for cross-border acts of corruption as well as corrupt transactions between private persons and is not limited to the public sphere. The enforcement of the Corrupt Activities Act could be very constructive in the combating of human trafficking.

Governments should make their best endeavours to design and implement training programmes in order to equip border and law enforcement officials, medical personal and carrier officials to effectively and promptly identify victims, potential victims and perpetrators. It is also of paramount importance that individuals dealing with victims should be fully informed about the correct reporting procedures of trafficking cases. Other crucial aspects to be covered in training should entail providing law enforcement officials with skills enabling them to follow a victim-centered approach when dealing with trafficking cases.

Even though the promulgation and implementation of the PACOTIP Act was a step in the right direction for South Africa, the implementation of the act remains a challenge for law enforcement when dealing with foreign trafficking victims. During a recent workshop held by the Department of Justice and constitutional development as well as the Department of Correctional Services, the outlines for an anti-trafficking action plan was formed and recommendations for specific goals and objectives were set out aiming at furthering the South African government's anti-trafficking efforts over the next year. It was concurred during the workshop that the PACOTIP Act should be amended to ensure that penalties are sufficiently stringent and that the ability of judges to impose fines instead of imprisonment, should be restricted. It was also highlighted that efforts shall be increased to investigate, prosecute and convict traffickers and especially labour traffickers in terms of the PACOTIP Act. Corruption was also identified as a point of concern during the workshop and the government will endeavour to investigate and prosecute officials suspected of trafficking complicity. Employers using forced labour shall be investigated and prosecuted. The continued training of law enforcement and social service officials furthermore forms part of the future goals of the South African government and Department of Justice in particular. Officials shall be trained in order to effectively implement the PACOTIP Act and related regulations and shall also be held accountable for implementing the training received.
Data collection and the collection of intelligence is vital in order to effectively combat human trafficking and the SAPS computer database systems have been updated recently in the aftermath of the implementation of the PACOTIP Act, criminalising trafficking and all the related crimes in terms of the Act to reflect the twenty offences relating to human trafficking in the crime software database. The Department of Justice is also planning to institute formal procedures to compile national statistics on all prosecuted traffickers and victims assisted in order to make it easier for the Department of Social Development, the National Prosecuting Authority, the Department of Justice and the Department of Home Affairs to keep track of current trafficking cases and to monitor such cases. Regulation 16 of the PACOTIP Act places an obligation on Non – Governmental Organisations to, on a quarterly basis, collect information from trafficking victims such as the purpose for which the victims were trafficked, the countries from which victims have been trafficked, the number of South African citizens or permanent residents who are victims of trafficking and who have accessed a Non-Governmental Organisation programme, countries to which victims have been trafficked, the methods used to recruit and transport trafficking victims, methods and routes used for trafficking victims to and from the Republic, the methods used to keep victims in exploitative situations, as well as the types of travel documents that victims have used to cross the borders of South Africa and how these documents were obtained. 1152

The South African government will aim to ensure that law enforcement and social service providers use a victim-centered approach when interacting with potential victims and officials must be aware of the fact that initial consent by trafficking victims is irrelevant and that victims are often drugged and extremely vulnerable. Cognisance must be taken of the challenges victims face during court testimonies and that, due to the frequency of incidents, victims might struggle to testify about the exact details regarding the incidents. Judges and prosecutors should receive specialised training in this regard and should acknowledge the fact that victims may struggle to recollect exact details and give flawless testimonies during trials due to the immense trauma they suffered.1153 The UNODC created the Human Trafficking Knowledge Portal in order to assist law

1152 Regulation 16 of Act 7 of 2013.
1153 The Zulu Observer reported on a 26-year old trafficking victim who was from age 6 “groomed for greater things” by family members and first raped at 9. After telling a friend what had happened, her mother reported the incident to the police but the perpetrator was acquitted as the victim struggled to recall exact times and places during her testimony due to the immense regularity with which the abuse took place. She was thirteen years old at that stage. After the acquittal of the perpetrator, she was trafficked by him for income after school and was given a list of names that had already paid for her services. The victim then escaped to Johannesburg where she started abusing crack in order to
practitioners to effectively prosecute human trafficking cases and to provide judges with sufficient information on previous trafficking convictions. It aims to guide judges and law practitioners when it comes to defining certain legal terms such as “the abuse of the position of vulnerability” and how these terms are applied by other countries. The Portal consists of a database of more than 1 200 trafficking convictions and gives immediate access to practitioners and judges with regards to human trafficking cases across the globe. Investigation strategies are also documented in the database which can assist with the investigation process.1154 This portal could serve as a source of information and guide judges in South Africa in sentencing human trafficking perpetrators.

