

**COMBATING HUMAN TRAFFICKING IN SOUTH AFRICA:
A COMPARATIVE LEGAL STUDY**

by

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DECLARATION

I declare that **COMBATING HUMAN TRAFFICKING IN SOUTH AFRICA: A COMPARATIVE LEGAL STUDY** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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Signature

(Nina Mollema)

.....

Date

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SUMMARY

This research is aimed at evaluating the adequacy and effectiveness of the legal framework dealing with human trafficking in South Africa. To achieve this purpose, a comprehensive diachronic as well as contemporary overview of the punishment and prevention of human trafficking in South Africa as well as in the legal systems of the US, Germany and Nigeria is provided.

An overview of the history of slavery and an analysis of the modern conceptualisation of human trafficking indicate that human trafficking is a highly complex concept, and that there are various approaches to the understanding of the concept of human trafficking. There are various definitions of trafficking found in international instruments of which the most important has been identified as that contained in the Palermo Protocol. The definitions vary also because trafficking is closely related to the phenomena of migration, slavery and smuggling of humans. The study further identifies some significant root causes of trafficking generally, as well as specific, to the four selected regions. It was found that in South Africa – similar to the history of slavery in the jurisdictions of the US, Germany and Nigeria – colonisation and the institution of slavery and, more particularly in South Africa, the legacy of the apartheid regime has had an impact on modern human trafficking.

The research concedes that although common-law crimes, statutes and transitional legislation can be utilized to challenge some trafficking elements, these offences are not comprehensive enough to amply deal with the crime's complexities and provide only a fragmented approach to combating the crime. The study shows that South Africa needs to adopt specific and comprehensive anti-trafficking legislation that is based essentially on the provisions of the Palermo Protocol, that is, the draft TIP Bill. Although the Bill is a major improvement on the provisions in the Palermo Protocol as well as on certain aspects of the anti-trafficking legislation in the US, Germany and Nigeria, the Bill can still be improved, especially with regard to more effective victim assistance and the combating of local-specific vulnerability factors. Anti-trafficking efforts undertaken in the US, Germany and Nigeria which may be of value also for the adoption of anti-trafficking legislation, law enforcement and other strategies in South Africa, are further identified.

The research further establishes also that international, regional and sub-regional instruments on trafficking and related aspects of trafficking provide guidelines for developing effective strategies to deal with trafficking within the region. The counter-trafficking strategies as found in treaties (including conventions), protocols, declarations and resolutions – those focussing specifically on combating trafficking and those with a human-rights focus – oblige states to prosecute traffickers, protect people vulnerable to trafficking as well as those already trafficked and create structures for prevention. Regional instruments specifically formulated to combat trafficking as well as instruments that make reference to the issue of trafficking in persons may further provide the basis for long-term strategies to combat human trafficking. However, it was found that although South Africa has adopted many cooperative mechanisms in the form of direct bilateral or multilateral agreements, as well as international and regional treaties and conventions, the jurisdiction has not as yet implemented comprehensive strategies to combat human trafficking. The introduction of legislation to combat human trafficking, and various other strategies envisaged in the TIP Bill and also recommendations suggested in this thesis, should be considered by parliament as a matter of priority. A comprehensive response to human trafficking which includes adequate protection of victims is required in terms of various constitutional imperatives identified in this research.

KEY WORDS

Child trafficking; Combating human trafficking; Human trafficking; Modern-day slavery; Prosecution of human trafficking; Trafficking in persons

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	The American Convention on Human Rights
ACRWC	African Charter on the Rights and the Welfare of the Child
AU	African Union
CAT	Committee against Torture
CIA	Central Intelligence Agency
CPA	Criminal Procedure Act of 1977
BPFA	Beijing Platform for Action
CAST	Coalition to Abolish Slavery and Trafficking
CATW	Coalition Against Trafficking in Women
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of all forms of Discrimination Against Women
CEOP	Child Exploitation and Online Protection Centre
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIA	Central Intelligence Agency
CRC	Convention on the Rights of the Child
CTOC	UN Convention on Transnational Organised Crime
DEVAW	Declaration on the Elimination of Violence against Women
ECHR	European Commission on Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council (of the UN)
ECOWAS	Economic Community of West African States
ECOWAS Declaration	The Economic Community of West African States' Declaration on the Fight against Trafficking in Persons
ECPAT	End Child Prostitution, Child Pornography, and Trafficking of Children for Sexual Purposes
ECPHR	The European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
European Convention	The Council of Europe Convention on Action against Trafficking in Human Beings
EU	European Union
EU Framework Decision	The European Union Framework Decision on Combating Trafficking in Human Beings
FATW	Foundation Against Trafficking in Women
GAATW	Global Alliance Against Traffic in Women
GOA	US Government Accountability Office
HIV/AIDS	Human Immune-Deficiency Virus/Acquired Immune Deficiency Syndrome
HRC	Human Rights Caucus
HRW	Human Rights Watch
HSRC	Human Sciences Research Council
IACHR	Inter-American Commission on Human Rights
IAWJ	International Association of Women Judges

ICAT	Inter-Agency Cooperation Group against Trafficking in Persons
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRLG	International Human Rights Law Group
ILO	International Labour Organisation
ILO C29	ILO Convention No 29 Concerning Forced Labour
ILO C105	ILO Convention No 105 Concerning Abolition of Forced Labour
ILO C138	ILO Convention No 138 concerning the minimum age for admission to employment
ILO C182	ILO Convention No 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour of 1999
ILO-IPEC	ILO International Programme on the Elimination of Child Labour
Inter-American Convention	The Inter-American Convention on International Trafficking in Minors
IOM	International Organisation for Migration
IPEC	International Programme on the Elimination of Child Labour
IPU	Inter-Parliamentary Union
Migrant Workers Convention	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
Migrant Smuggling Protocol	UN Protocol against the Smuggling of Migrants by Land, Sea and Air
MoWVA	Ministry of Women's and Veterans' Affairs
NPA	National Prosecuting Authority
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OCSE	Organisation for Co-operation and Security in Europe
OHCHR	Office of the High Commissioner of Human Rights
OMCT	World Organisation against Torture
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
OPCC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
OSCE	Organization for Security and Cooperation in Europe
Ouagadougou Plan	The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children
Palermo Protocol	UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
RAPCAN	Resources Aimed at the Prevention of Child Abuse and Neglect
RISDP	Regional Indicative Strategic Development Plan

Rome Statute	Rome Statute of the International Criminal Court
SABC	South African Broadcasting Corporation
SADC	Southern African Development Community
SADC Plan of Action	The SADC 10 Year Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children
SALRC	South African Law Reform Commission
SANDF	South African National Defence Force
SAPS	South African Police Services
SOCA	Sexual Offences and Community Affairs
TVPA	Trafficking Victims Protection Act
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIP	UN Inter-Agency Project
UNDP	UN Development Programme
UNESCO	UN Educational, Scientific and Cultural Organisation
UNFPA	UN Populations Fund
UNGA	UN General Assembly
UNGIFT	UN Global Initiative to Fight Human Trafficking
UNHCHR	UN High Commission on Human Rights
UNICEF	UN Children's Education Fund
UNIFEM	UN Development Fund for Women
UNODC	UN Office on Drugs and Crime
UNTS	United Nations Treaty Series
USAID	United States Agency for International Development
WHO	World Health Organisation
WOCON	Women's Consortium of Nigeria
Women's Rights Protocol	Protocol to ACHPR on the Rights of Women in Africa
WTO	World Trade Organization

CHAPTER ONE

INTRODUCTION

1.1 General background

Human trafficking is hardly a new phenomenon. Slavery - a form of human trafficking - has an age-old history. It can factually be traced back to the first written code of laws in human history - *The Code of Hammurabi* - in which slavery was considered an established institution as early as 1760 BC.¹ Slavery was formally abolished by the British Empire in 1833 and, more than three-quarters of a million slaves subsequently freed. However, today it is widely recognised that slavery is now more widespread than at any other time in world history and that almost no country is unaffected by it.²

Especially over the past three decades, trafficking in persons has emerged as an issue of considerable concern for the international community.³ Although the exact extent of human trafficking cannot be ascertained because of its clandestine nature, it is estimated that 27 million people are in slavery worldwide and that at its most general level 12.3 million people are trafficked worldwide at any given time.⁴

As a significant facet of transnational organised crime⁵ and one of the most lucrative criminal enterprises globally,⁶ human trafficking was ranked in 2006 as the world's third largest crime.⁷ However, in 2010 the United Nations (UN) cited trafficking in humans as the second most profitable crime around the world next to the drug trade,⁸ making it the

¹ King *The Code of Hammurabi* (2007) 11.

² Skinner *A Crime so Monstrous* (2008) 13.

³ Pharoah *Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa* (2006) 75.

⁴ US Dept of State *Trafficking in Persons Report 2006* (2006) 6.

⁵ SA Law Reform Commission *Trafficking in Persons Issue Paper 25* (2004) 1.

⁶ The turnover from trafficking is also estimated to be US\$7 to US\$10 billion a year. See Gould & Fick *Selling Sex in CapeTown: Sex Work and Human Trafficking in a South African City* (2008) 94.

⁷ Keefer "Human trafficking and the impact on National Security for the United States" *US Army War College (USAWC) Report* (2006) 5. See also the US Dept of Justice "Attorney General's Annual Report to Congress on US Government Activities to Combat Trafficking in Persons Fiscal Year 2005": "[A]n estimated 600,000 to 800,000 persons are trafficked across international borders each year. More than 80% of these victims are women and girls and 70% of them are forced into sexual servitude." <http://justice.gov/ag/annualreports/tr2005/agreporhumantrafficking2005.pdf> (accessed 2012-12-20).

⁸ United Nations Global Initiative to Fight Human Trafficking (UNGIFT) "500 Miles in Chains to End Modern Day Slavery" <http://www.ungift.org/ungift/en/stories/500-miles-in-chains-to-end-modern-day-slavery.html> (accessed 2012-12-20); Shelley *Human Trafficking: A Global Perspective* (2010) 10. Also

fastest-growing source of revenue for organised criminal operations internationally. Trafficking in children⁹ has especially boomed over the last few decades and is worldwide a major concern:

The increasing internationalisation of the sale of children, child prostitution and child pornography is most disconcerting. Children are not only sold for these purposes at the national level, but they are also trafficked across frontiers far and wide. The problem transcends national frontiers and local jurisdiction. There is thus an urgent need for international cooperation to counter the illicit trade.¹⁰

In order to combat the trade in human cargo, many legal jurisdictions have adopted a range of international standards and obligations,¹¹ of which the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol)¹² is the most significant. Governments around the world have committed themselves to enact national human-trafficking legislation so as to address modern-day slavery. Western countries such as the United States of America and Germany have extensive anti-human trafficking legislation in place. In Africa, where the scourge of trafficking is widespread, apathy and neglect on the subject is exhibited.¹³ Apart from Nigeria and a few other countries which have passed specific national legislation¹⁴ criminalizing human trafficking, other countries on the continent do not have any comprehensive laws to address this plight. Again, even

see Olateru-Olagbegi "State Response to Trafficking in Women and Children - the Nigerian Experience" in Centre for Human Rights *Gender-Based Violence in Africa: Perspectives from the Continent* (2008) 154. See also Siobhan "Sinister Industry" 2006 92(3) *ABA Journal* 59 59–60; Miko & Park *Trafficking in Women and Children: The US and International Response* (2002) 1; Hughes "The „Natasha“ Trade: The Transnational Shadow Market of Trafficking in Women" 2000 53(2) *Journal of International Affairs* 625 628; Malarek *The Natashas: Inside the New Global Sex Trade* (2003) 4; and Belser *Forced Labour and Human Trafficking: Estimating the Profits* (2005) 14-15.

⁹ According to the UN Dept of State *Trafficking in Persons Report 2005* (2005)19; 50% of trafficking victims are minors (below the age of 18).

¹⁰ Muntarhorn *Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, UN Doc E/CN 4/1994/84 (1994) 3.

¹¹ These include, amongst others, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (the OPCC), and the Second Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (the OPSC), both adopted in 2002. See also the Rome Statute of the International Criminal Court which considers trafficking under enslavement.

¹² The Palermo Protocol supplementing the UN Convention Against Transnational Organised Crime, GS Resolution 55/25, annex II, 55 UNGAOR Suppl (No 49) 60, UN Doc A/45/49 1 (2001) was adopted by the General Assembly of the UN on 15 Nov 2000 and opened for signature from 12 to 15 Dec 2000 at the Palazzidi Giustizia in Palermo, Italy, and at UN headquarters in New York until 12 Dec 2002.

¹³ Regionally, the African Charter on Human and Peoples' Rights (ACHPR), the Protocol to the ACHPR on the Rights of Women in Africa (Women's Rights Protocol) and the African Charter on the Rights and the Welfare of the Child (ACRWC) are the only regional texts in Africa combating this crime.

¹⁴ Trafficking in Persons (Prohibition) Law Enforcement Act 2003.

though trafficking laws were implemented in Nigeria, their limited purposes, shortcomings and ineffective implementation may have exacerbated the problem. In fact, Nigeria was named by the United Nations Office on Drugs and Crime (UNODC) in 2008 as among the eight countries considered the highest in human trafficking in the world.¹⁵

South Africa is one of the few other African nations that has actively pursued the punishment of human trafficking. However, the absence of legislation dealing directly with human trafficking meant that human trafficking was prosecuted and punished in terms of a variety of other existing common-law crimes such as kidnapping; rape; abduction; assault and more recently, statutory crimes such as money laundering and racketeering. The introduction of comprehensive legislation to cover all aspects of human trafficking became a major priority in order to protect persons vulnerable to trafficking; to combat this phenomenon and to adequately punish traffickers. The appeal was made also to South Africa by the UN Secretary General to: "... rally our forces to prevent vulnerable people from falling into the clutches of traffickers, to bring those responsible to justice, and to shelter the victims".¹⁶

On 16 December 2007 the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act 2007) came into effect. The Sexual Offences Act 2007 created the new statutory crime of human trafficking, yet is of limited value since it only targets trafficking for sexual purposes. The Children's Act 38 of 2005 (Children's Act 2005), which came into operation only in April 2010, also contains provisions in Chapter 18 relating to trafficking in children. The awaited anti-human trafficking Bill - the Prevention and Combating of Trafficking in Persons Bill - was introduced in Parliament only on 16 March 2010. Thus the Sexual Offences Act 2007 and Children's Act 2005 are still the only statutes providing guidance on trafficking crimes but only to the extent of trafficking for sexual purposes and in children. As will be explained in this research, trafficking in persons is a much wider concept which includes trafficking for sexual exploitation, forced labour, armed conflict, child soldiers, irregular adoption, servitude, forced marriage, begging and the removal of human

¹⁵ UNODC *Global Report on Trafficking in Persons 2009* (2009) 105.

¹⁶ Ban Ki-Moon *Greetings from the United Nations Secretary General to the participants of the Global Initiative to Fight Human Trafficking Interfaith Dialogue* (Unpublished paper presented at the *Conference on Global Initiative to Fight Human Trafficking Interfaith Dialogue*, UNODC and Sexual Offences & Community Affairs (SOCA) Unit within the National Prosecuting Authority (NPA) of South Africa, Cape Town 3-5 Oct 2007) 1.

organs and body tissues. Pending the adoption of a comprehensive Human Trafficking Act, the above fragmented laws are the only legislative measures available to charge people engaged in human trafficking.

As the supreme law of the land, the Constitution of the Republic of South Africa, 1996 (the Constitution) provides explicit directives on the subject of human trafficking stating that:

No one may be subjected to slavery, servitude and forced labour.¹⁷

In addition to this right, the Constitution recognises, amongst others, the following basic rights of all individuals: the right to equality, the right to human dignity, the right to freedom and security of person, the right to privacy, the right to freedom of movement and residence and the right of children to be protected. Viewed critically from a human-rights perspective, trafficking violates all these human rights:

Trafficking in human beings is morally reprehensible, it is illegal; it robs people of their dignity and violates their fundamental human rights. It objectifies and commodifies individuals, preys on the vulnerable and the marginalized, it perpetuates their vulnerabilities and it repeatedly victimises and re-victimizes those who are the objects of trafficking.¹⁸

The Constitutional Court in *S v Dodo* affirmed this stance when Ackermann J commented:

Human beings are not commodities to which a price can be attached; they are creatures with inherent worth and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.¹⁹

Trafficking may occur in respect of all people but, sadly, the vulnerable members of society, namely female adults and children are targeted mostly. As such, trafficking

¹⁷ Constitution of the Republic of South Africa, 1996 (hereafter Constitution) s 13.

¹⁸ Pahad *Opening Address at Global Initiative to Fight Human Trafficking Interfaith Dialogue* (Unpublished paper presented at *Conference on Global Initiative to Fight Human Trafficking Interfaith Dialogue*, UNODC and Sexual Offences & Community Affairs (SOCA) Unit within the National Prosecuting Authority (NPA) of South Africa, Cape Town 3-5 Oct 2007) 1.

¹⁹ *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) para 38.

characteristics are intertwined with violence chiefly directed at the female gender.²⁰ Females are more prone to fall victim to trafficking because of their subordinate position in certain societies. Gender discrimination within the family and the community, as well as a tolerance of violent behaviour against women and children also come into play.²¹ Of course, related root causes of trafficking in persons include abject poverty, a deficiency in political, social and economical stability, a lack of access to education and information, the disintegration of the family structure and the HIV/AIDS reality.²²

Despite significant efforts made by the South African government to combat trafficking in persons (including the ratification of the Palermo Protocol²³ and progress made on developing a national plan of action to deal with the problem), the country was placed in 2008 on the “Tier 2 Watch List” by the US Department of Trafficking in Persons for a fourth consecutive year.²⁴ South Africa was positioned in this tier since it failed to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year. The South African government was furthermore criticized for providing inadequate data on trafficking crimes investigated and/or prosecuted and, on resulting convictions or sentences. Moreover, it failed to provide information on its efforts to protect victims of trafficking. A further grievance was that the country continued to deport and/or prosecute suspected foreign victims without providing them with appropriate protective services. South Africa managed to reach the “Tier 2” level only in 2009. It was consigned to this position since it had not yet complied with international obligations to pass domestic legislation and to meet the minimum standards needed to eliminate trafficking as laid down by the Palermo Protocol.

²⁰ Ezeilo *UN Special Rapporteur on Trafficking in Persons* (2010) 6.

²¹ UN Population Fund (UNFPA) *Gender Equality – Trafficking in Human Misery* <http://www.unfpa.org/gender/violence1.htm> (accessed 2012-12-20).

²² Laczko “Data and Research on Human Trafficking” 2005 43(1/2) *International Migration* 5-16; see also Kempadoo, Sanghera & Pattanaik (eds) *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (2005) 48-55.

²³ South Africa signed this treaty on 14 Dec 2000 but did not ratify it until 20 Feb 2004. See UN Convention against Transnational Organised Crime (UN Doc A-55-383) http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&lang=en (accessed 2012-12-20).

²⁴ US Dept of State *Trafficking in Persons Report 2008* (2008) 227-229. As mandated by the Trafficking Victims Protection Act of 2000 (TVPA), the US Dept of State positions each country in the Report onto one of 3 tiers. This placement is based more on the extent of government action to combat trafficking than on the size of the problem, although the latter is also an important factor. The analyses consider the extent of governments’ efforts to reach compliance with the TVPA’s minimum standards for the elimination of human trafficking. Governments that fully comply with the standards are placed on Tier 1. Governments that are making significant efforts to bring themselves into compliance with the TVPA’s standards, yet still do not fully comply with those minimum standards are placed on Tier 2. Governments that do not fully comply with the minimum standards and are not making significant efforts to do so are placed on Tier 3. Tier 2 countries can also move to Tier 2 Watch List and *vice versa*, according to Special Watch List criteria.

With its history of southward migration flows, permeable borders, weak institutions and structures, high rates of poverty, and pervasive gender inequalities, Africa and consequently also South Africa, is fertile ground for human trafficking.²⁵ The South African legal response to trafficking in persons is overdue. Despite various attempts to counter human trafficking, South Africa has also failed to guarantee victims effective protection. The need to assess and address the South African legal response to this problem is a matter of urgency before it escalates even further.

1.2 Research questions and hypotheses of study

The study makes an exploratory attempt to examine the adequacy and effectiveness of the legal framework dealing with human trafficking in South Africa by means of a comparative approach. To achieve this objective, the following research questions are asked:

- What does the concept “human trafficking” mean?
- Does the history of slavery in South Africa have any significance in understanding the current problem of human trafficking?
- What are the root causes of human trafficking?
- Does South Africa have appropriate and effective strategies in place for addressing human trafficking?
- Are these strategies in accordance with norms of international law?
- Should comprehensive anti-trafficking laws be implemented in order to address the escalation of human trafficking in its various forms?
- Should protection of victims of human trafficking be addressed in terms of such and other laws?
- Can we learn from the experience of other jurisdictions’ efforts in combating human trafficking and protecting victims of trafficking?

The hypotheses underlying the research are the following:

- Human trafficking is a growing problem in South Africa.
- The history of slavery and the apartheid regime contributed to the modern slave trade in South Africa.

²⁵ Graham “Human Trafficking Concerns for 2010” *Genderlinks*
<http://www.genderlinks.org.za/article/human-trafficking-concern-for-2010-2007-11-29>
(accessed 2012-12-20). See also IOM *Breaking the Cycle of Vulnerability: Responding to the Health Needs of Trafficked Women in East and Southern Africa* (2006) 22.

- The root causes of human trafficking are poverty; unemployment; lack of education and ingrained gender discrimination.
- Currently, the combating of human trafficking and related issues such as victim protection is not sufficiently addressed in South African law.
- South Africa needs to adopt specific and comprehensive anti-trafficking legislation that is based essentially on the provisions of the Palermo Protocol but that acknowledges the jurisdiction's local-specific vulnerability factors.
- Anti-trafficking efforts undertaken in other jurisdictions such as the US, Germany and Nigeria may contribute to a more comprehensive South African response to human trafficking.
- International, regional and sub-regional instruments on trafficking and related aspects of trafficking provide guidelines for developing effective strategies to deal with trafficking within the region.
- The Constitution provides human-rights protection to trafficked persons in South Africa.

1.3 Aim of study

- **Adequacy and efficacy of current legal framework**

As pointed out above, the purpose of this study is to examine the adequacy and effectiveness of the legal framework dealing with human trafficking in South Africa. In order to achieve this objective, a comprehensive diachronic as well as contemporary overview of the punishment and prevention of human trafficking in South Africa, as well as in three foreign legal systems will be provided. Comparative analyses of international and regional instruments, as well as various national legal responses to human trafficking are also undertaken.

- **Reasons for disregard of human trafficking considered, especially in Africa**

A further aim of the research is to determine why human-trafficking transgressions have to date largely been ignored in Africa. The reasons for the disregard thereof will be questioned and solutions provided. It will be shown that there is especially an urgent need to examine more closely the concepts of trafficking as it applies specifically in Africa. International instruments tend not to consider an African perspective to

trafficking *per se*.²⁶ This study will consider reasons why an African response to the recognition and combating of human trafficking is not necessarily represented in international treaties.

- **Illumination of concept**

In order to begin a dialogue on trafficking, a clear understanding of the concept is crucial. Confusion regarding the definition of human trafficking leads to poor prosecution thereof. From the outset a universally acceptable definition of human trafficking should be introduced. This description should also make clear whether human trafficking is a form of gender-based violence or not. The question must pertinently be asked whether gender is a variable in identifying those at risk and whether women and girls are more vulnerable to human trafficking than men. As such, the primary links of human trafficking with gender discrimination should be illustrated in the description.

- **Historical development**

Apart from underscoring the definition of trafficking in persons, this study will furthermore draw attention to the historical development of the phenomenon. The purpose is to throw more light on the modern trade in slavery.

- **Trafficking crisis in South Africa**

The trafficking crisis in South Africa will be investigated to ascertain which aspects contributed to the current situation. Aspects considered will include legal and political factors such as the paucity of legislation targeting all forms of trafficking, the deficiency in implementation mechanisms; the lack of commitment amongst the main role players and the absence of political will to counter this quandary.

- **General root causes**

Other general root causes of trafficking comprising of socio-cultural and economic factors such as a lack of education, lack of information, poverty, social or economic instability in the home as well as in the country, will only be considered briefly.

²⁶ The first publication on trafficking offering ideas for a legal framework and law enforcement response was OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) which does not provide an African response to the problem.

- **Adequate protection of fundamental human rights**

As indicated above, trafficking violates its victims' fundamental human rights.²⁷ The Constitution of South Africa explicitly protects the right to equality;²⁸ the right to human dignity;²⁹ the right to freedom and security of person³⁰, the right not to be subjected to slavery, servitude and forced labour,³¹ the right to privacy;³² the right to freedom of movement and residence,³³ and the right of children to be protected.³⁴ The question will be posed whether these rights are adequately protected by current legislation. Attention will also be focused on whether legislation is the appropriate route to combat human trafficking or whether the common law should be developed by the courts to uphold and promote the spirit, purport and objects of the Bill of Rights as required by the Constitution.³⁵

The possible challenge of the crime of human trafficking on constitutional grounds will also be considered briefly in view of proposed trafficking legislation and certain fundamental rights of accused for instance their right to a fair trial,³⁶ their right to freedom and security of the person, and their right to equality before the law.

- **Protection in terms of international law**

The infringement of a trafficked individual's human rights is one of the core current concerns of international law.³⁷ When South Africa acceded to the Palermo Protocol³⁸ and the African Charter on Human and People's Rights,³⁹ the issue of protection and

²⁷ By definition, a human right is a universal moral right, something which all people, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because s/he is human. See Cranston *What are Human Rights?* (1973) 36.

²⁸ Constitution s 9.

²⁹ Constitution s10.

³⁰ Constitution s12.

³¹ Constitution s13.

³² Constitution s14.

³³ Constitution s 21.

³⁴ Constitution s 28(1)(d)–(f).

³⁵ Constitution s 39(2): "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

³⁶ Constitution s 35(3).

³⁷ See generally Henkin, Pugh, Schachter & Smit (eds) *International Law, Cases and Materials* 3rd ed (1993) 596-597, 638, 675-676; Cook "State Responsibility for Violations of Women's Human Rights" 1994 (7) *Harvard Human Rights Journal* 126 126; Shelton *Remedies in International Human Rights Law* (1999) 9-11; Harris *Cases and Materials on International Law* 4th ed (1991) 601-604.

³⁸ See n12 *supra*.

³⁹ This charter was adopted on 27 Jun 1981 and came into operation on 21 Oct 1986. South Africa signed and ratified the charter on 9 Jul 1996. The first international declaration with the purpose to promote and protect human rights and fundamental freedoms of all people was the Universal Declaration of Human Rights (UDHR), which was adopted by the UN General Assembly (UNGA) on 10

promotion of human rights, which was until then an exclusive subject of its domestic jurisdiction, became an international concern.⁴⁰ There are several international and regional human-rights instruments ratified by South Africa in terms of which trafficking is strictly prohibited and specific duties are imposed upon the state to effectively prohibit and penalise the crime and to protect the rights of the victims.

The various international and regional agreements will be investigated in order to determine South Africa's compliance with the instruments. Where international human-rights law strictly prohibits trafficking in persons and obliges the member state to protect the human rights of the victims and to provide adequate legal protection and remedies, which include health services and compensation, the question whether South Africa fulfils these obligations will be considered.

- **Previous punishment of conduct that amounted to trafficking in South Africa**

The previous punishment of human trafficking in South Africa will also be considered. It will be shown that a specific crime of human trafficking did not exist in the past and that existing common-law crimes and other statutory provisions were utilised to punish various forms of human trafficking. Under common law, depending on the circumstances of each case, suspects could be charged with crimes such as kidnapping; rape; abduction; fraud; indecent assault; assault (common and with intent to commit grievous bodily harm); extortion; murder; attempted murder; *crimen iniuria*; etc. Various statutory crimes could also be utilised to prosecute manifestations of human trafficking through mainly the following legislation: The Sexual Offences Act 23 of 1957; the Child Care Act 74 of 1983, as amended; the Prevention and Combating of Corrupt Activities Act 12 of 2004; Immigration Act 13 of 2002; the Films and Publications Act 65 of 1996 (child pornography) as amended; the Corruption Act 94 of 1992; the Intimidation Act 13 of 2002 as amended, the Intimidation Act 72 of 1982 and the Riotous Assemblies Act 17 of 1956 (conspiracy, incitement). This research will examine the efficacy of the law previously applied to combat trafficking.

⁴⁰ Dec 1948 with the abstention of South Africa. South Africa has still not signed nor ratified it. See Ezeilo (n 20 *supra*) 3.

- **Desired interpretation and application of the new trafficking offence in terms of transitional legislation**

A few human-trafficking cases have been prosecuted under the new Sexual Offences Act 2007 and the Children's Act 2005. These cases will be examined in order to determine the ambit and interpretation of the provisions. It will be pointed out that the provision on trafficking in the said Act is merely transitional and has limited operational scope for it does not target all forms of human trafficking. It will furthermore be argued that the current law is not in accordance with various constitutional imperatives, that is, the principles of equality and non-discrimination against trafficking victims other than those of sexual offences. Absence of consent as an element of the offence is also problematic. The study also purports to investigate whether the legislative developments are an improvement on the common-law position and to make suggestions for further developments. It will be made clear that the law is in need of reform and that reform should ideally take place via proper legislation and not the common law.

- **Evaluation of draft legislation**

Draft legislation on human trafficking will be analyzed and proposals to improve the legislation from the perspective of prevention of the crime, prosecution of offenders and protection of the victim will be offered.

- **Compilation of human trafficking legislation**

A further aim of this study is to produce an updated, contemporary and comparative compilation of the law that relates to human trafficking in South African and some foreign jurisdictions. Although the study does not purport to provide a solution to the predicament of human trafficking, the research will endeavour to provide a critical perspective on current efforts to combat the phenomenon.

- **Outcome of research**

The intended outcome of the research is to make recommendations regarding the adoption of appropriate legislation and the implementation of other strategies to effectively counter human trafficking and also to protect victims of trafficking.

1.4 Scope of study

This study provides a critical and comprehensive account of the crime of trafficking in persons and the combating thereof. The research will focus on human-trafficking legislation in South Africa and in the legal systems of the United States of America, Germany and Nigeria. Comparative research will be conducted regarding the difference in approach followed with regard to the prevention and prosecution of the crime of human trafficking in these jurisdictions.

The comparative research is conducted in the context of the different jurisdictions' historical, legal and cultural environments. In all four legal systems, there are strong resemblances regarding the supremacy of a Constitution. All four constitutions also exhibit particular influences. The Bill of Rights (Amendments 1-10) in the Constitution of the United States (US) was inspired by the English Bill of Rights of 1689.⁴¹ The Nigerian Constitution and Bill of Rights are also based on the English common law.⁴² The German "Grundgesetz" of 1949 had a significant influence on the development of the new South African constitutional system⁴³ while the German legal system again drew inspiration from Roman law which is also an original source of South African criminal law.

While the South African legal system is known as a hybrid legal system with traces of Roman-Dutch and English law, the legal systems of the US developed mainly from English law. Federal courts and 49 states had legal systems originally based on English common law but these systems diverged greatly in the 19th century with substantial indigenous innovations and borrowing from some civil-law practices such as codification.⁴⁴ The legal system of the US is selected for research purposes since it is representative of a system with a human-rights culture with an extensive and proven record of anti-human trafficking legislation and prosecution. The country was one of the first countries in the world to regulate the irregular migration of humans. The US exhibits strong law enforcement efforts and encourages a victim-centred approach

⁴¹ Schwartz *The Great Rights of Mankind: A History of the American Bill of Rights* (2002) 1-2.

⁴² Ollennu "The Influence of English Law on West Africa" 1961 5 *Journal of African Law* 21 21-22.

⁴³ Sarkin "The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions" 1998 1(2) *Journal of Constitutional Law* 176 180-181.

⁴⁴ Excluding Louisiana where state law is based upon French and Spanish civil law. See Friedman *A History of American Law* 2nd ed (1985) 171.

among local, state, and federal law enforcement.⁴⁵ Similar to South Africa, the US is a country that attracts trafficking because it is economically developed, cosmopolitan; diverse and provides as such, a lucrative market for human traffickers.⁴⁶

Corresponding to South African law, the roots of the German legal system stems from Roman law. The German legal system is selected as a model for comparison because it represents legal responses to trafficking from the Continental European law family; a civil law legal system with completely codified criminal laws⁴⁷ which prohibits trafficking in persons for all purposes. Germany's Penal Code⁴⁸ is of a very high standard and is an important source for law reform for any country. Germany is an ideal choice for comparison because of its history of a newly reunified country. Similar challenges of integration and transformation had to be addressed after the reunification of Germany in 1990, as in South Africa in 1994. Germany also acted as host nation of the FIFA⁴⁹ World Cup tournament in 2006, which South Africa had the opportunity to be in 2010. Such a large-scale tournament presents ideal sex profit-generating opportunities, with the presence of significant numbers of male tourists and the correlating demand for sex. Fears regarding extraordinary increases in trafficking in persons especially children surrounding the tournament were similar in both countries and the coping mechanisms and outcomes of these mechanisms introduced in Germany will be considered.

Nigeria is partly a Muslim state with blended sources of law. Similar to South Africa, the Nigerian legal system is a pluralistic system based on the English common law by virtue of colonization. Following its transition to democracy in 1999, one-third of its federal states declared that they would be governed by Shari'a law.⁵⁰ Although its legal systems is influenced by Shari'a law (especially in the Northern states), Nigeria has ceded ultimate authority to its constitution⁵¹ and the rule of law in a system of democratic federalism.⁵² Nigeria is a country with enormous natural and human

⁴⁵ US Dept of State *Trafficking in Persons Report 2012* (2012) 360.

⁴⁶ Kreston "Trafficking in Children in South Africa: An Analysis of the Pending Legislation" 2007 8(1) *Child Abuse Research in South Africa* 35 38-39.

⁴⁷ Merryman & Pérez-Perdomo *The Civil Law Tradition* 3 ed (2007) 31.

⁴⁸ Strafgesetzbuch (or StGB). The StGB serves as a codification of criminal law and constitutes the foundation of Germany's criminal law.

⁴⁹ Fédération Internationale de Football Association (FIFA) trademark.

⁵⁰ Shari'a (Islamic) law is based on legal precedent and reasoning by analogy and is thus considered similar to common law. See Harnischfeger *Democratization and Islamic Law: The Sharia Conflict in Nigeria* (2008) 244.

⁵¹ Constitution of the Federal Republic of Nigeria 1999.

⁵² El-Gamal *Islamic Finance: Law, Economics, and Practice* (2006) 16.

resources but widespread poverty abounds mainly because of corruption. Research has shown corruption of public officials to be a key impediment to progress in addressing modern slavery.⁵³ Nigeria implemented its Trafficking in Persons Law Enforcement and Administration Act in 2003 which prohibits all forms of human trafficking, and amended it in 2005 to increase penalties for trafficking offenders. Previously, Nigeria had one of the worst records for the combating of human trafficking. But, since 2010, this position has changed substantially.⁵⁴ The country's efforts in changing the situation will be examined with a view to evaluate the position in South Africa.

All four of the jurisdictions considered in the comparative study are source, transit, and destination countries for men, women, and children subjected to trafficking. While the US, Germany and Nigeria are rated in "Tier 1" of the Trafficking in Persons Country List for 2012, South Africa is categorized in "Tier 2".⁵⁵ South Africa, because of its slow response to legislate human trafficking, has a unique opportunity to learn from the mistakes of other countries, which may have responded too quickly to the Palermo Protocol. The country has a chance to create evidence-based legislation that is country-specific, to institute measures that take the rights of trafficked people and other migrants into account and to respond in ways that also address the root causes of migration.⁵⁶

1.5 Methodology

In order to conceptualize the issue of human trafficking, the research is based upon an extensive **literature study**. An abundance of research regarding trafficking in humans exists in the West.⁵⁷ There is, however, a paucity of African literature on the subject. As such, this study endeavours to give a South African perspective on the topic. Regrettably, hardly any solid data on this topic can be found in Africa. Trafficking in persons is as such virtually non-existent as a field of study in African legal studies, and little has been done in South Africa in this regard. This study aims to be a contribution

⁵³ See Agbu "Corruption and Human Trafficking: The Nigerian Case" 2003 14(1) *West Africa Review* 1 3-4; Agbu *Re-visiting Corruption and Human Trafficking in Nigeria: Any Progress?* (2008) 2-5.

⁵⁴ US Dept of State *Trafficking in Persons Report 2010* (2010) 255-257.

⁵⁵ Other African countries in this category include Botswana, Angola, Namibia and Ghana. See US Dept of State *Trafficking in Persons Report 2012* (n45 *supra*). For information on the Tier-system, see n24 *supra*.

⁵⁶ Laczko (n22 *supra*) 14.

⁵⁷ See Jonsson (ed) *Human Trafficking and Human Security* (2009) which is a collection of articles on human trafficking in Europe.

in this field.

Information concerning the combating of human trafficking internationally as well as domestically is provided. In the examination of international and regional instruments, the primary sources will be treaties and protocols, while reports of regional and other organisations will substantiate or invalidate findings. As human trafficking is a fairly novel area of research, little information on the subject can be found in text books, while substantial literature is found on the Internet and in journals. Data collection and inductive analysis through a qualitative research method,⁵⁸ supported by quantitative structures are undertaken.

Since the focal point of this thesis is to examine human-trafficking legislation; sentencing of offenders and the effect thereof in the legal systems of particular countries, a comparative *modus operandi* will be implemented. The research draws upon a comparative study in order to scrutinize and inform pending legislation in South Africa. The comparative method is chosen as it assists in broadening horizons for the researcher and is the main tool used for collecting information on proven ways to combat human trafficking.⁵⁹

In the South African context the comparative method is legitimate and is sanctioned by the Constitution.⁶⁰ The Constitutional Court also used the comparative method in several instances during the certification process⁶¹ and subsequent jurisprudence. Comparing human trafficking legislation and sentencing practices can lead to new insights and a deeper understanding of issues that are of central concern in each of the

⁵⁸ See Marshall & Rossman *Designing Qualitative Research* 5th ed (2011) 91. The strength of qualitative research is its ability to produce complex textual findings regarding a given research issue – through the collecting of evidence - that were not determinable in advance and are applicable beyond the immediate boundaries of the study. Qualitative research is especially effective in obtaining culturally specific information and in identifying intangible factors, such as gender roles, ethnicity, etc. Qualitative research is often used for policy and program evaluation research since it can resolve certain issues more efficiently and effectively than quantitative approaches. Through qualitative research, important questions are answered vis-à-vis how and why certain outcomes were achieved (or not achieved), as well as questions about relevance, unintended effects and the impact of policies.

⁵⁹ Eser “The Importance of Comparative Legal Research for the Development of Criminal Sciences” in *Blancpain Law in Motion: Recent Developments in Civil Procedure, Constitutional, Contract, Criminal, Environmental, Family and Succession, Intellectual Property, Labour, Medical, Social Security, Transport Law* (1997) 498.

⁶⁰ See Constitution s 39(1): “(1) When interpreting the Bill of Rights, a court, tribunal or forum -
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.”

⁶¹ See, eg, *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) paras 50, 71–73, 89–90, 112–113.

different jurisdictions. Hereby gaps in human trafficking policies may be identified and possible directions that should be followed may be identified. The challenge in a comparative study lies in identifying the features of trafficking legislation of the US, Germany and Nigeria which have contributed to the successful combating of human trafficking. Of course, South Africa's unique features and local conditions will have to be taken into account. The information obtained from the foreign jurisdictions cannot merely be transplanted, but will have to be adapted to South Africa's specific social environment and needs. Comparisons may also help to sharpen the focus of analysis of the subject under study by suggesting new perspectives.⁶² The character of human trafficking in these diverse legal systems and reasons for certain similarities and/or differences can be revealed only by means of theoretical and historical comparative study.

Certain key terms will be employed in the investigation of human trafficking. Therefore, explanations of key terminology representative of the main ways of looking at the problems encountered in the discussions of human trafficking will be given.

In the discussion of the law of each jurisdiction, the description and interpretation of trafficking legislation will be provided (legal and functional approach). Each jurisdiction's legal design viewed against its institutional, political, cultural and social context will be explained. Constitutional or legal considerations within which proposals for the combating of trafficking policy are considered will be identified. The reconciliation of each country's national laws with international human trafficking conventions will be investigated. The research is intended to provide a better understanding of the extent to which some countries borrow from international law and what the best practices are for the regulation of the crime of human trafficking.

The comparative study is undertaken in order to find specific solutions for the combating of human trafficking in South Africa. The relevant South African laws will be investigated. Although a myriad of factors contribute to trafficking characteristics, producing a wide range of trafficking scenarios and posing challenges to finding an adequate response, this study will not focus as such on the socio-economic factors. An **analytical legal comparative method** will be followed in order to gain insight into the combating of trafficking in persons. **The comparative legal study**

⁶² See Hantrais *International Comparative Research: Theory, Methods and Practice* (2009) 10.

will be utilised to make various proposals for law reform or interpretation of current proposals.

1.6 Chapter outline

In the **introduction**, the **aim**, **method** and **scope** of this thesis are set out. The reasons for selecting the problem of human trafficking in South Africa; the rationale for the study, as well as the statement of the research problem and hypotheses are presented. The ambit of the study is outlined and the chapter layout of the study is given. **The rationale for the selection of the legal systems of three foreign countries for comparative purposes is explained.** The neglected stance that most African critics have taken towards the topic of human trafficking is highlighted.

In **Chapter 2** of this study, **a historical background to the phenomenon of trafficking is given.** A time-line of human trafficking is provided and current forms of trafficking are explained. **Different approaches to the understanding of the concept of human trafficking and closely related phenomena such as migration, slavery and smuggling of humans** are explained. Key terminology in human trafficking is elucidated. In this chapter, the **causes** of trafficking are also explained.

The **third** chapter concerns an **analysis of international provisions regarding trafficking in persons** at its most basic level. **All appropriate international instruments, especially those that South Africa has adopted,** are examined. In doing so, the researcher draws upon collected comparative evidence and interpretations of the international conventions. The existing legal framework at regional level is also examined.

Chapter 4 examines the **manner in which trafficking in human beings is dealt with by various international organisations.** The counter-trafficking strategies as found in treaties (including conventions), protocols, declarations and resolutions will be outlined and assessed as to their real impact and potential for long-term effectiveness. This chapter will evaluate both international conventions centring only on human trafficking as well as international instruments with other focus areas, but which still have relevance to human trafficking. **International human rights instruments relating to trafficking** will also be discussed. These international legal frameworks oblige states to

prosecute traffickers, protect people vulnerable to trafficking as well as those already trafficked and create structures for prevention.

After **evaluating the international responses to human trafficking, regional responses are considered in the fifth chapter.** The manner in which human trafficking is dealt with by the various regional organisations of Europe, the Americas and Africa will be investigated. The real impact and potential for long-term effectiveness of the regions' treaties on the crime of human trafficking will be assessed. More specifically, the obligations under the regional directives in comparison to those contained in the Palermo Protocol will be compared. Various instruments specifically formulated to combat trafficking as well as instruments that make reference to the issue of trafficking in persons will be looked into. In this regard, the **various contributions to combat human trafficking in these different regions will be considered.**

Chapter 6 focuses on the **combating of trafficking in the selected legal jurisdictions namely the US, Germany and Nigeria.** This chapter explores the different states' legal approaches to counter human trafficking and assesses their effectiveness. Both the US and Germany are representatives of countries with wide-ranging, verified anti-human trafficking legislation and prosecution of trafficking. Nigeria is selected as the only African country that has already implemented human trafficking legislation. This state's legal response to trafficking will be investigated in order to see whether the new laws have substantially reduced or alleviated the magnitude of the problem of trafficking.

Chapter 7 relates to the **use of the criminal sanction to combat human trafficking in South Africa.** Having compared and contrasted the trafficking legislation of the US, Germany and Nigeria in the previous chapter, and having set them against the background of the international human trafficking conventions, the situation in South Africa will be examined. The previous combating of human trafficking through common law crimes as well as specific legislative measures will be traced. **Legislation, case law and collected data will be presented, discussed and compared to the position in legal systems of the three selected foreign countries.**

In **Chapter 8**, the discussion focuses on **the impact of human trafficking on human rights guaranteed in terms of the South African Constitution.** In this chapter the

various constitutional imperatives contained in the Bill of Rights which may be particularly relevant in combating the violation of rights in human-trafficking situations are investigated. This investigation necessarily involves examining the Constitutional Court's interpretation of the provisions of the Bill of Rights in assessing whether **trafficking victims' rights** may have been infringed by the conduct of the trafficker (or other parties) or by a certain law. The aim of this chapter is to discern amongst its jurisprudence those human-rights infringements which may inform similar situations in the trafficking scenario.

Chapter 9 concludes the study whereby the main conclusions of the research are summarised, discussed and interpreted, and recommendations are made for law reform, practice and policy. The findings of the research are that there is scope for improvement of the South African response to human trafficking. The main areas identified as deserving of attention include the following:

- the implementation of the TIP Bill as law;
- the development and implementation of various other policies and strategies to educate and inform the public of the dangers of human trafficking;
- the development of legal and other measures to offer protection and assistance to victims of trafficking and also to ensure effective protection of fundamental human rights of victims;
- continuous international cooperation in combating human trafficking;
- more effective cooperation among law enforcement agencies and NGOs;
- the introduction of specialised anti-trafficking units, specialised training and specialisation in prosecution, and
- the development of a national database on all aspects of human trafficking.

CHAPTER 2

HISTORICAL BACKGROUND AND CONCEPTUAL APPROACHES TO HUMAN TRAFFICKING

2.1 Introduction

Human trafficking is a dire multidimensional criminal phenomenon with global proportions.¹ It is not a static phenomenon, but a continuum with many interplaying factors, with extreme forms of force and coercion at one end and voluntary aspects through economic need on the other.² Trafficking in persons is an economic problem for the vast majority of people (mainly females) seeking to escape poverty is lured into trafficking by the false promise of economic gain. It is a health problem, as the trafficked persons are most at risk of HIV infection. Furthermore, trafficking in persons is a gender problem, as unequal power relations reinforce women's secondary status in society. As such, it also reinforces cultural discrimination. Lastly, and most importantly for this research, it is a legal problem, as its victims are stripped of their human rights and lack any access to redress for the crimes committed against them.³

As previously stated, human trafficking is not a novel development. Although many researchers claim that trafficking in persons is a contemporary form of slavery, which

¹ Among the many researchers and organisations who have examined the multidimensionality of human trafficking are Altink *Stolen Lives: Trading Women into Sex and Slavery* (1995) 22; Kempadoo & Doezema (eds) *Global Sex Workers: Rights, Resistance, and Redefinition* (1998) 65; Williams (ed) *Illegal Immigration and Commercial Sex: The New Slave Trade* (1999) 1-10; Brown *Sex Slaves: The Trafficking of Women in Asia* (2000) ix-xi; Hughes "The „Natasha“ Trade: The Transnational Shadow Market of Trafficking in Women" 2000 53(2) *Journal of International Affairs* 625 625–651; Laczko & Thompson (eds) *Migrant Trafficking and Human Smuggling in Europe: A Review of the Evidence with Case Studies from Hungary, Poland and Ukraine* (2000) 3; IOM *Trafficking in Women and Prostitution in the Baltic States: Social and Legal Aspects* (2001); Kyle & Koslowski (eds) *Global Human Smuggling: Comparative Perspectives* (2001) 1-28; Raymond & Hughes *Sex Trafficking of Women in the United States: International and Domestic Trends* (2001) 15; Hughes & Denisova "The Transnational Political Criminal Nexus of Trafficking in Women from Ukraine" 2001 6(3-4) *Trends in Organized Crime* 1 2-21.

² See Archavanitkul *Combating the Trafficking in Persons and their Exploitation in Prostitution and Other Intolerable Forms of Labour in Mekong Basin Countries* (2000) <http://www.seameo.org/vl/combat/1content.htm> (accessed 2012-12-21).

³ US Agency for International Development (USAID) *Strategic Treatment for the Asia Regional Anti-Trafficking Initiative* (1999) 2.

existed for at least a century between Africa and Europe,⁴ its history in Africa and the rest of the world reaches even further back. The annals of trafficking in persons will be investigated in order to assess various legal approaches to trafficking.

This chapter will outline the history of human exploitation from its conceptualisation as slavery through to its evolution as human trafficking. Important periods in the history of slavery as well as the legal instruments formulated over time to address traditional and contemporary slavery are discussed. The various definitions of trafficking in people are focused on, and the most suitable definition; i.e. the definition set out in the Palermo Protocol⁵ and its elements are discussed in detail. It is important to have a clear understanding of the concept of human trafficking in order to ensure that effective measures are designed and implemented to combat it. The concept of human trafficking is also elucidated by highlighting its association with related phenomena such as slavery, migration and human smuggling. The various forms and types of human trafficking are explained, for example, forced labour, sexual exploitation, the removal of organs and body parts, the use of victims for criminal activities, the use of victims for begging, forced marriage, illicit adoption and the use for armed conflicts. The contexts in which human trafficking may occur, its causes, patterns, trends, actors, victims, and consequences are examined. The current conceptual approaches to human trafficking need to be reconsidered especially against a wider interdisciplinary background. This will assist in the understanding of the human-trafficking concept and also provide firmer ground on which to develop strategies to combat trafficking.

2.2 The origins of human trafficking - slavery

Some researchers maintain that the first manifestation of human trafficking in the world appeared a few hundred years ago in the form of trans-Atlantic slave trade.⁶ Others, who regard only sexual exploitation as trafficking, state that the origins of current trafficking

⁴ SADC *10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children* (2009 – 2019) (2009) 1.

⁵ UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (2000). See Chap 1 (n12 *supra*).

⁶ SADC (n4 *supra*) 1.

dates back to the end of the nineteenth century.⁷ These different views are the result of different concepts of “trafficking”. The original form of human exploitation - slavery - has an age-old tradition in Europe and Asia and later between Europe and Africa.⁸

Evidence of slavery predates written records but the prevalence of slavery, in one form or another, can be traced to the remotest of times.⁹ The history of all ancient civilizations reveals that whenever captives were taken in war, these prisoners became the slaves of their enemies. They were employed as slaves in public works, or sold to individuals, or appropriated by the captors for their own private use, as in the usual practice of war booty.¹⁰ Other slavery institutions were a mixture of debt-slavery, punishment for crime, child abandonment and the birth of slave children to slaves.¹¹ In the ancient Egyptian period, the pharaohs had a policy to employ the labour of captives in the erection of stately temples.¹² Slavery among the ancient Greeks in the seventh century BC was both extensive and rigorous.¹³ Slaves were obtained by conquest of war; by sale of themselves for subsistence, or in payment of debts; and by the cupidity of persons who traded in slaves¹⁴ and who often stole persons, even of noble birth and sold them.¹⁵ In Sparta,¹⁶ the Helots from Laconia were the most cruelly degraded and oppressed of all slaves.¹⁷ They were often murdered arbitrarily and without any show of justice.

⁷ Derks *From White Slaves to Trafficking Survivors: Notes on the Trafficking Debate* (2000) 2; Doezema “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women” 2000 *Gender Issues* 23 30-31.

⁸ Martens, Pieczkowski & Van Vuuren-Smyth *Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa* 3rd ed (2003) 7.

⁹ The earliest records of slavery can be traced to the Code of Hammurabi (ca 1760 BC); see King *The Code of Hammurabi* (2007) 11-21. The Bible also testifies to the commonplaceness of slavery in both the Old and New Testament. See Ephes vi 5-8; Col iii 22-25; 1 Tim vi 1-2; Tit 9-14; Pet ii 18-25; 1 Tim i 10; Ezek xxvii 13; Rev xviii 13 in *King James Bible* (2013) <http://www.kingjamesbibleonline.org/> (accessed 2013-01-10).

¹⁰ Copley *A History of Slavery and its Abolition* (1836) 20.

¹¹ Harris “Demography, Geography and the Sources of Roman Slaves” 1999 89 *The Journal of Roman Studies* 62 65.

¹² Copley (n10 *supra*) 28. The monument of Sesostris, one of the greatest Egyptian pharaohs, bore hieroglyphic inscriptions testifying to the fact that the building had been constructed by slaves.

¹³ Ancient Greece provides the first extensive records available on slavery. From this information, it is noticeable that the number of slaves in Greece was nearly 20 times that of free citizens. See Copley (n10 *supra*) 29-34.

¹⁴ These slave-traders travelled quite far distances in procuring their human cargo. Copley (n10 *supra*) 34.

¹⁵ Copley (n10 *supra*) 30.

¹⁶ One of the leading states of ancient Greece, the other being Athens.

¹⁷ Eg, among the Spartans an annual ritual for the goddess Diana consisted of whipping a number of boys – the offspring of slaves - on her alter, with such severity that the blood gushed forth in profuse streams, and they sometimes died under the cruel infliction. See Copley (n10 *supra*) 30.

Slavery continued in all its forms in the second century BC amongst the Romans. With the expansion of the Roman Empire, entire populations were enslaved. Obtained by the triumphs of war, the *servi*, a label denoting their destiny in servitude for the benefit of others, and *mancipia* (“bringing under subjection”)¹⁸ were treated more harshly than slaves acquired by sale or as a punishment for a crime. It was lawful for free-born Roman fathers to sell their children to slavery, and insolvent debtors were sometimes given up to their creditors, but their state was not that of absolute slavery. They could be freed and reinstated in their former privileges.¹⁹ Among the Romans, masters had an absolute power over their slaves. They could scourge or put them to death at pleasure. Prisoners of war were sometimes saved only to shed their blood in the amphitheatre as gladiators.²⁰ Slaves could obtain their freedom by the voluntary act of the owner, or redeemed from slavery by the benevolence of another person. However, the patron still retained various rights over him, such as financial support in case of the master’s poverty. If the freed man died intestate, the patron succeeded to his effects.²¹ The citizens of Rome were also enslaved on some occasions. More than twenty thousand Romans were carried away as captives into Germany, only to be rescued by the emperor Julian. When Rome was destroyed by the Goths, multitudes of citizens were reduced to slaves.²²

In Medieval times and later (sixth to fifteenth century AD), the slave trade was sustained through constant warfare in mainly South and East Europe. Land and other property were divided amongst the Germanic barbarians according to rank and the few remaining inhabitants of each land were placed in a state of vassalage under their conquerors. This new division of property introduced the feudal system which continued until the end of the twelfth century.²³ From the eleventh to the nineteenth century, North African Barbary Pirates²⁴ captured Christians from European coastal villages to sell at slave markets in places such as Algeria and Morocco. This trafficking of Christian slaves to non-Christian lands was repeatedly prohibited by the Roman Catholic Church at the Council of Koblenz

¹⁸ Copley (n10 *supra*) 39.

¹⁹ Copley (n10 *supra*) 40.

²⁰ Copley (n10 *supra*) 41.

²¹ Copley (n10 *supra*) 45-46.

²² Copley (n10 *supra*) 46.

²³ See Copley (n10 *supra*) 72.

²⁴ These were Moors who raided coastal areas around the Mediterranean and Atlantic Ocean.

(922), the Council of London (1102), and the Council of Armagh (1171).²⁵ In England canonical law declared slavery within its borders an illegal practice as early as 1102.²⁶ In Western Europe slavery largely disappeared by the later Middle Ages, while it persisted longer in Eastern Europe.

The influence of Christianity in Europe and the emphasis on the rights of man had as a consequence that slavery became almost extinct in most states. It was however revived in the fifteenth century, in an aggravated form, in the colonies of the New World.²⁷ In the year 1440 the Portuguese seized Moors on the African West Coast. At the close of the same century, after the Spaniards took possession of the West Indian islands in 1503, African slaves were procured from the Portuguese for labour.²⁸ In 1511, Ferdinand V of Spain allowed a larger importation of slaves. His successor, Charles V, granted in 1517 a patent for the exclusive supply of 4000 Africans annually to Hispaniola, Cuba, Jamaica and Puerto Rico. However, in 1542, he ordered that all slaves in his West Indian possessions should be freed, which was effected.²⁹ After his resignation of the throne in 1555, a return to the former slave trade practice followed. England entered into the African slave trade in 1562 when Captain John Hawkins (later Sir John Hawkins) took captive 300 slaves; a practice repeated several times more in the trans-Atlantic slave trade. From 1700 to 1786, the number of slaves imported by Britons into the island of Jamaica alone was 610 000; the total import into all the British colonies, from 1680 to 1786, was about 2 130 000.³⁰

International trafficking in women for commercial sexual exploitation gained momentum during the early nineteenth century. Whereas slavery had thus far mainly focused on labour exploitation, young women were trafficked into South Africa from Europe to serve as prostitutes or wives for mine workers. Simultaneously, many African girls were trafficked to Europe where a number of them were used as sex slaves in French ports.³¹ A

²⁵ Coulson *A Source Book for Medieval Economic History* 2nd ed (1965) 285-286.

²⁶ The canon proclaimed "Let no one from henceforth presume to carry on that wicked traffic, by which men in England have hitherto been sold like brute animals." Copley (n10 *supra*) 75.

²⁷ Copley (n10 *supra*) 109.

²⁸ This was done in order to replace the indigenous inhabitants who were almost exterminated by the colonists' depredations, diseases and labour demands. See Davis *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (2006) 98, 103.

²⁹ Copley (n10 *supra*) 112.

³⁰ See Copley (n10 *supra*) 114.

³¹ Martens, Pieczkowski & Van Vuuren-Smyth (n8 *supra*) 7.

tragic case is that of Sara Baartman, a Khoikhoi woman who was trafficked in 1810 from South Africa to Britain and later, in 1814, to France where she died a year later. She was trafficked for the purpose of exhibition at fairs and medical research. In the late nineteenth century, Jewish women were transported to Buenos Aires for prostitution.³² Equally, in the 1920s in order to escape poverty and famine in post revolutionary Russia, Russian women were trafficked into China.³³

Britain was the main driving force behind the end of the trans-Atlantic slave trade. Under pressure of moral entrepreneurs, the British Parliament banned slavery with the Slave Trade Act in 1807 which came into effect on 1 January 1808.³⁴ The slave trade ostensibly ended in the United States on the same date.³⁵ Great Britain, using its diplomats, armies and naval power, proceeded to abolish slavery in 1833 throughout its colonies and to enforce its anti-slavery policy around the world.³⁶ In the Americas, Asia and the Middle East, slavery continued into the second half of the nineteenth century, despite British pressure to end it. In America, slavery only came to an end in 1865 with the ratification of the Thirteenth Amendment after the Civil War. As more people began to view slavery as morally wrong, slaveholders lost political and economic influence and the legal institution of slavery disappeared.

However, during the second half of the nineteenth century, the phenomenon of so-called “white slavery” or the “white slave trade”³⁷ caused considerable concern in Europe and the

³² Chuang “Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts” 1998 11 *Harvard Human Rights Journal* 65 75.

³³ Jeffreys *Trafficking in Women versus Prostitution: A False Distinction* (Unpublished paper presented at conference on *Poverty, Violence and Women’s Rights: Setting a Global Agenda* hosted by Townsville International Women’s Conference, James Cook University, Australia 3 Jul 2002) <http://www.nswp.org/pdf/JEFFREYS-WINTER.PDF> (accessed 2012-12-21).

³⁴ See Davis (n28 *supra*) 231-237.

³⁵ Called “An Act to Prohibit the Importation of Slaves into any Port or Place Within the Jurisdiction of the United States, From and After the First Day of January, in the Year of our Lord One Thousand Eight Hundred and Eight” and enacted on 2 May 1807; the law is protected by the US Constitution art I, s 9(1) providing: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax may be imposed on such Importation, not exceeding ten dollars for each Person”. See Davis (n28 *supra*) 237.

³⁶ Britain “... thus assumed many of the qualities of an international criminal police force, one that has had few successors since.” See Andreas & Nadelmann *Policing the Globe Criminalization and Crime Control in International Relations* (2006) 27.

³⁷ This term was derived from the French *Traite des Blanches*, which related to *Traite des Noirs*, a term used in the beginning of the 19th century to describe the Negro slave trade. See Derks (n7 *supra*); Goździak & Collett “Research on Human Trafficking in North America: A Review of Literature” 2005 43(1-2)

United States. White slavery referred to the abduction and transport of white women for prostitution mainly to Muslim harems.³⁸ The movement against “white slavery” grew out of the so-called abolitionist movement, initiated in England and other western European countries as well as in the United States against the regulation of prostitution.³⁹ The issue received wide media coverage, a number of organizations were set up to combat prostitution and national and international legislation were adopted to eradicate the trade.

In reaction to the “white slave trade”, the League of Nations (later the United Nations) drafted in 1902 the first international anti-slavery agreement⁴⁰ in Paris. It was signed two years later by sixteen states and later ratified by some 100 governments.⁴¹ The International Agreement for the Suppression of the White Slave Trade 1904 (White Slave Traffic Agreement) addressed the fraudulent and abusive recruitment of white women for prostitution. This agreement defined trafficking for prostitution as a moral problem related to slavery and was intended to address the export of European women into brothels in various parts of colonial empires.⁴² It provided for the states to refer victims to public or private charitable institutions, or to private individuals offering the necessary security prior to their repatriation.⁴³ Although the intent of the White Slave Traffic Agreement was to suppress “white slavery”, this agreement merely required states party to it to collect information on the procurement of women across international borders.⁴⁴

International Migration 99-100. However, as pointed out by researchers, the trade did not consist of white females only, and in many instances it was not a trade but migration for employment, see also Kempadoo, Sanghera & Pattanaik (eds) *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (2005) x.

³⁸ See Doezeema (n7 *supra*) 25.

³⁹ “Abolitionism” arose as a specific response to the Contagious Diseases Acts enacted in England in 1864, 1866 and 1869 whereby prostitution could be regulated through medical supervision. Under the Acts, any woman who was suspected of prostitution could be detained by the police and forced to undergo an internal examination. See Doezeema (n7 *supra*) 27; Bullough & Bullough “Women and Prostitution” in Derks *From White Slaves to Trafficking Survivors* (1987) 262; Goździak & Collett (n37 *supra*) 99-128.

⁴⁰ International Agreement for the Suppression of White Slave Traffic, 18 May 1904 35 Stat 1979 1 LNTS 83.

⁴¹ Derks (n7 *supra*) 4. Also see Irwin “White Slavery” As Metaphor Anatomy of a Moral Panic” 1999 *The History Journal* San Francisco State University <http://www.walnet.org/csis/papers/irwin-wslavery.html> (accessed 2012-12-21).

⁴² Coontz & Griebel “International Approaches to Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law” <http://www.awid.org/eng/Issues-and-Analysis/Library/International-Approaches-to-Human-Trafficking-The-Call-for-a-Gender-Sensitive-Perspective-in-International-Law> (accessed 2012-12-21).

⁴³ International Agreement for the Suppression of White Slave Traffic (n40 *supra*) art 3, as in Amiel “Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation” 2006 12 *Buffalo Human Rights Law Review* 5 25.

⁴⁴ Coontz & Griebel (n42 *supra*) 74.

After the 1904 Act proved largely ineffective, its scope was broadened in 1910 to include the trafficking of women and girls within national borders.⁴⁵ In 1921, the trafficking of boys was also incorporated into the agreement with the International Convention for the Suppression of Traffic in Women and Children of 1921 (1921 Convention).⁴⁶ This Convention addressed trafficking, but considered its end purposes, such as prostitution, as a matter of domestic jurisdiction thereby limiting the scope of the convention to recruitment and transportation. However, it expanded the scope of protective measures provided by previous instruments such as the White Slave Traffic Agreement to include non-white women and children of either sex.⁴⁷ No definition of “traffic” or “trafficking” was provided.

Another international instrument adopted to address slavery but also encompassing trafficking was the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention 1926 (1926 Slavery Convention). It defined slavery and slave trade as

... the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. 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.⁴⁸

This definition already focuses on elements of trafficking such as coercion and loss of liberty,⁴⁹ similar to that of the Palermo Protocol,⁵⁰ which will be examined later. A succeeding convention, the International Convention for the Suppression of the Traffic in Women (1933 Convention)⁵¹ condemned all recruitment for the purpose of prostitution

⁴⁵ International Convention for the Suppression of White Slave Traffic (n40 supra). Wijers & Lap-Chew *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution* (1997) 20.

⁴⁶ International Convention for the Suppression of the Traffic in Women and Children, 30 Sept 1921 9 LNTS 416.

⁴⁷ Chuang (n32 supra) 75.

⁴⁸ The 1926 Slavery Convention art 1(1)-(2).

⁴⁹ Morrison & Crosland *The Trafficking and Smuggling of Refugees; the End Game in European Asylum Policy?* (2001) 61.

⁵⁰ See n5 supra.

⁵¹ International Convention for the Suppression of the Traffic in Women of Full Age, 11 Oct 1933 150 LNTS 431.

across international borders. It also provided that consent by a trafficked woman did not constitute a defence to the crime of international trafficking.⁵² The foregoing four international instruments were merged by the League of Nations to produce the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950 Convention).⁵³ It is consequently regarded as the first consolidated anti-trafficking convention of the world (though only for the purpose of prostitution).⁵⁴ The abolitionist standards of the 1933 Convention were herein reiterated:

Prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of a human person and endanger the welfare of the individual, the family, and the community of a person.⁵⁵

This Convention limited its concern to cross-border trafficking into forced prostitution which it criminalised (even prostitution with the consent of all parties concerned). The purpose of the convention was to punish any person who engaged in the trafficking and procurement of or any other activities related to prostitution, irrespective of the victim's age or consent.⁵⁶ Although trafficking into prostitution was considered an international issue for the first time,⁵⁷ its prevention and punishment was left to the national jurisdiction. The convention furthermore lacked enforcement mechanisms because of the non-binding nature of its provisions. It lacked a compulsory reporting requirement (merely self-reporting systems) or a mandate for an international authority to monitor its implementation⁵⁸ and was not widely

⁵² Chuang (n32 *supra*) 75.

⁵³ The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 21 Mar 1950 96 UNTS 271 entered into force 25 Jul 1951. For further discussion of the treaties, see Fariior "The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to Its Potential" 1997 10 *Harvard Human Rights Journal* 213 213; Pearson "Historical Development of Trafficking - The Legal Framework for Anti-Trafficking Interventions" in Sector Project Against Trafficking in Women (eds) *Challenging Trafficking in Persons Theoretical Debate & Practical Approaches* (2005) 20-26; Pearson *Human Traffic, Human Rights: Redefining Victim Protection* (2002) 14.

⁵⁴ See Chuang (n32 *supra*) 75.

⁵⁵ The 1950 Convention (n53 *supra*) preamble. See Amiel (n43 *supra*) 24-25.

⁵⁶ The 1950 Convention (n53 *supra*) art 1(1).

⁵⁷ Art 8 of the Convention renders all offences referred to in the Convention extraditable, in order to punish or extradite perpetrators, exchange information, and assist each other in the prevention of trafficking in prostitution. The Convention undoubtedly had as its aim the global eradication of any or every form of trafficking related to the prostitution. See Chuang (n32 *supra*) 75; Coomaraswamy *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences; Report on the Mission of the Special Rapporteur to Poland on the Issue of Trafficking and Forced Prostitution of Women* (UN Doc E/CN.4/1997/47/Add 117 1997) <http://www.unhcr.org/refworld/docid/3b00f4104.html> (accessed 2012-12-21).

⁵⁸ Coomaraswamy (n57 *supra*) para 22.

ratified.⁵⁹ The 1950 Convention defined the concept of trafficking in persons for the first time by the United Nations; however the term was reserved exclusively for the sexual exploitation of women and children in prostitution.

Slavery resurfaced again in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institution and Practices Similar to Slavery (1956 Supplementary Convention).⁶⁰ This instrument widened the understanding of slavery-like practices by prohibiting debt-bondage, serfdom, servile marriage and child servitude.⁶¹ The 1956 Supplementary Convention as well as the 1950 Slavery Convention focused on the elimination of “slavery, the slave trade and institutions and practices similar to slavery”,⁶² while describing exploitative practices considered as human trafficking in the Palermo Protocol.⁶³ Both these Conventions did not, however, define the concept of “right of ownership”, which made a genuine comparison between slavery and human trafficking difficult. As such, the interpretation of both these terms remained contested.

In the late 1980s and in the 1990s a renewed interest in the issue of trafficking in human beings emerged in the international arena. This was influenced by developments regarding migration flows, the feminist movement, the AIDS pandemic, prostitution and child sex tourism.⁶⁴ Sex tourism in Southeast Asia and the trafficking of women and girls from poor countries to Western Europe and North America raised concern among policy-makers and the public. Since no new agreements were adopted, the 1950 Convention was still in force. Pressure on countries to ratify the 1950 Convention led to 70 countries signing it by 1996.⁶⁵ However, it was outdated and inadequate. It was framed in a manner that

⁵⁹ By 2007, only 74 countries have ratified the 1950 Convention. Additionally, 5 states had signed the Convention but had not yet ratified it. See Wijers & Lap-Chew (n45 *supra*) 21; Pearson *Global Human Rights and Trafficking in Persons: A Handbook* (2000) 21.

⁶⁰ The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institution and Practices Similar to Slavery, 30 Apr 1956 266 UNTS 3/1958 ATS 3, entered into force 30 Apr 1957.

⁶¹ The 1956 Supplementary Convention (n60 *supra*) art 1.

⁶² The 1956 Supplementary Convention (n60 *supra*) preamble, s 1. Art 3 criminalises slave trafficking; which indicates that the Convention considered “trafficking” as a distinct concept from “slavery”.

⁶³ See n5 *supra*. The Palermo Protocol will be discussed in more detail in Chap 4.

⁶⁴ In Europe, the socio-economic transformation in former communist countries, trans-nationally organized crime groups, the wars in the former Yugoslavia, demand for cheap labour and sexual services and other factors spurred human trafficking. See Wijers & Lap-Chew (n45 *supra*) 45; Doezema “Forced to Choose: Beyond the Voluntary v Forced Prostitution Dichotomy” in Kempadoo *Global Sex Workers: Rights, Resistance and Redefinition* (1998) 34-50.

⁶⁵ Kelly & Regan *Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in Women for Sexual Exploitation in the UK* (2000) 13.

considered trafficking as undertaken for the exclusive purposes of either prostitution or the sexual exploitation of women. This Convention's approach was viewed by many as ineffective as its aim was the elimination of prostitution. However, abolitionist groups insisted that there is a link between the acts of prostitution and trafficking. They further argued that similar to trafficking, prostitution can hardly be consensual, and that like prostitution, trafficking affects predominantly women. They maintained that the 1950 Convention was merely not properly enforced. The adequacy of this Convention to deal effectively with the modern manifestations of trafficking was therefore questioned on various grounds by abolitionist groups, as well as other interest groups.

These factors led to the trafficking in human beings, particularly women and children, re-appearing on the agenda of the UN General Assembly in the 1990s.⁶⁶ At an international level, demands were growing for a comprehensive and clear definition, comprising every form of trafficking.⁶⁷ Accordingly, in November 2000 the UN General Assembly adopted the Palermo Protocol.⁶⁸ Hitherto many international organizations such as the International Labour Organisation (ILO), the United Nations Children's Fund (UNICEF), and the International Organisation for Migration (IOM) as well as the European Union (EU) have engaged in anti-trafficking campaigns. Relevant international instruments followed, including the ILO's Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour as well as the Protocol to the Convention of the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography. Furthermore, numerous NGOs as well as international networks, such as GAATW (Global Alliance Against the Trafficking in Women), CATW (Coalition Against Trafficking in Women) and CAST (Coalition to Abolish Slavery and Trafficking) are endeavouring to combat human trafficking.

But despite these attempts, human trafficking continues in the 21st century, exacerbated by various factors. Some are old and associated to issues such as poverty, war, patriarchal

⁶⁶ Discussion took place at the World Conference on Human Rights in Vienna in 1993 and later at the World Conference on Women in Beijing in 1995.

⁶⁷ See Coomaraswamy (n57 *supra*) para 22; Chang "Trafficking in Women" in Askin & Koenig (eds) *Women and International Human Rights Law Vol 1* (1999) 356; Chuang (n 32 *supra*) 78-83.

⁶⁸ See n5 *supra*.

societies and gender inequality.⁶⁹ New factors include globalisation and information technology which have facilitated trafficking because they enable people to easily buy, sell and exchange images of trafficking victims. Furthermore, advanced technology allows for anonymity in committing the crime.⁷⁰ This combination has given the industry various means of exploiting especially women and children, fuelling demand and utilising supply.⁷¹ It comes as no surprise that some regard slavery as more common now than at any time in world history.⁷²

2.3 Human trafficking defined

As the dynamics and complexities of trafficking in human beings began to evolve, it was agreed that the constitutive elements of the crime were ill-defined in previous international instruments and non-responsive to the prevailing realities of the trafficking phenomenon.⁷³ A new all-encompassing operational definition of human trafficking was required.

2.3.1 Development of the definition of human trafficking

The definition of “trafficking in persons” in early conventions was confined to the abduction of females into forced prostitution. Other manifestations of trafficking were not accommodated in international conventions. As a result, various governmental and non-governmental organisations adopted individual definitions formulated specifically for their purposes.⁷⁴ For example, the Cambodian Women’s Development Agency described trafficking as “the practice of taking people outside their support structure and rendering them powerless”.⁷⁵ This definition is so broad that it could apply to a multitude of practices. The IOM again defined trafficking in terms of international migratory movements without

⁶⁹ United Nations Office of the High Commissioner for Human Rights (OHCHR) *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) principle 5.

⁷⁰ Hughes “The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children” 2002 13(1) *Hastings Women’s Law Journal* 127 129.

⁷¹ Hughes “Globalization, Information Technology and Sexual Exploitation of Women and Children” 2001 13 *Rain and Thunder – A Radical Feminist Journal of Discussion and Activism* 1 1-3.

⁷² See Bales *Disposable People: New Slavery in the Global Economy* (1999) 233; Skinner *A Crime So Monstrous* (2008) xvi.

⁷³ Pearson “Historical Development of Trafficking” (n53 *supra*) 21.

⁷⁴ Pearson *Human Traffic, Human Rights* (n53 *supra*) 15.

⁷⁵ Cambodian Women’s Development Agency “*Selling Noodles: The Traffic in Women and Children in Cambodia* (1996) 1.

specific reference to types of exploitation.⁷⁶ According to them, trafficking occurs with the exchanging of currency (or another form of payment); the involvement of a facilitator (or trafficker) and the illegal, but voluntary crossing of international borders.⁷⁷ The above definition is more akin to the current international definition of smuggling in human beings, a phenomenon which will be considered later in this chapter. Taking heed of the criticism, the IOM again adapted its definition in 1999, defining trafficking as a situation in which:

A migrant is illicitly engaged (recruited, kidnapped, sold, etc) and/or moved, either within national or across international borders; [and] intermediaries (traffickers) during any part of this process obtain economic or other profit by means of deception, coercion, and/or other forms of exploitation under conditions that violate the fundamental rights of migrants.⁷⁸

The above definition is still restricted to the criminalisation of aspects of migration while trafficking has various other dimensions such as illegal adoptions, forced marriages, forced labour and human organ removal.⁷⁹ Additionally, aspects of the violation of human rights were not considered at all.⁸⁰

The most widely used definition of trafficking in 1999 was jointly arrived at by feminist organizations such as the Global Alliance Against the Trafficking in Women (GAATW), the Foundation Against Trafficking in Women (FATW), and the International Human Rights Law Group (IHRLLG). A significant aspect of this definition is that to be considered trafficked a person would have to be exploited, abused and deceived "... in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage."⁸¹ The problem with such a definition is that it makes migration

⁷⁶ Gunatilleke *International Responses to Trafficking in Migrants and the Safeguarding of Migrants' Rights* (1994) 593.

⁷⁷ Gunatilleke (n76 *supra*) 594.

⁷⁸ Pearson *Human Traffic, Human Rights* (n53 *supra*) 15, 16.

⁷⁹ Pearson *Human Traffic, Human Rights* (n53 *supra*) 16. In South Africa the forced removal of body organs is also for the purpose of making traditional medicines and rituals. See Bermudez *"No Experience Necessary": The Internal Trafficking of Persons in South Africa* (2008) 60.

⁸⁰ Pearson *Human Traffic, Human Rights* (n53 *supra*) 23. UNICEF, OHCHR, the United Nations Special Rapporteur on Violence against Women and IOM all adopted definitions that recognised trafficking as a human rights problem. These definitions will be discussed in Chap 4.

⁸¹ Debt bondage is defined in international law as: "The condition arising from a pledge by a debtor of his/her personal services or those of a person under his/her control as security for a debt, if the value of those

the overriding concern, without considering that the exploitation may also appear locally. The premise is that it is migration that is inherently damaging and not the actual causes of people's displacement or its consequences.

Another contentious issue during the negotiation process of the Palermo Protocol was the controversy over consent to trafficking and the inclusion or exclusion of voluntary prostitution. Two of the most vocal international NGO's fighting against trafficking in females worldwide had sharply opposite views on the notions of consent and prostitution.⁸² A point of dispute was whether the means used to secure the consent of the victim for transportation and harbouring should be regarded as a determinant factor in the definition of trafficking in persons. The GAATW did not consider all forms of prostitution as wrong, and suggested a definition of trafficking in women where force should be regarded as the fundamental parameter to decide the act of trafficking.⁸³ It defined trafficking in persons as "all acts involved in the recruitment and/or transportation of a person within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion."⁸⁴ It has been suggested that such a definition leaves the door open for consensual trafficking for prostitution or any other forms of coercive labour.⁸⁵ The IHRLG, who supported the view of prostitution as employment, argued that force or deception should be a necessary element of the definition of trafficking in order to differentiate it from consenting prostitution.⁸⁶ They also maintained that human trafficking should include trafficking of women, men, and children for different types of labour, including sweatshop labour, agriculture, and prostitution.⁸⁷ The CATW strongly rejected the definition in the draft of the Palermo Protocol and advocated for fervent action against any form of trafficking in women and of prostitution whether consensual or non-consensual. They argued that prostitution is

services as reasonably assessed is not applied towards the liquidation of the debt or the length or nature of those services are not respectively limited or defined" ILO Convention 105 concerning Abolition of Forced Labour (1957) art 1.

⁸² These NGO's are the GAATW and the IHRLG.

⁸³ See Pearson *Human Traffic, Human Rights* (n53 *supra*) 44-45; Chuang (*supra* n32) 79.

⁸⁴ Pearson *Human Traffic, Human Rights* (n53 *supra*) 44-45; Chuang (*supra* n32) 79.

⁸⁵ See Chuang (*supra* n32) 83-84.

⁸⁶ Doezeema (n64 *supra*) 20. It has been also argued that considering trafficked people as victims whenever they have given consent is a paternalistic approach.

⁸⁷ Human Rights Caucus *Human Rights Standards for the Treatment of Trafficked Persons* (1999) 5.

never voluntary.⁸⁸ They further contended that trafficking should include all forms of recruitment and transportation for prostitution, regardless of whether force or deception took place.⁸⁹ The CATW aimed "... to abolish prostitution as organised gang rape and a violation of women's human rights",⁹⁰ and suggested that voluntary prostitution in fact portrays a prostitute as a subhuman, helpless, and choice-less victim of male domination.⁹¹ The negotiation process already demonstrated that a single workable definition of trafficking would be complicated since "[t]he shared international agenda that is designed to combat forced labour and slavery may really include several agendas including countering organised crime and abolishing prostitution."⁹²

2.3.2 The definition of human trafficking in the Palermo Protocol

The Palermo Protocol defines "trafficking in persons" as consisting of:

... the **recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person,**

- for the **purpose of exploitation.**
- Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁹³

⁸⁸ Consent in the context of women and children's historical and legal relationships with men is an entirely inappropriate concept according to Kappeler "The International Slave Trade in Women, or Procurers, Pimps and Punters" 1990 1 *Law and Critique* 219 223: "The age of consent is perhaps the most cynical misnomer in the history of women. Is a woman in a position to consent? And what is it she is said to consent? Bondage, exploitation, and violation."

⁸⁹ See Alexander "Feminism, Sex Workers, and Human Rights" in Nagle (ed) *Whores and Other Feminists* (1997) 82.

⁹⁰ Alexander (n89 *supra*) 82-83.

⁹¹ Alexander (n89 *supra*) 82.

⁹² Gould & Fick *Selling Sex in Cape Town: Sex Work and Human Trafficking in a South African City* (2008) 93.

⁹³ Palermo Protocol (n5 *supra*) art 3(a).

The definition has traditionally always been analysed in terms of three distinct components⁹⁴ namely the activity of trafficking; the means of trafficking and the purpose of trafficking. However, these elements can also be dissected into the **acts** of trafficking and the **purpose** of trafficking (the *actus reus* and the *mens rea*), or the material element (what and how)⁹⁵ and the purpose element (why).⁹⁶ These core elements in the trafficking definition in the Palermo Protocol are used to ascertain whether particular conduct amounts to human trafficking. However, despite the more precise definition, continuing difficulties in determining whether trafficking took place persist mainly because of the range of actions and outcomes covered by the term.

2.3.2.1 The act of human trafficking

The Palermo Protocol lists the **recruitment, transportation, transfer, harbouring or receipt of persons by means of threat, or force or other forms of coercion as acts** as acts of human trafficking. Generally, most of these trafficking activities suggest the movement of persons from one place to another. This movement includes cross-border trafficking, which is the trafficking of persons across national borders. The Convention states in article 4 that human trafficking applies to activities which are transnational in nature. The definition of transnational⁹⁷ entails traffic between at least two countries. However, nowhere is there explicit mention made of human trafficking solely within a country's borders (internal trafficking). But the crossing of national borders is not required for human trafficking in the definition. Therefore, trafficking may also occur within a country's borders. An interpretation of the transnational definition describing trafficking activities which are committed in one state but have ramifications for another state allows

⁹⁴ UNODC *Measures to Combat Trafficking in Human Beings in Benin, Nigeria and Togo* (2006) 21; UNODC *Trafficking in Persons: Global Patterns* (2006) 50. See also OHCHR *Abolishing Slavery and its Contemporary Forms* (2002) 22; Gallagher "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis" 2001 23 *Human Rights Quarterly* 975 986-987.

⁹⁵ It consists of the acts and the means of human trafficking.

⁹⁶ The purpose of the exploitation.

⁹⁷ The Convention against Transnational Organized Crime (CTOC) art 3(2): "Transnational means that the offence is committed (a) in more than one State; (b) in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) in one State but has substantial effects in another State".

for internal trafficking to be included in human trafficking.⁹⁸ Still, the broad trafficking definition covers most international trafficking and some types of internal trafficking.

In addition, article 4 of the Palermo Protocol provides that the treaty is applicable where trafficking is perpetrated by an organised criminal group⁹⁹ across international borders. There are however situations where persons are trafficked by only one person. It is irrelevant whether the crime is perpetrated by an organised criminal group or by an individual as it is “evidently irrelevant to an individual who has been trafficked and whose human rights have been abused whether one, two, three or more people were responsible.”¹⁰⁰

Viewed as a process, trafficking may consist in various acts – from recruitment to transportation, and control in the place of destination. Different groups, agents or individuals may be involved in different phases of the process, and can organize recruitment, transportation and control in different ways. There is thus immense diversity between and within trafficking systems.¹⁰¹ It could accordingly be extremely misleading to use the definition for trafficking in persons as a coordinating or unifying label covering a variety of conducts and outcomes.

2.3.2.2 Further acts of human trafficking

The second part in the definition relates to acts of **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**

⁹⁸ Bermudez (n79 *supra*) 19.

⁹⁹ See CTOC arts 2(a) & 3(1)(b): “Organized criminal group means 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.” The CTOC is referred to as the “parent” agreement since its principle provisions apply *mutates mutandis* to the three additional Protocols dealing respectively with Smuggling of Migrants, Trafficking in Persons, Especially Women and Children, and Trafficking in Firearms. See also Obokata *Trafficking of Human Beings from a Human Rights Perspective – Towards a Holistic Approach* (2006) 29-32.

¹⁰⁰ Weissbrodt *Abolishing Slavery and its Contemporary Forms* (2002) 21.

¹⁰¹ O’Connell Davidson & Donelan *Review of the Evidence and Debates on the “Demand Side of Trafficking”* (2003) 5.

another person. As such, any means of control over human trafficking victims are taken into consideration.