The Palermo Protocol sets out the third P of the “three P’s approach” as protection, reiterating the fact that a victim-centered approach must be followed at all times by member states when dealing with trafficking cases. Ensuring the safety of victims at all times, seeing the protection of victims during the investigative and prosecution process and ensuring the availability of remedies and appropriate compensation to trafficking victims is of great importance. The Palermo Protocol highlights the fact that states should constantly endeavour to establish trafficking-specific safe houses and that these should be provided not only for women and children, but also for men. Victims’ needs must be identified and met in such a way as to limit any possible extra trauma.

The screening process of victims after being freed from their traffickers involves specific challenges in the South African context. The PACOTIP Act prescribes that victims may only be screened by the Department of Social Development after being freed from captivity. Corruption and the involvement of police officials in trafficking rings for their own financial gain, also causes victims to distrust law enforcement officials and doubt the criminal justice system.

“dull the pain and trauma”. While visiting a friend in Hillbrow, three Nigerians entered the room and she was taken to the streets to earn money for her traffickers. She could only remember one number being the number of a childhood tormentor, whom called the police after she informed him of her captivity. She and other victims were rescued by the police during a sting operation. However, severely addicted to drugs, she was convicted of theft, drug dealing and given prison time. After being released from prison she was again raped during a house break, something the victim struggles to come to terms with. See Zululand Observer Human Trafficking Survivor Tells Her Story http://zululandobserver.co.za/79027/human-traffic-survivor-tells-her-story/#.V7phIIUfPQG.facebook (23-08-2016).

1154 UNODC “How do Experts use the Human Trafficking Knowledge Portal?” available online at https://www.youtube.com/watch?v=-yvIEnNH9b0 (28-12-2016).
Various non-governmental organisations make huge efforts to reach victims, doing street work and building relationships with victims in order to gain their trust, as is the case with Dane Du Plessis working with the foreign fishermen at the V & A Waterfront harbour in Cape Town. The victims then start to trust and open up to the non-governmental organisation volunteers. Once the victims are freed from their captors, they are placed in shelters by non-governmental organisations and their screening process commences. Unfortunately, once the case has been brought to the South African Police Service, the victim has to be screened again by the relevant person at the Department of Social Development, causing re-traumatisation of the victim. It is therefore of great importance that civil society and safe house personnel are trained in order to understand and know the processes prescribed by the PACOTIP Act.

In order to meet the requirements as set out by the Palermo Protocol with regard to shelters for male victims, the Department of Justice and Correctional Services indicated that additional shelters shall be provided for male trafficking victims and that drug rehabilitation services for victims shall be extended.1155

Even though South Africa has increased efforts to create awareness via media reporting, more must be done by the national government in order to educate the South African public about human trafficking. Coalitions between governmental departments, the South African Police Service, non-governmental organisations and other civil society role-players should be encouraged and information be shared in order to form a database of shared knowledge and intelligence. The submission of the National Action Plan to parliament and the acceptance thereof by parliament, appointment of specialized judges, and specialized courts, special task units and well-trained government and NGO officials should all form part of South Africa’s future combating agenda.

The main aim of this study was to critically analyse the existing international, regional and national frameworks with regards to human trafficking in order to establish to what extent existing international, regional and national legal frameworks provide remedies for human trafficking victims. As indicated earlier, the mere existence of instruments and good practices does not ensure the implementation of such instruments and practices by states parties. The effective implementation of state

obligations is pivotal in the pursuit against trafficking. Existing codes and good practices can only be effective in an obligatory context and it is paramount that these practices be implemented as obligations placed upon states in order to be effective.
BIBLIOGRAPHY

1. Books


Bales and Soodalter *The Slave Next Door* (2009).


2. Articles


Davis and Scaffy “Young witnesses: Experiences of court support and court preparation” 2004 *Acta Criminologica* 17.


Van Dijk and Van Mierlo “Revisiting the link between corruption prevalence and implementation failure in anti-trafficking policies” 2014 *International Perspectives in Victimology* (2014) 8.


### 3. Reports


Annual Human Rights Reports Submitted to Congress by the US Department of State (Vol 31).

Ezeilo *Report to the UN General Assembly on trafficking in persons especially women and children* GE.10.13211(e) (2010).

Ezeilo *Achievements of the Trafficking Protocol: Perspectives from the former UN Special Rapporteur on Trafficking in Persons* 2015 Anti Trafficking Review.


Kane and Saghera Trafficking in Children for Sexual Purposes (UNICEF 2001).


Report of the Special Rapporteur on violence against women, its causes and consequences A/HRC/14/22 (2010).


4. International Instruments

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2006).


International Labour Organisation Declaration on Fundamental Principles and Rights at Work (1989).


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).


International Covenant on Civil and Political Rights (1976).


Helsinki Final Act (1975).


Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).


Convention relating to the Status of Stateless Person (1954).


Universal Declaration of Human Rights (1948).


Slavery Convention (1926).
5. Regional Instruments


The ASEAN Human Rights Declaration (2012).