The definition groups threat and use of force as forms of coercion, yet continues to categorize unrelated types together such as abduction and deception. Abduction may be accompanied with coercion but not necessarily. However, whether deception is part of coercion is a controversial issue. The means of human trafficking (recruitment, transportation etcetera) hinges on the word “coercion”, which is a very broad term encompassing both physical and psychological aspects.¹⁰² The *travaux préparatoires* for the official records defined “deception” to mean that a person has been tricked into a vulnerable or abusive situation.¹⁰³ Issues as to whether economic hardship, fear of prosecution, armed conflict or terrorism will constitute coercion when the trafficker takes advantage of such situation has been raised. It has been argued that the definition is broad enough to include these situations as a form of coercion.¹⁰⁴ Furthermore, the issue of who has to prove the existence of coercion or force triggers controversy. As it requires extensive investigation of the situation, it is difficult to prove. It has been argued by some critics that it appears that the Palermo Protocol places the burden of proof squarely on the individuals seeking protection to establish that they have in fact been trafficked.¹⁰⁵

It is evident trafficking can also occur without the use of force, for example, by deception. This is also recognised by the Palermo Protocol in its use of the phrase “abuse of a position of vulnerability”, referring to people who are vulnerable to the extent that they are

¹⁰² Coercion is the use of express or implied threats of violence or reprisal (eg, as discharge from employment) or other intimidating behaviour that puts a person in immediate fear of the consequences in order to compel that person to act against his or her will. See Wood *Merriam-Webster's Dictionary of Law* (1996).

¹⁰³ See UN Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols (UN Doc A/55/383/Add1 2000) para 63: “An abuse of power or position of vulnerability” is also defined to occur when “a person involved had no real and acceptable alternative but to submit to the abuse involved; see also Weissbrodt (n100 *supra*) 22.

¹⁰⁴ Malone “Economic Hardships as Coercion under the Protocol on International Trafficking in Persons by Organised Criminal Elements” 2001 25(1) *Fordham International Law Journal* 54 89-91; Obokata (n99 *supra*) 25.

¹⁰⁵ Ladan *Migration, Trafficking, Human Rights and Refugees under International Law: A Case Study of Africa* (2004) 122.

trafficked due to their circumstances, for example poverty.¹⁰⁶ Article 3(b) of the Palermo Protocol provides subsequently that:

... the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of the article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

This applies to cases when individuals initially consent to a specific employment (even prostitution), but are afterwards subjected to exploitation. If there is no realistic possibility of free and fully informed consent being given, the recruitment or movement of persons amounts to trafficking. As such, traffickers cannot use the consent of the trafficking victim as a defence.¹⁰⁷ Thus, if a victim of trafficking withdraws her consent later on, even if she has given her consent initially, it will be a case of trafficking from the time of the withdrawal of consent.¹⁰⁸

If the trafficking victim is an adult, it does not matter whether the victim knew the exact nature of the work. The ignorance of exploitative working conditions is enough to qualify as trafficking. The emphasis is not placed on the type of services she is expected to deliver but rather on the abuse to make her abide by the exploiter's rules.¹⁰⁹ Similarly, the parents' or guardian's consent is equally insignificant whether they knew of the exploitation to which the child will be subjected or not.

The two elements of the definition must exist concurrently to qualify as human trafficking except in the case of children for whom the second requirement is waived. The question of consent is irrelevant under any circumstances in the case of a child, as outlined in Article

¹⁰⁶ Ollus *The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel* (2002) 16, 26.

¹⁰⁷ Weissbrodt (n100 *supra*) 23; Gould & Fick (n92 *supra*) 92.

¹⁰⁸ See Coomaraswamy *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences on Integration of the Human Rights of Women and the Gender Perspective* (UN Doc E/CN.4/2000/68 2000) para 12: "At the core of any definition of trafficking must be the recognition that trafficking is never consensual. It is the non-consensual nature of trafficking that distinguishes it from other forms of migration". See also Obokata (n99 *supra*) 26.

¹⁰⁹ UNODC *Trafficking in Persons and the Global Programme* http://www.unodc.org/pdf/HumanTrafficking_leaflet.pdf (accessed 2012-12-21).

3(c) of the Palermo Protocol.¹¹⁰ In accordance with the Convention on the Rights of the Child (CRC), Article 3(d) of the Palermo Protocol defines a child as any person less than 18 years of age, a subject of rights like every human being, “not an object of his family’s rights and duties”.¹¹¹ In giving specific emphasis to child victims, the Protocol recognizes that trafficked children need special protection under international law; and that their best interests shall be a guiding principle in all matters.¹¹²

2.3.2.3 The purpose of human trafficking

The purpose of human trafficking is ultimately **exploitation for profit of a person and that person’s loss of self-determination**.¹¹³ The Palermo Protocol determines that, at a minimum, exploitation encompasses exploiting the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or similar practices, and the removal of organs. The exploitative outcome need not be fulfilled for it to constitute a case of trafficking, if the intent to do so is proved. However, an act carried out with an intent to exploit, but not conducted in the manner set forth in article 3 subparagraph (a) does not amount to trafficking.¹¹⁴

Instead of providing a non-exhaustive list of different types of exploitation, the expression “at a minimum” was incorporated for two reasons.¹¹⁵ The rationale for setting a broad definition in the Protocol was on the one hand to cover any future forms and means of exploitation; considering that human trafficking is a fast-growing and flexible industry. On the other hand, it enables states to formulate and incorporate domestic legislation specific

¹¹⁰ Palermo Protocol (n5 *supra*) art 3(c): “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered „trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.”

¹¹¹ Kolosov “The Rights of the Child” in Symonides (ed) *Human Rights: Concepts and Standards* (2000) 259.

¹¹² Gallagher (n94 *supra*) 989.

¹¹³ IOM *Direct Assistance for Victims of Trafficking: IOM Handbook* (2004) 59.

¹¹⁴ Abramson “Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol” 2003 44 *Harvard International Law Journal* 473 477.

¹¹⁵ The words “at a minimum” are used in lieu of a listing of specific forms of exploitation and in order to ensure that unnamed or new forms of exploitation were not excluded by implication. See UNODC *Seventh Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (UN Doc A/AC 254/4/Add 3/ Rev 7 2000). See Gallagher (n94 *supra*) 974. See also UNODC *Summary of the United Nations Convention against Transnational Organized Crime and Protocols Thereto* (2000).

to their particular cultural situation. This will encourage states which have already legalized sex work to sign the Protocol since it affords them a broader discretion.¹¹⁶

The flexible terms in the definition, such as “forced labour or services, slavery or practices similar to slavery” can generally be interpreted to include every form of deceptive, fraudulent and/or forced movement of persons from one place to another for the benefit of others. The definition of the terms “slavery, forced labour, practice similar to slavery, or servitude” can be inferred from various international instruments and from the earlier drafts.¹¹⁷ However, the phrases “prostitution of others” or “other forms of sexual exploitation” is not defined under any international instruments. This may cause difficulties in the identification of such victims.

According to the Protocol’s *travaux préparatoires*, it is left to states to define these types of exploitation under their domestic laws based on their position towards prostitution or adult sex work.¹¹⁸ There was a debate whether “use in prostitution” should be included as an exploitative practice. However, the final draft departed from such proposal and notated “exploitation of the prostitution of others” (pimping) as a form of exploitation. Generally, the Protocol attempted to reconcile the views in favour of prostitution and those opposed to it.¹¹⁹ The *travaux préparatoires* indicates that the Protocol addresses the issue of prostitution only in the context of trafficking, and that these references are without prejudice as to how states address this issue in their respective domestic laws.¹²⁰

Whereas the 1950 Convention focused on forced prostitution as the only form of human trafficking, the Palermo Protocol recognises the **existence of voluntary and forced prostitution as well as other manifestations of trafficking in persons**.¹²¹ As such, this definition has substantively widened the meaning and scope of trafficking in persons and addressed the criticism of the 1950 Trafficking Convention.

¹¹⁶ Gould & Fick (n92 *supra*) 90.

¹¹⁷ See 1926 Slavery Convention (n48 *supra*) art 1 for the definition of slavery; art 2(1) of ILO Convention No 29 (1930) for the definition of forced labour and the 1956 Supplementary Convention (n60 *supra*) art 1(b).

¹¹⁸ Weissbrodt (n100 *supra*) 23; Jordan “Human Rights or Wrongs? The Struggle for a Rights-based Response to Trafficking in Human Beings” in Masika (ed) *Gender, Trafficking and Slavery* (2002) 8, 32.

¹¹⁹ Ladan (n105 *supra*) 109.

¹²⁰ Ladan (n105 *supra*) 110.

¹²¹ Hathaway “The Human Rights Quagmire of Human Trafficking” 2008 49(1) *Virginia Journal of International Law* 1 58.

2.3.2.4 Criticisms of the Palermo Protocol

While the definition in the Palermo Protocol has provided a baseline, specifying that cases of trafficking involve the acts and intention to exploit,¹²² the discussion on trafficking in persons has been made easier but not less controversial.¹²³ The debates around unresolved positions on the issues of migration, prostitution, and agency have not been settled.¹²⁴

There are various views put forward explaining the rationale of the Palermo Protocol. Some argue that the Palermo Protocol is the consequence of concerns over security issues and the human-rights dimensions of the movement of people across and within national borders,¹²⁵ while others contend that the Palermo Protocol focuses on the punishment of traffickers and allows developed countries to pursue a border control agenda, making their borders less porous and curtailing international migration.¹²⁶ The differences in interpretation illustrate the continuing ambiguities inherent in the definition, resulting in its ineffectual functioning.

Principally, the Palermo Protocol is a supplement to the UN's Convention on Transnational Organised Crime (CTOC) and therefore addresses human trafficking within the context of organised transnational criminal activities such as money laundering, smuggling of migrants and corruption.¹²⁷ It is as such primarily a law enforcement instrument developed by a law enforcement body arising from the desire of governments to create a tool to combat the growth of transnational organised crime.¹²⁸ It is therefore reasonable that the

¹²² The illegal trafficking of persons is commonly understood as "the transportation of persons through deception or coercion into exploitative or slavery-like conditions". See Anderson & O'Connell Davidson *Trafficking - A Demand Led Problem?* (2002) 33.

¹²³ Truong *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management* (2006) 72.

¹²⁴ Anderson & O'Connell Davidson *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study* (2003) 7-8.

¹²⁵ Abramson (n114 *supra*) 473.

¹²⁶ Hathaway (n121 *supra*) 26-27.

¹²⁷ Ollus (n106 *supra*) 21. The Palermo Protocol was developed within the UN Crime Commission, which is a law enforcement body, not a human rights body. This Crime Commission focuses on the combating of national and transnational crime, such as organized crime, economic crime and money laundering in the international arena. It also promotes the role of criminal law in protecting the environment; crime prevention in urban areas, and improving the efficiency and fairness of criminal justice administration systems.

¹²⁸ Jordan *The Annotated Guide to the Complete UN Trafficking Protocol* (2002) 2. Organised crime is also defined as "... continuing and self-perpetuating criminal conspiracy, having an organized structure, fed by

Palermo Protocol's definition of trafficking follows a traditional law enforcement approach. This approach has been criticised as not only marginalising human rights and labour concerns but having human rights implications.¹²⁹ Although the Palermo Protocol is not a human rights instrument, it contains human rights protection¹³⁰ and victims' assistance, albeit couched in vague language.¹³¹

The disregard of meaningful attempts to protect victims and the overemphasis on criminalisation is seen as weaknesses in the Protocol.¹³² Other criticism has been that the focus on criminalisation, deportation and border control strategies results in a "supply-side approach"¹³³ that places responsibility primarily on law enforcement, paying scant attention to addressing the root causes of trafficking such as increasing global economic disparities, poverty, lack of education prospects, lack of adequate employment opportunities and discriminatory gender practices.¹³⁴ Apart from article 9 of the Palermo Protocol,¹³⁵ no other article therein specifically addresses the **root causes** of trafficking; thereby failing to bolster preventative measures. Taking the core causes of trafficking into account is essential to facilitate an understanding of trafficking which enables the development of policies and responses towards trafficking.¹³⁶ The law enforcement approach also tends to isolate and punish individual perpetrators, excluding the organised crime syndicates behind these individuals. Much trafficking occurs with involvement of government officials such as police officers and immigration officials.¹³⁷ It should be pointed out, however, that

fear and corruption and motivated by greed", see Shelley, Corpora & Picarelli "Global Crime Inc" in Love (ed) *Beyond Sovereignty: Issues for a Global Agenda* (2003) 145.

¹²⁹ Bruch "Models Wanted: The Search for an Effective Response to Human Trafficking" 2004 40 *Stanford Journal of International Law* 1 21. There is disapproval despite the fact that members of the Human Rights Caucus, eg Global Rights (formerly IHRLG), FATW, GAATW etc participated in the Palermo Protocol's negotiations to ensure that the human rights of the trafficked person were included.

¹³⁰ Palermo Protocol (n5 *supra*) arts 6–8. These human rights protections will be discussed in Chap 4.

¹³¹ Jordan (n128 *supra*) 2-3. The weak language in the Protocol includes phrases such as: "States shall undertake these measures merely *in appropriate cases and to the extent possible*" as found in arts 9(3) and 11(2) (my italics).

¹³² Hathaway (n121 *supra*) 42.

¹³³ The supply-side approach focuses on the prosecution of prostitutes or illegal migrants (victims) while the demand-side targets those who purchase the trafficked victims or their services.

¹³⁴ Coontz & Griebel (n42 *supra*). Also see Bruch (n129 *supra*) 20; Gallagher (n94 *supra*) 921; Ollus (n106 *supra*) 16.

¹³⁵ Art 9(4) of Palermo Protocol (n5 *supra*) provides that: "States Parties shall 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."

¹³⁶ Jordan (n128 *supra*) 7.

¹³⁷ Bruch (n129 *supra*) 21.

their participation as accomplices or organising or directing other persons to commit the offence is criminalised in Article 5 of the Palermo Protocol.

The Palermo Protocol further provides that states shall undertake social and economic initiatives to prevent and combat trafficking in persons and that states shall take or strengthen measures to alleviate the factors that make persons especially women and children vulnerable to trafficking. States must also adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons that leads to trafficking.¹³⁸ However, the Protocol does not specify the initiatives and measures to be undertaken by states. This allows states to determine what measures to undertake, in accordance with each state's domestic legislation and policies as well as to each state's financial and human resource capabilities. Conversely, this negates the sense of urgency surrounding human trafficking and provides states with grounds for delays in implementing anti-trafficking legislation and policies.

Despite an expanded list including forced labour, slavery like-practices and servitude, the definition appears to focus primarily on sexual exploitation, a concept under which prostitution or sex work can be categorised.¹³⁹ An explanation for this could be that the most prominent form of trafficking, according to research, is for purposes of sexual exploitation with 79% of women trafficked for this purpose, while 18% of people are trafficked for purposes of forced labour.¹⁴⁰ Another reason could be the domination of the human trafficking debate by feminist movements with differing viewpoints regarding sex work. The Protocol furthermore failed to include the worst forms of child labour as identified by ILO Convention 182 in its list of forms of exploitation.¹⁴¹ This can be cured by

¹³⁸ Palermo Protocol (n5 *supra*) art 9(2), (4), (5).

¹³⁹ Bruch (n129 *supra*) 20.

¹⁴⁰ UNODC *Global Report on Trafficking in Persons 2009* (2009) 6.

¹⁴¹ According to the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182) art 3, the term "the worst forms of child labour" comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. Also see Ladan (n105 *supra*) 112.

the fact that the provision is made open deliberately so that new forms of exploitation such as the trafficking of babies under the guise of adoption can be incorporated in the future.¹⁴²

Being “a rather lengthy (and difficult) definition”¹⁴³ has led to complications being experienced by practitioners and researchers in the field. The first quandary is the fact that a number of the terms are vague; poorly defined or undefined. The lack of definition of pertinent terms such as “sexual exploitation” and “the exploitation of the prostitution of others” in addition to definitions of such terms being contained in other instruments sometimes proves difficult for an effective reconciliation of the terms and definitions.¹⁴⁴ The high risk of confusion between the related concepts may impede the drafting of domestic legislation, as well as the prosecution of transgressors as the definition has too many elements which have to be proved by prosecutors.¹⁴⁵ Yet, the suggestion is that, at a national level, state parties amend the international trafficking definition by incorporating elements from their specific cultural and social realities into it.

Another problem caused by the definition’s wide breadth is that certain institutions such as the Protection Project,¹⁴⁶ for instance, has included within its scope, early or child marriage, marriage by catalogue, sex tourism, and pornography. It embraces also illicit inter-country adoption, involvement of children in armed conflict, domestic servitude, begging, and other forms of child labour.¹⁴⁷ Although some have claimed that trafficking has become politicised and its definition “stretched” by stakeholders,¹⁴⁸ the aim of the definition is nevertheless to cast the net wide enough in order to include almost any type of exploitative trafficking situation.¹⁴⁹

¹⁴² Ollus (n106 *supra*) 22; Mezmur “From Angelina (to Madonna) to Zoe’s Ark: What are the „A – Z“ Lessons for Inter-country Adoptions in Africa?” 2008 23 *International Journal of Law, Policy and the Family* 145 156-160.

¹⁴³ Muntarhorn *Human Rights versus Human Trafficking in the Face of Globalization* http://www.hawaii.edu/global/projects_activities/Trafficking/Vitit.pdf (accessed 2012-12-21).

¹⁴⁴ Gallagher (n94 *supra*) 986.

¹⁴⁵ Jordan (n128 *supra*) 7.

¹⁴⁶ The Protection Project is a Human Rights Research Institute based at the Johns Hopkins University School of Advanced International Studies (SAIS), Washington DC, USA.

¹⁴⁷ The Protection Project *Trafficking in Persons, Especially Women and Children: A Country-by-Country Report on a Contemporary Form of Slavery* 3rd ed (2005) 1. As far as child marriage is concerned, it is submitted that even when a 16-yr-old girl has freely consented to the marriage, the mere fact of being a minor invalidates the consent and can amount to a form of human trafficking.

¹⁴⁸ Jahic & Finckenaer “Representations and Misrepresentations of Human Trafficking” 2005 (8)3 *Trends in Organised Crime* 24 24.

¹⁴⁹ Gould & Fick (n92 *supra*) 91.

There is still a need to create a comprehensive legal definition that will establish trafficking as an international crime and human rights violation.¹⁵⁰ Some organisations or states have exceedingly wide definitions of human trafficking. For example, based on the Palermo Protocol's definition, Indonesia's National Plan of Action on the Elimination of Trafficking in Women and Children defines trafficking in persons as:

... encompassing all forms of action undertaken by perpetrators of trafficking that have one or more elements of recruiting, transporting between regions and countries, transferring, sending, receiving and temporary placement or placement at their destination of people by using threats, verbal and physical abuse, abduction, fraud, deception, misuse of vulnerability (e.g. if someone has no alternative, is isolated, is addicted to drugs, trapped in debt), giving or receiving payments or profits in cases in which a person is used for prostitution and sexual exploitation (including paedophilia), legal or illegal migrant workers, child adoptions, fishing platform work, mail order brides, domestic helpers, begging, pornography, drug dealing, selling of body organs as well as other forms of exploitation.¹⁵¹

In an attempt to cover as many exploitative situations as possible, the above definition seems to have gone beyond the boundaries of the Palermo Protocol's definition of trafficking in persons. This validates the stance that the existence of a new legal definition of trafficking such as that in the Palermo Protocol does not mean that the term is used in a uniform way by researchers.¹⁵² A review of available literature indicates that trafficking can be defined in quite different ways. Some label all sex workers as trafficked persons, whilst others distinguish between voluntary and forced prostitution. Still others struggle to differentiate between smuggling and trafficking.¹⁵³ An operational definition which clearly delineates all aspects is necessary especially for the purpose of research and data gathering.

¹⁵⁰ Hyland "The Impact of the Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children" 2001 8(2) *Human Rights Brief* 30 31.

¹⁵¹ Misra "National Plan of Action on the Elimination of Trafficking in Women and Children" in Rosenberg (ed) *Trafficking of Women and Children in Indonesia* (2003) 220.

¹⁵² Goździak & Collett (n37 *supra*) 106.

¹⁵³ Laczko "Data and Research on Human Trafficking" 2005 43(1/2) *International Migration* 5 11.

It seems as if an adequate definition of trafficking will always be a challenge. One reason may be the nature of the crime of trafficking itself since it lacks unity of time, place, perpetrators and activity. Many people may be involved in the activity of trafficking. Recruitment may take place in one country while the exploitation occurs in another country. This situation makes it extremely complex for a narrow but all encompassing definition, especially when domestic laws on prostitution and sexual exploitation differ.

2.4 Phenomena related to human trafficking – similarities and differences

The need for a legal definition and criminalisation of trafficking *per se* has been questioned. It has been argued that if the intention of countering human trafficking is to combat forced labour and slavery, there is no reason for a distinction between, on the one hand, forced labour involving illegal immigrants; smuggled persons and victims of trafficking on the other hand. The argument is that

... the distinction between trafficking and smuggling may be clear to those who attach political priority to issues of border control and national sovereignty, but it is far from obvious to those who are primarily concerned with the promotion and protection of the rights of migrant workers.¹⁵⁴

Human trafficking needs to be differentiated from illegal immigration, smuggling and slavery since the protection accorded to trafficking victims differs from the aforementioned groups.¹⁵⁵ The existence of coercive and/or deceptive elements in trafficking results in human rights abuses unlike in the case of smuggling and illegal immigration where such persons may only be subjected to measures like arrest, detention and deportation.¹⁵⁶ Victims of trafficking are further provided a defence and protection from charges and prosecution for illegal acts committed as a consequence of their situation as trafficked

¹⁵⁴ Gould & Fick (n92 *supra*) 93.

¹⁵⁵ Obokata "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law" 2005 17(2) *International Journal of Refugee Law* 395 397.

¹⁵⁶ Gallagher (n94 *supra*) 1000; Obokata (n99 *supra*) 21.

persons.¹⁵⁷ Accordingly, trafficking should be considered separately from smuggling and illegal migration.

2.4.1. Slavery

Human trafficking is often referred to as the “new slave trade”. This analogy implies that many people trafficked nowadays live under conditions equal to those experienced by slaves in former times. The United Nations Population Fund has equated trafficking to slavery,¹⁵⁸ the United States Department of State refers to trafficking as modern day slavery¹⁵⁹ and various authors refer to trafficking as either slavery or a new slavery.¹⁶⁰ The general consensus among authors who write about organisations that address human trafficking is that it amounts to slavery. However, as revealed in the international agreements previously discussed,¹⁶¹ trafficking in women and children for sexual purposes was considered a separate concept to that of slavery. Trafficking was incorporated into the Slavery Conventions as an element of slavery.¹⁶² In 1998 the Working Group on Contemporary Forms of Slavery confirmed this conclusion by declaring in its recommendation that cross-border trafficking of women for sexual exploitation is a contemporary form of slavery.¹⁶³

Although human trafficking is called contemporary slavery, trafficking and traditional slavery are not essentially the same. Slavery, in its widest sense, is the absolute subjection of one human being to the will of another. The slave is considered as the property of the master, who feels himself entitled to do what he will with his own. The slave is constrained to labour, whether he will or not; and that for the benefit of his master, not

¹⁵⁷ OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) 4.

¹⁵⁸ UNFPA *Trafficking in Human Misery* <http://www.unfpa.org/gender/trafficking.htm> (accessed on 2012-12-20).

¹⁵⁹ US Dept of State *Trafficking in Persons Report 2006* (2006) 1.

¹⁶⁰ Esquibel *Human Trafficking: A Violation of Human Rights, A Universal Issue* (2005) 5; Bales (n71 *supra*) 233.

¹⁶¹ See the “White Slave Trade” discussion in para 2.2 *supra*.

¹⁶² *Ibid.*

¹⁶³ See Morrison & Crosland (n49 *supra*) 50. In *Prosecutor v Kunarac, Kovac & Vukovic* (Appeal Judgment), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002, the trial Chamber stated that slavery consists of the exercise of powers attaching to the right of ownership over a person and the exercise of such powers includes (among others) control of someone’s movement, control of sexuality, force or threat of force, subjection to cruel treatment, prevention of escape and forced labour. See also Watson *A Form of Slavery: Trafficking in Women in OSCE Member States* (2000) i; Hathaway (n121 *supra*) 5-6.

his own.¹⁶⁴ Article 1 of the 1926 Slavery Convention defines slavery as the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised. This embraces debt bondage, serfdom, marital bondage, slave labour and sexual bondage or exploitation and trafficking.¹⁶⁵ Slavery is also described as the “most extreme expression of the power human beings possess over their fellow beings, representing the most direct attack on the essence of the human personality and dignity”.¹⁶⁶ In a similar trend, human traffickers may exercise full control over the victim in order to exploit her to their advantage only. In this sense, slavery and trafficking are essentially similar.

Nevertheless, the two phenomena differ in terms of legality. Slavery, from its earliest origins¹⁶⁷ up until the trans-Atlantic slavery trade was lawful.¹⁶⁸ Trafficking in persons, other than in slaves, was never a legally-recognised practice. Unlike the traditional form of slavery that consisted of legally owning or having a legal right of ownership over a person, human trafficking entails the **unlawful control of persons for purposes of exploiting them**.¹⁶⁹ Contemporary human exploitation involves slave-holding, rather than slave-owning. Erstwhile slavery was permanent and in certain cases, such as the trans-Atlantic trade, slavery was racially based. Present-day human trafficking is usually temporary and not based on racial identity.¹⁷⁰ This is confirmed in the *Kunarac* case¹⁷¹ where the tribunal considered slavery an act of continuous exploitation. The tribunal held that “the duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved.”¹⁷² An act of enslavement is thus more than buying, selling or trading in people.

Further both trafficking and slavery may involve illegal migrations, violence, violations of human rights and labour standards, poverty and gender discrimination.¹⁷³ In the context of

¹⁶⁴ Copley (n10 *supra*) 4.

¹⁶⁵ Bassiouni *Crimes against Humanity in International Criminal Law* (1992) 299.

¹⁶⁶ Nowak “Civil and Political Rights” in Symonides J (ed) *Human Rights: Concepts and Standards* (2000) 69, 80.

¹⁶⁷ The history of slavery was discussed previously in this chapter.

¹⁶⁸ Obokata (n99 *supra*) 18.

¹⁶⁹ Esquibel (n160 *supra*) 6.

¹⁷⁰ Obokata (n99 *supra*) 18.

¹⁷¹ *Prosecutor v Kunarac*, IT-96-23, Trial Judgment, 22 Feb 2001 quoted in Obokata (n99 *supra*) 19.

¹⁷² *Prosecutor v Kunarac*, IT-96-23, Trial Judgment, 22 Feb 2001, para 542 quoted in Obokata (n99 *supra*) 19.

¹⁷³ Masika *Gender, Trafficking and Slavery* (2002) 7.

trafficking, the *mens rea* to **exploit the vulnerability of the victims** is enough to qualify as trafficking in persons.¹⁷⁴ Even though no exploitation actually took place after the person has been trafficked because of early interception by law enforcement authorities, it is still considered human trafficking. Again, if no intention to exploit at the time of transportation is present,¹⁷⁵ the case will resort under smuggling of persons.

Human trafficking and slavery are so closely related that many regard the notions as equivalent, or the one as a subsidiary to the other. Hathaway, for example, argues that human trafficking presents a very partial perspective of the problem of modern slavery, as only a small percentage of modern slaves meet the definition of a trafficked person under the Palermo Protocol.¹⁷⁶ Such a partial perspective of the problem ignores the predominant manifestations of slavery and allows governments to avoid addressing the endemic slavery that persists everywhere. This is usually to the detriment of people enslaved the world over but who do not fall under the definition of trafficking.

2.4.2. Human smuggling

Another phenomenon related to human trafficking is human smuggling. Prior to the drafting of the UN definition, trafficking in persons was often viewed as human smuggling and a type of illegal migration.¹⁷⁷ In terms of article 3 of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol), “smuggling of people” is “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a state party of which the person is not a national or permanent resident”.¹⁷⁸ It is the illegal facilitation of border crossing between the smuggler and the smuggled person, and their relationship ends once the fee has been paid and the person smuggled has successfully entered the country of destination.¹⁷⁹ The reasons for the illegal entering of a country may vary. Increasingly strong immigration

¹⁷⁴ Obokata (n99 *supra*) 19.

¹⁷⁵ In terms of the Palermo Protocol art 3.

¹⁷⁶ Hathaway (n121 *supra*) 5-6.

¹⁷⁷ Laczko *Human Trafficking: The Need for Better Data* (2002) 2
<http://www.migrationinformation.org/Feature/display.cfm?ID=66> (accessed 2012-12-21).

¹⁷⁸ UN Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted by GA res 55/25, entered into force on 28 Jan 2004, art 3(a).

¹⁷⁹ Hosken “Human Trafficking „A Huge Problem” in South Africa” *Pretoria News* (7 Mar 2006)
<http://www.iol.co.za> (accessed 2012-12-21).

controls which create irregular migration also generate the markets for facilitation and smuggling.

Both human trafficking and human smuggling are processes where an individual or an organized criminal group¹⁸⁰ may transport a person to another territory. However, in human smuggling the person is a client, wishing to enter a desirable foreign destination illegally in exchange for payment. When one compares the phenomena of human trafficking and the smuggling of people,¹⁸¹ four distinctive elements illuminate their disparity, namely consent; exploitation; source of profits and territory.¹⁸² Smuggling is voluntary. There is no coercion or deception. While the persons being smuggled have consented to their smuggling, trafficked persons have, in actual fact, not done so freely and consciously, and ostensible consent is no defence.

Smuggling necessarily entails the crossing of transnational borders,¹⁸³ which may not be the case with trafficking. Human trafficking does not require the crossing of a border as long as transfer from one place to another, within the same country or out of the country exists.¹⁸⁴ Smuggling always entails illegal entry while trafficking may involve the legal or illegal entry of individuals.¹⁸⁵ The illegal entry of smuggled persons connotes that they have illegal documents (false or stolen); while human trafficking victims may have legal documentation, which is consequently taken away from them by the traffickers.

Smugglers benefit from the fees generated by the illegal entry of migrants; similarly traffickers derive advantage and financial gain from the exploitation of their victims. Unlike that of smuggling, the process of trafficking does not come to a close but involves the continual, repeated coercion and exploitation¹⁸⁶ of the victims in some manner to generate

¹⁸⁰ Although both Conventions define the practices as involving organized criminal groups, a single person may also traffic or smuggle.

¹⁸¹ Obokata (n99 *supra*) 20. See also Gallagher (n94 *supra*) 1000f.

¹⁸² UNODC (n94 *supra*) 21. See also Obokata (n99 *supra*) 21; UNODC *Toolkit to Combat Trafficking in Persons* (2006) xiii.

¹⁸³ Obokata (n99 *supra*) 21.

¹⁸⁴ McCabe (n6 *supra*) 5.

¹⁸⁵ See *Travaux Préparatoires* of the Migrant Smuggling Protocol, A/AC 254/4/Add 1/Rev 1-6 & A/55/383/Add 1; Obokata (n99 *supra*) 21.

¹⁸⁶ Obokata (n155 *supra*) 397.

illicit profit for the traffickers. Human trafficking only concludes with either the escape or death of the victim.

No relationship is maintained in smuggling after crossing the border.¹⁸⁷ Smugglers are usually only held responsible for safe passage and not for what happens in the destination country, even if the smugglers are friends or relatives of those being smuggled.¹⁸⁸ However, in case of trafficking, the relationship between the trafficked person and the trafficker is continuous. The victim may be passed from one trafficker to another, but the exploitative relationship remains unchanged. Traffickers usually exert total control over their movement, which is very restricted. Humans are the commodity of human traffickers; which means that trafficking is a violation of the individual's human rights while the product in human smuggling is an illegal service which is a crime against the destination state's immigration laws.

It is not always easy to differentiate between people smuggling and trafficking, because a voluntary agreement may be a result of deception, or may involve an individual or family entering into debt to pay for the travel which puts them at the mercy of the smuggler. Distinctions between trafficking and smuggling become blurred when the hired smuggler doubles as a trafficker intending to deceive them into forced labour conditions.¹⁸⁹ They may be physically confined in the destination state,¹⁹⁰ and compliance is assured because documents have been confiscated, or by threats of disclosure to the authorities.¹⁹¹ In these cases, the voluntary agreement becomes a ticket to trafficking. It is thus important that the difference between human trafficking and human smuggling be underscored in order to generate a better understanding of these profitable and criminal phenomena, and to ensure that adequate measures are taken against both.

¹⁸⁷ McCabe (n6 *supra*) 6.

¹⁸⁸ Ministry of Women's and Veterans' Affairs (MoWVA) *Counter Trafficking Information, Campaign Stakeholder Analysis in Six Provinces, Preliminary Results and Recommendations* (2004) 11.

¹⁸⁹ Piper "Gender and Migration Policies in South-East Asia: Preliminary Observations from the Mekong Region" 2005 43(1/2) *International Migration* 203 207-208.

¹⁹⁰ ILO *Trafficking in Human Beings: New Approaches to Combating the Problem* (2003) 36.

¹⁹¹ McCabe (n6 *supra*) 6.

2.4.3 Illegal migrants and refugees

The process of trafficking cannot be viewed outside the context of migration - to focus solely on one without mentioning the other would give a distorted view of both. Migration denotes the movement of large numbers of people, from one place to another, or from one geographical unit to another across an administrative or political border, with the intention of settling indefinitely or temporarily in a place other than the place of origin.¹⁹² In this context, migration can be legal, illegal, take place within a country's borders, or be transnational. When unlawful, it can either take the form of illegal migration or trafficking in persons.

Accordingly, a regular migrant is someone who voluntarily leaves her country of origin to engage in seasonal or longer-term work in order to earn income in another state. Irregular or undocumented migrants are also economic migrants who enter, travel or work within a country without the necessary travel documents, residency or work permits. Most of them migrate for the reason of economic hardship.¹⁹³ Undocumented migrants may face detention and deportation based on the particular country's migration laws.¹⁹⁴ The term "illegal migrant" is sometimes applied to encompass all foreigners who are illegally in a particular country, which is an incorrect conception.¹⁹⁵ Migration also includes forced or involuntary migration i.e. those persons who leave their homes due to factors such as armed conflict, natural disasters or domestic violence. These migrants are considered as displaced or uprooted persons or refugees. A refugee is defined as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country".¹⁹⁶ Those who acquire refugee status will not be deported because of the risk of persecution. Refugees have the right to seek asylum.¹⁹⁷ Illegal

¹⁹² Laczko & Thompson (eds) *Migrant Trafficking and Human Smuggling in Europe: A Review of the Evidence with Case Studies from Hungary, Poland and Ukraine* (n1 *supra*) 19, 21.

¹⁹³ Kneebone "Refugees, Asylum Seekers and the Rule of Law" <http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=9780521889353&ss=exc> (accessed 2012-12-21).

¹⁹⁴ Iselin & Adams *Distinguishing between Human Trafficking and People Smuggling* (2003) 8.

¹⁹⁵ Iselin & Adams (n194 *supra*) 2.

¹⁹⁶ Art 1(a)(2) of the 1951 Convention Related to the Status of Refugees; art 1A(2); art 1(1) of the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa.

¹⁹⁷ UDHR art 14.

migrants enter a country illegally while trafficking victims might enter into a country either legally or illegally. There is no third-party involvement in case of illegal migrants while in case of trafficking there is usually third party involvement such as recruiters, transporters and exploiters.

Migration and human trafficking are often distinguished from one another on the basis that migration is characterized by choice and trafficking by coercion or, deception for purposes of exploitation.¹⁹⁸ Trafficking in persons therefore is a particularly abusive form of migration.¹⁹⁹ In practice, the distinction is not so clear. The links between migration and trafficking are complex, disputed and fluid, shifting easily between what might be seen as voluntary migration for legitimate work and what can clearly be recognized as exploitation. People often migrate in expectation of well-paid employment, only to find themselves forced to work under exploitative conditions.

Migration itself does not make a person more vulnerable to trafficking. However, the process of migration involves particular risks for especially women and children, who may end up being trafficked in an exploitative situation.²⁰⁰ Whatever its cause, uninformed, ill-informed and unconsidered willingness to migrate through unregulated channels potentially puts the migrant at risk of trafficking. Known as “blind migration”, it is more common amongst women owing to a lack of available information on safe migration practices, coupled with socio-cultural conditions that discourage especially women from actively seeking such information. Women are also duped into coercive situations due to lack of access to recruitment networks and job opportunities.

Another factor which places migrants at risk of being trafficked is an “unprotected migratory process”, in which a person travels unaccompanied or with unknown persons. A “non-secured migratory destination” constitutes a third vulnerability factor of this kind. This situation refers to a person travelling for an uncertain purpose for which she has made no preparatory contact or correspondence, or for which she has no confirmed place of arrival

¹⁹⁸ Joshi “The Face of Human Trafficking” 2002 13(1) *Hastings Women’s Law Journal* 31 32.

¹⁹⁹ OHCHR (n68 *supra*) 2.

²⁰⁰ Although it was in the past primarily men who migrated in search of work, research has shown that the overwhelming majority of migrants are young women. See MoWVA (n188 *supra*) 8. See also Preece *Gender Analysis of the Patterns of Human Trafficking into and through Koh Kong Province* (2005) 13.

(addresses of friends, family, workplace). While these vulnerability factors are addressed through safe migration activities, other aspects such as the causes and methods of trafficking must be addressed by anti-trafficking interventions.²⁰¹

A current dilemma is that migration has become a survival strategy for large sections of the population. The desperate need to migrate for work creates “survival migrants”.²⁰² This phenomenon combined with the proliferation of ever-increasing restrictive immigration policies (despite an increasing national and international demand for migrant workers), render these migrants highly vulnerable to trafficking.²⁰³ The escalation in migratory movement simultaneously leads to a growth in trafficking. As such, global trafficking echoes patterns of the globalization of labour migration.²⁰⁴ Conversely, the extent of trafficking is obscured by the general flow of migration.²⁰⁵

In developing anti-trafficking prevention and intervention strategies, it is essential that attention should be directed at reducing the vulnerability of migrants, not at restricting migration itself. The right to mobility for employment is an important human right; especially where local economies offer limited livelihood alternatives. Strategies need to be developed to enhance social and economic opportunities at the source. Understanding the connection between migration and human trafficking as well as the motivations and processes involved is therefore critical to the development of counter-trafficking strategies.

2.5 Participants in human trafficking

Trafficking in persons is a relationship that involves two persons or a group of persons, the victim(s) and the trafficker(s). The two categories will now be examined.

²⁰¹ UN Development Programme (UNDP) *Human Trafficking and HIV* (2007) 14.

²⁰² Ghosh *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (1998) 35.

²⁰³ South Africa has also been characterized by the rapid growth of a market-driven intraregional migration in the past century. The pressing need for work and life opportunities has turned migration into a common livelihood strategy in South Africa, creating a fertile field for traffickers and unscrupulous “employment agents”.

²⁰⁴ Kelly *Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe* (2002) 26; Kelly “You Can Find Anything You Want”: A Critical Reflection on Research on Trafficking in Persons within and into Europe” 2005 43(1/2) *International Migration* 235 236.

²⁰⁵ Skrobanek; Boonpakdee & Jantateero *The Traffic in Women, Human Realities of the International Sex Trade* (1997) 16.

2.5.1 Traffickers

Although no definition for a human trafficker exists, traffickers are mostly defined by their trade, position or relationship with the victim. As such, they are the “recruiters; transporters; those who exercise control over trafficked persons; those who transfer and/or maintain trafficked persons in exploitative situation; and those who profit either directly or indirectly from trafficking, its component acts and related offences”.²⁰⁶ These traffickers may be a single person trafficker (male or female),²⁰⁷ a second wave trafficker (former victims turned traffickers); syndicates or gangs.

Traffickers could be family members, parents, partners, friends, acquaintances, pimps, business contacts, strangers or any other person²⁰⁸ who lures any person, by means of enticement, force, threats, the use of hypnotic drugs,²⁰⁹ or by other means, for the purposes of sale, forced prostitution, forced labour and servitude. Many traffickers come from the villages, communities and district of their victims and rely on connections and relationships they have in these areas to operate. Some have loose informal networks from source to border and to the destination point. Police and immigration officials also become part of the trafficking process as they assist in internal and cross-border trafficking.²¹⁰ There also appears to be entrepreneurial networks of traffickers, i.e. opportunistic individuals who seize the chance to deceive or coerce their victim into a situation of exploitation for profit.

²⁰⁶ UN Development Fund for Women (UNIFEM) “Women, War, Peace” <http://www.womenwarpeace.org/issues/trafficking/trafficking.htm> (accessed 2012-12-21).

²⁰⁷ According to the UN, most traffickers are female. See UNGIFT *Profiling the Traffickers* (2008) 5. Also see Dave-Odigie “Human Trafficking Trends in Nigeria and Strategies for Combating the Crime” 2008 1(1) *Peace Studies Journal* 63 70.

²⁰⁸ 46% of recruiters are known to their victims, sometimes recruiting from places of work such as factories where they themselves have worked. The remaining 54% constitute strangers recruiting their victims. See UNGIFT (n207 *supra*) 11; UNGIFT *Human Trafficking – An Overview* (2008) 12.

²⁰⁹ Traffickers are particularly skilful in gaining the trust of their victims; befriending them mostly during a time of crisis, supporting them emotionally and financially, and finally luring them with stories of high incomes and material possessions. See McCabe (n6 *supra*) 82; Preece (n200 *supra*) 38.

²¹⁰ Many female brothel owners bribe policemen or are married to policemen and military or border officials, or have close contact with them. On trying to escape, the victims will be returned by the police. See Hughes & Denisova (n1 *supra*) 4.

There has been little, if any, research done that directly focuses on the organization of human traffickers and nothing is known about the structure of their trafficking networks. Additionally, reasons for entering the business of human trafficking are unknown. Common stereotypes insinuate that greed, money, and power attract these people but it is not known whether or not these supposed reasons are their only motivations.²¹¹ Traffickers from Benin in West Africa, for example, see themselves as facilitators for families looking for some extra income. They are thus viewed as helping the community.²¹² What is known is that the profits are high and the risks minimal for the traffickers and numerous other people involved in the trafficking process.²¹³

2.5.2 Victims of human trafficking

The Palermo Protocol does not provide for a definition of trafficking victims other than the designation of “trafficked persons”. The UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines a victim as an individual who “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”.²¹⁴ Thus, victims of trafficking are those who have suffered harm as the direct result of their traffickers’ exploitation.

It is difficult to identify victims of trafficking. The Palermo Protocol does not give any guidance as to how the identification process is to be made and by whom.²¹⁵ This lacuna affects the proper implementation of the Palermo Protocol’s provisions granting protection

²¹¹ Troshynski & Blank “Sex Trafficking: An Exploratory Study Interviewing Traffickers” 2008 11 *Trends in Organised Crime* 30 32.

²¹² TEAM (Tolerance, Equality and Awareness Movement) “Human Trafficking: Facts and Figures” <http://teamthemovement.com/educational-information/human-trafficking-facts-figures/> (accessed 2012-12-21).

²¹³ Other people assisting include the transport organisers, the providers of the transportation; the guides for cross-border routes; officials who are paid to ignore border crossings and to provide legal documents at international crossings as well as those who find employment (such as orders from brothels) in the destination state. See MoSALVY (Ministry of Social Affairs, Labour and Vocational Training and Youth Rehabilitation) *The Implementation of the International Convention on the Elimination of All Forms of Discrimination against Women in Cambodia* (2003) 32.

²¹⁴ GA Res 40/34 (1985) as quoted in Amiel (n43 *supra*) 27. This declaration seeks to protect victims of crime by ensuring that they receive access to justice and fair treatment during legal proceedings.

²¹⁵ See Ladan (n105 *supra*) 116. Organisations such as the IOM, the UNODC and the UNGIFT have developed different guidelines to identify trafficking victims; however their guidelines are not analogous. See UNICEF *UNICEF Guidelines on the Protection of Child Victims of Trafficking* (2006) 14.

to victims as well as the prevention of repeat victimisation.²¹⁶ Identifying an individual as a trafficked person carries different responsibilities for a state party than in the case when the same person is identified according to the Migrant Smuggling Protocol as a smuggled migrant.²¹⁷ Ladan puts the consequence of failure to provide for identification as follows:

Under the terms of the Protocol, dealing with trafficking persons will be more costly and impose a greater administrative burden on states than dealing with smuggled migrants. States, therefore, have an incentive to ratify one but not both Protocols.²¹⁸ For the same reasons, border authorities and immigration officials responsible for identifying and categorizing irregular migrants also have an incentive to identify such persons as being smuggled rather than as trafficked.²¹⁹

This is one of the possible consequences of a state ratifying one but not both instruments. Both Protocols also do not make any provision for overlapping as where a smuggled person ends up in exploitative trafficking situation. These defects should be addressed and systematic identification procedures established.

According to research, victims may be categorized as persons at risk of being trafficked; current victims of trafficking, and former victims of trafficking or “survivors”.²²⁰ It is difficult to distinguish externally observable traits of those at risk of trafficking. The usual explanations of trafficking point to young, unsuspecting women being deceived only to be sold to pimps and pressured through violence into prostitution.²²¹ The victims are described as young, naive, usually uneducated, willing to move abroad, or to be exploited,

²¹⁶ Ladan (n105 *supra*) 117.

²¹⁷ UN Doc A/AC 254/27 “Inter-Agency Submission” quoted in Ladan (n105 *supra*) 121; *Smuggling and Trafficking in Persons and the Protection of their Human Rights* (Note by Secretary General UN Doc E/CN.4/Sub.2/2001/26) para 7 quoted in Weissbrodt (n100 *supra*) 25.

²¹⁸ The Protocols referred to are the Palermo Protocol and the Migrant Smuggling Protocol. See *supra* n5; n178.

²¹⁹ Ladan (n105 *supra*) 122.

²²⁰ The use of the term “victim” instead of “survivor” may therapeutically speaking be counter-productive; there is however a legal necessity to use the term “victim”. See Goździak “On Challenges, Dilemmas, and Opportunities in Studying Trafficked Children” 2008 81(4) *Anthropological Quarterly* 903 913; Tyldum & Brunovskis “Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking” 2005 43(1/2) *International Migration* 17 21-22.

²²¹ Caldwell, Galster & Steinzor *Crime and Servitude: An Expose of the Trafficking in Women for Prostitution from the Newly Independent States* (1997) 10; Bruinsma & Meershoek “Organized Crime and Trafficking in Women from Eastern Europe in the Netherlands” 1999 3 *Transnational Organized Crime* 105 118.

and attracted by a better standard of living. While some victims of trafficking really do fit this depiction, this manner of presenting the victims greatly oversimplifies the problem.

The current victims of trafficking are the most difficult to identify because of the secrecy of the trade. Possible visible indicators of these types of victims (especially that of labour victimisation) include situations where the victims live within the same area in which they work and are constantly driven from home to work by their employer, supervisor or owner(s) of establishment. Victims are also under the constant surveillance of their employer or other employees; and if they need to communicate with someone outside the workplace, their translator will be either their employer or another employee.²²² These trafficking victims are totally under the control of their traffickers. Traffickers may utilize mechanisms which minimise the need for physical violence such as debt bondage, isolation²²³ or blackmail.²²⁴ They may also resort to the use of physical violence, drug dependency, and torture as well as magical beliefs and practices. For fear of deportation and arrest, victims may not come forward to law enforcement authorities.²²⁵ It has been observed that even among trafficking victims who are subjected to severe physical and mental abuse, very few seem to ask for help when they have the possibility, and many go to great lengths to avoid contact with the police.²²⁶ This causes further difficulties in assisting victims of trafficking, for in order to determine if a person has been manipulated, and the extent to which she has been exploited, the person has to give up this information herself.

Former victims of trafficking consist of those rescued by authorities; those that escaped enslavement; those whose freedom is bought by customers (especially applicable to the cases of sexual exploitation); and those who have died.²²⁷ Survivors of trafficking may still suffer harm with short- and long-term effects. They may have diseases; such as sexually transmitted infections, HIV/AIDS and stunted growth in minors. They may have permanent

²²² McCabe (n6 *supra*) 48.

²²³ This takes place either by removing identity and/or travel documents or social/linguistic isolation.

²²⁴ If trafficked to another country illegally, traffickers exploit victim's fear of police and fear of being deported.

²²⁵ US Dept of State *Trafficking in Persons Report 2006* (n159 *supra*) 28.

²²⁶ Brunovskis & Tyldum *Crossing Borders: An Empirical Study of Transnational Prostitution and Trafficking in Human Beings* (2004) 75. Police officials may be former clients or in collusion with their traffickers.

²²⁷ See Landesman "The Girls Next Door" *New York Times* 25 Jan 2004: "Most trafficked victims only survive for two to four years before they die as a result of homicide, suicide, HIV/AIDS, or other factors." <http://www.nytimes.com/2004/01/25/magazine/25SEXTRAFFIC.html> (accessed 2012-12-21) .

damage due to physical violence and severe psychological damage from premature/forced sexual activity. They may be ostracised by their family and communities because of their trafficking experience or they may be treated as criminals and face difficult re-integration on returning home. Many former victims of trafficking are afraid to testify or contact law enforcement due to their complicity with traffickers and pimps.

2.6 The *modus operandi* of human trafficking

It is important to understand how clandestine systems and processes such as human trafficking is developed and maintained, allowing the trafficking of men, women and children. However, a predicament is that these methods are constantly adapted and changed. Human trafficking may involve three stages: recruitment, transportation, and exploitation. Recruitment usually involves some kind of trickery or deception. Some victims are recruited by false promises of marriage or well-paying jobs, while others are simply abducted. Other victims respond to bogus employment advertisements in newspapers and other media for overseas studies, domestic work, waitressing or any other low-skilled work. Sometimes, a victim is recruited by partial deception; the recruiter may inform the victim that she would be doing a particular kind of work, but may not disclose the full exploitative nature of the work that she will be subjected to. This is common in the case of women who are recruited to work as prostitutes in far-off areas. They are promised lucrative wages, but end up working under threat of violence and deplorable conditions, while their earnings are seized by the traffickers. The trafficking recruitment system relies heavily on well-trodden routes and several layers of people. There may be many traffickers involved, from the first one who is in direct contact with the employers, to a second trafficker who transport the victims and a third who recruits people. This recruitment method is very systematised, others less so.

The second phase of human trafficking is usually transportation, where the victim is smuggled illegally or legally taken away from her known surroundings. Transporting a victim from a familiar environment to a new, strange setting renders the victim defenceless and easy to exploit. In an unfamiliar locale, there is no support system, the language may be incomprehensible, and they may not have legal documentation. Trafficking victims are

not only transported to other countries, but are usually trafficked within their own national borders, for example, from rural areas to cities.

Exploitation is the third phase and the ultimate purpose of human trafficking. In the new environment, the trafficker's true intention is revealed. If the trafficking victim possesses any money or documentation such as a passport, it is confiscated by traffickers. At transition houses victims may be drugged, raped or gang-raped to be broken in for prostitution if being trafficked for the sex industry. The trafficker could exploit the victim for financial gain or sexual gratification, or sell the victim, or both. Usually, small-time traffickers sell victims to anyone who needs them, who again may sell them. In this manner, victims are constantly relocated both internally and internationally. When of no further use to the trafficker or employer, victims are disposed of.²²⁸

2.7 Types of trafficking

Different types of trafficking may be distinguished according to its movement, types of victims and forms of exploitation.

2.7.1 Internal and international trafficking

As already indicated, trafficking may involve international trafficking (transfers across national borders) and internal trafficking (transfers within national borders). Internal trafficking may be a stepping stone to international trafficking, while an increase in international trafficking may lead to more internal trafficking. Internal and international trafficking should not be regarded as completely distinct and separate phenomena. More research is needed on the linkages between these two concepts.

2.7.2 Adult and children trafficking

The commodities in human trafficking are people; however, particular persons are more desirable for particular purposes. Generally, human trafficking concerns adults and

²²⁸ Trafficking victims are either abandoned or killed. See IOM *Eye on Human Trafficking* (2007) 4.

children. However, the trafficking of babies needs separate consideration from that of older children. Adult trafficking may involve recruitment or movement of an adult person by a third party with an intention to exploit that person using any form of coercion. Both males and females may be exploited for labour purposes, in other words, “any work or service which is exacted from a person under the menace of any penalty and for which the said person has not offered himself voluntarily”.²²⁹ Both genders may also be exploited for sexual purposes but research shows that the majority of sex-work victims are female.

Child trafficking may concern the recruitment or movement of persons under the age of 18, internally or across borders by an individual who has an intention to exploit.²³⁰ The child’s consent is irrelevant when determining whether or not such recruitment or movement is a case of trafficking, and coercion or deception need not be present. Similar to adults, children may be trafficked for labour or sexual exploitation, but additional purposes include illegal adoption, forced marriage, criminal activities, begging, child soldiers, camel jockeys, paedophilia etc. The Palermo Protocol does not specifically mention the recruitment of children for hazardous work or illegal adoption, but it is dealt with in other binding international-legal instruments, such as the ILO Worst Forms of Child Labour Convention²³¹ and the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoptions. Trafficking in children violates the inherent right of a child to grow up in a protective environment, and the right to be free from all forms of abuse and exploitation.²³² Although the main motive behind baby trafficking is illegal adoption; babies are also trafficked for sexual exploitation, organ trade and as aides in begging. Trafficked babies are obtained from sources such as debt-ridden families looking for somebody who would be able to take care of them. Many trafficked babies are from unwanted pregnancies especially from places such as brothels. Babies may of course also be kidnapped for trafficking purposes, but the risks involved are sometimes too high for traffickers.

²²⁹ Article 2(1) of the ILO Convention No 29 Concerning Forced Labour.

²³⁰ ILO suggests the following: “A child has been trafficked if the child has been moved within a country, or across borders, whether by force or not, with the purpose of their exploitation”. See “Definition of Child Trafficking” <http://www.child-labour.org.za/definitions/updated-note-on-the-definition-ofchild-trafficking/> (accessed 2010-07-14).

²³¹ See ILO (n141 *supra*).

²³² US Dept of State *Trafficking in Persons Report 2006* (n159 *supra*) 6-13.

The Palermo Protocol and other international agreements underscoring the protection of children against exploitation contain mainly Western assumptions about what a child and childhood constitute. The CRC does not distinguish between four- and seventeen year-olds and treat them in a similar manner. This viewpoint also underlies the apparatus of assistance programs caring for trafficked children. While agreeing that child trafficking exists, experts have certain “disagreements over its magnitude (which) is underpinned by different understandings of the term „child“ and „trafficking“. This is a conceptual and political problem that cannot be resolved by more data alone”.²³³ This view is supported by Goździak:

In the United States the system of care for trafficked children has been developed within a framework based on middle-class Western ideals about childhood as a time of dependency and innocence during which children are socialized by adults and become competent social actors. Economic and social responsibilities are generally mediated by adults so that the children can grow up free from pressures of responsibilities such as work and child care. Children who are not raised in this way are considered “victims” who have had their childhood stolen from them.²³⁴

In many cultures, especially in Africa, children do not consider themselves trafficked victims, but perceive their experiences as migration in search of better opportunities that turned into exploitation. Many also do not think of their traffickers as perpetrators of crime and villains; after all in some instances the traffickers are parents or close relatives.²³⁵

2.7.3 Forms of exploitation

There are different types of exploitation found in human trafficking. These types of exploitation will now be discussed.

²³³ Manzo “Exploiting West Africa’s Children: Trafficking, Slavery and Uneven Development” 2005 37(4) *Area* 393-394.

²³⁴ Goździak (n220 *supra*) 905.

²³⁵ Manzo (n233 *supra*) 294; 297-298.

2.7.3.1 Sexual exploitation

The UNODC has reported that sexual exploitation is the most common form of human trafficking in the world.²³⁶ Trafficking for sexual exploitation is also described as “the perfect criminal business; unlike drugs or guns, which can only be sold once to any particular party, the sexual services of trafficked victims can be sold again and again”.²³⁷ However, sexual exploitation is not defined in either the Palermo Protocol or in international law.²³⁸ Researchers in the field apply different definitions, for example, Jordan defines sexual exploitation as

...the participation by a person in prostitution,²³⁹ sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, coercion, abduction, force, abuse of authority, debt bondage or fraud.²⁴⁰

The above definition is victim-centred, gender neutral and specific as to the types of exploitative practices. On the other hand, Hughes defines sexual exploitation as

...all practices by which a person achieves sexual gratification or financial gain through the abuse or exploitation of a woman or child by abrogating her human right to dignity, equality, autonomy, and physical and mental well-being.²⁴¹

²³⁶ According to UNODC, sexual exploitation makes up 79% of the various forms of trafficking. See UNODC (n140 *supra*) 50. ILO again states that 43% of trafficked persons are trapped in commercial sexual exploitation; see ILO *Fighting Human Trafficking: The Forced Labour Dimensions* (2008) 2.

²³⁷ Tiefenbrun “Sex Sells but Drugs Don’t Talk: Trafficking of Women Sex Workers” 23 2001 *Thomas Jefferson Law Review* 161 199; Yen “Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand through Educational Programs and Abolitionist Legislation” 2008 98(2) *The Journal of Criminal Law & Criminology* 653 658.

²³⁸ There are several international human-rights laws prohibiting trafficking in women and girls for prostitution, but none give a definition of sexual exploitation. Prominent among these are the Convention on the Rights of a Child (UN Doc A/RES/44/25, entered into force 2 Sept 1990); the International Covenant on Civil and Political Rights (art 2(1) 999 UNTS 171, entered into force 30 Mar 1976); the Convention for the Elimination of all Forms of Discrimination Against Women (art 2 1249 UNTS 14, entered into force 3 Sept 1981), and the Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others.

²³⁹ The term “prostitution” refers to the act of having sexual intercourse or performing other sexual acts, explicitly for material compensation - normally money, but also other forms of property, including drugs, expensive clothing, jewellery, or real estate. It is said that prostitution is not the oldest profession, but the oldest form of violence. See Batsyukova “Prostitution and Human Trafficking for Sexual Exploitation” 2007 24 *Gender Issues* 46 46.

²⁴⁰ Jordan (n128 *supra*) 9.

²⁴¹ Hughes “The Internet and Sex Industries: Partners in Global Sexual Exploitation” 2000 *Technology and Society Magazine* 35 36.

Sexual exploitation usually entails the coercion of a trafficked person to provide sexual services for the benefit of the exploiter.²⁴² By leaving the particular exploitative practices open-ended, the last definition provides for any possible type of sexual exploitation. Trafficking in persons for the purpose of sexual exploitation has also been defined as a crime that involves the recruitment, transport and exploitation of an individual which can take the form of forced prostitution, pornography or any other forced sexual practices.²⁴³

Sexual exploitation and trafficking are intrinsically connected. When focussing on trafficking for sexual exploitation, many authors blame the sex industry for trafficking,²⁴⁴ but neglect to address the link between trafficking, globalisation and the sex industry, which is a huge multi-billion dollars business all over the world.²⁴⁵ The sex industry is defined as “the collection of legal and illegal, single and multi-party operations that profit from the selling of women and children through trafficking, organized prostitution and/or pornography.”²⁴⁶ It consists of various sectors such as street and indoor prostitution, brothels, escort agencies, massage parlours, strip bars, peep booths, revue and karaoke bars, pornography (both published and on the internet) and adult shops, among others.

Although the origins of the modern sex industry is said to root particularly in the United States of America in the 1950s and 1960s, it has vastly expanded and has become alarmingly industrialised. This has been attributed to a liberalisation of laws regulating prostitution and pornography, and a wide scale tolerance of men’s sexual abuse and exploitation of women.²⁴⁷ Women have become a trade in themselves, commodities to be bought and sold by organised crime syndicates, individuals, tourists, military personnel, men seeking sexual entertainment or non-threatening marriage partners,²⁴⁸ largely aided by globalisation.

²⁴² Surtees “Commercial Sex Work” in Rosenberg R (ed) *Trafficking of Women and Children in Indonesia* (2003) 63.

²⁴³ Bermudez (n79 *supra*) 34.

²⁴⁴ Askola *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (2007) 27; Kelly 2002 (n204 *supra*) 18.

²⁴⁵ Hughes “The Internet and the Global Prostitution Industry” in Hughes & Roche (eds) *Making the Harm Visible: Global Sexual Exploitation of Women and Girls* (1999) 157.

²⁴⁶ Hughes (n 241 *supra*) 1.

²⁴⁷ Hughes (n 241 *supra*) 2.

²⁴⁸ Hughes (n 241 *supra*) 5.

The increase in the sex industry is also witnessed in the influx of foreign-born sex workers into Europe. The proportion of these sex workers in European cities started to rise rapidly in the 1970s. In the 1980s, most of these foreign women were from the developing countries of Africa and South America.²⁴⁹ By the 1990s, women from Eastern and Central Europe had become the new commodity, and trafficking in women for work in the sex industry loomed as an issue of increasing concern as it gained prominence and media coverage.²⁵⁰ Currently, in most of the countries of Western Europe, foreign-born sex workers outnumber the locals.²⁵¹

Some have argued that the reason why the number of trafficked women in the sex industry has grown is because local sex workers, especially in Europe, have secured some control over their work through awareness-raising campaigns.²⁵² Thus, for example, local sex workers may refuse customers that they do not feel safe with, insist on the use of condoms, etc. Trafficked women, on the other hand, have no control, and thus cannot set such demands. Trafficking for sexual exploitation can therefore be viewed as a reaction to these changes in the local “sex labour” market.²⁵³

From the year 2000, it was estimated that the global sex industry makes US\$52 billion dollars a year²⁵⁴ and to keep the global sex industry in business; women are trafficked to, from and through every region in the world.²⁵⁵ The value of the global trade in women as commodities for sex industries creates a situation in which the sex industry targets and consumes young women, usually under age²⁵⁶ and becoming younger each year.²⁵⁷ It appears that trafficking for purposes of sexual exploitation is strongly linked to organised crime syndicates, although some operations appear to be individually run. For instance, in

²⁴⁹ Wohlwend *Report on Traffic in Women and Forced Prostitution in Council of Europe Member States* (1997) para III.

²⁵⁰ Jahic & Finckenauer (n148 *supra*) 25.

²⁵¹ Bruinsma & Meershoek (n221 *supra*) 115-116.

²⁵² Brussa *Survey on Prostitution, Migration and Traffic in Women: History and Current Situation* (1991) 42.

²⁵³ Jahic & Finckenauer (n148 *supra*) 35.

²⁵⁴ It is said that the sex industry is more visible than, eg, domestic servitude or organ trafficking and it is also less economically important than other industries which use trafficked workers. See Lehti & Aromaa “Trafficking for Sexual Exploitation” 2006 5(2) *Criminologist* 12 12.

²⁵⁵ Hughes *Men Create the Demand; Women are the Supply* (2000) 1-2
<http://www.uri.edu/artsci/wms/hughes/demand.htm> (accessed 2012-12-21).

²⁵⁶ Hughes (n 255 *supra*) 1.

²⁵⁷ Hughes (n 255 *supra*) 1.

South Africa trafficking for the purpose of sexual exploitation is dominated by Nigerian, Chinese, Moroccan and Eastern European crime syndicates which operate in Johannesburg, Pretoria, Cape Town, Durban, Port Elizabeth and Bloemfontein. Their purpose is supplying women to meet the demands of the sex industry.²⁵⁸

The trafficking of women and girls into prostitution represents a severe form of contemporary slavery. Women, due to their vulnerability arising from an array of factors such as poverty, gender inequality, racism and violence, are forced into the sex industry. These females may also be abducted, lured, deceived, and sold into prostitution. Their price is fixed on the basis of their colour, beauty, age, and virginity.²⁵⁹ They rarely can escape²⁶⁰ or negotiate their working or living conditions because of their vulnerability and complete subordinate position.²⁶¹ Driven by the desire to maximize profit and by the fear of HIV/AIDS, traffickers acting on behalf of brothels owners infiltrate ever more remote areas of the developing world seeking unsuspecting recruits. Virgin girls are particularly sought after because they bring a higher price and pose less threat of exposure to sexually transmitted diseases (STDs) and HIV/AIDS. In forced prostitution, women are subjected to rape, violence or threats of violence against themselves or their families, their documents are confiscated or destroyed and they are forced to pay off insurmountable debts.²⁶² The children of these sex workers, especially girls, are often either pushed into the trade or are taken as substitutes for their mothers.²⁶³

In seeking to combat trafficking for sexual exploitation, some NGO's are actively promoting the legalisation of prostitution. They believe that a licensing system for sex establishments makes the supervision of the licensed sex industries easier. In this manner, licensed establishment may be inspected for human trafficking victims. Yet, traffickers continue to produce ways to enter the regulated segment of prostitution, usually by means of identity fraud and arrangement of the residence status for illegal prostitutes.

²⁵⁸ See Bermudez (n79 *supra*) 36.

²⁵⁹ See Human Rights Watch *The Human Rights Watch Global Report on Women's Human Rights* (1998) 196; Human Rights Watch *Owed Justice: Thai Women Trafficked into Debt Bondage in Japan* (2000) 51.

²⁶⁰ Thomas A *Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand* (1993) 3 reports eg, that "the worst brothels in the Southern Thai town of Ranong are surrounded by electrified barbed wire and armed guards".

²⁶¹ See Human Rights Watch (1998) (n259 *supra*) 196.

²⁶² IOM "Control Mechanisms in Human Trafficking" 2009 *Eye on Human Trafficking* 1 2.

²⁶³ Wiesen-Antin *Human Trafficking and HIV/AIDS* (2007) 11.

Many researchers argue that legalization of prostitution is never the answer. Prostitution establishments are reported to do little to protect their workers. In the Netherlands, where prostitution is legalized, 60% of prostitutes suffer physical assault; 70% experience verbal threats, and 40% experience sexual violence.²⁶⁴ Some countries such as Switzerland have legalized or regulated prostitution. However, only persons with Swiss nationality or resident status could benefit from such protective legal measures. Trafficking victims thus lack any legal status and are especially vulnerable in these destination countries.²⁶⁵ In Sweden, prostitution is officially acknowledged as a form of exploitation which undermines equality between women and men.²⁶⁶ Both outdoor and indoor prostitution are prohibited. Only clients are criminalized (up to four years of imprisonment) and not prostitutes. Prostitutes are considered as victims of violence. By exercising these regulatory measures, the Swedish government was able to significantly reduce demand for prostitution and make the Swedish sex market unattractive for international traffickers.

2.7.3.2 Forced labour and servitude

According to the Global Report on Trafficking in Persons, trafficking for purposes of forced labour is the second most common form of human trafficking constituting 18 percent of the various forms of trafficking.²⁶⁷ The ILO estimates that at least 12.3 million people are victims of forced labour worldwide, whereof 9.8 million are victims exploited by private agents and 2.4 million victims exploited as a result of human trafficking.²⁶⁸ As human trafficking almost always has forced labour as its end product, the estimates could be much higher.²⁶⁹

Forced labour refers to “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself

²⁶⁴ O'Connor & Healy *The Links between Prostitution and Sex Trafficking* (2006) 18.

²⁶⁵ Raymond “The New UN Trafficking Protocol” 2002 25(5) *Women’s Studies International Forum* 491 491-502.

²⁶⁶ Di Nicola, Orfano, Cauduro & Conci *Study on National Legislation on Prostitution and the Trafficking in Women and Children* (2005) 99.

²⁶⁷ UNODC (n140 *supra*) 50.

²⁶⁸ ILO (n236 *supra*) 2.

²⁶⁹ ILO (n236 *supra*) 2.

voluntarily”.²⁷⁰ The term forced labour encompasses all work that any woman, man or child is compelled to do under threat of a punishment and for which they have not voluntarily offered themselves.²⁷¹ Servitude or serfdom again conveys the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate services to such other person, whether for reward or not, and he is not free to change his status.²⁷² Cultural practices, illiteracy and unequal power relationships make this traditional form of slavery for low-skilled work particularly hard to eliminate. As such, the phenomenon of servitude is still common and widespread.²⁷³ Millions of people are enslaved from generation to generation, mainly through debt bondage. Debt bondage entails the pledging of a person’s services or labour indefinitely as security for a debt when the length and nature of the debt is not clearly defined.²⁷⁴ The labourers seldom know the amount of their debt, a fact that increases the coercive power of their employers and ensures their continued servitude. Debt bondage may also be incurred by a victim during trafficking and at the destination in some cases. The debt usually consists of a high figure that in no way relates to the actual expenditure for travel cost, etc. It accumulates to such large amounts that the victim is unable to pay it off and is as such bound to the trafficker or employer for an uncertain period of time.

There are various forms of forced labour such as domestic labour in which women, usually but not exclusively, are engaged as household domestic workers.²⁷⁵ Forced labour trafficking is generally found in such less privatized sectors of economies, including agriculture, construction, and manufacturing (including low-tech/craft production). The trend here is also that women are often found working in the worst forms of labour, related to the low status given to them in some societies. Forced labour can include sexual exploitation as well. Women and girls are trafficked within their countries for the purpose of

²⁷⁰ ILO Convention concerning Forced or Compulsory Labour No 29 (1930) art 2(1).

²⁷¹ ILO (n236 *supra*) 2.

²⁷² Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) art 1(b).

²⁷³ Eg, in South Asia.

²⁷⁴ Wijers & Lap-Chew (n45 *supra*) 225. Art 1(b) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) states that debt bondage is “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.” For the international law definition of debt bondage, see ILO (n81 *supra*).

²⁷⁵ Bermudez (n79 *supra*) 46.

domestic labour where they are often forced to provide sexual services to their employers or others, with or without the knowledge of their employers.²⁷⁶ On the whole, men are trafficked for the purpose of forced labour and to similar sectors as that of women; although construction, agriculture as well as fishing and fish processing prove to be the most common types of work.²⁷⁷ In these industries, there is growing evidence of victims enduring extremely long working days, forced amphetamine use and even the murder of those unable to keep up with the work pressure.²⁷⁸

Although many countries have signed and ratified the ILO's Conventions on the Minimum Age of Employment and Elimination of the Worst Forms of Child Labour, as well as the UN's Convention on the Rights of the Child, child labour is still quite common and widely accepted in many parts of the world. The ILO estimates that 250 million children between the ages of five and fourteen living in developing countries qualify as child labourers. At least 120 million children work full-time. Sixty one percent of child labourers are in Asia, thirty-two percent in Africa, and seven percent in Latin America. Their work varies; from helping with family farms to performing physically demanding tasks in manufacturing, construction, and extractive industries.²⁷⁹ Children in cities are especially used for street vending, forced begging and to commit crimes.²⁸⁰

Forced and bonded labour for children continually transforms and diversifies into new avenues. For example, the trafficking and exploitation of African and South Asian children as camel jockeys has burgeoned in the Gulf States, where the traditional Bedouin sport has transformed into a multi-million dollar commercial activity. These children range from three to seven years of age and are malnourished to keep their weight below thirty-five pounds. Many of them suffer extreme injuries or death from falling off camels during the races.²⁸¹ Another novel example is that of young African footballers who are lured to

²⁷⁶ Tiefenbrun (n237 *supra*) 212.

²⁷⁷ Bermudez (n79 *supra*) 54.

²⁷⁸ UN Inter-Agency Project (UNAIP) *Partnership against Trafficking* (2004) 7.

²⁷⁹ Henne & Moseley "Combating the Worst Forms of Child Labour in Bolivia" 2005 32(1) *Human Rights: Journal of the Section of Individual Rights and Responsibilities* 1212-15.

²⁸⁰ Bermudez (n79 *supra*) 56.

²⁸¹ TEAM (n212 *supra*).

Europe with promises of money and glory, only to end up exploited or abandoned by traffickers, middlemen and football clubs.²⁸²

A person trafficked for the purpose of labour is coerced to work in a similar manner to that for sexual exploitation. This includes, for instance, threats of or actual physical violence against the victim or their family members, including deprivation of freedom (of movement or of personal choice). There is deception with regard to working conditions and/or the nature of the work to be done. One also finds abuse of authority which can range from the confiscation of identification documents, the withholding of wages and threats of reporting them to immigration officials.²⁸³

2.7.3.3 Illegal adoption

Illegal adoption usually operates on a covert level.²⁸⁴ Whereas in some cases babies are kidnapped, there are instances in which poor, pregnant and single women are targeted by baby-selling syndicates or individuals, forcibly held captive until birth, whereupon the child is taken away and sold.²⁸⁵ This situation amounts to trafficking. Illegal adoptions are to the detriment of small children because they are removed and placed outside the protection afforded to them by legal adoption systems. They are usually placed on the black market and are consequently always in danger. This violates many of their rights, such as the right to non-separation from the family.²⁸⁶

2.7.3.4 Traffic in human organs

The trade in human organs may be for medical or magical reasons. A shortage of transplantable organs all over the world has led to illegal methods of procuring organs in attempts to fulfil organ donation requests. Often these illegal methods entail human-rights

²⁸² IOM (n228 *supra*) 8.

²⁸³ Wijers & Lap-Chew (n45 *supra*) 48.

²⁸⁴ Misra "Adoption" in Rosenberg (ed) *Trafficking of Women and Children in Indonesia* (2003) 114.

²⁸⁵ Misra (n284 *supra*) 114.

²⁸⁶ Pascoe *Trafficking in Unborn Children* (2008) <http://www.fmc.gov.au/pubs/docs/trafficking2008.pdf> (accessed 2012-12-21).

abuses, including the sale of organs harvested from trafficking victims.²⁸⁷ In this form of trafficking, a person is exploited for the purpose of a trafficker obtaining profit on the organ black market. In Africa and many other countries, human body parts are harvested for use in „*muti*“ (medicine) or charms. The belief is that the life force of a person may be appropriated through its literal consumption of another. Body parts such as skulls, hearts, eyes and genitals are sold and used by deviant practitioners to increase wealth, influence, health or fertility.²⁸⁸ In this instance a person is trafficked for the removal of their organs for the purpose of witchcraft and traditional medicine.

2.7.3.5 Forced marriage

Forced marriages are coercive relationships without valid consent of one or both of the parties (usually the female).²⁸⁹ It is a form of human rights abuse, since it violates the principle of the freedom and autonomy of individuals. Forced marriage or “bride trafficking” includes constituent acts that are codified crimes in international customary and human rights law. These crimes include rape, sexual slavery, enforced pregnancy, forced labour, enslavement and torture.²⁹⁰ Females are forced to marry for cultural, religious, socio-economic and monetary reasons. Many countries have a system of forced marriage in which something of value is exchanged for the woman (a dowry, fee, gift, etc.). China, for example, has as a result of the decade-long one-child policy a gender imbalance, and men in communities experiencing severe shortage of women are under strong pressure to find a bride. When they cannot afford to pay the high bride price for local women, they readily resort to purchasing brides kidnapped from other areas.²⁹¹ In Uganda, a rebel movement fighting the government called The Lord’s Resistance Army (LRA) is estimated to have

²⁸⁷ According to the Palermo Protocol, trafficking for body organs occurs only if a person is transported for the purpose of removing organs and not the transportation of the organs alone. See also Statz “Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage” 2006 39 *Vanderbilt Journal of Transnational Law* 1677 1679.

²⁸⁸ UNODC *Human Trafficking for the Removal of Organs and Body Parts* (2008) 2.

²⁸⁹ The UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art 1(c) describes this situation as a “practice similar to slavery” whereby:

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person;

²⁹⁰ Rome Statute on the International Criminal Court (1998), arts 7(1)(c)-(g).

²⁹¹ Lee “Human Trafficking in East Asia: Current Trends, Data Collection, and Knowledge Gaps” 2005 43(1/2) *International Migration* 165177.

kidnapped over 60,000 Ugandan children and youth. Many of the abducted girls served as forced wives to male members of the group.²⁹² Forced marriage by way of abduction into a fighting force is currently not a codified crime in international law.

2.7.3.6 Child soldiers

The use of children in armed combat is a form of human trafficking and a human rights violation since it interferes with a child's fundamental human right to education, health, and development.²⁹³ The Rome Statute that founded the International Criminal Court also recognizes this type of trafficking in persons as "enslavement" (Article 7) which is considered a "crime against humanity."²⁹⁴ A child soldier is "trafficked" when there is forced recruitment or no genuine voluntary consent; when the recruitment is done without the informed consent of the person's parent or legal guardians; and when such persons were not fully informed of the duties involved in the military service.²⁹⁵ Child soldiering is moreover listed as one of the worst forms of child labour in the ILO Convention 182.²⁹⁶ The participation of children in armed conflicts is prevalent in developing countries experiencing political, economic, and social instability. Currently, over three hundred thousand children, most of them ranging in ages from eleven to fifteen, are serving as child soldiers in fifty countries in every region of the world.²⁹⁷ Almost half of these child soldiers are girls, who suffer serious human rights abuses. Among the many major international instruments protecting children's rights, even the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, none seem to address the specific plight of female child soldiers.

²⁹² Carlson & Mazurana *Forced Marriage within the Lord's Resistance Army, Uganda* (2008) 4.

²⁹³ See Valentine "Trafficking of Child Soldiers: Expanding the United Nations Convention on the Rights of the Child and Its Optional Protocol on the Involvement of Children in Armed Conflict" 2003 9 *New England Journal of International Law* 109 110.

²⁹⁴ The Rome Statute of the International Criminal Court, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 16 Jun 1998, UN Doc A/CONF183/9 (1998), art 7, entered into force 1 Jul 2002.

²⁹⁵ Tiefenbrun *Child Soldiers, Slavery, and the Trafficking of Children* (2007) 4.

²⁹⁶ See ILO (n141 *supra*) art 3(a).

²⁹⁷ Leibig "Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection?" 2005 3(6) *Northwestern University Journal of International Human Rights* 1 1.

2.8 Conclusion

The phenomenon of human trafficking has only recently been addressed as a global social problem making it a modern-day priority for human-rights organizations and international legislative bodies. However, prior to the conception and implementation of effective counter-trafficking strategies, a clear understanding of what the concept of human trafficking entails is needed. Therefore, the history of human trafficking, related phenomena, different forms of trafficking as well as the underlying socio-economic conditions that drive trafficking in human beings were discussed.

In this chapter, a historical background to the concept of human trafficking was given. Contemporary human trafficking has historical precursors. Ancient slavery, the trans-Atlantic slave trade, the “White Slave” trade and modern-day exploitation of men and women in slavery-like conditions show that human trafficking is constantly changing. Past treaties against exploitative practices provide important information for contemporary efforts to combat trafficking. Although British anti-slavery efforts and pressure from civil society contributed to the decline of the old slave trade, other contingent conditions played a role as well. This suggests that the success of contemporary counter-trafficking endeavours not only depends on domestic trafficking legislation and prosecution. A global approach is needed for an appropriate understanding of the phenomenon, taking into account various cultural, economic, and geographic differences.

This chapter furthermore illustrates that a comprehensive understanding of the concept “trafficking in persons” has for long been a controversial and unsettled issue at international level because of the lack of definite meaning and scope of this problem. Although a definition thereof was provided in the Palermo Protocol in 2000, there is still uncertainty about the concept. The elements contained in the definition of human trafficking fail to guarantee a clear distinction between the different types of trafficking. Most of the current data focuses mainly on trafficking in women for sexual exploitation to the detriment of men who are excluded from the discussion. Other forms of trafficking are also disregarded. Some label all sex workers as trafficked persons, believing that no one would willingly enter or stay in this occupation. Others do not distinguish between victims trafficked across international borders and those trafficked within a particular country.

Some argue that the definition of trafficking in persons must be broadened to encompass the complex problems associated with trafficking and the diverse situations of women and include in their analysis of trafficking mail-order brides, arranged marriages, sham adoptions, forced labour, and slavery-like practices.

Related phenomena of human trafficking were also considered. Trafficking is often simultaneously referred to as slavery, illegal migration or human smuggling. It is contended that human trafficking is a sub-set of slavery and also contains elements of illegal migration and human smuggling. The elements of trafficking relate to slavery, diverging only in terms of ownership in slavery and control in trafficking.

CHAPTER 3

CAUSES OF HUMAN TRAFFICKING

3.1 Introduction

Current legal responses to the problem of human trafficking often reflect a deep reluctance to address the socio-economic root causes of the problem. Because trafficking is perceived as an act (or series of acts) of violence, most responses focus predominantly on prosecuting traffickers, and to a lesser extent, on protecting trafficked persons.¹ However, human trafficking is a multi-dimensional social phenomenon perpetuated by socio-economic challenges as well as a demand for the exploitative use of individuals.² The fact that most victims are trafficked from poor to more affluent countries has led researchers to focus almost exclusively on the role of poverty in the trafficking business.³ This makes sense because the lack of economic opportunities most often provides the initial impetus for prospective victims to fall prey to human traffickers. However, in order for human traffickers to continue operations, a socio-legal environment conducive to the trafficking trade and related vice industry is required. Consequently, all aspects contributing to the vulnerability of people to trafficking recruitment must be examined.

The primary factors that facilitate trafficking in persons are extremely complex and inter-connected but can be categorised into two major groups – “push” factors and “pull” factors.⁴ Push factors intensify the vulnerability of disadvantaged or marginalised social groups to trafficking, whereas pull factors create the demand for particular forms of labour.⁵ Push factors are conditions conducive to trafficking which fall in the broader

¹ Chuang —“Beyond a Snapshot: Preventing Human Trafficking in the Global Economy” 2006 13(1) *Indiana Journal of Global Legal Studies* 137 137.

² Bermudez —“No Experience Necessary”: *The Internal Trafficking of Persons in South Africa* (2008) 12.

³ See eg Dave-Odigie —“Human Trafficking Trends in Nigeria and Strategies for Combating the Crime” 2008 1(1) *Peace Studies Journal* 63 63-67; Simkhada “Life Histories and Survival Strategies amongst Sexually Trafficked Girls in Nepal” 2008 22(3) *Children & Society* 235-248; Solla *Slavery and Human Trafficking: International Law and the Role of the World Bank* (2009) 1-69.

⁴ UNODC *Measures to Combat Trafficking in Human Beings in Benin, Nigeria and Togo* (2006) 25. See also Delpont, Koen & Mackay *Human Trafficking in South Africa: Root Causes and Recommendations* (2007) 37.

⁵ James & Adler —“Trafficking of Young Women” in Arvanitakis (ed) *Highly Affected Rarely Considered: The International Youth Parliament Commission Report on the Impacts of Globalisation on Young People* (2003) 74.

context, for example, the economic impact of globalization.⁶ These factors drive people to leave a region in search of a better life somewhere else.⁷ They include economic poverty, unemployment, underdevelopment of countries of origin, armed conflict, the marginalization of women, escape from war and humanitarian crises, corruption in the public or private spheres, domestic or community violence, natural disasters and the involvement of organised crime groups or networks.⁸ Defective immigration policies and flawed law enforcement mechanisms are also contributors.⁹ Traditions such as the placement of children¹⁰ away from their homes, a culture of early marriage,¹¹ the breakdown of family and social structures and absence of symbols that protect human dignity in traditional societies,¹² lack of education and peer pressure¹³ are of equal impact. The lack of birth registration facilitates the exploitation of children without a legal identity,¹⁴ and the impact of the HIV/AIDS pandemic produces its own legacy of widows or orphan-headed households.¹⁵ The list is not exhaustive.

Under pull factors, the demand for cheap manual labour and the high demand for paid sex in destination countries,¹⁶ globalisation, improved communications systems, improved transport networks by air, land and sea and expanding global tourism, the business of high profits and low risks, parents offering or selling their children for financial advantage,¹⁷ together with the lack of information on the risks involved¹⁸ are the root causes of trafficking in persons.

Another classification identifies three key clusters of factors contributing to trafficking in persons.¹⁹ The first cluster relates to socio-cultural factors such as the social

⁶ See Sassen –Women’s Burden: Counter-Geographies of Globalization and the Feminization of Survival” 2002 71 *Nordic Journal of International Law* 255 255- 257.

⁷ Sassen (n6 *supra*) 256.

⁸ UNODC (n4 *supra*) 25. See also US Dept of State *Trafficking in Persons Report 2006* (2006) 35.

⁹ *Ibid.*

¹⁰ Truong *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management* (2006) 71.

¹¹ Katerere –Human Traffickers Thrive in Mozambique” *The Citizen* 27 Mar 2007 <http://www.citizen.co.za/index/article.aspx?pDesc=35379,1,22> (accessed 2012-12-27).

¹² Hosken –Human Trafficking –A Huge Problem’ in South Africa” *Pretoria News* 7 Mar 2006 <http://www.iol.co.za> (accessed 2012-12-21).

¹³ *Ibid.*

¹⁴ UNICEF *Combating Child Trafficking: Handbook for Parliamentarians* (2005) 18.

¹⁵ Martens, Pieczkowski & Van Vuuren-Smyth *Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa* 3ed (2003) 15.

¹⁶ UNODC (n4 *supra*) 28; US Dept of State *Trafficking in Persons Report 2006* (n8 *supra*) 17.

¹⁷ Pharoah *Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa* (2006) 30.

¹⁸ Pharoah (n17 *supra*) 41.

¹⁹ Truong & Angeles *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children* (2005) 11.

acceptability of putting children to work, illiteracy, low education levels and preparation for marriage. The second comprises economic factors such as the imbalance between rural and urban wealth levels and a desire to escape poverty. The last considers juridical and political factors such as absence of legislation; ignorance of parents and trafficked persons of their rights under the law and open borders. Similar to the previous categorization, this classification also refers to the root causes of human trafficking.