The ASEAN Charter (2007).


Inter American Convention to Prevent and Punish Torture (1985).


Helsinki Final Act (1975).


The ASEAN Declaration (1967).


American Declaration of the Rights and Duties of Man (1948).


6. International Resolutions, Recommendations and Comments


CAT General Comment No 3 (2012) CAT/C/GC/3/.

CCPR General Comment No.35 (2013) CCPR/C107/R.3.

CCPR Human Rights Committee Concluding observations CCPR/C/ZAF/CO/1 (2016).


CERD Concluding observations CERD/C/ZAF/CO/4-8 (2016).


CMW General Comment No 1 (1992) CMW/C/GC/1.


CRC General Comment No 5 on General measures on the implementation of the Convention of the Rights of the Child (2003) CRC/GC/2003/5.


CRC General Comment No 16 on State obligations regarding the impact of the business sector on children’s rights (2013) CRC/GC/16.


EALA Resolution EALA.RES.3.5.2015.

ECOSOC Resolution 2006/27.


General Assembly resolution 40/34 of 29 (1985).


General Assembly Resolution 60/147 (2005).


HRC General Comment No 28 (2000) CCPR/C/21/Rev.1/Add.10.

HRC General Comment No 6 (1994) HRI/GEN/1/Rev.1.

HRC General Comment No 21 (1994) HIR/GEN/1/Rev.1.

HRC General Comment No 20 (1992) HRI/GEN/1/Rev.1.

HRC General Comment No 15 (1986) HRI/GEN/1/Rev.1.


Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings A/HRC/31/CRP.3

OAS Declaration AG/RES. 2551 (XL-O/10).

OAS Work Plan against Trafficking in Persons in the Western Hemisphere AG/RES. 2551 (XL-O/10) (2010).


UN OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary (2010).

7. **Legislation**

Prevention and Combating of Trafficking in Persons Act 7 of 2013.


Child Care Act 35 of 2005.

Children’s Act 38 of 2005.


Immigration Act 13 of 2002.


International Cooperation in Criminal Matters Act 75 of 1996.

International Co-operation in Criminal Matters Act 75 of 1996.

Promotion of National Unity and Reconciliation Act 34 of 1995.

Criminal Procedures Act 21 of 1977.

8. **Government Gazettes**


9. **Court Cases**

*Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).

*Belgium v Senegal* ICJ GL No. 144 ICGJ 437 (ICJ 2012).

*Factory at Chorzow Case (Germany v Poland)* ICGJ (Ser.A) No.17 (1928).

*Gonzalez et al. (Cotton Field) v Mexico* Inter-Am Ct H.R (Ser.C) No.205 (2009).

*Gouriet v Union of Post Office Workers* AC 435 (1977) WLR 300; (2977) 3 AIIER.


*Nel v Byliefeldt and Another* [2015] ZAGPPHC 386.

*Önerylidiz v Turkey* ECHR 48939/99.

*President of the Republic of South Africa v Quagliani* 2009 2 SA 466 (CC).

*S v Emmanual Uche Odii and Others* ZAKPHC Case No: 41/2382/2010.

*Khumalo v S* 2014 AD 504.

*S v Makesh Mansaur* UNODC ZAF006.

*S v Jezile* 2015 JDR 0566 WCC.

*State v Matyityi* 2011 1 SACR 40 (SCA).


10. Internet Sources

A21 http://www.a21.org (31-12-2016).


African Union AU Commit Campaign Combating Human Trafficking

African Union Commission Initiative against Trafficking

American NGO Coalition for the ICC Bringing Terrorism under ICC Jurisdiction

ASEAN About ASEAN http://asean.org/asean/about-asean/overview/ (24-09-2016).


ASEAN Convention Against Trafficking in Persons, Especially Women and Children

ASEAN member states http://asean.org/asean/asean-member-states/ (24-09-2016).

Asia News EAS Countries Escalate Fight Against Human Trafficking

Brand South Africa Revisions to South Africa’s amended visa regulations


Citizen South Africa Joins 14 other Countries in Anti-trafficking Programme

Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism
http://www.thecode.org/about/ (24-03-2016).


ECOWAS *About ECOWAS* [http://www.ecowas.int/about-ecowas/basic-information/](http://www.ecowas.int/about-ecowas/basic-information/) (20-09-2016).


Exchange Initiative http://www.exchangeinitiative.com/our-work (31-12-2016).


Global Slavery Index 2013 http://www.globalslaveryindex.org/findings/?gclid=CL7Nkbrinr0CFQkUwwod_IcA5g#overview (13-03-2014).


268
ICAT The International Legal Frameworks Concerning Trafficking in Persons

International Justice Resource Centre Inter-American Human Rights System


International Labour Organisation Publication Operational Indicators of Trafficking in human beings

International Labour Organisation Recommendation, No 203 (2014)


Interpol Cybercrime https://www.interpol.int/Crime-areas/Cybercrime/Cybercrime (31-12-2016).