Although similar in all regions and countries, the root causes of trafficking may also be different depending on the conditions that prevail in a particular region. For instance the prevalence of HIV and AIDS within the Southern African region that renders women and girls vulnerable to trafficking does not exist to the same extent in Western Europe.²⁰ In the following paragraphs, the root causes as well as the factors that sustain human trafficking will be investigated. Understanding the reasons why people become involved in trafficking is of the utmost importance for governments if they are to develop effective legislation and policies to combat it.

3.2 Poverty and unemployment

Almost half the world — over three billion people — live on an income of less than \$2.50 a day.²¹ According to UNICEF, 22 000 children die each day due to poverty.²² Not surprisingly, poverty is usually ranked first on any list of trafficking vulnerability factors in all African countries. Poverty is multi-dimensional and cannot be reduced to a single definition, but it is generally understood to describe an economic condition of lacking both money and basic necessities necessary to live successfully, such as food, water, education, healthcare, and shelter. The causes of poverty are numerous and interrelated, ranging from personal factors such a lack of individual responsibility, to external factors for instance war, famine, drought, over-fishing, poor crop yields, unemployment, overpopulation, inadequate education, bad government policies,

²⁰ Kelly *Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe* (2002) 23-24. Kelly does not allude to the disease as one of the principal root causes of trafficking in women and children in Europe.

²¹ Shah —“Poverty Facts and Stats” <http://www.globalissues.org/article/26/poverty-facts-and-stats> (accessed 2012-12-27).

²² Shah —“Today, Over 22,000 Children Died Around the World” <http://www.globalissues.org/article/1715/today-over-22000-children-died-around-the-world> (accessed 2012-12-27). (Note that the statistics cited use children as those under the age of 5. If it was say 6, or 7, the numbers would be even higher).

exploitation and many more. The effect of poverty is that people are desperate to survive or to provide for their families. It is this despair that human traffickers prey on.

The potential for trafficking in Sub-Saharan Africa, where large percentages of people live below the poverty line, is immense. There is consensus amongst most economic and political analysts that approximately 40% of South Africans are living in poverty – with the poorest (15%) desperately struggling to survive. This means that approximately 18 million out of 45 million people do not have the benefit of livelihood basics.²³ In 2010 South Africa ranked 110th out of 169 comparable countries on the United Nations Development Programme's (UNDP) Human Development Index with almost 26% living on \$1.25 a day.²⁴ The CIA estimated in 2000 that 50% of the South African population live below the poverty line.²⁵ This situation has not improved much. Research indicates that 47.1% of South Africa's population consumed less than the "lower-bound" poverty line proposed by Statistics South Africa in 2007 – which means 47.1% of the population did not have R322 per month (in 2000 prices) for essential food and non-food items.²⁶

The poverty rates of South Africa's nine provinces differ significantly, as do those of the urban and rural areas of the country. In 2005/06 the poverty rates ranged from 24.9% in Gauteng and 28.8% in the Western Cape to 57.6% in the Eastern Cape and 64.6% in Limpopo. The three provinces with the highest poverty rates (KwaZulu-Natal, the Eastern Cape and Limpopo) are also relatively populous – they housed 47.4% of the South African population. It should come as no surprise then that fully 60.1% of poor individuals lived in these three provinces. The incidence of poverty, however, was much higher in the rural areas of South Africa – 59.3% of poor individuals were rural

²³ Landman *Breaking the Grip of Poverty and Inequality in South Africa 2004-2014. Current Trends, Issues and Future Policy Options* (2003) 1.

²⁴ The Human Development Index (HDI) is a summary measure of human development. It measures the average achievements in a country in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living. Data availability determines HDI country coverage. To enable cross-country comparisons, the HDI is, to the extent possible, calculated based on data from leading international data agencies and other credible data sources available at the time of writing. See UNDP *Composite Indices - HDI and Beyond* (Human Development Reports) <http://hdr.undp.org/en/statistihdr.undp.org/en/statistics/indices/cs/indices/> (accessed 2012-12-27).

²⁵ CIA (Central Intelligence Agency) *The World Fact Book* <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> (accessed 2012-12-27).

²⁶ Armstrong, Lekezwa & Siebrits *Poverty in South Africa: A Profile Based on Recent Household Surveys* (2008) 8. University of Stellenbosch's Dept of Economics analyzed the data of 2 surveys conducted by Statistics South Africa – the Income and Expenditure Survey of Households (IES) 2005/06 and the General Household Survey 2006.

dwellers despite the fact that the rural areas housed well below one-half of the South African population.

Female-headed households are the poorest of the poor. Over 53% fall below the poverty line.²⁷ There are at least four factors at play here: female-headed households are more likely to be in the rural areas where poverty is concentrated, female-headed households tend to have fewer adults of working age, female unemployment rates are higher and the wage gap between male and female persists.²⁸ The estimated earned income in South Africa for females is US\$6.9 per day and for males US\$15.5 as calculated by the purchasing power parity (PPP)²⁹ method. The difference in poverty rates between male-headed households and female-headed households in South Africa widened during the post-apartheid period³⁰ while the percentage of households that were female-headed increased significantly during the post-apartheid period.³¹ This may affect the wellbeing and human security of children significantly and often may lead to situations of trafficking. Poverty is exacerbated among women due to their lack of access to resources such as land and capital and also because women's participation in the domestic labour force is often relegated to the informal sector.

Driven by poverty, the demand for employment and secure livelihood options are important contributors to trafficking vulnerability. The shortage of decent income-earning opportunities among people in South Africa is closely linked with poverty as a root cause of trafficking. The Labour Force Survey estimates unemployment among 14-year-olds to 24-year-olds to be 50% - almost double the general unemployment rate, which in 2010 has increased to 25.3%. There was an annual decrease of 1.2% (158 000) in employment, an increase of 3.7% (155 000) in the number of unemployed persons³² and an increase of 3.6% (514 000) in the number of persons who are not

²⁷ These figures are based on the PSLSD data as the 1995 OHS data did not make a distinction between *de facto* and *de jure* household heads. Woolard *An Overview of Poverty and Inequality in South Africa* (2002) 3.

²⁸ Goebel, Dodson & Hill —Urban Advantage or Urban Penalty? A Case Study of Female-headed Households in a South African City" 2010 16(3) *Health Place* 573 573.

²⁹ Purchasing-power parity figures are calculated by assuming that \$1 has the same purchasing power in the domestic economy as it has in the United States. See UNDP —Gender-related Development Index" http://hdr.undp.org/en/media/HDR_20072008_GDI.pdf (accessed 2012-12-27).

³⁰ Posel & Rogan *Gendered Trends in Poverty in the Post-Apartheid Period, 1997-2006* (2009) 3.

³¹ Bhorat, Naidoo & Van der Westhuizen *Shifts in Non-Income Welfare in South Africa: 1993-2004* (2006) 57.

³² Unemployed persons are those (aged 15–64 yrs) who a) were not employed in the reference week and; b) actively looked for work or tried to start a business in the 4 weeks preceding the survey interview and; c) were available for work, ie would have been able to start work or a business in the reference week or; d) had not actively looked for work in the past 4 weeks but had a job or

economically active – 379 000 of which are discouraged work-seekers.³³ The comparisons show that KwaZulu-Natal, Western Cape and Limpopo were the hardest-hit provinces in terms of job losses, with KwaZulu-Natal recording 125 000 job losses, Western Cape recording 36 000 Limpopo recording 31 000 job losses out of the 158 000 job losses. The danger of high unemployment, especially long-term unemployment, is that people are often forced into exploitative situations.

The limited better-paid job market in South Africa is out of the reach of many people, especially those from the rural areas, because of their lack of skills and education. When they come from rural communities to find job in the cities, they accept domestic work or any kind of low paid labour job in the informal sector such as factories. These workplaces may function as transit points for girls to be trafficked. The low-paid and exploitative working conditions provide an opportunity for traffickers to deceive these persons to agree to leave such a low-paid job for a better job in a new place.

The unstable economic situation and lack of employment opportunities in the Southern African region may force many to pursue insecure and unreliable employment in South Africa and other countries. People with meagre or no economic resources may be lured by the dream of a better livelihood and may easily be trapped by traffickers. Unaware of the possible consequences, such people will often consent to travel via undocumented migration routes to affluent cities and countries and are thus caught up in domestic and international human trafficking.

3.3 Illiteracy and ignorance

Low levels of literacy, lack of legal knowledge and a derisory worldview tend to increase individuals' vulnerability to trafficking and to reduce the likelihood of them benefiting from measures taken to prevent the practice. Nearly a billion people entered the 21st century unable to read a book or sign their names.³⁴ Education gives individuals the ability to read, write, and understand the nature of any event or occurrence. It is the strongest weapon to inform people of the dangers inherent in trafficking.

business to start at a definite date in the future and were available. See Statistics South Africa *Quarterly Labour Force Survey Quarter 3, 2010* (2010) 18.

³³ Statistics South Africa (n32 *supra*) 7.

³⁴ UNICEF *The State of the World's Children 1999* <http://www.unicef.org/sowc99/index.html> (accessed 2012-12-27).

As elaborated on earlier, unemployment in rural communities prompts many people to seek better job opportunities in urban areas although lacking information and awareness of reliable sources of employment. Their lack of education curtails their ability to carefully analyse the reality of any false promises and deception. Even people with little education and access to various types of media are easily deceived under the pretext of a better life. Traffickers draw on people's desires for alternatives to rural life and to expanding their horizons.

In most countries where human trafficking is rife and figures available, illiteracy is a common cause of trafficking. Statistics generally show that fewer girls are enrolled at school and most girls will drop out from primary school before the completion of the primary grade.³⁵ Except for pervasive and chronic poverty which underpins the reasons for learners' not completing school, traditional beliefs that values the education of boys rather than girls also play an important role. Discriminatory cultural and social practices such as the above can be alleviated through education. Traditional beliefs regarding witchcraft and voodoo have a stronghold in the local population especially in Africa. The superstition surrounding these beliefs becomes a powerful device that traffickers exploit in order to convince their victims that something terrible would happen to them if they dare to resist.

While the world has moved from minimum literacy to the cyberspace-based education, 14% of the South African population is illiterate, (completely unable to read and write). Within that population, the discrepancy between male and female literacy rate is negligible.³⁶ Statistics show that the overall female literacy rate is 85.7% compared to that of 87% in case of male. The majority of children in South Africa are completing primary schooling and most are entering secondary school. Entry into secondary school level is characterised by a "revolving door syndrome" – young people are able to get there, but are circulating in the system, unable to make it through to Grade 12. This is qualified by the Community Household Survey that shows overall improvement in the percentages of the population with no schooling and those with higher education, but very slow progress in the proportion attaining matriculation. Enrolment starts to decline sharply at the end of compulsory schooling at grade 9, or at a stage when

³⁵ See Gray & Wouters *Country Profile on Women in Development/Gender and Development in Cambodia* (1999) 13.

³⁶ CIA (n25 *supra*). This is the estimate for 2003.

scholars are 15 years of age. As such, the highest drop-out rates are experienced from age 16 to 18 years, roughly corresponding to grades 10 to 12.³⁷ Data on the reasons for drop-out in South Africa are limited. Available information suggests that poverty remains the single largest contributor to the dropout rate. School children who drop out of school with limited education stand the risk of being unemployed, which again heightens their vulnerability to recruitment for trafficking. Regrettably, even those with Grade 10 battle to find employment.

3.4 Gender inequality

Gender affects all aspects of the trafficking process - from the factors that contribute to trafficking to the nature of the laws and policies developed to deal with the phenomenon.³⁸ The term gender describes those characteristics of women and men that are socially constructed rather than biologically defined. It is learned attributes of behaviour, roles and activities that constitute gender identity and define gender roles.³⁹ Gender roles are reinforced by the gender values, norms and stereotypes that exist in each society.

More women than men are trafficked.⁴⁰ This gender disparity is often attributed to the “feminization of poverty” arising from the failure of existing societal and cultural structures to provide equal and just educational and employment opportunities for women.⁴¹ Although the causes of trafficking relate to both men and women, women are faced with an additional vulnerability that stems from social discriminatory practices towards women and girls.⁴² Gender-based discrimination and gender disparity, resulting in inequalities in health care, workload, labour market,⁴³ education and

³⁷ Panday & Arends —“School Drop-Outs” 2008 6(1) *HSRC Review* 4 4-5.

³⁸ Vichuta *Gender, Human Trafficking and the Criminal Justice System in Cambodia* (2003) 1.

³⁹ From a working definition developed by the World Health Organisation (WHO) *Women and Health: Mainstreaming the Gender Perspective into the Health Sector* (Report of the Expert Group Meeting Tunis Tunisia 28 Sept – 2 Oct 1998) 5.

⁴⁰ No studies have as yet been done on the situation of trafficked men, so information is scarce on this critical issue.

⁴¹ Coomaraswamy *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences on Integration of the Human Rights of Women and the Gender Perspective* UN Doc E/CN 4/2000/68 (2000) 58.

⁴² There is a surplus of literature addressing the universal factors that render women vulnerable to trafficking. Regional causes may differ according to customs and circumstances. See eg James & Adler (n5 *supra*) 76.

⁴³ Women earn substantially less than men. One of the reasons for this labour market segregation is their grouping into different occupations, linked to stereotyped ideas about men and women’s roles and weaknesses, ie men work in construction etc whereas women work in the service industries, such as domestic work etc.

decision-making power undermines the resilience of women and render them vulnerable to exploitation and trafficking.

The patriarchal system prevalent in many countries results in the unequal status of women. These social systems and gender stereotypes reinforce women's lower status, leading to dependency, feelings of helplessness and low levels of self-esteem in females and make them more vulnerable to any exploitative situation. As such, discrimination⁴⁴ against girls and women is perpetuated and institutionalized in the family and community. A woman's position is usually one of subordination and dependency. Women are characterized in terms of their relationships to men – as daughters, wives or mothers – and these roles are what ultimately determine their position in the family, which is never equal to that of male family members.

Unequal gender relations leave females with little choice or decision-making power regarding education, occupation and marriage. In the case of girls, preference is given to daughters being trained in household activities like cooking, cleaning and rearing of children, whereas the sons are sent to school. Girls are considered to form part of their future husbands' family, and investing in them for education and health is regarded as an unproductive investment. Many girls internalize their subordinated status in society as an unchangeable social reality and are eager to leave their villages because they do not see their future there. They become easy targets for traffickers who manipulate this situation with promises of a better life. Once trafficked for sexual exploitation, these women have no power at all, not even to negotiate safer sex practices, which increase their risk of HIV infection, early pregnancy and unsafe abortion.⁴⁵

Additionally, violence against women and children heightens their vulnerability.⁴⁶ Violence against women is on the increase in South Africa,⁴⁷ but there is still a wide divergence between the number of actual incidents and the number reported to the police. The gap is wider in the case of sexual offences, mainly because the shame of public admission makes victims reluctant to report it and also because of long delays in

⁴⁴ Discrimination is any distinction, exclusion or preference based on sex, gender (or other classifiers in society, such as ethnicity, colour, religion or political opinion), which has the effect of nullifying or impairing equality of opportunity and treatment. See Haspels & Suriyasam *Promotion of Gender Equality in Action against Child Labour and Trafficking, A Practical Guide for Organizations* (2003) 5.

⁴⁵ McCabe *The Trafficking of Persons: National and International Responses* (2008) 29.

⁴⁶ Coomaraswamy (n41 *supra*) 58.

⁴⁷ Vetten —“Violence against Women in South Africa” in Buhlungu; Daniel; Southall & Lutchman (eds) *State of the Nation – South Africa 2007* (2007) 429.

bringing the guilty to book. In South Africa and also in other third-world countries, there is an increased demand in human trafficking for younger girls because of the myth that intercourse with a virgin can cure a man of sexually-transmitted diseases. The myth also exists that sex with a female child does not expose the man to sexually-transmitted infections, including HIV/AIDS.

Forced marriage is another form of culturally-sanctioned gender discrimination and a method of trafficking in women and girls. In many countries in Asia as well as in Africa, young girls are procured through forced marriage. In South Africa, the traditional custom of *ukuthwala* (literally, 'to be carried') still exists where Xhosa girls as young as fourteen are being abducted and forced into marriages with elderly men in exchange for payment or *lobola* (bride price).⁴⁸ In certain African countries, forced marriage comes by way of exchanging women as a way of settling tribal disputes. In Afghanistan, women and girls are in some cases used as tradeable objects in the settlement of family disputes and are also internally trafficked to settle other disputes and debts. It is said that "where local custom, sometimes supported by law, treats women so explicitly as property, their commodification through trafficking is facilitated."⁴⁹

The legal frameworks in many countries reflect the gender biases prevalent in those societies. In the absence of laws that ensure rights of inheritance and their ownership and control over productive resources and assets, many women are economically dependent on their husbands and limited in their life and livelihood choices. However, with the breakdown of traditional social structures, women are rendered vulnerable by the lack of economic independence and lack of the same education and employment opportunities as their male counterparts, in ways that could not have occurred in the traditional context.

Without laws, policies or social customs that facilitate land ownership or credit regulation for women, they are forced to migrate in search of economic opportunities, thus increasing their vulnerability to trafficking. As yet, little research has been conducted on the gender-related dimensions of trafficking migration motives and

⁴⁸ In most cases the men are between 55 and 70 yrs old, widowed and HIV-positive and these men believe that sex with a virgin would cure them. See Prince "Parents sell Girls as Child Brides" *Sunday Times* 31 May 2009 1-2.

⁴⁹ Kelly "You Can Find Anything You Want": A Critical Reflection on Research on Trafficking in Persons within and into Europe" 2005 43(1/2) *International Migration* 235 238.

patterns. It can be said that the patterns of women's migration differ from those of men. Men and women have different reasons for leaving, and their means of travel and their destination are not always the same. While women migrate in response to economic hardship, they also migrate to flee gender-based repression.⁵⁰ These women are often less educated, socially isolated and in unfamiliar surroundings, far from the social safety-nets of family and community and make easy prey for traffickers.

3.5 Social marginalisation due to ethnicity, religion, race or caste

Closely linked to gender inequality and poverty, is social marginalisation due to ethnicity, religion, race or caste. Although very prominent in the countries of South Asia, social marginalisation is universally found. Poverty in South Asia is characterized by social exclusion based on gender, religion, ethnicity and caste. These characteristics are reinforced by tradition and institutionalized in areas such as politics, religion, education, health and access to development resources.

Certain cultural and religious practices such as *devadasi* and *devaki* in India and Nepal or the comparable *trokosi*⁵¹ in Ghana illustrate how trafficking can become institutionalised by a society. When a family suffers a misfortune, the family becomes liable to give a virgin girl-child (a member of their extended family) to a priest (or his shrine) to appease the angry gods. As a *trokosi*, the girl has a life-long bondage to the local shrine priest, as an unpaid servant or sex slave. As many as 35,000 virgin girls as young as eight in Ghana, Benin, Togo and Nigeria have been given to 'fetish priests' who treat them like serfs and often rape them."⁵² The priest may gather a "harem" of girls who are frequently punished by whipping or denial of food for offences such as refusal of sex, leaving the shrine without permission, running away and lateness.⁵³ Any children born to *trokosi* slaves are also slaves of the priest and are known as *trokosiviwo*. With the death of the priest, his *trokosi* slaves and *trokosiviwo* children are inherited by the priest next in line; as a consequence *trokosi* is perpetuated. Although

⁵⁰ Coomaraswamy (n41 *supra*) note 1, 54-60.

⁵¹ *Trokosi* means "slave of the gods" or "slave of a deity". See Wiafe "Slaves of Tradition: Fetish Priests Are Targets of Campaign in Ghana" 2000 328 *New Internationalist* 19 19-20; Bilyeu "Trokosi - The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs Human Rights" 1999 9 *Indiana International & Comparative Law Review* 457 457.

⁵² StopDemand "In the Name of Culture and Tradition" <http://www.stopdemand.org/wa.asp?idWebPage=8109&idDetails=140> (accessed 2012-12-27).

⁵³ Pearson *Global Human Rights and Trafficking in Persons: A Handbook* (2000) 39.

the practice was declared an illegal practice in Ghana in 1998,⁵⁴ it is still maintained by traditionalists and thousands of girls and women remain *trokosi*, *devadasi* and *devaki* today.

Moreover, in India many states have a semi-feudal politico-economic structure, with rampant discrimination along caste lines. Human Rights Watch has estimated that 40 million people, including fifteen million children, work as bonded labourers in India. The report notes that the majority of bonded labourers are Dalits⁵⁵ and that bondage is passed on from one generation to the next.⁵⁶ More than 90% of all women and girls trafficked or engaged in commercial sex activity in the Indian state of Andhra Pradesh belong to impoverished families, scheduled castes, scheduled tribes and other “backward” castes.⁵⁷

Conversely, while caste, religious and ethnic segregation remain a political and social problem in these regions, there is no evidence to indicate that women and children from any particular caste, race, ethnic or religious group are disproportionately trafficked. However, caste and ethnicity do have an impact on education and literacy levels and traffickers tend to target poorly educated or illiterate victims. These marginalized communities are thus most vulnerable to trafficking.

3.6 Family instability

Very little attention has been given to family and community factors that contribute to the vulnerability of girls and women being trafficked. Although family stability (or contrarily, family dysfunction) is widely accepted as a primary factor in a child’s social resilience and protection (or contrarily, her social problems), absence or lack of family integrity as a vulnerability factor for trafficking has been considered to a lesser extent. Recently, some studies have shown a link between the incidence of trafficking or entry

⁵⁴ *Ibid.* The Ghanaian Parliament passed the 1996 Criminal Code Amendment Bill on 12 Jun 1998. The Amendment Bill adds s 314A to the 1960 Criminal Code and criminalizes all customary or ritual enslavement. It provides that (1) Whoever (a) sends to or receives at any place any person; or (b) participated in or is concerned in any ritual or customary activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary servitude or any form of forced labour related to customary ritual commits an offence and shall be liable on conviction to imprisonment for a term not less than three years.”

⁵⁵ “Dalit” is the term used for “scheduled castes” - those at the bottom of the Hindu caste hierarchy in India.

⁵⁶ US Dept of State *Country Reports on Human Rights Practices for 1999* (2000) para C1.

⁵⁷ Shakti Vahini *Trafficking in India Report 2004* (2004) 15.

into sex work and family alcoholism, physical or sexual abuse, the family's alienation from the local community, the death of one or more parents or the presence of step-parents or second wives. It is widely accepted that "[t]roubled families are the breeding ground for sex workers. And troubled families in poor, marginal and crisis ridden communities generate the most reliable source of cheap girls".⁵⁸

3.7 Vulnerabilities of children, especially street children

Children, especially those who migrate, run away from home or are abandoned, are in the greatest danger of being trafficked. Even when they migrate with their parents, the pressures of urban life on new migrants can rupture family ties, causing them to end up fending for themselves on the streets. Most children trafficked had been in search of jobs to support themselves and/or their family.⁵⁹ Family breakdowns such as the death or divorce of their parents as well as economic difficulties are some of the triggers. There are few facilities available to serve as shelters or temporary homes for orphaned or abandoned children and persistent problems with the quality of care provided, especially at state-administered foster care systems where a child may end up being institutionalized for years. Children without birth certificates are especially vulnerable to traffickers. According to UNICEF, a birth certificate not only represents recognition of a child's existence and hence his or status in law, but also ensures access to vaccination, treatment at health centres and enrolment in school.

Many of the orphaned or abandoned children eventually land up on the street. Street children are found in major cities all over the world. However, their exact numbers are unknown. Many street children form a floating population, on the move from one place to another. These children are especially vulnerable to sexual exploitation, drug abuse or other crimes. Some are sold to organized criminal groups, which mutilate them before putting them to work as beggars, and others end up as sex workers at popular tourist destinations. In some countries, the lack of willing recruits for guerrilla groups results in forced abductions of especially street children. They are easy targets, because their disappearance is not likely to be noticed or reported by anyone.

⁵⁸ Brown *Sex Slaves: The Trafficking of Women in Asia* (2000) 6.

⁵⁹ Goździak — "Challenges, Dilemmas, and Opportunities in Studying Trafficked Children" 2008 81(4) *Anthropological Quarterly* 903 904: — "The cohort of trafficked children in our study ranged in age from 2 to 17 years, with the vast majority (83.3%) of the children falling between 14 and 17 years of age when they were trafficked. Approximately two-thirds of all the children concentrated in the 16 to 17 year age range when trafficked. Not surprisingly, the unaccompanied children were older than those who were trafficked with other family members. The majority of the children were girls."

Traditional customs such as child fostering or child circulation is a long-standing cultural practice in Africa rooted in kinship structures and traditions.⁶⁰ Children are not sent out only in the event of crisis. The sending of children is practiced by both stable and unstable families, married and single mothers.⁶¹ The traditional causes of sending children to live with other relatives and friends vary widely. They include illness, death, divorce, the parents' separation, mutual help among family members, socialization and education and the strengthening of family ties (by blood or by marriage).⁶² For the societies involved, child fostering is a characteristic of family systems, fitting in with patterns of family solidarity and the system of rights and obligations.⁶³ However, while researchers extol the benefits of child fostering, some child advocates point out that the West-African tradition of "placing" children to live with relatives and to work in better-off households has created a regional market for child labour and encourages child trafficking.⁶⁴

While some blame child fostering as a root cause of child trafficking, others call for the revitalization of traditional fostering systems.⁶⁵ The dissolution of the traditional clan-based foster care system due to colonial rule, urbanization, large-scale farming, mining and globalization has contributed to the increase in the number of street and abandoned children. Some researchers claim that the buffering capacity of fosterage depends on the prevalence of the fosterage; that the fosterage opportunities be distributed according to need (low income to higher income) and that fosterage must benefit the foster parents.⁶⁶ Many children in South Africa are placed with willing relatives - mainly grandmothers who serve as a safety net for children whose parents (mainly single mothers) - cannot not care for them. Problems emerge when the grandmother can no longer provide for the child because of old age or illness, and sends the child to another relative who feels forced to care for the child. Such a situation can quickly degenerate into abuse, exploitation and trafficking.

⁶⁰ Goździak (n59 *supra*). Also see Bledsoe —"Success without Struggle": Social Mobility and Hardship for Foster Children in Sierra Leone" 1990 (25)1 *Man New Series* 70-73; Goody *Parenthood and Social Reproduction: Fostering and Occupational Roles in West Africa* (2007) 37; Schildkraut —"The Fostering of Children in Urban Ghana: Problems of Ethnographic Analysis in a Multi-Cultural Context" 1973 2(1) *Urban Anthropology* 48-49.

⁶¹ Isiugo-Abari —"Child-Fostering in West Africa" 1985 11(1) *Population and Development Review* 53-56.

⁶² Isiugo-Abari (n61 *supra*) 57-58.

⁶³ Pilon *Foster Care and Schooling in West Africa: The State of Knowledge* (2003) 6.

⁶⁴ Dottridge —"Visible Girl" 2002 366(8309) *Economist* 38-39.

⁶⁵ Umbima —"Regulating Foster Care Services: The Kenyan Situation" 1991 70(2) *Child Welfare* 169-170.

⁶⁶ Eloundou-Enyegue & Shapiro *Buffering Inequalities: The Safety Net of Extended Families in Cameroon* (2004) 2-3.

3.8 HIV/AIDS effects

HIV/AIDS threatens human security and human development in all countries. In a report by the World Health Organization (WHO), the HIV/AIDS department estimates that 33.4 million people worldwide are currently living with the HIV/AIDS virus. Of these, 22.4 million people are from the sub-Saharan region.⁶⁷ AIDS is still the world's leading infectious disease killer with two million deaths worldwide in 2008. Infection rates and the presence of high-risk behaviour are both growing.

HIV/AIDS and human trafficking share many causal and consequential factors, and require similar rights-based responses with sufficient focus on underlying development factors. Both affect vulnerable and disempowered populations often associated with poverty and gender inequality. These populations are inflicted with low literacy levels and unstable, abusive environments. Both are associated with unsafe migration⁶⁸ and sex work. Finally, both involve issues of stigmatisation and discrimination against affected or infected persons. Like trafficking, stigma and discrimination associated with HIV/AIDS are often gender-related. Trafficked women, who are further burdened with HIV/AIDS and the accompanying stigmatisation, discriminatory treatment, segregation and abuse, carry a double affliction.

Both trafficking and HIV/AIDS are increasingly seen in people aged between fifteen and 24 years. There are noted shifts in the spread of the HIV/AIDS epidemic towards girls and young people as almost half of all new HIV infections in the world are among people younger than 25 years old.⁶⁹ Young people remain the most vulnerable group to HIV infection predominantly through unprotected sexual intercourse due to many factors, including lack of information, education, societal influences and inability to access healthcare services.⁷⁰ The factors that increase a woman's vulnerability to HIV/AIDS are also the factors that increase her risk of being trafficked.

⁶⁷ AVERT "Worldwide HIV and AIDS Statistics" <http://www.avert.org/worldstats.htm> (accessed 2012-12-27).

⁶⁸ Rural-to-urban and intrastate migration of especially male populations affect the rate of HIV/AIDS infection.

⁶⁹ Estimates show that more than 7.4 persons become infected with HIV daily, 3.3 of who are young people. Globally, 5.4 million young people are living with HIV. See UNAIDS "Aids Info" <http://www.unaids.org/en/dataanalysis/datatools/aidsinfo/> (accessed 2012-12-27).

⁷⁰ Young women of prime reproductive age under the age of 25 are at an even greater risk for HIV infection and comprise 57.4% of infected youth. Many of them are less than 17 yrs old. See UNAIDS "Report on the Global AIDS Epidemic" <http://web.worldbank.org/> (accessed 2012-12-27).

The linked vulnerabilities of women and girls in the region to trafficking and HIV demand urgent attention.⁷¹ Studies show that brothel-based sex workers are most likely to become infected with HIV in the first six months of work, during which time they have the least bargaining power to counter male resistance to condom use and are forced to service more clients. The increasing probability of HIV/AIDS and sexually transmitted diseases among the sex workers has created a demand for younger girls from rural areas where it is believed these diseases have not manifested. The superstitious belief that any person infected with AIDS or venereal diseases can be cured by sexual intercourse with a virgin, has put a high price tag on virgin girls.⁷² This has encouraged traffickers to explore many new areas to find young girls, increasing the number of girl children trafficked into brothels.

South Africa is affected by both HIV/AIDS and human trafficking. Both issues are addressed through government policy and through multiple interventions (awareness-raising and advocacy initiatives) by local non-governmental organizations, donor partners and the government.⁷³ However, there is little cooperation between the anti-trafficking advocates and the HIV/AIDS community to address the two issues concurrently. This is largely due to a lack of conceptual clarity regarding the linkage between HIV/AIDS and human trafficking, compounded by the lack of credible data.

3.9 Conflicts, crises and natural calamities

Conflicts, crises and natural calamities lead to a rise in unsafe migration and human trafficking. Conditions such as violence, human rights violations, environmental degradation, drought, floods, loss of land and property, ethnic conflict, armed militia activity, political oppression and unrest exacerbate pre-existing vulnerabilities of populations already at risk. These are often poverty-stricken groups who have already experienced discrimination because of their ethnicity, religion, class or gender that have left them living in fragile physical environments. The principal victims of these disasters live in conflict areas in substandard housing, on unstable ground or in flood

⁷¹ Wiesen-Antin *Human Trafficking and HIV/AIDS* (2007) 5.

⁷² See Human Rights Watch *The Human Rights Watch Global Report on Women's Human Rights* (1998) 197; see generally Humphrey *Child Trafficking: Driven by Desire* (2010) 360-361.

⁷³ Adepoju "Review of Research and Data on Human Trafficking in sub-Saharan Africa" 2005 43(1/2) *International Migration* 75 75-98; Richter "The Impact of HIV/AIDS on the Development of Children" in Pharoah *A Generation at Risk? HIV/AIDS, Vulnerable Children and Security in Southern Africa* (2004) 13, 26; Coleman *The Overlap between Human Trafficking and HIV/AIDS in Africa* (2011) <http://thesojournerproject.wordpress.com/> (accessed 2012-12-27); Allais (ed) *Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa* (2010) 1.

plains. These internally displaced persons are forced to relocate, often *en masse*, to seek safety and to meet basic needs. Such communities have no skills or education; as such their capacity to secure sustainable livelihoods is reduced. They are generally without resources, official residence or government recognition. Their status makes them more susceptible to dangers such as trafficking. Many have lost property and other income-generating resources, leaving them vulnerable to depend on aid to survive. Additionally, many have lost their birth certificates (which are often the only documents recognizing their existence), making it easier for them to “disappear”.

An example of an environmental disaster leading to human trafficking is that of the December 2004 tsunami in South East Asia. The aftermath of the tsunami in affected countries saw sporadic reports of rape, sexual abuse, kidnapping and trafficking of orphans. In response, governments, international organizations and NGOs made the prevention of human trafficking, particularly child trafficking; an integral component of disaster-relief planning.⁷⁴ The impoverished nation of Haiti where child trafficking is already a problem, benefited from the heightened trafficking awareness after the January 2010 earthquake, when a group of Americans were arrested after attempting to take 33 children illegally out of Haiti.⁷⁵

Warred conflict is rife across Africa, where armed militias perpetuate kidnapping and trafficking through their direct involvement as well as by creating a general climate of insecurity. Indigenous and foreign armed militia groups, notably, the Democratic Forces for the Liberation of Rwanda (FDLR), the National Congress for the Defence of the People (CNDP), various local militia (Mai-Mai), and the Lord's Resistance Army (LRA), abduct and forcibly recruit men, women, and children to serve as labourers, porters, domestics, combatants, and in sexual servitude.⁷⁶ There is furthermore a close tie between the sex trade, human trafficking and the militarization⁷⁷ of countries across the world.⁷⁸

⁷⁴ Fletcher, Stover & Weinstein *After the Tsunami: Human Rights of Vulnerable Populations* (2005) 9-10.

⁷⁵ Katz -Baptist 'Human Trafficking' Update: Some Haitian Children Weren't Orphans" *CBS News* 1 Feb 2010 http://www.cbsnews.com/8301-504083_162-6162491-504083.html (accessed 2012-12-27).

⁷⁶ US Dept of State *Trafficking in Persons Report 2009* (2009) 20.

⁷⁷ Militarization is an act of assembling and putting into readiness for war or other emergency. Militarization suggests a society dominated by military values, ideology, and patterns of behaviour. This definition accounts not only for the role of the army itself but also the authoritarianism, oppression, and violence that become a routine part of state affairs. For a detailed discussion on militarization, see Enloe *Manoeuvres: The International Politics of Militarizing Women's Lives* (2000) 33.

⁷⁸ Enloe *The Morning After: Sexual Politics at the End of the Cold War* (1993) 153-156; Cheng *Transnational Desires: „Trafficked“ Filipinas in US Military Camp Towns in South Korea* (Unpublished DPhil dissertation Oxford 2002) 59.

Ironically, peacekeeping forces such as that of the UN is also a factor leading to the increase of human trafficking and sex workers. Before the arrival of 15,000 UN troops in Cambodia in 1991, for example, there were an estimated 1,000 prostitutes in the capital. Currently, no less than 55,000 women and children are sex slaves in Cambodia, 35% younger than eighteen years of age.⁷⁹ The human trade amplified as the demand for sexual services increased.

3.10 Unsafe migration

Unsafe migration is a situation in which people relocate in distress, unprepared, undocumented and uninformed about conditions in transit and at their intended destinations. These migrants are vulnerable to various forms of exploitation, of which trafficking is a main concern.

International migration is a significant source of foreign exchange for any country and of disposable income for migrant households. Some countries' national policies on external migration exclude many unskilled people, particularly women, from legal migration processes, obliging them to seek alternative livelihood options through illegal means.⁸⁰ They may be smuggled illegally, but they may also be duped by human traffickers posing as smugglers.

The expectations of migrants are generally mismatched with the reality of their experience at the place of destination. Countries such as South Africa have weak records of rights protection for undocumented migrants and trafficked persons. The conditions that offer profit to opportunistic traffickers are thus perpetuated. Currently, the migration policy in place in South Africa is under strain and needs a thorough overhaul.⁸¹ Much-needed amendments to the Immigration Act 2002 must be consideration by the national legislature. Appropriate policies should be adopted to address the adverse impact of unsafe migration while simultaneously promoting the benefits of safe migration.

⁷⁹ TEAM (Tolerance, Equality and Awareness Movement) —“Human Trafficking: Facts and Figures” <http://teamthemovement.com/educational-information/human-trafficking-facts-figures/> (accessed 2012-12-21).

⁸⁰ Fisher —“The Sex Slave Trade: Biological Imperatives, Cultural Trends, and The Coming Empowerment of Women” 2002 13 *Hastings Women’s Law Journal* 21 21-22.

⁸¹ For more information on the Immigration Act 2002 see *infra* Chap 7 para 7.3.2.6.

3.11 Open borders

Open and unprotected borders have allowed many criminal gangs to function freely, crossing the border of one country after committing crime in another country and enjoying the benefits derived from the territorial limits of law enforcement agencies. Porous borders have caused a great deal of social, economic, and security problems, and it is widely accepted that it facilitates easy human trafficking. Although South African borders have border controls, there are still many opportunities for human traffickers to accomplish their criminal activities. Checkpoints and security personnel are widely dispersed and few in number and geographical borders such as rivers are easily crossed. Trafficking routes are also fluid, and new routes continually replace old ones as traffickers seek to avoid detection. Many traffickers connive with police, border officials and politicians. Often, traffickers use marriage as a method to avoid any kind of harassment by police, since the police cannot prevent a husband from taking his wife across the border. Such factors make it difficult to maintain strict vigilance against human trafficking.

3.12 Absence of effective legislation and law enforcement

The absence of effective legislation and/or poor enforcement mechanisms combined with corruption and the breakdown of law-and-order structures, are some of the factors commonly cited as contributing to or accelerating the traffic in women and children in Africa. In particular, weak governance makes the poor more vulnerable to the risk of being trafficked.

A lack of government effort to combat human trafficking is likely to correlate highly with the severity of trafficking problems. The lack of political commitment and even state complicity is evident in their reluctance to implement the Palermo Protocol's policies and guidelines. No serious efforts have been made by certain member states to acknowledge the problem.

Hardly any of the countries in sub-Saharan Africa have comprehensive laws and policies on human trafficking. Existing legislation is negligible, focusing mainly on trafficking for sex work. Some countries' laws do not permit extraterritorial prosecutions. The lack of policies and institutional structures to address human

trafficking combined with corruption, are important facilitators of human trafficking. Women and children are reluctant to identify themselves as victims of trafficking fearing their captors, or being treated by the authorities as illegal immigrants.

3.13 Corruption

Countries that make the least effort to fight human trafficking also tend to be those with high levels of official corruption.⁸² Corruption impedes a nation's political will and effort to combat sex trafficking. Corrupt acts range from passivity (ignoring or tolerating), to actively participating in, or even organising sex trafficking. In many countries, local police officers frequent brothels as customers where trafficked victims are kept.⁸³ Visa and immigration officials receive free sexual services in exchange for overlooking fraudulent documents presented by human traffickers.⁸⁴

Official corruption is an important dynamic in sex trafficking activities,⁸⁵ if not amongst the most important contributors to human trafficking.⁸⁶ A study carried out in South-Eastern Europe linked corruption directly to human trafficking, and asserted that "trafficking cannot take place without the involvement of corrupt officials".⁸⁷ In Croatia, for example, corrupt officials use fraudulent tactics to coerce a trafficked person to facilitate her own exploitation. At the point where a woman has paid off her debt to her manager and she is allowed to return home, she is searched by borders guards (by previous arrangement with their exploiters). Whatever savings she has are confiscated, under the pretext that it is illegal to carry foreign currency into the country. This money is then split between the customs officers and the manager.⁸⁸ Another method consists of notifying the police as soon as the debt has been paid off, which results in the trafficked person's arrest and removal.⁸⁹

⁸² Zhang — Beyond the 'Natasha' story – A Review and Critique of Current Research on Sex Trafficking" 2009 10(3) *Global Crime* 178 192.

⁸³ Cockburn — "21st Century Slaves" *National Geographic Magazine* 1 Sept 2003
<http://ngm.nationalgeographic.com/ngm/0309/feature1> (accessed 2012-12-27).

⁸⁴ Agbu — "Corruption and Human Trafficking: The Nigerian Case" 2003 (14) *West Africa Review* 1 1.

⁸⁵ Zhang & Pineda — "Corruption as a Causal Factor in Human Trafficking" in Siegel & Nelen (eds) *Organized Crime: Culture, Markets and Policies* (2008) 45-46.

⁸⁶ Bales *Understanding Global Slavery: A Reader* (2005) 103.

⁸⁷ Programme against Corruption and Organised Crime in South-Eastern Europe (PACO) *Trafficking in Human Beings and Corruption* (2002) 9.

⁸⁸ Štulhofer & Raboteg-Šarić *Sex Trafficking in Croatia: An Assessment Study* (2002) 10.

⁸⁹ *Ibid.*

Correlations with regard to high flows for trafficking for sexual exploitation and regional reputations of corruption and organized criminal networks have been noted across the globe.⁹⁰ In many African countries, the police, political organisations and the judiciary are all considered by the public to be corrupt institutions. A high acquittal rate, and even in case of convictions, minimum sentencing patterns raise a serious doubt on the integrity of the police, the public prosecutor and judges who are responsible for handling cases of trafficking. In many towns and villages, traffickers are well-known people who regularly bribe the local police and politicians to avoid arrest.

3.14 Demand and supply

The argument has been put forward that human trafficking would not exist if there was not a ready market of customers for a trade in humans, whether for labour or sexual purposes.⁹¹ It is obvious that the supply would cease to exist unless there is a constant demand in the market and *vice versa*. Demand encourages supply to grow and as profit increases because of high demand, the different methods of supply will also grow. Some researchers credit male demand for driving sex trafficking patterns, stating that “in areas around the world where sex trafficking and prostitution were previously non-existent, abundant male demand but insufficient supply has resulted in an exploding commercial sex industry”.⁹² As evidence, examples such as the influx of American soldiers in Southeast Asia in the 1960’s are given. This led to a sudden and rapid increase of the demand for commercial sexual services. It is alleged that “[a]s demand exceeded supply, traffickers started to kidnap women and girls from various countries in the region and force them into the commercial sex industry.”⁹³ Furthermore, the rapid growth of demand for virgins has led to more young girls being kidnapped or deceived into brothels and many other forms of sexual exploitation.⁹⁴ As

⁹⁰ Eg; in the Ukraine (Hughes & Denisova “The Transnational Political Criminal Nexus of Trafficking in Women from Ukraine” 2001 6(3/4) *Trends in Organized Crime* 2-21; and in Nigeria (Pearson Study on Trafficking in Women in East Africa (2003) 5-6; and Thailand (Phongpaichit, Piriyaarangsarn & Treerat 1998 *Guns, Girls, Gambling and Ganja: Thailand’s Illegal Economy and Public Policy* (1998) 89.

⁹¹ See Torrey & Dubin *Demand Dynamics: The Forces of Demand in Global Sex Trafficking* (2003) 60: “The root cause of trafficking is demand for commercial sexual services, without which trafficking for purposes of sexual exploitation would dissolve.”

⁹² Yen —“Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand through Educational Programs and Abolitionist Legislation” 2008 98(2) *The Journal of Criminal Law & Criminology* 653 666; Rennell “Saving the Youngest Workers: The Struggle against the Southeast Asian Sex Trade” 2004 26 *Harvard International Review* 30 33.

⁹³ Yen (n92 *supra*) 666-667; Rennell *ibid*.

⁹⁴ See generally Brawn “Sexual Offences against Children, Exploitation and the Rights of the Child” 2000 (4)7 *Global Journal on Human Rights Law* 7, 12.

already discussed above, areas with heavy military presence impacts directly on the prevalence of prostitution and sex trafficking patterns.⁹⁵

To halt the demand for sex workers is a difficult task. Not enough research has been done in this area as yet for ~~the~~ there has been a tendency in these baseline studies to focus on supply-side questions, such as the factors that contribute to trafficking in countries of origin and the profile of those most at risk of being trafficked, and less on demand-side questions, such as the factors in destination countries that contribute to the existence of, and a market for, trafficking”.⁹⁶ There is however an ~~emerging~~ consensus that strategies which solely address the supply side of trafficking are insufficient and ultimately ineffective”.⁹⁷ Some researchers suggest a demand-orientated approach to minimize or eradicate the male demand for commercial sexual services, which includes various demand-side educational programs and legislative approaches.⁹⁸

While some researchers argue that the legalisation of prostitution may be a solution to counter the traffic in women and children for sexual exploitation,⁹⁹ others contend that legalised sex industries are a magnet for human traffickers to bring in foreign and domestic women to meet the open demand.¹⁰⁰ The 2005 US Trafficking in Persons Report asserts that legalized or tolerated prostitution nearly always increases the

⁹⁵ See *supra* n79.

⁹⁶ Laczko —Data and Research on Human Trafficking” 2005 (43) 1-2 *International Migration* 5 9.

⁹⁷ See Hughes —Best Practices to Address the Demand Side of Trafficking” (2004) 2. Hughes believes —the movement to abolish trafficking and sexual exploitation needs a more comprehensive approach, one that includes analyses of the demand side of trafficking, and develops practices to combat the demand in receiving countries.”

⁹⁸ Yen (n92 *supra*) 653. See also Tiefenbrun —Sex Sells but Drugs Don’t Talk: Trafficking of Women Sex Workers” 2001 23 *Thomas Jefferson Law Review* 161 180. She contends that the problem of sex trafficking must be addressed from an economic perspective by increasing the cost of doing the business of sex trafficking and by decreasing the economic benefits of this lucrative industry. Yen extends Tiefenbrun’s argument to the male clients of prostitutes as well, in that the cost (eg, incarceration, fines) of engaging in commercial sexual exploitation must outweigh the benefits (eg, physical pleasure, ~~cheap~~ sex) in order to change the men’s behaviour.

⁹⁹ Kempadoo & Doezema (eds) *Global Sex Workers: Rights, Resistance, and Redefinition* (1998) 36-42.

¹⁰⁰ Raymond & Hughes *Sex Trafficking of Women in the United States: International and Domestic Trends* (2001) 87. The state of Victoria in Australia legalised prostitution in 1984 with the aim of containing prostitution, eliminating organised crime and ending child prostitution and sex trafficking. After 20 yrs, a study revealed that legalisation has actually stimulated a surge in male demand, which required a steady supply of women. Legalisation has aggravated the harms it was meant to minimize as well as created new problems. See Sullivan *What Happens When Prostitution Becomes Work? An Update on Legalization of Prostitution in Australia* (2005) 3, 5. Some countries, such as Sweden, have criminalised the buyers of commercial sex. Within 2 yrs, there was a sharp drop in male demand (75%) which again precipitated a similar decline in the supply: the number of female prostitutes dropped by 50%. See Hughes (n97 *supra*) 25-26.

number of women and children trafficked into commercial sex slavery,¹⁰¹ but no supporting evidence is cited. Their assertion is probably based on a 2005 European Parliament sponsored study¹⁰² on the link between national legislation on prostitution and the trafficking of women and children. The study concluded that a country's legal position on prostitution is not the only factor that influences the number of women and children trafficked for sexual exploitation and that a final evaluation of the existing legislative model and the impact on the number of victims should be based on a wider, more reliable and comparable set of data.¹⁰³

3.15 Globalization

Although trafficking in persons is not a recent phenomenon, the global sophistication, complexity and consolidation of trafficking networks, as well as an increasing number of women and children who are trafficked each year is very recent.¹⁰⁴ The impact of globalization and increasing urbanization include the spread of modernization with greater access to transport, resources and the media. But, for many, the disappearance of traditional income sources and rural employment lead to social disorientation.¹⁰⁵ The ever-widening wealth disparities created by the globalized economy between countries, and between rich and poor communities within countries,¹⁰⁶ have increased intra- and transnational migration. Traditional livelihood options disappear in less wealthy countries and communities.¹⁰⁷ It is at this extreme

¹⁰¹ US Dept of State *Trafficking in Persons Report 2005* (2005) 19. Hughes (n97 *supra*) 2 agrees with this finding and adds that —without men's demand for prostitute women, there would be no such women”.

¹⁰² Di Nicola, Orfano, Cauduro & Conci *Study on National Legislation on Prostitution and the Trafficking in Women and Children* (2005).

¹⁰³ Di Nicola *et al* (n102 *supra*) 232-233; Weitzer —The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade” 2007 35(3) *Politics & Society* 447 447-475.

¹⁰⁴ Troshynski & Blank —Sex Trafficking: An Exploratory Study Interviewing Traffickers” 2008 (32) *Trends in Organised Crime* 30 30-31; Farr *Sex Trafficking: The Global Market in Women and Children* (2005) 12; Hughes —The ‘Natasha’ Trade: The Transnational Shadow Market of Trafficking in Women” 2000 53(2) *Journal of International Affairs* 625 625-651; Raymond; D’Cunha; Dzuhayatin; Hynes; Rodriguez & Santos *A Comparative Study of Women Trafficked in the Migration Process: Patterns, Profiles and Health Consequences of Sexual Exploitation in Five Countries* (2002) 141.

¹⁰⁵ Lansink *Women and Migration, Interim Report on Trafficking in Women* (2004) 2.

¹⁰⁶ See UN High Commission for Human Rights (UNHCHR) *Report of the United Nations High Commissioner Delivered to the Economic and Social Council* (1999) noting that while globalisation has had its benefits, there is a — clear trend towards a smaller percentage of the population receiving a greater share of wealth, while the poorest simultaneously lose ground”. See generally Coomaraswamy (n41 *supra*) 4.

¹⁰⁷ See generally Ghosh *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (1998) 35 n2 (distinguishing between survival migration and opportunity seeking migration); Kaye *The Migration-Trafficking Nexus: Combating Trafficking Through the Protection of Migrants*” *Human Rights* (2003) 13.

end of the emigration continuum where trafficking exists,¹⁰⁸ where migration is an escape from economic, political, or social distress.

Global restructuring trends have produced an environment conducive to trafficking. These trends include the shift to “export-oriented” approaches, where the production of essential goods is targeted for external trade rather than countries’ own internal markets and the entry of multinational corporations and their extensive networks of subcontractors into developing countries. The subsequent rise in power of these multinational corporations and also institutions such as the International Monetary Fund, the World Bank and the World Trade Organization, has shifted the structure of power at the international level to focus on markets.¹⁰⁹ These changes to the international political economy have caused a number of countries, especially in Asia, which grapple with foreign debt and rising unemployment, to provide the infrastructure for human trafficking networks either directly or indirectly.¹¹⁰

In this process of globalization growth, Asia has attracted direct foreign investment and has become a centre for low-cost, labour-intensive manufacturing.¹¹¹ Competition among countries in Asia and elsewhere has put pressure on manufacturers’ profit margins, encouraging some employers to sacrifice labour standards or to use illegal practices such as bonded labour to drive down costs. Many multinational corporations also prefer female workers due to their lower cost and lesser likelihood of resisting adverse working conditions.¹¹²

Globalization has also driven growth in tourism, which has given rise to large-scale trafficking operations in connection with the industry. To encourage economic growth, states themselves are investing in tourism industries widely associated with recruitment of trafficked females for the entertainment of foreign tourists.¹¹³ Advances in information technology, global media, and internet access provide sex tourists and pornography producers the means for faster and greater international exchange of

¹⁰⁸ Gallagher *Consideration of the Issue of Trafficking: Background Paper* (2002) 16-17; Ghosh (n107 *supra*) 35.

¹⁰⁹ See Pyle *How Globalization fosters Gendered Labour Networks and Trafficking* (2002) 2-3.

¹¹⁰ Samarasinghe “Confronting Globalization in Anti-Trafficking Strategies in Asia” 2003 X(1) *Brown Journal of World Affairs* 91 94.

¹¹¹ Kaye (n107 *supra*) 95.

¹¹² Pyle (n109 *supra*) 5.

¹¹³ Kaye (n107 *supra*) 92, 94.

goods and capital. Traffickers also utilize these innovations for recruitment and other purposes.¹¹⁴

3.16 Lack of conceptual clarity and reliable data

In order to combat human trafficking, the crime needs to be well defined¹¹⁵ because “messy definitions result in slippery statistics ridden with methodological problems”.¹¹⁶ Although the Palermo Protocol’s definition has improved an understanding thereof, there still seems to be a lack of conceptual clarity on issues related to human trafficking. This ambiguity reverberates in the limited information available about the magnitude of the problem. Despite the growing literature on human trafficking, a great deal of the current knowledge, including statistical estimates and characteristics of the trafficking business, derives from a handful reports issued by government and non-government agencies.¹¹⁷ Much of the information on the actual number of trafficked persons is unclear and relatively few studies are based on extensive scientific research.¹¹⁸ With few empirical studies available, imagination seems to have filled the gaps.¹¹⁹

¹¹⁴ Kaye (n107 *supra*) 11.

¹¹⁵ The definition of trafficking, let alone human trafficking, is widely contested. See Young *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity* (1999) 1.

¹¹⁶ Goździak & Collett —“Research on Human Trafficking in North America: A Review of Literature” 2005 43(1/2) *International Migration* 99 107. Laczko & Gramegna —“Developing Better Indicators of Human Trafficking” 2003 (1) *Brown Journal of World Affairs* 179 180 note the growing consensus on the existing difficulty in measuring and monitoring trafficking given the wide range of actions and outcomes covered by the term as provided in the Palermo Protocol (including recruitment, transportation, harbouring, transfer and receipt).

¹¹⁷ The most cited numbers come from a few familiar sources such as the US government, the UN, the ILO, and the IOM. Bales (n86 *supra*) 103 estimates the extent of modern day slave labour (both labour and sex trafficking) worldwide and arrived at an estimate of about 27 million globally. The UN Population Fund (UNFPA) estimated that up to 800,000 people are trafficked across borders annually. See UNFPA *State of World Population 2005: The Promise of Equality – Gender Equity, Reproductive Health and the Millennium Development Goals* (2005) 5, 66 (based on the US Dept of State’s *Trafficking in Persons Report 2005* (n101 *supra*)). Agencies that issued sex trafficking estimates also seem to support one another by quoting each other’s numbers. Eg, agencies under the UN would use numbers quoted in the US State Dept’s annual *Trafficking in Persons Report* while the *Trafficking in Persons Report* also quote UN numbers. See US Dept of Justice *Attorney General’s Annual Report to Congress and Assessment of US Government Activities to Combat Trafficking in Persons Fiscal Year* (2008) 7. This has been labelled the “Woozle Effect” of research statistics, after a character in a Winnie-the-Pooh story that follows his own footprints. Weiner & Hala *Measuring Human Trafficking: Lessons from New York City* (2008) 8 state that “the Woozle Effect begins when one investigator reports a finding, often with qualifications (eg, that the sample was small and not generalizable). A second investigator then cites the first study’s data, but without the qualifications. Others then cite both reports, and —the qualified data gain[s] the status of an unqualified, generalizable truth”.

¹¹⁸ The methodologies applied in these studies are not always well suited for these purposes, and inferences are often made based on very limited data. See Laczko & Gramegna (n115 *supra*) 180.

¹¹⁹ Zhang (n82 *supra*) 178.

Reasons that limit the quality of trafficking data broadly fall into three categories - availability, reliability and comparability.¹²⁰ A factor that hampers the availability of trafficking data is primarily the fact that trafficking is an illegal activity shrouded in secrecy. Persons involved in human trafficking are described as “hidden populations” typified by stigmatized or illegal behaviour, leading victims to refuse to cooperate or to provide reliable answers.¹²¹ Perpetrators go to great lengths to conceal their activities from any form of monitoring. The numbers of victims fluctuate incessantly for any given period. Brothel owners also regularly change the names of the girls, their ages and their origin, making case-choosing particularly difficult.¹²² For empirical studies, this presents particular challenges and requires approaches different from those commonly used for other such studies.¹²³

It is furthermore very difficult to obtain first-hand information from those who have been exploited. Victims are afraid to seek help from the relevant authorities or to talk about their experiences. A great deal of research on trafficking is, therefore, based on relatively small samples of survivors, usually identified by law enforcement agencies or persons assisted by NGOs or international organizations.¹²⁴ The actual ratio of assisted survivors to the total number of victims is unknown, meaning that studies based only on assisted cases may not be representative of the total number of trafficked persons which may remain undiscovered.¹²⁵

¹²⁰ This classification is made by the US Government Accountability Office (GOA) which analyses reports, articles and presentations from international organizations, the US government and academia. See *GOA Human Trafficking, Better Data, Strategy, and Reporting Needed to Enhance US Anti-trafficking Efforts Abroad* (US GOA Report to the Chairman Committee on the Judiciary and the Chairman Committee on International Relations House of Representatives 2006) 2.

¹²¹ A “hidden population” is a group of individuals for whom the size and boundaries are unknown, and for whom no sampling frame exists. See Heckathorn —“Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations” 1997 44(2) *Social Problems* 174 174-198.

¹²² See Preece *Gender Analysis of the Patterns of Human Trafficking into and through Koh Kong Province* (2005) 19.

¹²³ The scarcity in empirical research on sex trafficking highlights the limited access to either victim populations or trafficking operators. Zhang (n82 *supra*) 188 suggests obtaining information from buyers of sex services (ie johns); or through online adult communities; through prostitutes themselves and any auxiliary service to the sex trade (eg bouncers, taxi drivers, bar tenders, hotel owners, etc). How reliable these sources will be, remains to be seen. See Laczko & Gramegna (n115 *supra*) 180.

¹²⁴ Anderson & O’Connell Davidson *Trafficking - A Demand Led Problem?* (2002) 8-12, 14; Farr (n104 *supra*) 13; Raymond *et al* (n104 *supra*) 1-2. See Tyldum & Brunovskis —“Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking” 2005 43(1/2) *International Migration* 17 27: “While it is possible to obtain information about general background characteristics and behaviour of migrants in prostitution, we do not believe it is possible to collect reliable information about forms of exploitation and abuse among victims *currently* experiencing this abuse”.

¹²⁵ Laczko (n96 *supra*) 8.

Few governments have begun to systematically collect data on actual trafficking victims. Lack of data on the scale of trafficking can be attributed to the low priority given to the combating of human trafficking by authorities in many countries. One reason for the low prioritization appears to be the lack of or inadequate or unimplemented legislation, making the prosecution of traffickers very difficult and often impossible. Trafficking convictions are mostly dependent on witness and/or victim testimonies. Victims are often too frightened to testify. Inadequate legislation, for both prosecution and for victim and witness protection, means that the authorities often prefer not to prosecute traffickers at all, because much effort seldom results in a conviction.

Only a few countries are able to collate data on trends in trafficking over several years, making it difficult to accurately establish the extent to which trafficking may be increasing. The reliability of some of the trafficking data is moreover questionable because the capacity for data collection and analysis in their countries of origin is often inadequate. Figures from Germany (a country that has data on human trafficking) suggest that there has been a substantial increase in the number of victims of trafficking (mainly for sexual exploitation) during the last decade. The German Federal Criminal Office (*Bundeskriminalamt*) reported in 2001 there were 987 victims of trafficking identified in police investigations of suspected cases of trafficking, a figure nearly 25 percent higher than the 1999 figure, which reported 801 victims.¹²⁶ Most victims recorded in these figures are women; this is largely due to the German legal definition of trafficking at the time, which limited its purpose to prostitution only. Although German data do include information on the means of trafficking, the current legal status and country of residence of victims and the nationality of traffickers, information about the trafficking of men or trafficking for other purposes such as forced labour did not exist before the revision of the trafficking definition in 2005. The German account amply illustrates that even when data is collected, it may mostly focus on women and/or children trafficked for sexual exploitation, and other forms of trafficking are likely to be underreported.¹²⁷ It is also unclear to what extent the reported increases are due to a genuine rise in cases of trafficking or due rather to better police enforcement efforts and improved assistance from NGO's. Certainly, in the case of

¹²⁶ Laczko & Gramegna (n115 *supra*) 182.

¹²⁷ Laczko & Gramegna (n115 *supra*) 180.

Germany, it has been shown that the number of victims identified each year varies according to the priority given by police to combating trafficking.¹²⁸

The methodologies used to analyse available information is also questionable. Many researchers question the merits of producing global estimates of trafficking without a good explanation of how the figures are arrived at.¹²⁹ The US State Department's oft-quoted estimates of the size of the trafficked population worldwide (800,000 to 900,000 annually) provide a brief description of the statistical methods employed to calculate the estimates, but this description does not explain the methodology used to arrive at the baseline data sources. The estimates are given without explanation of their underlying assumptions and are widely considered to be conservative as they do not include intra-country trafficking or the trafficking of men.¹³⁰ Furthermore, the use of crime statistics to ascertain the scope of trafficking may provide a very low estimate of its incidence. In a recent report on trafficking in EU Member States, Europol, the EU's law enforcement agency, commented that:

The overall number of victims trafficked in the EU is still unknown and only estimates are available. What is clear is the fact that the number of victims is much higher than the official statistics from investigated cases in Member States.¹³¹

Trafficking statistics may not be comparable because some countries and organisations define trafficking differently.¹³² Furthermore, official statistics do not provide clear distinctions among trafficking, smuggling, and illegal migration. Governments providing statistical information often merge data related to trafficking, smuggling, and illegal migration.¹³³ In some accounts all undocumented migrants assisted in crossing, for example, the US border, are counted as having been

¹²⁸ Laczko, Klekowski von Koppenfels & Barthel —“Trafficking in Women from Central and Eastern Europe: A Review of Statistical Data” in Laczko, Stacher & Klekowski von Koppenfels (eds) *New Challenges for Migration Policy in Central and Eastern Europe* (2002).

¹²⁹ Kelly (n49 *supra*) 235-239; Laczko & Gramegna (n115 *supra*) 180, 182-184; Goździak & Collett (n116 *supra*) 108; Jahic & Finckenaue —“Representations and Misrepresentations of Human Trafficking” 2005 (8)3 *Trends in Organised Crime* 24 27-32; Tyldum & Brunovskis (n124 *supra*) 17-19; Goździak & Bump *Data and Research on Human Trafficking: Bibliography of Research-Based Literature* (2008) 13, 23-24, 43; Goździak (n59 *supra*) 906-911; and Zhang (n82 *supra*) 182-183.

¹³⁰ Laczko & Gramegna (n115 *supra*) 180.

¹³¹ Europol Crime Assessment *Trafficking in Human Beings into the European Union* (2000) 18.

¹³² A universal definition of human trafficking will always be hampered by the ideologies of particular governments and/or NGO's, or certain countries' specific trafficking problems.

¹³³ Laczko *Human Trafficking: The Need for Better Data* (2002) 2, 4-5; <http://www.migrationinformation.org/Feature/display.cfm?ID=66> (accessed 2012-12-21).

trafficked.¹³⁴ Other reports reserve the term “human trafficking” exclusively to victims of sexual slavery.¹³⁵

Another quandary is that existing data are frequently program-specific. The four organizations with databases on global trafficking in persons are the US government, the ILO, the IOM, and the UNODC. The US government and the ILO estimate the number of victims worldwide; the IOM collects data on victims it assists in the countries where it has a presence, and the UNODC traces the major international trafficking routes of the victims. The databases provide information on different aspects of human trafficking since each organization analyzes the problem based on its own mandate. For example, IOM looks at trafficking from a migration and rights point of view, and ILO from the point of view of forced labour. Data is often based on the various trafficking definitions used by each individual agency and focuses on characteristics of victims and policy perspectives pertinent to specific agencies. As each of these agencies gather data according to their specific interests, the same individual may appear in data produced by more than one organization. Data will also vary according to the resources of any given organization.¹³⁶ Advocacy groups have also been accused of exaggerated claims and grossly generalised horror stories in order to obtain funds and to have their views incorporated in government policy, legislation and law enforcement practices.¹³⁷

Although current national statistics and global figures are often no more than “guesstimates”, several new projects have been launched in recent years to improve the understanding of trafficking data and to generate better collection, sharing, and analysis of reliable trafficking data.¹³⁸ If data on trafficking is to improve, common guidelines for the collection of data should be developed, both with regard to the type

¹³⁴ Goździak & Collett (n116 *supra*) 107.

¹³⁵ Chapkis “Trafficking, Migration and the Law” 2003 (17) 6 *Gender and Society* 923 926; Goździak & Collett (n116 *supra*) 108.

¹³⁶ Laczko & Gramegna (n115 *supra*) 183.

¹³⁷ Weitzer “The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade” 2007 (35)3 *Politics and Society* 447 447–475. See also Weitzer “Flawed Theory and Method in Studies of Prostitution” 2005 (11)7 *Violence Against Women* 934 934 where he claims: “In no area of the social sciences has ideology contaminated knowledge more pervasively than in writings on the sex industry. Too often in this area, the canons of scientific inquiry are suspended and research deliberately skewed to serve a particular political agenda”.

¹³⁸ See Laczko (n96 *supra*) 11. Eg, UNESCO’s “Trafficking Statistics Projects” produced a practical Internet tool to provide worldwide data on trafficking, see <http://www.unescobkk.org/index.php?id=1022> (accessed 2012-12-27). It not only aims to assemble trafficking statistics from a variety of sources, but also discusses the methodology used to obtain them. IOM’s global database on trafficking trends was established under the Global Programme against Trafficking in Human Beings (GPAT) of the UNODC.

of data and to the methods used.¹³⁹ More detailed comparative research to evaluate relevant data sources across countries and effective identification of data management practices are needed. Such research could, for example, explore the validity of developing a broader set of indicators of trafficking.¹⁴⁰ By adopting such an approach it is likely that estimates of the number of persons trafficked worldwide will be more accurate and reliable.¹⁴¹

3.17 Conclusion

In this chapter, the underlying causes and contributing factors of trafficking were discussed comprehensively. The root causes of trafficking, such as pervasive poverty, gender discrimination, illiteracy, armed conflicts, corruption, the demand for cheap, unregulated labour or commercial sexual services, and the absence of effective legislation and law enforcement were explained. Research confirms that gender is a definite variable in identifying those at risk. Thus, women and girls are more vulnerable to trafficking than men. Human trafficking crosses so many disciplinary boundaries that a more interdisciplinary-research approach is needed which examines trafficking issues from a range of different perspectives, including migration, human rights, health, law enforcement, and the like. It was indicated that South Africa is in need of an appropriate immigration policy in order to address the adverse impact of unsafe migration while simultaneously promoting the benefits of safe migration. It is argued that, to be effective, counter-trafficking strategies must also address the underlying economic, social, and cultural conditions that sustain the trafficking phenomenon.

It was also indicated that the clandestine and criminal nature of the phenomenon, the inadequate monitoring by law enforcement agencies and public confusion about the nature of the problem makes it almost impossible to obtain accurate quantitative data on the subject. In fact, available data is purely speculative and based largely on extrapolations. The existing regional literature, as well as the global literature demonstrates that most of what is known about human trafficking is based on anecdotal reports in the media and derived from certain human-rights organizations,

¹³⁹ See European Commission (EC) *Report of the Experts Group on Trafficking in Human Beings* (2004) 78; Laczko (n96 *supra*) 15.

¹⁴⁰ See eg Hughes –The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children” 2002 13(1) *Hastings Women’s Law Journal* 127 129; McMahon & Stanger *Speaking Out: Three Narratives of Women Trafficked to the United States* (2002).

¹⁴¹ Laczko & Gramegna (n115 *supra*) 191.

particularly those that assist victims. If our understanding of trafficking is to improve, more enhanced techniques to generate better data and indicators of the problem are required. However, while there are conflicting definitions and inconsistent estimates of the nature and scope of human trafficking, a wide range of researchers and academics acknowledge that the illegal trafficking of human beings is a growing social phenomenon greatly in need of continued research.

CHAPTER 4

INTERNATIONAL RESPONSES TO TRAFFICKING IN PERSONS

4.1 Introduction

As a growing global crime, trafficking in persons is on the international agenda. Efforts to address this prevalent problem are evident in the numerous multilateral responses at international levels.¹ Under international legal frameworks,² protection has been put in place in order to oblige states to prosecute traffickers, protect people vulnerable to trafficking as well as those already trafficked and to recompense victims. These treaties create binding obligations by agreement between the States Parties to the instruments.³ States Parties commit themselves to develop corresponding legislation at a domestic level. However, it is argued that the complete unanimity of international directives outlawing human rights abuses have incorporated the laws against trafficking in human beings as part of customary international law.⁴ As such, every country has the responsibility to combat human trafficking, and punish those who engage and profit from these practices irrespective of whether or not they have ratified any relevant international treaties.⁵

¹ Some key international conventions and agreements addressing the combating of human trafficking and other forms of slavery have already been cited in Chap 2.

² Much of the international law that establishes the actions necessary for combating human trafficking worldwide is created by the UN. A number of UN agencies deal with various aspects of human trafficking. These institutions include the UNODC as the custodian of the Palermo Protocol; UNICEF which promotes the protection of children from violence, abuse and exploitation; UNIFEM which focuses on women's issues; the ILO which focuses on protection against forced labour and preventing child labour; the IOM which facilitates the security of migrant workers; the OHCHR as the custodian of the anti-slavery legal instruments and the Organisation for Cooperation and Security in Europe (OSCE) fighting human trafficking in its region. Furthermore, since 2006 a broad range of activities and partners have been coordinated through the Inter-Agency Cooperation Group against Trafficking in Persons (ICAT).

³ See generally Coomaraswamy *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, Radhika Coomaraswamy, *on Trafficking in Women, Women's Migration and Violence Against Women* (2000) paras 50, 51, 52, 53; Cook "State Responsibility for Violations of Women's Human Rights" 1994 7 *Harvard Human Rights Journal* 127 137, 147; Tomuschat "Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law" in Randelzhofer & Tomuschat (eds) *State Responsibility and the Individual* (1999) 23; Zemanek "Responsibility of States: General Principles" in Bernhardt (ed) *Encyclopedia of Public International Law Vol 10* (1987) 362-372; Chang "Trafficking in Women" in Askin & Koenig (eds) *Women and International Human Rights Law Vol 1* (1999) 344-346.

⁴ See generally Bassiouni "Enslavement as an International Crime" 1991 23(2) *New York University Journal of International Law* 445 445.

⁵ See Bassiouni (n4 *supra*) 446.

Yet it seems as if all these instruments combined still do not effectively bar the trade in human cargo. Many international laws relating to trafficking have limited targets and purposes (which are sometimes also reflected in the titles of these conventions) and are consequently inadequate to address the phenomenon. Although the principal emphasis of these instruments is on the interception of trafficking, hardly any noticeable result in the reduction of the crime is seen. In contradiction, there is evidence that trafficking in persons is increasing in all regions of the world.⁶ Several reasons may be attributed to this situation. However, it is believed that “by failing to assess the long-term implications of existing counter-trafficking strategies, these responses risk being not only ineffective, but counterproductive.”⁷

There are furthermore poor or no mechanisms to ensure the implementation of these international treaties or to monitor their compliance. Absence of effective enforcement mechanisms impedes the efforts of national authorities, that have the primary obligation to prohibit human trafficking and slavery-like practices. A paradigm shift is perhaps necessary for more effective law enforcement. The US State Department’s yearly *Trafficking in Persons Report* reveals that most countries’ counter-trafficking efforts focus on effectuating a strong criminal justice response⁸ to the problem. However, an effective law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses which can only be guaranteed if due regard is given to the protection of their rights. This study will investigate these instruments to ascertain the best approach which will create a disincentive for traffickers and that will have a direct impact upon demand.

⁶ See Chuang — Beyond a Snapshot: Preventing Human Trafficking in the Global Economy” 2006 13(1) *Indiana Journal of Global Legal Studies* 137-138: —“Notwithstanding the hundreds of millions of dollars already invested in the criminal justice response to the problem, we have yet to see an appreciable reduction in the absolute numbers of people trafficked worldwide.” The US Dept of State’s *Trafficking in Persons Report 2005* (2005) 245 reports that the US alone has invested \$295 million in counter-trafficking efforts over the last 4 fiscal years.

⁷ Chuang (n6 *supra*) 139,156. Statistics reveal that the number of traffickers arrested is low compared to the efforts expended to capture them. Few are convicted and if convicted, sentences are relatively minor and often not served. Almost no criminal network kingpins have been apprehended.

⁸ This approach focuses on imposing punishment on offenders, strengthening police cooperation and improving the number of prosecutions and convictions of traffickers as the only way to combat trafficking. See Amiel —“Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation” 2006 *Buffalo Human Rights Law Review* 12 27. It ignores the human rights issues that arise with trafficking. See Gallagher *Consideration of the Issue of Trafficking: Background Paper* (2002) 991.

In this chapter, the manner in which trafficking in human beings is dealt with by various international organisations as well as their real impact and potential for long-term effectiveness will be assessed. Existing counter-trafficking strategies as found in treaties⁹ (including conventions), protocols,¹⁰ declarations and resolutions¹¹ will be outlined and evaluated with a view to combat trafficking in South Africa. These legal instruments vary according to their focal areas. Accordingly, in this chapter the various instruments will be categorised as international conventions focusing on human trafficking only; international instruments with other focus areas and international human rights instruments relating to trafficking.

4.2 International legal framework

Despite the fact that international obligations for combating trafficking in persons were found in a variety of international instruments,¹² there was no common instrument that collectively addressed all aspects of human trafficking until the advent of the Palermo Protocol. The Protocol was drafted specifically because of the concern that without a wide-

⁹ Treaties are legally-binding conventions or covenants. Once signed and ratified by countries (called States Parties), they impose the highest possible level of obligations on governments. Most treaties are accompanied by recommendations, ie documents explaining how a treaty should be interpreted and applied.

¹⁰ Protocols are additions to treaties that usually must be agreed to separately from the treaty itself. They also impose the highest level of obligations on governments.

¹¹ Declarations are not binding, but give an indication of international political commitment to an issue. Resolutions will not be discussed in this chapter. Resolutions are formal statements of persuasive value calling for action, but are also not binding upon States. The UNGA has, since 1993, adopted a series of resolutions on human trafficking according to which governments, inter-governmental and non-governmental organisations and other bodies are called upon to continue and develop new measures to combat trafficking in women and children. These resolutions include Res 48/156 Need to Adopt Efficient International Measures for the Prevention, Eradication of the Sale of Children, Child Prostitution and Child Pornography (23 Dec 1993); Res 53/116 Traffic in Women and Girls (9 Dec 1998); Res 55/2 UN Millennium Declaration (8 Sept 2000); Res 59/496 Trafficking in Women and Girls (10 Feb 2005); Res 61/144 Trafficking in Women and Girls (19 Dec 2006); Res 61/180 Improving Coordination of Efforts against Trafficking in Persons (18 Dec 2006); Res 1820 Women, Peace and Security (19 Jun 2008); Res 11/3 Trafficking in Persons, especially Women and Children (17 Jun 2009) and Res 14/2 Trafficking in Persons, especially Women and Children: Regional and Sub-regional Cooperation in Promoting a Human Rights-based Approach to Combating Trafficking in Persons (23 Jun 2010). The UN's Economic and Social Council (ECOSOC) has since 1996 adopted several resolutions, such as the Res on Measures to Prevent Illicit International Trafficking in Children and to Establish Penalties Appropriate to Such Offences (1996), the Res on Action against Illegal Trafficking in Migrants, Including by Sea (1998), Res on Action to Combat International Trafficking in Women and Children (1998/20), Res on Human Rights of Migrants (1999); Res 2006/27 Strengthening International Cooperation in Preventing and Combating Trafficking in Persons (27 Jul 2006); Res 6/14 Contemporary Forms of Slavery (28 Sept 2007); Res 2008/33 Strengthening Coordination of the United Nations and Other Efforts in Fighting Trafficking in Persons (3 Jun 2008); Res on Action to Combat International Trafficking in Women and Children (1998/20), and the Res on Human Rights of Migrants (1999).

¹² See *supra* n1.

ranging instrument at an international level, trafficking victims or those vulnerable to trafficking will not be protected adequately. The development of the Protocol set the stage for a rapid proliferation of counter-trafficking laws in the past ten years.

4.2.1 Primary international instrument prohibiting human trafficking

The Convention against Transnational Organized Crime (CTOC), the Palermo Protocol and its Interpretative Notes (*Travaux Préparatoires*)¹³ comprise the complete collection of international obligations specifically addressing the trafficking of human beings.¹⁴ These instruments, and especially the Palermo Protocol, will now be discussed.

4.2.1.1 The Palermo Protocol

As a response to concerns about the reported increase of transnational organised crime, the UN adopted the CTOC. Additional agreements or protocols to combat trafficking in persons,¹⁵ smuggling¹⁶ and firearms¹⁷ supplement the Convention. Only states that have signed the CTOC may become party to the Protocol,¹⁸ as regulated in article 37(2) of the

¹³ UN Convention against Transnational Organized Crime UNGA Res 55/25 15 Nov 2000 (CTOC); UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children 2000 (Palermo Protocol). The Interpretative Notes (*Travaux Préparatoires*) (A/55/383/Add1 Addendum) are found at http://www.unodc.org/unodc/crime_cicp_convention_documents.html (accessed 2012-12-28).

¹⁴ See Jordan *The Annotated Guide to the Complete UN Trafficking Protocol* (2002) i. The UN did not organise these documents into one complete instrument.

¹⁵ See Chap 1 (n12 *supra*).

¹⁶ The UN Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol), UNGA Res A/RES/55/25 of 25 Nov 2000 was adopted at the Millennium Meeting of the UNGA on Nov 2000 and entered into force on 28 Jan 2004. The Migrant Smuggling Protocol is intended to prevent and combat unlawful migration by (1) penalizing smuggling, the production of fraudulent travel or identity documents, and the act of providing, procuring or possessing such a document; (2) strengthening border controls and (3) facilitating international agreements with respect to the exchange of information and assistance at sea.

¹⁷ The third supplementing Protocol to the Convention (Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, adopted in May 2001) will not be of any relevance to this study. The Convention is found at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/ (accessed 2012-12-28).

¹⁸ Most but not all governments have signed both instruments. See UNODC "Signatories to the United Nations Convention against Transnational Crime and its Protocols" <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (accessed 2012-12-28). As of 10 Feb 2012, 117 states were signatories and 143, parties. In Africa, 30 states were signatories and 38 ratified the Protocol. Among Southern African countries Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania and Zambia have ratified the Trafficking Protocol. The ratification date indicates the date whereupon the country actually agreed to be bound by a treaty. A country that has signed but not ratified a treaty is obliged to refrain from acts that would "defeat the object or purpose of the treaty". See Convention on the Law of Treaties, 23 May 1969, UN Doc A/CONF 39/27

Convention. All relevant provisions of the CTOC are incorporated into the Protocol and must be interpreted together.¹⁹ Although the Protocol contains the greater part of human trafficking obligations, a number of important provisions are contained in the CTOC.²⁰

The Palermo Protocol is a landmark in international anti-trafficking law for several reasons. It is the first anti-trafficking agreement adopted by the United Nations that takes a "comprehensive international approach",²¹ it comprises of the first internationally agreed definition of the crime of trafficking in humans,²² it is the first official recognition by the United Nations of poverty as an important contributing factor²³ and it highlights the issue of demand and calls upon the Member States to adopt or strengthen measures that would "discourage the demand".²⁴

What is further significant about this Protocol is the manner in which it has attempted to address trafficking in persons not only from a criminal-law approach but also from a human-rights approach.²⁵ This is clear from the preamble of the Protocol which states that "effective action to prevent and combat trafficking in persons, especially women and

(1969), 63 AJIL 875 (1969), 8ILM 679 (1969) (entered into force on 27 Jan 1980) (hereafter the Vienna Convention) art 18(a).

¹⁹ See Palermo Protocol (n13 *supra*) para 1. The CTOC (n13 *supra*) art 37(4) supplements this position: —Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol". Para 2 states that —the provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein". The Interpretive Notes explicates in the *Travaux Préparatoires* that this paragraph was adopted on the understanding that the words '*mutatis mutandis*' meant 'with such modifications as circumstances require' or 'with the necessary modifications'. Provisions of the United Nations Convention against Transnational Organized Crime that are applied to the Protocol under this article would consequently be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention."

²⁰ States Parties to the CTOC but not to any or all of the Protocols are still obliged to take measures against human trafficking. The CTOC (n13 *supra*) art 37(2) covers 5 offences, whether committed by individuals or corporate entities - participation in an organized criminal group, corruption, money laundering, obstruction of justice, and serious crime. Serious crime is defined in such a way as to include all significant criminal offences, which can include human trafficking.

²¹ Nelson "Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches" 2002 9 *Houston Journal of International Law* 551 570. See also CTOC (n13 *supra*) art 1, which states its purpose as being the promotion of interstate cooperation in order to combat transnational organised crime more effectively. In this manner, it is envisaged that "safe havens" where organised criminal activities or the concealment of evidence or profits can take place will be eliminated.

²² See Askola *Legal Response to Trafficking in Women For Sexual Exploitation in the European Union* (2007) 123. The definition of human trafficking as set out in the Palermo Protocol is discussed in Chap 2.

²³ Palermo Protocol (n13 *supra*) art 2.

²⁴ Palermo Protocol (n13 *supra*) art 9(5).

²⁵ This approach centres mainly on protection from human rights abuses, but also considers the need for criminal justice. See Haynes "Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers" 2004 26 *Human Rights Quarterly* 221 238. As such, it is a holistic approach to trafficking in persons since it not only analyses the process but also the causes and consequences of trafficking.

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, including by protecting their internationally recognised human rights".²⁶ These objectives are further reiterated in the purposes of the Protocol, which will be discussed subsequently.

(i) Criminalisation; investigation and prosecution

The Palermo Protocol obliges signatory countries to establish comprehensive policies, programs, and other measures to prevent and combat trafficking in persons. As such, it is primarily a law enforcement instrument designed to criminalise trafficking in persons, prosecute transgressors, protect victims, and promote collaboration among States Parties in order to meet those objectives.²⁷ This is accomplished, for example, through the advancement of national and regional initiatives and the facilitation of crime-control cooperation.²⁸ Member States are allowed to determine the details pertaining to prosecution and victim protection themselves.²⁹

²⁶ See Palermo Protocol (n13 *supra*) preamble.

²⁷ Palermo Protocol (n13 *supra*) art 2, para 1 of the preamble. Member States are provided legal and technical assistance in order to help them ratify the Protocol and to implement its provisions. Furthermore, in order for developing states and states in economic transition to cope with lack of resources in the implementation of the Protocol, the CTOC provides for a range of international cooperation measures including the establishment of a dedicated UN funding mechanism (Palermo Protocol (n13 *supra*) art 30).

²⁸ See Askola (n22 *supra*) 123. See also Palermo (n13 *supra*) preamble para 2; Pharoah *Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa* (2006) 3. The Interpretative Notes (n13 *supra*) 49 states: —"The Convention represents a major step forward in the fight against transnational organised crime and signifies the recognition of UN Member States that this is a serious and growing problem that can only be solved through close international cooperation". Different measures are set out that should be taken among nations to enhance effective law enforcement and judicial enforcement. States need to co-operate and exchange information on investigations, evidence, service of judicial documents, execution of searches, identification of the proceeds of crime and production of information and documentations (see Palermo Protocol (n13 *supra*) art 10(2) & the CTOC (n13 *supra*) art 27). States Parties can also establish joint investigation bodies, come to a formal agreement on the use of special investigative techniques, consider the transfer of criminal proceedings and sentenced persons, and facilitate extradition procedures for offences (see CTOC (n13 *supra*) arts 13, 14(2), 15, 16, 17, 18, 19, 20, 21 & 26).

²⁹ For that reason the UNODC had, together with other UN institutions, launched the Global Initiative to Fight Human Trafficking (also known as UNGIFT) in 2007. This initiative coordinates actions among governments and international organisations to raise awareness, to expand on their knowledge base and to provide technical assistance. One of its 10 objectives is law enforcement where it aims to improve information exchange on trafficking routes, trafficker profiles and victim identification in order to dismantle criminal groups, convict more traffickers and ensure that the punishment fits the crime.

The scope of application is contained in article 4 of the Palermo Protocol which states that it shall apply to the prevention, investigation and prosecution of offences³⁰ that are transnational in nature and involve an organised criminal group, as well as to the protection of victims of such offences. The first function of the Protocol is the prevention of trafficking where the key is to alleviate the factors that make persons vulnerable to trafficking and to enhance law enforcement. In terms of prosecution, the Protocol obliges signatory countries to *undertake* to criminalize the organization of, assistance with or participation in the trafficking of individuals as defined in article 3(a).³¹ States are however only asked to *consider* implementing protective measures for victims. This is due to the understanding that a broad international consensus can only be achieved by setting the required compliance relatively low. As regards protection, the Protocol underlines the physical, psychological and social recovery of trafficking victims.