269


MEA *About EAS* Available online at http://www.mea.gov.in/aseanindia/about-eas.htm (06-12-2016).


OAS Report of the Secretariat for multidimensional security pursuant to the work plan to combat trafficking in persons in the Western hemisphere http://scm.oas.org/doc_public/ENGLISH/HIST_14/CP32235E07.doc (04-09-2014).


Pew Internet Teens Social Media Technology (09-04-2015)

Plan of Action on Promotion and Protection of Human Rights in East Africa (EAC/CM 15/ Decision 36)

Policy Paper No 14.5 Human Trafficking in South Africa: Root Causes and Recommendations (02-01-2016).


Shaun Wingler *The Deep Dark Web* https://shaunswingler.com/2013/05/03/the-deep-dark-web/ (29-06-2016).


Speaking notes, Minister of Home Affairs, Naledi Pandor

*Status of ratification of the United Nations Convention against Transnational Organized Crime and the Protocols thereto as at October 2012*

Telegraph *Mediterranean Migrant Crisis Hits Italy as EU Ministers Meet*


The Guardian *Bid for freedom: rescuing trafficked fishermen as they dock in Cape Town*

The Guardian *Britain Must Address Root Causes of Sex Trafficking from Nigeria to Europe*

*The Islamic State in Iraq and the Levant and the Al-Nusrah Front for the People of the Levant: report and recommendations submitted pursuant to resolution 2170 A2/2014/815*


The Telegraph *Facebook used to “enslave” people trafficking victims*


*The Treaty for the Establishment of the East African Community*
The Victims Charter of South Africa – Compensation for Victims of crime


Thomson Reuters Modern slavery generates $150 billion in profits globally per year – ILO” 20 May 2014 Thomson Reuters available online at http://news.trust.org/item/20140520074422-2iw/3 (24-08-2016).


Towards Global EU-Action against Trafficking in Human Beings

Trafficking in Persons in the SADC Region: a baseline report

UN Fact Sheet No 36. Human Rights and Human Trafficking (2014)

UN Gift Armed Conflict and the Trafficking in Women Desk Study

UN Gift Armed Conflict and Trafficking in Women

UN Global Compact Children’s Rights and Business Principles: Good Practices Per Principle

UN Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework
UN Migration Report 2015 ST/ESA/SER.A/384 (September 2016)

UN Support Mission in Libya Detained and Dehumanised; Report on Human Rights Abuses against Migrants in Libya

UN.Gift.Hub Trafficking for Human Trade

UNESCO Policy Paper No 14.5 Human Trafficking in South Africa: Root Causes and Recommendations

UNHCR Human Trafficking and Refugee Protection: UNHCR’S Perspective
http://www.unhcr.org/4ae1a1099.html (14-12-2016).


University of New England Sex Trafficking: An Online Epidemic


UNODC Consultative Workshop on Operationalizing the Ouagadougou Action Plan to Combat Trafficking in Human Beings & Launching of the African Union (AU) Commission Campaign against trafficking in persons

UNODC How do Experts use the Human Trafficking Knowledge Portal?
https://www.youtube.com/watch?v=-yvIEnNH9h0 (28-12-2016).


US Department of State 2015 *Trafficking in Persons Report* - South Africa

US Department of State 2016 *Trafficking in Persons Report* - South Africa
https://www.state.gov/j/tip/rls/tiprpt/ (17-12-2016).

USA Today *Facebook used to kidnap, traffic Indonesian girls*


Wingler *The Deep Dark Web* available online at https://shaunswingler.com/2013/05/03/the-deep-dark-web/ (29-06-2016).

Worldbank 2016 World Bank Migration and Remittances Factbook

Zululand Observer *Human Trafficking Survivor Tells Her Story*

Zweynert “Modern slavery generates $150 billion in profits globally per year – ILO” 20 May 2014 *Thomson Reuters*
11. Research Theses and Dissertations


12. Interviews

Data collected during a telephonic interview on 22 May 2014 with the NPA Advocate who deals with human trafficking in South Africa.

Interview held on 15 January 2015 with National Prosecution Authority State Advocate who chose to stay anonymous.

Interview with an anonymous young woman from Gauteng recruited in a similar way by an international crime ring on 18 February 2015.

Interview with the National Freedom Network South Africa on 2 June 2016

Interview with Comair airhostess conducted on 22 July 2016.

Information obtained in an email received from the NFN South African on 28 July 2016 after the NFN representative attended a workshop held by the Minister of Justice and Correctional Services.

Obtained during an email interview with a representative of the A21 Campaign in South Africa on 12 October 2016.

Informative interview with NPA state prosecutor on 13 October 2016.