Although the Palermo Protocol's scope of application extends to any person, without restrictions to gender and age, it pays particular attention to trafficking in women and children.³² For the protection of children, the Protocol considers any act of recruitment, transportation, transfer, harbouring or receipt of a child under the age of 18 an offence of "trafficking in persons". The definition of a child is given specifically as "any person under eighteen years of age".³³ Child-trafficking victims are explicitly identified through definitions of "(child) trafficking"³⁴ and "child".³⁵ However, children are only mentioned in these provisions and again briefly in section 6(4). Despite recommendations from the Human Rights Caucus (HRC), the UNHCHR, UNICEF, the IOM and others to address the special needs and legal status of children, the delegates failed to do so. Member States can still hone their domestic trafficking legislation regarding this gap by incorporating relevant provisions from the Convention on the Rights of the Child (CRC), the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) and the ILO Convention Concerning the Prohibition and

³⁰ Those offences established in accordance with the Palermo Protocol (n13 *supra*) art 5: "Legal responses to the problem typically adopt a three-prong framework focused on prosecuting traffickers, protecting trafficked persons, and preventing trafficking". See Chuang (n6 *supra*) 137.

³¹ Protocol (n13 *supra*) art 3(a) is discussed in Chap 2.

³² This is already seen in the title of the instrument.

³³ This definition does not permit national laws to lower the age-limit as allowed by the Convention on the Rights of the Child (CRC). The CRC will be discussed later in this chapter.

³⁴ Palermo Protocol (n13 *supra*) art 3(c). The CRC does not focus on these aspects.

³⁵ Palermo Protocol (n13 *supra*) art 3(d).

Immediate Action for the Elimination of the Worst Forms of Child Labour No C182 (ILO C182).

Under article 4 of the Protocol, the scope of application is restricted to only transnational crimes. This seems to suggest that only cross-border trafficking is considered. As trafficking may also be performed entirely within a country by its nationals, these offenders could claim their non-liability based on the principle of legality.³⁶ Furthermore, the scope of the crime is limited to an “organised criminal group” only. This constraint would leave many victims who, mostly in developing countries, are trafficked by individuals who are not part of a criminal group without any redress. One could however apply the CTOC article 34(2) to the crime of trafficking in order to ensure that *all* traffickers can be prosecuted under domestic laws. This provision states that certain crimes, such as belonging to an organised crime group (article 5), money laundering (article 6), corruption (article 8) and obstruction of justice (article 23) need not be transnational or committed by an organised criminal group.

Article 5 of the Protocol provides for states to prosecute perpetrators of human trafficking in mandatory terms.³⁷ As regards the form of culpability required for this crime, the provision states that intention, and not negligence, is required.³⁸ The *mens rea*

³⁶ This principle which forms the basis of South African criminal law and other rule-of-law states, is also known as the *nullum crimen, nulla poena sine lege* principle, and may be translated as “no crime or sanction without a law”. It means that nobody can be prosecuted or sanctioned for conduct (an act or omission) in terms of a specific criminal legal system, if such conduct was not proscribed by the law applicable at the moment of the infringement. Lamprecht *Nullum Crimen Sine Lege (Iure) and Jurisdiction in the Adjudication of International Crimes in National Jurisdictions* (2009) 9-15 argues that this is the traditional role of the legality principle, and emanates from the national criminal laws of different states. The legality principle is also used in a wider sense — at the level of international law to define or test the legal validity of international actions by States, the United Nations (UN), the International Court of Justice (ICJ) and other international institutions in the field of protection and enforcement of international human rights law”. See Lamprecht (2009) 9-10. International human rights law will be discussed *infra* para 4.2.3.

³⁷ Palermo Protocol (n13 *supra*) art 5(1) states: “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally”. According to the *Travaux Préparatoires* “other measures” are “additional to legislative measures and presuppose the existence of a law.”

³⁸ See UNODC *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto* (2004) 276: “...the conduct of each offence must be criminalized only if committed intentionally. Thus, conduct that involves lower standards, such as negligence, need not be criminalized. Such conduct could, however, be made a crime under article 34, paragraph 3, of the Convention, which expressly allows for measures that are “more strict or severe” than those provided for in the Convention... the element of intention refers only to the conduct or action that constitutes each criminal offence and should not be taken as a requirement to excuse cases, in particular where persons may have been ignorant or unaware of the law establishing the offence”. UNODC *Anti-*

requirement is already introduced through the definition (article 3) with the phrase “for the purpose of”. As such, the crime of trafficking will take place only if the concerned person or entity had the intention to traffic a human being for one of the specified exploitative outcomes. In the case of adult trafficking victims, the various prohibited means listed to achieve the purpose of exploitation will also be included under intention. The element of intent in trafficking is described as special or specific intent (*dolus specialis*).³⁹ In order to satisfy the special intent element, the intended aim need not be actually achieved.⁴⁰ This means that trafficking can occur without any exploitation taking place.⁴¹ Intent to exploit is furthermore not limited to the first trafficking phases only. It is a common misconception that if an act which was not initially conceived or performed with the intent to exploit ends in exploitation; this act does not constitute trafficking.⁴² The requisite element of intent could further be held by any person or entity in the trafficking cycle. However, if the suspected trafficker cannot be directly linked to a specific situation of exploitation, intent may be difficult to prove. For instance, an individual apprehended at a border can only be found to be a human trafficker when there is an indication of an intention to exploit the other person (albeit that it may constitute human smuggling).⁴³ Traffickers may

Human Trafficking Manual for Criminal-Justice Practitioners (2009) 6 confirms that states are obliged to criminalize intentional conduct, but adds that “... countries are not precluded from allowing the *mens rea* requirement to be established on a lesser standard, i.e. via recklessness, wilful blindness or even criminal negligence, subject to the requirements of the domestic legal system”.

³⁹ UNODC *Trafficking Manual* (n38 *supra*) 5: “The “purpose of exploitation” is a *dolus specialis* mental element: *Dolus specialis* can be defined as the purpose aimed at by the perpetrator when committing the material acts of the offence”.

⁴⁰ Gallagher *The International Law of Human Trafficking* (2010) 34. See also UNODC *Trafficking Manual* (n38 *supra*) 5: “It is the purpose that matters, not the practical result attained by the perpetrator. Thus, the fulfilment of the *dolus specialis* element does not require that the aim be actually achieved. In other words, the “acts” and “means” of the perpetrator must *aim* to exploit the victim. It is not therefore necessary that the perpetrator actually exploits the victim”.

⁴¹ See UNODC *Legislative Guides* (n38 *supra*) 268-269, para 33. Without any exploitative act that constitutes trafficking, the guilty state of mind of the perpetrator will be difficult to prove. The intention of the trafficker may be impossible to establish if the trafficking victims are unwilling to give evidence regarding the trafficker’s intention. A report from the Child Exploitation and Online Protection Centre (CEOP) states: “Given the difficulty in proving intent to exploit of a facilitator, often many criminal cases that are possibly trafficking cases are prosecuted as simply facilitation cases” which carry less stringent penalties. See CEOP *A Scoping Report on Child Trafficking in the UK* (2007)19 <http://www.homeoffice.gov.uk/documents/ceop-child-traffick-report-0607?view=Binary> (accessed 2012-12-28). It further follows that if the intent to exploit qualifies as a crime of trafficking, partially completed trafficking offences should also constitute trafficking. These acts are however classified as attempts to traffic. See n43 *infra*.

⁴² See Piper “A Problem by a Different Name: A Review of Research on Trafficking in South East Asia and Oceania” 2005 43(1/2) *International Migration* 203 222: “... the definition could be interpreted as being initiation-based - that is, what the intention of the recruiter or broker was at the time when the recruitment or transport was transacted”.

⁴³ See Gallagher (n40 *supra*) 34 who argues that: “It may be difficult, for example, to establish the necessary *mens rea* with respect to a recruiter or transporter who may, quite reasonably, deny any knowledge of the

consequently claim that they had no intention to traffic victims or that they were acting as traffickers without any knowledge thereof. Intention may nonetheless still be present in the form of *dolus eventualis*, that is, if the possibility of the existence of the fact is foreseen but the person is reckless towards it. In other words, if the person is not deterred by the possibility of the existence of the fact and goes ahead with the forbidden conduct regardless. In this manner, even those claiming no direct intention to exploit may be held liable for their participation in the crime. Section 5(2) furthermore criminalises any attempt to commit the crime,⁴⁴ being an accomplice to the offence as well as organising others to commit the offence. In certain circumstances, trafficked persons have originally agreed to work illegally or to travel with false or no documentation. Although it could theoretically be argued that these victims may have assisted in “organising” or “attempting” or knowingly “participating” in their own trafficking, the necessary intent to exploit is not present. Still, the criminalisation of human trafficking would have been better served by broader substantive criminal-law provisions.⁴⁵ In addition, the Protocol does not declare the result of more aggravating trafficking consequences such as serious injuries or the death of a victim.

States are required to cooperate through information exchange; to strengthen law enforcement and border controls, and adopt legislative and other appropriate measures

final end purpose.” Also see Coster van Voorhout “Human Trafficking for Labour Exploitation: Interpreting the Crime” 2007 3(2) *Utrecht Law Review* 44 66.

⁴⁴ The *Travaux Préparatoires* indicates that “... references to attempting to commit the offences established under domestic law in accordance with this subparagraph are understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law.” The UNODC *Legislative Guides* (n38 *supra*) 272, para 43 however states: “Generally, legislation seeking to criminalize ‘attempt’ requires a basic intent to commit the offence as well as some concrete action in furtherance of that intent... Mere preparation for an offence generally does not constitute an attempt”. According to Morehouse *Combating Human Trafficking: Policy Gaps and Hidden Political Agendas in the USA and Germany* (2009) 64: “... attempted human trafficking ... addresses acts that do not result in the actual exploitation of victims”. The intention to exploit should similarly to a completed trafficking act also be present. It will be difficult to establish the difference between a trafficking attempt and a complete act of trafficking consisting only of the intention to exploit and not the actual exploitation (see n41 *supra*).

⁴⁵ The use of broader definitions would have provided for a broader scope and application, as well as flexibility in the charging and sentencing of trafficking perpetrators. A good example in this regard is the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted on 12 Jul 2007 by the Committee of Ministers of the Council of Europe [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2007\)1002/10](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2007)1002/10) (accessed 2012-12-28). Although this document is specific to children’s sexual exploitation and abuse, its chap VI makes certain acts criminal offences which again facilitates action against crime at national and international level by harmonising cooperation.

such as sanctions to prevent commercial carriers transporting trafficked persons.⁴⁶ A broad savings clause was implemented to lessen concern that strengthened border controls would conflict with the principle of *non-refoulement*⁴⁷ by limiting the right of individuals to seek asylum from persecution. Although states may legally deport illegal immigrants back to their country of origin, they are bound to respect international obligations especially if the person is a refugee who would be in danger in his home country if expelled. This principle is enforced in article 14 of the Protocol which states that nothing in the Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian and human rights law”, with particular regard to the principle of *non-refoulement* as contained in the 1951 Convention on the Status of Refugees⁴⁸ and its 1967 Protocol.⁴⁹ By making express mention of the Geneva Convention and *non-refoulement* in this article, the Palermo Protocol accords the status of refugee to human-trafficking victims when there are substantial reasons for believing that they will suffer real harm if returned to their country of origin.

⁴⁶ As provided for in Palermo Protocol (n13 *supra*) arts 10(1) & (2); 11(1), (2), (3) & (4). One of the biggest obstacles to effectively prosecute traffickers and protect trafficked persons is the lack of communication and cooperation between the national authorities of the country of origin and that of the country of destination.

⁴⁷ *Non-refoulement* is a *jus cogens* (a peremptory norm which is universal and non-derogable) and a principle in international law which prohibits states to return refugees to their country of origin where their lives or freedoms could be threatened. Stoyanova “The Principle of *Non-Refoulement* and the Right of Asylum-Seekers to enter State Territory” 2008 3(1) *Interdisciplinary Journal of Human Rights Law* 1 1 states that —[t]he *non-refoulement* principle means that states cannot return aliens to territories where they might be subjected to torture, inhumane or degrading treatment, or where their lives and freedoms might be at risk”.

⁴⁸ The Convention on the Status of Refugees, entered into force on 22 Apr 1954 (Geneva Convention). Art 33 states: —No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. Other humanitarian instruments include the Protocol Additional to the Geneva Conventions of 12 Aug 1949, and the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 1977. In addition, the UNHCR *Guidelines on International Protection: Gender-Related Persecution in the Context of Art 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* HCR/GIP/02/01 (7/5/02) para 18 includes gender-based persecution as a ground to receive refugee status in cases where states are unable or unwilling to protect them. Also see Obokata *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (2006) 157.

⁴⁹ The Protocol on the Status of Refugees, entered into force on 4 Oct 1967. Asylum has been granted in cases for trafficked people who may face persecution in their country of origin in terms of these instruments. Eg, see cases decided by UK’s Immigration Appeals Tribunal: *Secretary of State for Home Department v Lyudmyla Dzhygun* (2000); *Secretary of State for Home Department v Josephine Ogebeide* (2002); *Secretary of State for Home Department v AB* (2003); *Secretary of State for Home Department v A* (2003); *Secretary of State for Home Department v K* (2003); *Secretary of State for Home Department v Tam Thi Dao* (2003). Here the Immigrant Appeal Tribunal recognised that the respondent belonged to a particular social group under the definition of refugee. See Obokata (n48 *supra*) 55.

Corruption forms the basis of many human trafficking activities. As such anti-corruption provisions are provided for in articles 8 and 9 of the CTOC, which respectively criminalises corruption and sets out measures against corruption. Article 12 of the Palermo Protocol provides for the confiscation and seizure of trafficking assets by the government. It provides that the assets will become the property of the government in which they are located. It is extremely likely that most assets will consequently end up in richer countries of destination and not in the poorer countries of origin.⁵⁰ Article 14(3)(b) however encourages governments to share confiscated assets with all affected countries. In this manner, assets should be distributed considering the needs of the trafficked persons and the particular government's financial ability of providing assistance to trafficked persons. Article 12(8) ensures that *bona fide* third parties also have access to the confiscated assets. The proposed solutions in the earlier draft were to use the assets:

... first, to pay compensation and reintegration costs to trafficked persons; second, to pay for services to trafficked persons in origin and destination countries; and, third, to fund anti-trafficking programs in origin and destination countries.⁵¹

This is supplemented by the CTOC's article 14 which concerns the disposal of confiscated proceeds of crime and property. The assets should be distributed to and for the benefit of human-trafficking victims as compensation, restitution and damage awards. This includes support services for trafficked persons in countries of destination, transit and origin. If governments keep the proceeds of trafficking after it has been confiscated or use it for other purposes, they are guilty of profiting from the traffickers' criminal acts. This is a feature which should be regulated clearly in domestic legislation. Article 14(2) recognizes the need for governments holding confiscated assets to recompense victims, even if they are located in another country. Trafficked persons will thus not be prevented from financial recovery simply because the assets are located, for example, in the country of destination while they have returned (voluntarily or involuntarily) to another country. Provision is also made for the depositing of such assets into a special UN fund for technical assistance to developing countries and countries with economies in transition (article 14(3)(a)). Failure

⁵⁰ See Jordan (n14 *supra*) 13.

⁵¹ Jordan (n14 *supra*) 34; also Ladan *Migration, Trafficking, Human Rights and Refugees under International Law: A Case Study of Africa* (2004) 113.

to return the assets to trafficked persons could lead to their re-trafficking and re-victimisation.

(ii) Protection of victims of trafficking in persons

The assistance to and protection of victims is discussed under Protocol articles 6 - 8 which should be read together with articles 24 and 25 of the CTOC.⁵² However, these provisions are created in comparatively weak language (see Protocol articles 6, 7 and CTOC articles 24, 25) such as “in appropriate cases” and “to the extent possible.”⁵³ The gaps here may still be filled by other international and regional instruments that require governments to protect the rights of trafficked persons.⁵⁴ Accordingly, the Palermo Protocol only establishes certain minimum standards and must be supplemented by human rights obligations in other international instruments.

Whereas the Palermo Protocol treats law enforcement as a shared responsibility of all party governments, victim issues is considered the individual responsibility of governments.⁵⁵ The Palermo Protocol only provides guidelines or prescribes rules under the Convention agreed to by the Member States and monitors the implementation.⁵⁶ It cannot impose binding obligations or issue dilatory orders to Member States to provide remedies to a trafficking victim whose human rights have been violated. It can only request or recommend or remind a State of its responsibility or hold it responsible for failing to fulfil

⁵² Palermo Protocol (n13 *supra*) art 1(2) makes the CTOC applicable to the Protocol.

⁵³ Österdahl “International Countermeasures against Human Trafficking” in A Jonsson (ed) *Human Trafficking and Human Security* (2009) 72.

⁵⁴ These instruments will be discussed later in this chapter. An obligation of states to protect trafficking victims can be implied also from art 16 (2) of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Migrants Rights Convention) which provides that “[m]igrant workers and members of their families shall be entitled to effective protection by the state against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions”. A migrant worker is defined 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” (art 2 of the Migrants Rights Convention). This extends protection to trafficked people who are either legal or illegal migrants. See Obokata (n48 *supra*) 153. Governments are compelled by these instruments to protect trafficked persons’ rights even if they have *not* signed the Palermo Protocol. Palermo Protocol (n13 *supra*) art 14 ensures that nothing in this document or the CTOC can undermine international obligations to protect human rights. See Jordan (n14 *supra*) ii.

⁵⁵ Jordan (n14 *supra*) 19.

⁵⁶ See, eg, Shelton *Remedies in International Human Rights law* (1999) 9-11; Ladan (n51 *supra*) 112.

its obligation. Member States themselves have the responsibility to provide adequate remedies at national level through their courts or tribunals.⁵⁷

States Parties are obligated to protect the privacy, confidentiality, and identity of the victims through legal provisions;⁵⁸ provide all information and assistance regarding legal actions,⁵⁹ which have been taken on their behalf.⁶⁰ Effective prosecution of traffickers is an important form of redress for victims of human trafficking. The Protocol establishes that favourable conditions must be created for victims to participate and for their views and concerns to be presented and considered in the investigation and prosecution.⁶¹ However, these provisions are again phrased in weak language. Article 6(1) enjoins states to protect the victims' privacy and identity in legal proceedings "in appropriate cases and to the extent possible"⁶² under domestic law. Public disclosure of the person's identity increases the risk of retaliation by the traffickers. Governments that insist upon releasing the names of trafficked persons, particularly those who testify against their traffickers, should be prepared to grant any type of residency protection⁶³ to the victims as long as a risk of retaliation exists. Although the Palermo Protocol does not provide protection for the family of trafficking victims who testify against their traffickers,⁶⁴ article 24(1) of the CTOC expressly requires for an extension of such protection to the relatives of victims of transnational crimes and other people close to them. This shows that "for protection to be

⁵⁷ Consequently —.the focus now shifts to the national level, and the burden of advocating for rights-protective national legislation and policies shifts to domestic NGOs." See Jordan (n14 *supra*) 33.

⁵⁸ See Palermo Protocol (n13 *supra*) art 6(1).

⁵⁹ Palermo Protocol (n13 *supra*) art 6(2)(a). Victims of trafficking must be provided with information on relevant court and administrative proceedings. This includes legal advice in their mother language through an interpreter or in writing through a translator. See Palermo Protocol (n13 *supra*) 6(3)(b).

⁶⁰ Legal representation is essential for trafficked persons who are typically undocumented and do not understand the foreign legal system. Section 2(b) requires "assistance" in legal proceedings and this language must be interpreted to mean legal assistance because non-lawyers would not be competent to assist at "criminal proceedings".

⁶¹ Palermo Protocol (n13 *supra*) art 6(2)(b) & CTOC (n13 *supra*) art 25(3). Victims' participation in prosecutions can lead to restoration of their dignity and self-worth, constructively reducing their trauma and anger while preventing them from taking the law in their own hands. See Obokata (n48 *supra*) 158; Palermo Protocol (n13 *supra*) art 6(2)(b).

⁶² Palermo Protocol (n13 *supra*) art 6(1). The CTOC (n13 *supra*) art 24(2)(a) also calls upon governments to protect the identity and whereabouts of witnesses: "Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons".

⁶³ See Jordan (n14 *supra*) 34; Palermo Protocol (n13 *supra*) art 10(2) & CTOC (n13 *supra*) art 24. Protection must be provided to *all* trafficked persons; not only witnesses. Again, this provision is stated in weak terms: "shall endeavour".

⁶⁴ Their families may face danger because of the testimony of the victim. See Shelley —Human Security and Human Trafficking" in Jonsson A (ed) *Human Trafficking and Human Security* (2009) 14.

effective, whether in country of origin or destination, it needs to be longer lasting than the duration of a court case, and it needs to extend beyond the victims to include those close to her or him.”⁶⁵ Furthermore, the Protocol requires states to provide protection to the physical safety of victims while they are within their territory.⁶⁶ The formulation of article 6(2) is yet again insubstantial. It gives the impression that governments are granted permission to provide assistance to certain trafficked persons “in appropriate cases”⁶⁷ and not others.

Both origin and destination states must also provide appropriate shelter,⁶⁸ counselling, basic medical and mental health care, material assistance and employment, educational and training opportunities⁶⁹ for the recovery of trafficked persons from physical, psychological and social traumas. This is especially important since trafficked persons may require treatment to address post-traumatic symptoms and adequate recovery time before making decisions about participating in prosecutorial or immigration proceedings or returning home.⁷⁰ This provision is supported by the CTOC section 25(1) which contains

⁶⁵ Pearson —“Halfhearted Protection: What Does Victim Protection Really Mean for Victims of Trafficking in Europe?” in Masika R (ed) *Gender, Trafficking and Slavery* (2002) 58.

⁶⁶ Palermo Protocol (n13 *supra*) art 6(5). This concerns both countries of origin as well as destination. Trafficking victims should not be deported immediately or held in prisons or detention centres. This situation may lead to them not reporting the crime to law enforcement, which again allows traffickers to go unpunished. Furthermore, the phrase —“in their territory” excludes providing protection to victims prior to repatriation.

⁶⁷ Palermo Protocol (n13 *supra*) art 6(2).

⁶⁸ At the Palermo Protocol’s negotiations, some states refused that basic services must be provided to foreign trafficking victims, despite their obligations to respect everyone’s rights (including non-citizens) under international human rights instruments. Some governments often face an enormous burden in providing assistance to trafficked persons and many are financially unable to do so. Although several states have adequate financial resources to provide these services, some countries of destination are also countries of origin and thus face the double burden of providing assistance to non-citizens and citizens. See Jordan (n14 *supra*) 35.

⁶⁹ Palermo Protocol (n13 *supra*) art 6(3)(c). Victim assistance includes access to consular support from the consular of their home countries as prescribed in art 36 of the Vienna Convention on Consular Relations 1963. Assistance must also be gender and child sensitive (Palermo Protocol (n13 *supra*) art 6(4)), which is particularly important in cases involving sexual assault. Art 10 emphasizes this issue by stating that human rights, including child and gender-sensitive issues must be of paramount consideration in providing or strengthening law enforcement programmes and guide the cooperation with NGOs and other elements of civil society. Furthermore, the principles of *non-refoulement* and non-discrimination should be considered when the protection of refugees and victims are at stake. See arts 14(1) and 14(2).

⁷⁰ A recent study found that newly discovered trafficked women experience especially memory problems that may affect their ability to engage in criminal investigations. These trafficked persons —. may be unable to immediately recall details of the crime, substantiate their status as a victim, or make decisions about cooperating in a prosecution”. See Zimmerman, Hossain, Yun, Gajdadziev, Guzun, Tchomarova, Ciarrocchi, Johansson, Kefurtova, Scodanibblo, Motus, Roche, Morison, & Watts —The Health of Trafficked Women: A Survey of Women Entering Post-Trafficking Services in Europe” 2008 98(1) *American Journal of Public Health* 55 58. It is consequently very important to grant trafficking survivors an adequate period of recovery and reflection (ie temporary legal residency with access to post-trafficking services or even

more forceful language requiring that governments ~~shall~~ provide assistance and protection, ~~within its means~~". The Protocol section 6(3) grants governments discretionary power for it is required that they ~~shall consider~~ the implementation of physical, psychological or social recovery measures ~~in appropriate cases~~".

Another significant provision of the Protocol requires Member States to ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation⁷¹ as reparation for damages suffered, irrespective of their nationality.⁷² Adequate and appropriate remedies serve not only to redress the consequences of trafficking, but also act as a deterrent to traffickers by strengthening the position of trafficked persons.⁷³ It serves to ~~affirm public respect for the victim and give public recognition of the wrongdoer's fault in failing to respect basic rights~~".⁷⁴ This reparation must primarily be paid by the criminal wrongdoers (traffickers), however services for the recovery of victims are mainly provided by the state in cooperation with NGOs.⁷⁵ Compensation claims can also be made inherent to criminal proceedings as in the USA,⁷⁶ where trafficking survivors have access to evidence used by the prosecutor.

Article 7 of the Palermo Protocol recognises trafficked persons' need for legal immigration status, but does not really require governments to do anything.⁷⁷ This provision calls for States Parties to ~~consider~~ adopting legislative or other appropriate measures that permit trafficked persons to remain in their territories, temporarily or permanently ~~in appropriate cases~~". ~~Appropriate consideration~~" should be given to humanitarian and compassionate

asylum status) for improvement with their memory difficulties. This study also recommends that ~~services~~ for such women should be based on good practices used for victims of domestic violence, sexual assault, and torture and for migrants and refugees".

⁷¹ Palermo Protocol (n13 *supra*) art 6(6). This provision limits victims to the *possibility* of obtaining compensation, not the *right* to seek compensation *and* restitution for the harm suffered. Compensation is obtained from a government-created victim compensation fund, which could result in much less money than victims could recover directly from the traffickers in a court order to compensate for the harm suffered.

⁷² Palermo Protocol (n13 *supra*) art 6(6) & the CTOC (n13 *supra*) art 25(2).

⁷³ See Shelton (n56 *supra*) 14-15; Pearson *Global Human Rights and Trafficking in Persons: A Handbook* (2000) 52. Shelton (n56 *supra*) 45 rightly states that ~~...rights without remedies are ineffectual. Even the symbolic value of rights could disappear once it became obvious that rights could be violated with impunity~~".

⁷⁴ Obokata (n48 *supra*) 160.

⁷⁵ Österdahl (n53 *supra*) 73.

⁷⁶ US Dept of State & Bureau of Democracy, Human Rights and Labour *Human Rights Reports: Ethiopia* (2009) <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm> (accessed 2012-12-28).

⁷⁷ Weissbrodt *Abolishing Slavery and its Contemporary Forms* (2002) 24.

factors. It was noted that humanitarian factors, in this context, refer to “the rights established in the human rights instruments’ and, as such, applicable to all persons”.⁷⁸

Trafficking survivors are often quickly deported or obliged to cooperate in criminal investigations as a condition of assistance.⁷⁹ However, the multiplicity and severity of the types of abuse they had suffered indicate that trafficked persons (especially women and children) may not be capable of making rapid or informed decisions concerning their safety or legal options.⁸⁰ Several governments have already incorporated into their anti-trafficking laws a short-term residence of 45-60 days as a reflection period for these victims.⁸¹ Some governments have also recognised it as appropriate to provide longer temporary residence to trafficked persons who cooperate with the investigation (for example, the duration of their proceedings) or who are in danger due to threats of retaliation. In the latter situation, awarding a permanent residential permit should also be considered by states and should not be narrowly construed.⁸² Repatriation should be decided only after “due regard for the safety of that person”⁸³ to return home “without undue or unreasonable delay”.⁸⁴ Returns “shall preferably be voluntary”⁸⁵ but the *Travaux Préparatoires* makes it clear that they can

⁷⁸ Ladan (n51 *supra*) 114.

⁷⁹ Pearson *Human Traffic, Human Rights: Redefining Victim Protection* (2002) 2; 46.

⁸⁰ Zimmerman *et al* (n70 *supra*) 58.

⁸¹ This recovery period lasts for 45 days in Belgium and 3 months in Netherlands. Various services are made available for victims during their stay which includes housing, medical and legal services, counselling, language and integration courses, financial assistance, and in Belgium, the right to work. See Pearson (n65 *supra*) 57. There are countries eg, Italy, who consider awarding temporary refuge only if the victim is willing to testify. Refuge should be granted to *all* trafficking victims, whether they are willing to testify against their traffickers or not. See Pearson (n65 *supra*) 58. Annan *Smuggling and Trafficking in Persons and the Protection of their Human Rights, Note by the Secretary-General* (UN Doc E/CN.4/Sub.2/2001/26) requires that at a minimum “... the identification of an individual as a trafficked person should be sufficient to ensure that immediate expulsion which goes against the will of the victim does not occur and that necessary protection and assistance is provided.” See also Weissbrodt (n77 *supra*) 24.

⁸² See Pearson (n65 *supra*) 57. Asylum has been granted to trafficked people facing persecution. Obokata (n48 *supra*) 155 supplies the following successful cases decided by the UK’s Immigration Appeal Tribunal - *Secretary of State for Home Department v Lyudmyla Dzhygun* (2000); *Secretary of State for Home Department v Josephine Ogbeide* (2002); *Secretary of State for Home Department v AB* (2003); *Secretary of State for Home Department v A* (2003); *Secretary of State for Home Department v K* (2003); *Secretary of State for Home Department v Tam Thi Dao* (2003).

⁸³ Palermo Protocol (n13 *supra*) art 8(1). This provision imposes a positive obligation upon governments to ensure the safety of the trafficking victim. It also requires countries of origin to accept the return of their citizens and residents.

⁸⁴ This phrase implies that governments can arrange for the return of the trafficked person only after they have had the opportunity to access all of their legal rights to justice and their safety upon return is assured.

⁸⁵ The UNHCHR believes that “safe and, *as far as possible*, voluntary return must be at the core of any credible protection strategy of trafficked persons” (my italics). See Ladan (n51 *supra*) 114.

also be involuntary.⁸⁶ However, sections 8(1) and 8(2) also clearly limit involuntary returns to those that will be safe in their country of origin and after legal proceedings have been finalised. The Protocol remains silent on some trafficked persons' statelessness. Several trafficked persons come from communities in which childbirths are not registered while others travel with false documents. In both situations, these trafficked persons do not have any legitimate travel documents and may find it very difficult to obtain new ones. As a result, countries of destination are sometimes faced with the situation in which no government will accept the trafficked person as a citizen, leaving the person stateless. Ideally, countries of destination should treat all stateless trafficked persons in the same manner as refugees and provide them with a legal means to remain in the country.

(iii) Prevention, cooperation and other measures

The Protocol assigns five provisions to the prevention, cooperation and other measures to combat trafficking in persons.⁸⁷ In addition to governments establishing extensive policies and programmes regarding trafficking in collaboration and cooperation with NGOs (as specified in article 9(1) and 9(3)), research is important in understanding trafficking and developing these policies and responses (article 9(2)). It advocates information-sharing between states and the training of experts involved in one capacity or another in the struggle against human trafficking. Article 9(4) calls for measures in both countries of destination and origin to alleviate factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity". In order to reduce the ability of traffickers to prey on migrant workers, governments should adopt or strengthen legislative or other measures ... to discourage the demand"⁸⁸ for undocumented, vulnerable and exploitable migrant workers. Most of the "prevention" efforts focus on short-term strategies such as public-awareness campaigns regarding the risks of migration.

⁸⁶ The *Travaux Préparatoires* indicates that the words "and shall preferably be voluntary" are understood not to place any obligation on the State Party returning the victims.

⁸⁷ These are arts 9(1) - 9(5). These preventative measures are intended for non-trafficked persons. Preventive measures cannot be successful in an environment of slavery-like conditions of coercion and violent practices. This is mainly because trafficked persons have restricted freedom of movement and are further limited by language barriers and unfamiliar settings.

⁸⁸ Palermo Protocol (n13 *supra*) art 9(5).

Although the Palermo Protocol creates a new distinction between trafficked persons and smuggled migrants, implementation thereof has proved to be both difficult and controversial because no identification mechanisms are provided.⁸⁹ This situation is exacerbated by the fact that most governments have adopted restrictive immigration policies as their law-enforcement response to trafficking.⁹⁰ These policies also fail to distinguish between smuggling and trafficking. Flaws in the critical identification process inevitably compromise the object and purpose of any agreement on trafficking. Trafficked persons may be mistaken for illegal or smuggled migrants, who are increasingly seen as threats to internal security because of their connection with criminal activities.⁹¹ This leads to their summary deportation or incarceration.

When comparing the Palermo Protocol⁹² to the Migrant Smuggling Protocol⁹³ the latter's stated purpose is to prevent and combat migrant smuggling and to promote cooperation among States to that end while protecting the rights of smuggled migrants.⁹³ The Palermo Protocol, however, affords greater protection to the rights of trafficking victims than the Migrant Smuggling Protocol allows to smuggled migrants. For example, States Parties to the Migrant Smuggling Protocol are not required to consider the possibility of permitting victims to remain in their territories temporarily or permanently, nor are they required to consider migrants' rights in the repatriation process. Furthermore, smuggled migrants are not granted similar entitlements as trafficking victims with respect to legal proceedings or remedies against smugglers, nor are they entitled to any of the special protections that states may choose to afford trafficked persons in relation to their personal safety or physical and psychological well-being. Altogether, this difference implies that states accept

⁸⁹ This distinction between "innocent" and "complicit" victims of illegal migration practices is created here for the 1st time and is also found in the Migrant Smuggling Protocol. Annan (n81 *supra*) para 7: "The distinction that has been made between trafficked persons and smuggled migrants is a useful one. However, it is important to note that such a distinction is less clear on the ground, where there is considerable movement and overlapping between the two categories . . . Unfortunately there is little guidance in either instrument regarding how the identification process is to be undertaken and by whom." See also Weissbrodt (n77 *supra*) 25. Border measures are considered in the Palermo Protocol (n13 *supra*) art 11, but mechanisms for the detection of potential victims by border officials as well as embassy personnel are not provided.

Building up their capacities would probably shrink the permeability of borders.

⁹⁰ Chuang (n6 *supra*) 151.

⁹¹ Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law* (2009) 89.

⁹² See n14 *supra*. See also Chap 2 (n178 *supra*).

⁹³ Migrant Smuggling Protocol (n16 *supra*) art 2.

greater financial and administrative responsibilities when identifying trafficked persons.⁹⁴ Accordingly, in some cases national authorities may prefer to identify victims of trafficking as irregular migrants who have been smuggled rather than trafficked. This difference results in a potential incentive for States to ratify the Migrant Smuggling Protocol and not the Palermo Protocol. Additionally, neither Protocol recognizes the fact that it is becoming increasingly common for a person to begin their journey as a smuggled migrant, only to become trafficked when later forced or tricked into an exploitative situation.⁹⁵

Trafficking victims are also not exempted from criminal liability for status-related offences such as illegal migration, working without proper documentation, or prostitution in the Protocol.⁹⁶ The reason is that offenders may use a “trafficking defence” which might weaken states’ ability to control prostitution and migration flows through the application of criminal sanctions.⁹⁷ In addition, the Palermo Protocol does not expressly make legal persons or corporate bodies liable. However, based on article 10 of the CTOC they can be subjected to civil, criminal or administrative liabilities. Member States may still request that amendments be made to improve the Palermo Protocol as the five years’ restriction after its entry into force⁹⁸ has already passed.

The Palermo Protocol contains no provision for a mechanism to monitor its implementation or to hold governments accountable for failing to implement it.⁹⁹ The absence of a supervisory mechanism could prove significant, since a major criticism of the Suppression

⁹⁴ —“Treating trafficking as a criminal-justice issue is far less resource-intensive and politically risky than developing long-term strategies to address the labour migration aspects of the problem.” See Chuang (n6 *supra*) 155.

⁹⁵ Annan (n81 *supra*) para13. Gallagher (n8 *supra*) 58 believes that the failure of States to address these issues is evidence of their unwillingness to relinquish any measure of control over the migrant identification process.

⁹⁶ See Coomaraswamy *Position Paper on the Draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children, submitted by the Special Rapporteur on Violence Against Women, Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on its Fourth Session Held in Vienna 28 Jun -9 July 1999* (UN Doc A/AC 254/CRP13 1999) 2-3.

⁹⁷ Ladan (n51 *supra*) 113.

⁹⁸ Palermo Protocol (n13 *supra*) art 18(1).

⁹⁹ The Protocol also does not make provision for an individual-complaint procedure to be used by a trafficked person or on behalf of this person. This would have allowed individuals to communicate any violations of the treaty and issue adjudicative decisions interpreting and applying treaty provisions. Treaty bodies that provide for the establishment of specific institutions to monitor the terms of those conventions are eg, the HRC, the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee against Torture (CAT) and the Committee on Economic, Social and Cultural Rights (ICESCR).

of Traffic Convention has been its lack of an effective reporting mechanism.¹⁰⁰ The lack of any kind of review or reporting procedure is –a substantive weakness which is likely to undermine political commitment to the Protocols and, thereby, their eventual effectiveness”.¹⁰¹ The Conference of States Parties established by CTOC may only promote and review the implementation of the CTOC, and also improve the capacity of States Parties to combat transnational organized crime.¹⁰² This body however does not have any direct authority on the interpretation of the Palermo Protocol.¹⁰³ The only treaty mechanism that does exist under the present treaty-based regime is the jurisdiction given to the International Court of Justice (ICJ) to resolve any dispute that may arise concerning the interpretation or the application of the Palermo Protocol.¹⁰⁴

(iv) Recent developments

Against complaints that the Palermo Protocol is already appearing a little old-fashioned”,¹⁰⁵ the UNODC has recognised the need to continue to work towards a comprehensive, coordinated and holistic approach to the problem of trafficking in persons. It has launched several programmes designed to renovate its provisions and assist Member States in its implementation. The Resolution on Improving the Coordination of

¹⁰⁰ The Suppression of Traffic Convention merely requests that States Parties annually communicate to the Secretary-General of the UN any laws, regulations and other measures adopted by them concerning the Convention. See UN *Study on Ways and Means for Establishing an Effective Mechanism for the Implementation of the Slavery Conventions, delivered to the Sub-Commission on Prevention of Discrimination & Protection of Minorities* UN Doc E/CN.4/Sub.2/1989/37 (1989).

¹⁰¹ Ladan (n51 *supra*) 126.

¹⁰² CTOC (n13 *supra*) art 32. The implementation provision establishes a two-tier form of review. As the case is with many multilateral treaties negotiated under UN auspices, States Parties will be required to provide regular reports on the progress made in implementation. In addition, the Conference of Parties may itself establish additional review mechanisms (see CTOC (n13 *supra*) art 32(4)(5)).

¹⁰³ Ladan (n51 *supra*) 106: –The Conference of Parties will be concerned solely with the Convention and will not have any authority in respect to the Protocols, except insofar as their respective subject matters can be brought within the provisions of the convention itself”.

¹⁰⁴ Palermo Protocol (n13 *supra*) art 15(2) states: –Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.” This provision is similar to articles contained in the 1926 Slavery Convention (art 8) or the 1956 Supplementary Convention (art 10).

¹⁰⁵ See Gallagher –Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments” 2006 8 *European Journal of Migration and Law* 163 165-166: –For example, its reluctance to recognise a link between prosecution of perpetrators and protection and cooperation of victims now seems a touch unreasonable”.

Efforts against Trafficking in Persons¹⁰⁶ underlines the importance of bilateral, sub-regional and regional partnerships in counter-trafficking efforts and encourages their development. Member States that had not yet ratified or acceded to relevant treaties are furthermore urged to do so.

Another response to assist States in incorporating and implementing the legal provisions of the Palermo Protocol is the UNODC's Model Law against Trafficking in Persons.¹⁰⁷ This document comprehensively outlines a legislative framework both to facilitate and help systematise provision of legislative assistance by UNODC as well as to facilitate the review and amendment of existing legislation and adoption of new legislation by States themselves. First, it provides for a system of trafficking offences, categorised into foundational offences (it criminalises participation in an organised criminal group; laundering of the proceeds of crime; corruption; and obstruction of justice);¹⁰⁸ specific offences (trafficking in persons; aggravating circumstances; non-liability of victims of trafficking in persons; use of forced labour and services)¹⁰⁹ and ancillary and related offences (accomplice liability; organising and directing to commit an offence; attempt; unlawful handling of documents; unlawful disclosure of identity of victims/witnesses; duty of commercial carriers).¹¹⁰ It also pays attention to victim and witness protection, assistance and compensation;¹¹¹ immigration and return of victims;¹¹² and prevention, training and cooperation of law enforcement agencies.¹¹³ The Model Law is designed to be adaptable to the needs of each State, whatever its legal tradition and social, economic, cultural and geographical conditions. Whenever appropriate or necessary, several options for language are suggested in order to reflect the differences between legal cultures. Alternative wordings of certain provisions and sample legislation from various countries

¹⁰⁶ UNGA Res 61/180, adopted on 20 Dec 2006.

¹⁰⁷ UNODC *Model Law against Trafficking in Persons* (2009) 1-92.

¹⁰⁸ UNODC (n107 *supra*) Chap IV.

¹⁰⁹ UNODC (n107 *supra*) Chap V.

¹¹⁰ UNODC (n107 *supra*) Chap VI.

¹¹¹ UNODC (n107 *supra*) Chap VII. In this regard, the UNHCHR's *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (UN Doc E/2002/68/Add 1) further provide that effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences. This document was adopted to change the human trafficking paradigm from a criminal justice approach to a more victim-centred approach. However, it is not a binding instrument on states. See UNHCHR [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/ca3deb2b05d4f35c1256bf30051a003/\\$FILE/N0240168.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/ca3deb2b05d4f35c1256bf30051a003/$FILE/N0240168.pdf) (accessed 2012-12-28).

¹¹² UNODC (n107 *supra*) Chap VIII.

¹¹³ UNODC (n107 *supra*) Chap IX.

are also provided. As more countries adopt the Model Law, it is hoped that national approaches to addressing and eradicating trafficking in persons will become globally more uniform.

This publication has been supplemented by other technical-assistance tools that support Member States in the effective implementation of the Protocol. Some of these instruments are the Toolkit to Combat Trafficking in Persons (2006, 2008); the Anti-Human Trafficking Manual for Criminal Justice Practitioners (2009); the International Framework for Action to Implement the Trafficking in Persons Protocol (2009) which assists Member States in identifying gaps and putting in place additional measures they may need, in conformity with international standards, and the Needs Assessment Toolkit on the Criminal Justice Response to Human Trafficking (2010) which allows governments to conduct assessments of their criminal-justice responses to trafficking in persons and shortcomings in those responses.

4.2.2 International instruments with other focus areas addressing human trafficking

There are numerous international instruments which do not focus primarily on human trafficking but their provisions do address trafficking. These documents will be discussed below.

4.2.2.1 The Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol)

As the Palermo Protocol's sister instrument, the Migrant Smuggling Protocol¹¹⁴ focuses on the protection of persons entering a country without any authorisation, which makes them particularly vulnerable to exploitation.¹¹⁵ The Migrant Smuggling Protocol covers ~~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 a

¹¹⁴ See Migrant Smuggling Protocol (n16 *supra*).

¹¹⁵ The differences between human trafficking, human smuggling and illegal migration have been dealt with in Chap 2.

permanent resident”¹¹⁶ and requires States Parties to criminalise the smuggling of migrants and other related offences.¹¹⁷ The protection offered by the Migrant Smuggling Protocol is limited in two ways: first, it is only applicable in cases of international smuggling involving an organised crime group, and second, victims are afforded very few protections or remedies. The Migrant Smuggling Protocol does include, however, a number of provisions that seek to protect the rights of smuggled migrants, including safeguards found in international humanitarian law, human rights law and refugee law, as well as to prevent the worst forms of exploitation that often accompany the migrant smuggling process.¹¹⁸

Certain migration organisations such as the IOM identify the technical differences between trafficking and smuggling based on the explicit definition of various terms such as recruitment and deception.¹¹⁹ However, *per pro* its mandate, the IOM is required to protect humane and orderly migration from the perspective of migration management”.¹²⁰ As such, the IOM’s approach to human trafficking hinges on the concept of public order and the lack thereof. Human trafficking is framed as an issue of concern since it poses a migration management problem to governments of sending countries as well as transit and receiving countries, because orderly migration and several types of national legislation, including migration legislation, are violated”.¹²¹ The IOM also advocates an array of bodies that seek to address human trafficking where each will define the problem from the perspective of its own mandate”.¹²² Not only will differing definitions on human trafficking hamper the efficacy of its prosecution (as observed already), but their policy objectives will inevitably bear conflicting interests. While seeking to protect trafficked migrants and would-be trafficked migrants from abuse, it also regards trafficking in persons as a violation of the principle of sovereignty, hence is ready to consider the state as a victim of unruly practices of migrants”.¹²³

¹¹⁶ See Migrant Smuggling Protocol (n16 *supra*) art 3(a).

¹¹⁷ States Parties should also implement information campaigns designed to discourage illegal migration. See Migrant Smuggling Protocol (n16 *supra*) art 15(1).

¹¹⁸ See Migrant Smuggling Protocol (n16 *supra*) arts 4(4), 5, 9(1), 16(1)-16(4), 19(1). Foreign migrant workers are frequently subject to discriminatory rules and regulations which undermine human dignity.

¹¹⁹ Following directives provided in the Palermo Protocol.

¹²⁰ See IOM *Counter-Trafficking* <http://www.iom.int/jahia/Jahia/counter-trafficking> (accessed 2012-12-28).

¹²¹ See UNGA Res E/CN.4/2002/90 — Specific Groups and Individuals: Migrant Workers”, adopted on 9 Jan 2002, para 12. Also see Truong *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management* (2006) 34.

¹²² See IOM (n120 *supra*) 1.

¹²³ See Truong (n121 *supra*) 34-35.

On the other hand, the International Migration Programme of UNESCO¹²⁴ also has as a central objective to promote respect for the human rights of migrants and to contribute to the global fight against human trafficking. It endorses an enabling approach to migration management and views issues of international migration from the perspective of cultural diversity, thereby enabling migrants to exercise their rights and enabling governments to design creative solutions. In terms of this document, migrants are viewed as cultural assets rather than economic burdens.

4.2.2.2 The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention)

Closely related to the Migrant Smuggling Protocol is its predecessor, the Migrant Workers Convention.¹²⁵ This Convention took thirteen years to come into force as many states were not in favour of adopting an agreement that would require them specifically to recognize the rights of non-citizens in their countries. The number of ratifications remains low and countries that have ratified and signed the Convention are primarily sending countries, however some are also transit and receiving countries. The countries ratifying this Convention are low-income countries and home to some 4.5 million migrants (2.6 percent of the world total migrant population).¹²⁶ No migrant-receiving countries located in wealthy regions – such as Western Europe and North America – have yet ratified the Convention, even though they host the majority of migrant workers (nearly 100 million out of a total of 175 million migrant workers).¹²⁷ Other important receiving countries – India, Japan,

¹²⁴ UNESCO collects best practices in addressing human trafficking based on the view that “carefully documented case histories can be a source of information and an inspiration to policy makers on how to design creative, successful, sustainable solutions to the management of migration”. See UNESCO — “Best Practices” <http://www.unesco.org/most/bphome.htm> (accessed 2012-12-28). See also Bendixsen & de Guchteneire — “Best Practices in Immigration Services Planning” 2003 22(4) *Journal of Policy Analysis and Management* 677 682.

¹²⁵ Adopted by UNGA Res 45/158 of 18 Dec 1990, it entered into force only on 1 Jul 2003 in accordance with art 87(1). In 2012, it had 31 signatories and 44 parties. Of these, 19 ratifications and 14 signatures are from African countries. South Africa has neither ratified nor signed this Convention. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (accessed 2012-12-28). Another closely-related instrument concerning migration is the 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO Convention No 143).

¹²⁶ Statistics are from the UNESCO Information Kit on the UN Convention on Migrants Rights (2003) 3.

¹²⁷ *Ibid.*

Singapore, Malaysia, Australia, South Africa, and the Gulf States – have not ratified the Convention either.

The Migrant Workers Convention intends to protect migrant workers globally by setting out comprehensive safeguards¹²⁸ and to impose sanctions on those who abuse these workers.¹²⁹ Irrespective of the form of migration, The Convention recognises in articles 25-30 that migrants - whether “regular” or “irregular” - are entitled to a minimum set of rights which includes humane living and working conditions, education and health services,¹³⁰ freedom from sexual exploitation and legal equality. It also specifies that migrants have the right to return to their home country to participate in the political procedures of their country of origin. According to this instrument, even undocumented migrants are entitled to basic protection and recognition of their rights as human beings. This is an important provision for human trafficking survivors who are stranded in a foreign country without any legal documents. States may still, however, use their sovereign power to refuse to extend human rights to undocumented migrants – especially socio-economic rights.¹³¹

4.2.2.3 The Convention on the Rights of the Child (CRC)

The rights of the child¹³² are firmly guaranteed under the CRC,¹³³ which explicitly forbids all forms of child sexual exploitation, including child prostitution, child pornography, the sale

¹²⁸ Addressing human trafficking, the Migrant Workers Convention (n125 *supra*) art 11 prohibits slavery, servitude, forced or compulsory labour while art 10 prohibits torture or cruel, inhuman or degrading treatment or punishment. Art16(1) guarantees the right to liberty and security of person; art 16(2) the effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions; arts16(3)-(9) the minimum standards with regard to verification of identity, arrest, detention.

¹²⁹ Migrant Workers Convention (n125 *supra*) art 68 proposes that States Parties collaborate to impose effective, appropriate sanctions against persons, groups or entities which use violence, threats or intimidation against migrant workers in an irregular situation. This must be done within the jurisdiction of each State concerned.

¹³⁰ See Migrant Workers Convention (n125 *supra*) art 41. This includes the right of documented migrants to form associations and trade unions to protect their economic, social, cultural and other interests (art 40).

¹³¹ See Truong (n121 *supra*) 22.

¹³² According to the CRC (n133 *infra*) art 1: "A child means every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier". The problem concerning this definition is that the available data on children trafficked into prostitution has shown that most of these girls were under the age of 18 years at the time of trafficking. However, by the time they were rescued or escaped or ejected from the brothels, many of them may have passed the age of 18 and not eligible anymore to demand protection under the CRC. In such a situation, apart from the International Covenant on Civil and Political Rights (ICCPR), they are protected under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which guarantees protection of all females' rights irrespective of their age.

or traffic of children or other unlawful sexual practices.¹³⁴ The CRC is a very valuable instrument in the fight against child trafficking. This is seen in the unprecedented universal acceptance¹³⁵ of the CRC and the fact that the CRC (and its Protocol) contain inclusive international legal provisions regarding the prevention of all forms of child exploitation and the punishing of perpetrators of such acts. The enforcement mechanism of the CRC is furthermore better than that of the Palermo Protocol. It has a treaty-monitoring committee, which receives reports from the States Parties, the first report within two years of entry into force of the CRC for that state and every five years thereafter. The reporting mechanism brings the domestic implementation of the CRC before the international body, which discomfits the state that does not comply with the provisions of the Convention, and compels it to make some progress in accordance with the CRC before it faces the committee next time.¹³⁶ It places mandatory obligations on all governments to protect the rights of children in the light of their vulnerability and promote their best interest.¹³⁷ States Parties have the obligation to “take all appropriate measures to ensure that the child is protected against all forms of discrimination” and to provide suitable environments to this end.¹³⁸

¹³³ UNGA Res 44/25 of 20 Nov 1989, entered into force on 2 Sept 1990.

¹³⁴ This is found in CRC (n133 *supra*) arts 34 & 35 where States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse as well as the abduction of, the sale of or traffic in children for any purpose or in any form.

¹³⁵ Within 10 yrs of its promulgation 191 countries in the world, except USA and Somalia, had ratified it. As of 5 Apr 2012, 140 States are signatories and 193 are parties to the Convention. All the countries in Africa have ratified the CRC. South Africa ratified this Convention on 29 Jan 1993 and signed it on 16 Jun 1995. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed 2012-12-28).

¹³⁶ However, the non-availability of an individual complaint and inquiry procedure under the CRC and under the Optional Protocol on Sale of Children, Child Prostitution and Child Pornography is a major hurdle for its full effectiveness.

¹³⁷ CRC (n133 *supra*) art 2(1) contains the right to non-discrimination on the ground of sex, disability and other status: “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” This provision is similar to that in the ICCPR. The CRC (n133 *supra*) art 2, together with art 3 (the best interest principle), art 6 (the right to life, survival and development) and art 12 (the right to participate) comprise the 4 general principles adopted by the CRC which form the protective framework for the child.

¹³⁸ See CRC (n133 *supra*) art 2(2). The use of strong and mandatory words such as “shall take all appropriate measures” in these provisions underline the concrete demand for substantive action from States Parties. See Hodgkin & Newell *Implementation Handbook for the Convention on the Rights of the Child* 3rd ed (2002) 581-587. According to the monitoring body to the CRC (the CRC Committee) the success of national measures can be judged by *inter alia* the adoption of legislation that aims to ensure effective protection of children against abduction, sale and trafficking, including the consideration of these acts as criminal offences; as well as awareness and information campaigns, and the allocation of appropriate resources for the development and implementation of relevant policies and programmes. See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 603. This approach has

With the acceptance of the CRC, States Parties undertake to ensure certain rights of the child so that all children have the fullest opportunity to live a healthy, purposeful and happy life.¹³⁹ The CRC extends assistance to the child such as those contained in earlier texts (inherent right to life, food, housing, education, health),¹⁴⁰ or new ones such as identity (the right of a child to a name, nationality, and protection of this identity);¹⁴¹ as well as services focused on re-adaptation.¹⁴² All appropriate measures must be taken to promote physical and psychological recovery and social reintegration of a trafficked child of any form of neglect, exploitation or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.¹⁴³

The most relevant articles targeting the eradication of child trafficking for prostitution and other abuses are articles 32, 34, 35, 37 and 39. Article 32(1) prohibits the economic exploitation of a child through performing any type of work that is likely to be hazardous or to interfere with the child's education, or the child's health or physical, mental, spiritual, moral or social development.¹⁴⁴ This will also include recruitment to work involving the removal of a child from home¹⁴⁵ to be employed at an age or in circumstances that violate either national laws or international standards on the minimum age for employment¹⁴⁶ and

the merit of offering a range of actions that States Parties can take and imposes an obligation on States Parties to ensure that the reintegration of the victims is addressed (see CRC (n133 *supra*) art 39), as compared to the Palermo Protocol (n13 *supra*) art 6(3) which merely request States to consider implementing measures in this regard.

¹³⁹ Eg, CRC (n133 *supra*) art 31 grants children the right to rest and leisure; to engage in play and recreational activities. These are natural rights which trafficked children do not have.

¹⁴⁰ See CRC (n133 *supra*) arts 6; 24; 27; 28 & 29 respectively.

¹⁴¹ See CRC (n133 *supra*) arts 7 & 8 respectively.

¹⁴² CRC (n133 *supra*) art 39 advocates the child's recovery which is particularly significant in the context of child trafficking where the trauma suffered can be an obstacle to the rehabilitation of a victim.

¹⁴³ Children are protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse in CRC (n133 *supra*) art 19. Protection granted to children is also extended to new domains such as torture and trafficking. Art 37 requires children to be free from torture or other cruel, inhuman or degrading treatment or punishment, no unlawful or arbitrary deprivation of liberty. See Detrick (n138 *supra*) 564; Hodgkin & Newell (n138 *supra*) 486-489.

¹⁴⁴ Although "economic exploitation" is not explicitly defined in the CRC, one can infer that it encompass all hazardous and harmful work as stipulated in the provision. Detrick (n138 *supra*) 559 extends this to: "... the abduction of, the sale of or traffic in children that can occur for the purposes of economic exploitation". See also Hodgkin & Newell (n138 *supra*) 475. CRC (n133 *supra*) art 35: "States Parties shall take appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or the traffic in children for any purpose or in any form".

¹⁴⁵ CRC (n133 *supra*) art 16 grants legal protection from arbitrary or unlawful interference with privacy, family home or correspondence.

¹⁴⁶ Art 3 of ILO Convention No 138 sets a minimum age of 18 yrs, especially when that work is "likely to jeopardize the health, safety or morals of young persons". This applies unless, under the law applicable to the child, majority is attained earlier (see CRC (n133 *supra*) art 1). See ILO Convention concerning

on child servitude.¹⁴⁷ State obligations under this article are to provide for a minimum age for admission to employment, proper regulation of the hours and conditions of employment, as well as appropriate penalties to ensure the effective enforcement of that provision.¹⁴⁸ At the level of international cooperation, the signing of cooperation agreements will facilitate the design of clear prevention and prosecution mechanisms by exchanging information regarding traffickers,¹⁴⁹ and to extradite and prosecute them. However, these crucial provisions prohibiting trafficking of children into prostitution have been completely ineffective due to the omission of States Parties to implement them. In this regard, States must be held responsible for failing to fulfil the obligations they have undertaken under CRC.¹⁵⁰

The prohibition of trafficking in children in the CRC (as in the Palermo Protocol) is not limited only to recruitment for prostitution, but includes a range of situations in which children are taken away from, or given away by their families for a range of purposes, including, but not limited to, exploitation. Illegal adoption is a form of exploitation in that it involves illicit remuneration and the violation of the child's right to be brought up in his parental family environment.¹⁵¹ Terms such as "abduction", "sale" and "trafficking" are not defined. Although a related notion to "abduction" is found in the CRC article 11 as the "illicit transfer and non-return of children abroad", this phrase relates to parental-child abduction across borders,¹⁵² and not to a particular form of exploitation. The "sale of children" as defined by the Special Rapporteur's mandate includes:

Minimum Age for Admission to Employment (No 138) 1973 (ILO Minimum Age Convention), entered into force on 19 Jun 1976. Also see Detrick (n138 *supra*) 565.

¹⁴⁷ The 1956 Supplementary Convention art 1(d) as found in Chap 2 (n60), and ILO Minimum Age Convention.

¹⁴⁸ See CRC (n133 *supra*) art 32(2).

¹⁴⁹ See Detrick (n138 *supra*) 603.

¹⁵⁰ See generally Cook (n3 *supra*) 147-148.

¹⁵¹ The main instrument adopted to prevent such trafficking is the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption (1990, entered into force on 1 May 1995). Art 32(1) states: "None shall derive improper financial or other gain from activity related to inter-country adoption."

¹⁵² See Detrick (n138 *supra*) 598; Van Bueren *The International Law on the Rights of the Child* (1995) 280.

... the transfer of a child from one party (including biological parents, guardians and institutions) to another, for whatever purpose, in exchange for financial or other reward or compensation.¹⁵³

Similar to the Palermo Protocol, no definition is given of the concept of “sexual exploitation”. For Muntarbhorn “sexual exploitation” is “the use of children for the sexual satisfaction of adults”.¹⁵⁴ The definition highlights the objectification of the child, whose personality and dignity are denied to satisfy a third person. States Parties have not shown much progress in implementing the legal principles enshrined in this international instrument mainly because of the insufficient clarification on its key concepts. These deficiencies lead to the adoption of the OPSC and OPCC ten years later.

4.2.2.4 The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC)

Whereas the Palermo Protocol is the principal international instrument addressing human trafficking in its entirety, the CRC¹⁵⁵ and its OPCC¹⁵⁶ and OPSC¹⁵⁷ focuses more on the rights of children. Both Protocols conceive that children are not only objects of protection, but also subjects of rights.¹⁵⁸ However, children have a different legal status and different needs to that of adults, and thus justly often receive more extensive and different types of protection under national and international laws. They also have less capacity to exercise agency and need others to protect their rights. For these reasons, formulating remedies to address trafficking in children should be addressed separately from trafficking in adults.¹⁵⁹

¹⁵³ See Muntarbhorn *Rights of the Child, Sale of Children: Report of Mr Vitit Muntarbhorn, Special Rapporteur, Commission on Human Rights, 49th Session* (UN Doc E/CN.4/1993/28). Also see Detrick (n138 *supra*) 604; Hodgkin & Newell (n138 *supra*) 526-527.

¹⁵⁴ See Muntarbhorn (n153 *supra*) 22. Also see Detrick (n138 *supra*) 593; Van Bueren (n152 *supra*) 275.

¹⁵⁵ See CRC (n133 *supra*).

¹⁵⁶ See OPCC (n172 *infra*).

¹⁵⁷ UNGA Res A/RES/54/263 of 25 May 2000, entered into force on 18 Jan 2002. As of 5 Apr 2012, 118 States are signatories and 142 are parties to the Convention. South Africa has only ratified this Convention on 30 Jun 2003. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en (accessed 2012-12-28).

¹⁵⁸ See Zermatten *The Best Interests of the Child - From the Literal Analysis to the Philosophical Scope Working Report* (2003) 3. Another relevant child-specific instrument comprises the 1996 Declaration and Plan of Action from the World Congress against the Commercial Sexual Exploitation of Children.

¹⁵⁹ The OPSC is particularly relevant as it is aimed at achieving the goals of the CRC. See OPSC (n157 *supra*) preamble para 1: “Considering that, in order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions, especially articles 1, 11, 21, 32, 33, 34, 35 and

The OPSC acknowledges the increase in international trafficking of children for the purposes of sale, prostitution, and pornography,¹⁶⁰ and the extreme vulnerability of girl children to sexual exploitation.¹⁶¹ It aims to eliminate these crimes “by adopting a holistic approach, addressing the contributing factors”.¹⁶² The definitions of “sale of children”,¹⁶³ “child prostitution”¹⁶⁴ and “child pornography”¹⁶⁵ appear here for the first time in an international instrument. For the sake of completeness, the offering, delivering or accepting, by whatever means of a child for the purpose of organ harvesting, forced labour and illegal adoption is included.¹⁶⁶ The attempts to commit any of the said acts, and complicity in any of them,¹⁶⁷ are also criminalised. These offences are “punishable by appropriate penalties that take into account their grave nature”¹⁶⁸ whether they are “committed domestically or trans-nationally or on an individual or organized basis”.¹⁶⁹ The scope of the OPSC is therefore wider than that of the Palermo Protocol, since it covers the trafficking of children within domestic borders as well as by individuals.

The OPSC article 5 advocates the strengthening of international cooperation in the prosecution of offenders (articles 6 and 10).¹⁷⁰ All these provisions would remain

36, it would be appropriate to extend the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography”.

¹⁶⁰ See OPSC (n157 *supra*) preamble paras 3 & 4. These crimes are prohibited in OPSC (n157 *supra*) art 1. See also Hodgkin & Newell (n138 *supra*) 475.

¹⁶¹ See OPSC (n157 *supra*) preamble para 5. See also OHCHR *Legislative History of the Convention on the Rights of the Child Vol 1* (2007) 52.

¹⁶² See OPSC (n157 *supra*) preamble para 7.

¹⁶³ The OPSC (n157 *supra*) art 2(a) defines the sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”. This definition is wide as to cover as many constituents of child trafficking as possible.

¹⁶⁴ The OPSC (n157 *supra*) art 2(b) defines child prostitution as “the use of a child in sexual activities for remuneration or any other form of consideration”. Compare Muntarhorn (n153 *supra*) para 117 who defines “child prostitution” as “the sexual exploitation of a child for remuneration in cash or in kind, usually but not always organised by an intermediary (parent, family member, procurer, teacher, etc)”. See Detrick (n138 *supra*) 594.

¹⁶⁵ The OPSC (n157 *supra*) art 2(c) states that child pornography constitutes “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”. Muntarhorn (n153 *supra*) para 168 describes “child pornography” as “the visual or audio depiction of a child for the sexual gratification of the user, [involving] the production, distribution and/or use of such material”. See Detrick (n138 *supra*) 594.

¹⁶⁶ See OPSC (n157 *supra*) arts 3(1)(a)(i)b, 3(1)(a)(i)c and 3(1)(a)(ii) respectively.

¹⁶⁷ See OPSC (n157 *supra*) art 3(2).

¹⁶⁸ See OPSC (n157 *supra*) art 3(3).

¹⁶⁹ See OPSC (n157 *supra*) art 3(1).

¹⁷⁰ The OPSC (n157 *supra*) art 5 makes the offences referred to in art 3 extraditable offences; art 6 obliges States Parties to afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings. The OPSC (n157 *supra*) art 10(1) requires international cooperation by agreements for prevention, detection, investigation, prosecution and punishment of offenders, while art 10(2) promotes international cooperation to assist child victims in recovery, reintegration and repatriation.

meaningless if, as provided by article 12, the Committee did not compel States Parties to report on the measures taken to implement those provisions within two years following the OPSC's coming into force. The biggest lacunae in the OPSC is however that it does not incorporate a complaint procedure for individual trafficked persons or someone on their behalf to be able to make complaint before the treaty monitoring body.

In terms of providing protection for children who have been trafficked or otherwise abused, the provisions of the OPSC go significantly further than those of the Palermo Protocol, since it protects the rights of the trafficked child at all stages of the criminal justice process.¹⁷¹ In recognising their special needs and the vulnerability of child victims, article 8(3) states that the "best interests of the child" shall be a primary consideration and provides for measures to ensure victim assistance including full social reintegration and recovery; while article 8(4) grants access to adequate procedures for compensation for damages. The OPSC aims to redress the physical and psychological harm suffered by the child trafficked for prostitution and pornography under article 9(3) of the Protocol.

The OPSC remains one of the best attempts to counter certain manifestations of child trafficking. Still, trafficking extends further than the mere selling, prostituting or using children in the pornographic industry. These are only the "end" purposes of child trafficking. Child trafficking consists of further different criminal acts which are also prejudicial to the child – it is a whole process of exploitation, from the supply to the demand side. It is for this reason that the Palermo Protocol was adopted, which offers a more holistic approach to the issue of human trafficking.

¹⁷¹ See OPSC (n157 *supra*) art 8(1). Unfortunately the comprehensive protection provisions here are applicable only if the child is participating in the criminal justice process as a witness. Support services, privacy protection and safety services to be provided to child victims will furthermore be "appropriate" or "in appropriate cases" and only "throughout the legal process" (OPSC (n157 *supra*) art 8(d)-(f)).

4.2.2.5 The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPCC)

Although focusing only on one aspect of trafficking, that is, the use of children in armed conflict, this protocol is important in order to combat child trafficking. The OPCC¹⁷² is intended to ensure that children (persons who have not yet attained the age of 18 years) are not forced to enlist and to partake directly in hostilities.¹⁷³ Ratifying states must ascertain that while their armed forces can accept volunteers below the age of 18, they cannot be conscripted. To safeguard this purpose, States Parties must raise the minimum age for the voluntary recruitment of persons into their national armed forces. The OPCC has thus developed the right set out in article 38(3) of the CRC¹⁷⁴ by raising the age for direct participation in armed conflict to 18. In this manner, the OPCC improves and strengthens the implementation of rights recognised in the CRC. Although the OPCC does not mention the issue of human trafficking directly, it does recognise that certain children are particularly vulnerable to recruitment or use in hostilities owing to their economic or social status or gender.¹⁷⁵ Consequently, the economic, social and political root causes of the involvement of children in armed conflicts are taken into consideration.¹⁷⁶

¹⁷² UNGA Res A/RES/54/263 of 25 May 2000, entered into force on 12 Feb 2002. As of 5 Apr 2012, 128 States are signatories and 139 are parties to the Convention. South Africa signed this Convention on 8 Feb 2002 and ratified it on 24 Sep 2009. See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-11-b&chapter=4&lang=en> (accessed 2012-12-28).

¹⁷³ See OPCC (n172 *supra*) preamble para 6 & arts 1-3. This stipulation was reworded from art 77(2) of both the Protocol Additional to the Geneva Conventions of 12 Aug 1949 and the Protection of Victims of International Armed Conflicts (Protocol I) of 8 Jun 1977. The age limit was also modified from 15 yrs to 18 yrs in the OPCC. But there is not a total prohibition on the use of children under 18 yrs in armed conflict as states are required to "take *all feasible* measures" that they participate in direct hostilities. This stipulation is not as stringent as taking *all necessary* measures to bar children's involvement in combat. The OPCC also does not cover situations where children under the age of 18 are kidnapped or forced to join an army.

¹⁷⁴ The CRC (n133 *supra*) art 38(3) provides: "States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest". This proviso is reinforced by art 4 of the Rome Statute of the International Criminal Court which states that "enlisting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts" is a war crime. Consent of the child is never a valid defence. See *Prosecutor v Thomas Lubanga Dyilo*, No ICC-01/04-01/06-803, Decision on the Confirmation of Charges (Pre-Trial Chamber 1 29 Jan 2007) 246. Although the OPCC requires parties to refrain from recruiting children under 15, it does not exclude children who volunteer for armed service. This can be deduced from the word "direct" in the clause "take a direct part in hostilities". Child volunteers may thus be involved indirectly in warfare, by collecting and conveying military information, assisting in the transport transportation of weapons, delivering of supplies, etc.

¹⁷⁵ See OPCC (n172 *supra*) preamble para 15.

¹⁷⁶ See OPCC (n172 *supra*) preamble para 16.

4.2.2.6 The International Labour Organisation's (ILO) Forced Labour Conventions and the Minimum Age Convention

Following trafficking for purposes of sexual exploitation, trafficking for purposes of forced labour is the next biggest form of trafficking.¹⁷⁷ However, many of the employment conditions and activities that especially females are compelled to perform in the sex industry, fall under the category of forced labour because these persons do not usually volunteer for such work and accordingly do the work under threat of punishment.¹⁷⁸ The ILO has adopted some 183 conventions in the international labour code ranging from maternity protection issues to protection of the rights of vulnerable groups in exploitative work conditions. Although the ILO's original mandate is to protect the rights of persons to organised labour,¹⁷⁹ it has extended its mandate to address human trafficking as a sociological problem. The ILO deals with the human-trafficking issue in relation to forced labour, to the abuse of migrant workers and to its being one of the worst forms of child labour.¹⁸⁰ Its directive is to "promote social justice as the foundation of international peace, specifically by articulating and supervising fundamental human rights in the world of work".¹⁸¹

Prior to the entry into force of the ILO Convention No182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO C182)¹⁸² in

¹⁷⁷ See UNODC *Global Report on Trafficking in Persons* (2009) 6.

¹⁷⁸ Kelly *Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe* (2002) 20, 25.

¹⁷⁹ The rights of persons to organised labour consist of certain fundamental principles which include freedom of association of workers, including the right to form or join a trade union; the elimination of forced labour; the effective abolition of child labour; and the ending of discrimination in employment. See the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted on 18 Jun 1998 by the International Labour Conference at its 86th session, ILO Doc CIT/1998/PR20A <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (accessed 2012-12-29).

¹⁸⁰ In this regard, it coordinates and cooperates with UN Children's Fund (UNICEF), the IOM and the UNODC in certain projects.

¹⁸¹ ILO *Unbearable to the Human Heart – Child Trafficking and Action to Eliminate It* (2002) vii. http://www.ilo.org/public/libdoc/ilo/2002/102B09_227_engl.pdf (accessed 2012-12-28).

¹⁸² Adopted on 17 Jun 1999, this ILO Convention came into force on 19 Nov 2000. As of 5 Apr 2012, the Convention has 173 ratifications of which 50 (from 54) countries are from Africa (only Eritrea, Sierra Leone, Somalia and Western Sahara did not ratify). See <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182> (accessed 2012-12-28). This instrument was ratified at the fastest pace since ILO was founded in 1919, and was ratified by South Africa on 07 Jun 2000. Sloth-Nielsen argues that the adoption of this Convention was, *inter alia*, a response to the poor accession of African and Asian countries to the ILO C138. See Sloth-Nielsen "The Interface between Child Protection, Child Justice and Child Labour via Convention 182 on the Elimination of the Worst Forms of Child Labour" in Meuwese, Detrick & Jansen (eds) *100 Years of Child Protection* (2007) 205.

1999, the ILO had been addressing trafficking in the context of migrant workers in the framework of the ILO Convention No 29 on Forced Labour (ILO C29)¹⁸³ and the ILO Convention No 105 on Abolition of Forced Labour (ILO C105).¹⁸⁴

In its endeavour to eliminate forced labour, article 1 of the ILO C29 obliges states to suppress use of forced or compulsory labour within the shortest period possible. The lack of an absolute prohibition, along with the existence of such an ambiguous timeline for eradicating forced labour, may be explained by the fact that it was still routine for colonial authorities to rely on forced labour for public works. The Convention defines forced or compulsory labour in article 2(1) as meaning “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. While this definition distinguishes forced labour from slavery in that it does not include a concept of ownership, it is clear that the practice imposes a similar degree of restriction on the individual’s freedom – often through violent means. The ILO C29 and ILO C105 are essentially the only international instruments that set out a definition of forced labour, although its prohibition is endorsed by many treaties, both international and regional. However, not all forms of forced labour are prohibited under the ILO forced labour conventions.¹⁸⁵

Article 2(2) of ILO C29 sets out certain specific exemptions which otherwise would have fallen under the definition of forced or compulsory labour. From its provisions is exempted “any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country” and excludes “any work or service exacted in virtue of compulsory military service laws for work of a purely military character”.¹⁸⁶ The right of a government to exact forced labour in times of emergency is also exempted from the forced

¹⁸³ The ILO C29 entered into force on 1 May 1932. It is the most widely ratified ILO convention with 174 States Parties (as on 5 Apr 2012). This instrument was ratified by South Africa on 5 Mar 1997. See <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C029> (accessed 2012-12-28).

¹⁸⁴ The ILO C105 entered into force on 17 Jan 1959. This convention has 169 ratifications. South Africa ratified it on 5 Mar 1997. See <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C105> (accessed 2012-12-28).

¹⁸⁵ The ILO forced labour conventions do not prohibit prison labour but they do place restrictions on its use. Only convicted criminals may be forced to work. Detainees awaiting trial may not be forced to work, nor may those imprisoned for political offences or as a result of labour disputes. See ILO C105 (n184 *supra*) art 1(a), (d); Weissbrodt (n77 *supra*) 13.

¹⁸⁶ ILO C182 (n182 *supra*) art 3(a) prohibits “forced or compulsory recruitment of children [under 18] for use in armed conflict”. The OPCC (n172 *supra*) art 2 similarly states that: “States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.”

labour conventions. Examples of such circumstances include “war or . . . a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic”.¹⁸⁷ ILO C29 also exempts minor communal services “being performed by the members of the community in the direct interest of the said community”.¹⁸⁸ Article 6 states that officials shall not constrain any person to work for private individuals, companies or associations.

On the ground that the use of forced labour as a means of political coercion also violates articles 2, 9, 10, 11 and 19 of the Universal Declaration of Human Rights (UDHR), the ILO created the ILO C105.¹⁸⁹ This Convention provides for the immediate and complete eradication of forced labour in specific circumstances and for practices which could “lead to forms of forced labour”.¹⁹⁰ Similar to article 6 of ILO C29, article 1 imposes an obligation on States Parties to suppress the use of forced labour for political purposes, for purposes of economic development, as a means of labour discipline or punishment for strike action, and as a means of discrimination. All forms of forced labour as a means of racial, social, national or religious discrimination must be prohibited. Article 2 requires effective measures to secure the immediate and complete abolition of forced labour.

The ILO C182¹⁹¹ seeks to address labour exploitation specific to situations of child slavery or practices similar to slavery. Article 1 affirms the prohibition and elimination of the worst forms of child labour.¹⁹² These forms include debt bondage,¹⁹³ recruitment of children for prostitution, pornography, the use of children for illicit activities such as drug trafficking, and any work which would harm the health, safety or morals of children.¹⁹⁴ The trafficking of children is specifically included among the “worst forms” prohibited by article 3(a) which calls for its criminalisation and suppression. The Convention does not, however, spell out

¹⁸⁷ ILO C29 (n183 *supra*) art 2(2)(d). Emergency situations include war, calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic, that threaten a country’s existence, but the extent and length of service should be strictly limited to that which is absolutely necessary. See ILO Committee of Experts *General Survey concerning the Forced Labour Convention 1930 (No 29) and the Abolition of Forced Labour Convention 1957 (No 105)* (2007) 3.

¹⁸⁸ Such service (1) must be minor in nature, (2) must benefit the community directly, and (3) may be required only after the community has been consulted. See ILO Committee of Experts (n187 *supra*) 9-10.

¹⁸⁹ See *supra* (n187).

¹⁹⁰ UNESCO *Contemporary Forms of Slavery* (2000) para 10.

¹⁹¹ See *supra* (n182).

¹⁹² See ILO C182 (n182 *supra*) art 2 which defines children as persons under the age of 18 yrs.

¹⁹³ The ILO has observed that bondage of children generally occurs through a hereditary debt, an occasional debt or an advance on salary.

¹⁹⁴ See ILO C182 (n182 *supra*) art 3(d).

what it means by trafficking. Article 3(a) further bans “forced or compulsory recruitment of children for use in armed conflict”. This provision appears to permit parties to hostilities to allow children aged fifteen, sixteen and seventeen to enter the armed forces on a voluntary basis, but to prohibit conscription if those under eighteen are likely to be mobilised to fight. Some States accept volunteers from sixteen years upwards and refuse to increase the minimum age of recruitment into the armed forces to eighteen.¹⁹⁵

States are required to design and implement programmes of action to eliminate, as a priority, the worst forms of child labour.¹⁹⁶ In this regard, education is very important to prevent child labour, taking into account the special situation of girls.¹⁹⁷ National laws or regulations are invited to regulate this sector¹⁹⁸ and States Parties must assess the responsiveness of those measures periodically.¹⁹⁹ If needed, international cooperation and assistance shall provide support to the existing mechanisms to eliminate the worst forms of child labour.²⁰⁰ To facilitate the implementation of ILO C182, its accompanying Recommendation 190 puts forward a Programme of Action as a matter of urgency.²⁰¹ Although not binding, it offers a holistic approach for the criminalisation of the worst forms

¹⁹⁵ The Rome Statute, which will be discussed later, also reflects this view. See Rome Statute Final Act arts 8(2)(b)(xxvi) and 8(2)(e)(vii). The OPCC however improves the protection of children from recruitment to participation in armed conflict.

¹⁹⁶ See ILO C182 (n182 *supra*) art 6.

¹⁹⁷ See ILO C182 (n182 *supra*) art 7.

¹⁹⁸ See ILO C182 (n182 *supra*) art 4(1).

¹⁹⁹ See ILO C182 (n182 *supra*) arts 4(3) & 6. The submission of detailed reports by governments to the ILO Governing Body is widely regarded as one of the most effective systems of supervision. See Weissbrodt (n77 *supra*) 49. Furthermore, any allegations that a State has failed to comply with its obligation under a convention it has ratified are investigated. The monitoring body of all ILO Conventions is the Committee of Experts on the Application of Conventions and Recommendations. If found guilty of non-compliance; member states will not receive any development funds from the ILO, and are suspended.

²⁰⁰ See ILO C182 (n182 *supra*) art 8. This article enhances international cooperation and/or assistance including development, poverty-eradication programmes and universal education.

²⁰¹ ILO Recommendation No 190: Worst Forms of Child Labour (1999) <http://www.ilocarib.org.tt/projects/childlabour/r190.htm> (accessed 2012-12-28). Another ILO International Programme on the Elimination of Child Labour (ILO-IPEC) was created in 1992 to address specifically issues of child labour and child trafficking. ILO-IPEC's mandate intersects with that of the UN's Children's Fund (UNICEF) whose approach to children's rights extends beyond the workplace to cover all areas of childhood. Reports by the UNICEF *Innocenti* Centre covers trafficking of women and children in over 50 African countries eg, *Child Trafficking in West Africa: Policy Responses* (2002) and *Trafficking in Human beings, Especially Women and Children in Africa* (2003-2004). The Centre hosts a child-trafficking research hub, dedicated to data collection, knowledge transfer and the development of methodologies related to research on child trafficking. See *Innocenti* Child Trafficking Research Hub <http://www.childtrafficking.org>; UNICEF *Innocenti* Research Centre website: <http://www.unicef-icdc.org> (accessed 2012-12-28).

of child labour including trafficking in children,²⁰² the economic and social measures to support the elimination of their occurrence and prosecution of offenders.²⁰³

It has proven difficult, on a practical level, to distinguish between those practices that are permissible and those that constitute abusive forms of child labour. The ILO Convention concerning Minimum Age for Admission to Employment²⁰⁴ (Minimum Age Convention) and its accompanying Recommendation No 146²⁰⁵ are the principal international instruments providing the only existing comprehensive set of guidelines relating to the appropriate age at which young children can enter the work force. The minimum age for work may not be less than the age of completion of compulsory schooling, but also not less than fifteen years (fourteen years for countries in which the economy and educational facilities are insufficiently developed"²⁰⁶). The Minimum Age Convention allows children to do "light work" between the ages of thirteen and fifteen (twelve years in developing countries).²⁰⁷ The minimum age for "hazardous work" likely to jeopardize the health, safety or morals of a child is set at eighteen years.²⁰⁸ States Parties are required to implement national policies progressively to raise the minimum age for admission to the work force in order to ensure the fullest physical and mental development of young persons. The Minimum Age Convention applies to all sectors of economic activity and covers children whether or not they are employed for wages.

²⁰² ILO Recommendation No 190 (n201 *supra*) art 12: "Members should provide that the following worst forms of child labour are criminal offences: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; and (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties, or for activities which involve the unlawful carrying or use of firearms or other weapons".

²⁰³ ILO Recommendation No 190 (n201 *supra*) art 11 states that Parties should gather and exchange information concerning criminal offences, including those involving international networks; detect and prosecute those involved in the sale and trafficking of children, or in the use, procuring or offering of children for illicit activities, for prostitution, for the production of pornography or for pornographic performances; and also register perpetrators of such offences.

²⁰⁴ ILO Convention no 138 was adopted on 26 Jun 1973 and entered into force on 19 Jun 1976. The Convention has 158 ratifications. South Africa ratified this instrument on 30 March 2000. See <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C138> (accessed 2012-12-28).

²⁰⁵ ILO R146 was adopted on 26 Jun 1973.

²⁰⁶ Minimum Age Convention (n204 *supra*) art 2(4).

²⁰⁷ Minimum Age Convention (n204 *supra*) arts 7(1) and 7(4).

²⁰⁸ Minimum Age Convention (n204 *supra*) art 3(1).

4.2.2.7 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The failure of the international community to adequately address the concerns of women and girls led to the promulgation of a separate gender-specific instrument (CEDAW)²⁰⁹ to eliminate all forms of violence, discrimination, exploitation, and subordination of women of all age. The CEDAW's provisions have been interpreted by the CEDAW Committee in the form of General Recommendations.²¹⁰ This was done in the light of the final declaration of the Cairo and Beijing Conferences,²¹¹ where states have pledged to implement the policies and programmes set out by those Conferences. Such actions include "strengthening existing legislation with a view to providing better protection of the rights of women and girls and to punishing the perpetrators, through both criminal and civil measures".²¹² It specifically calls for the ratification of the Slavery Convention by States Parties in the context of this practice.²¹³

The widespread occurrence of violence against women reported all over the world has been interpreted by the CEDAW as gender-discrimination and, thus, satisfies the characteristics of discrimination outlined in article 1.²¹⁴ Gender-based violence, which

²⁰⁹ UNGA Res 34/180, UN Doc A/RES/34/180 (18 Dec 1979). It entered into force on 3 Sept 1981, and has 98 signatories and 186 parties. South Africa signed the CEDAW on 29 Jan 1993 and ratified it on 15 Dec 1995.

²¹⁰ These General Recommendations must be implemented and followed by the States Parties while presenting their report, and if not, they would be held responsible for failing to implement them. CEDAW's status as a treaty-monitoring body selected by the States Parties to the Convention gives its General Recommendations a strong legal standing as they are broader definitions of the provisions of the CEDAW coming from a legal authority.

²¹¹ See CEDAW General Recommendation 24 *Women and Health* (art 12) UN Doc A/54/38/ Rev1 (1999) para 3 <http://www.acpd.ca/compilation/2006/02-cedaw/2b.htm#15> (accessed 2012-12-28). The Cairo Conference (1994) emphasized gender equality and the need for legal regulation in both sending and receiving countries to counter trafficking (see *Report of the International Conference on Population and Development* UN Doc A/Conf 171/13 (1994) para 10(6)). At the Beijing Conference (1995), states compiled a comprehensive list of actions to address the root causes of and violent practices inherent in human trafficking (see *Report of the Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing Declaration, Platform for Action* UN Doc A/Conf 177/20 (1995) (hereafter Beijing Declaration) paras 122, 130).

²¹² Beijing Declaration (n211 *supra*) para 122.

²¹³ Beijing Declaration (n211 *supra*) para 130(a).

²¹⁴ The CEDAW (n209 *supra*) art 1 defines "discrimination against women" as "... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms..." The CEDAW Committee *General Recommendation 19 Violence against Women* (UN Doc A/47/38 1993) para 6 adds: "It includes acts that

includes slavery-like practices, is violence that is directed against a woman because she is a woman or that affects women disproportionately.”²¹⁵ This violence nullifies and impairs the enjoyment of human rights and fundamental freedoms under general international law or under human rights conventions.²¹⁶

In the recognition and application of socio-economic rights, gender- and race-based discrimination is a critical factor rendering women particularly vulnerable to trafficking. In practice, the non-discrimination principle has been applied to prohibit gender-based differential treatment²¹⁷ in the allocation of social benefits, such as unemployment benefits.²¹⁸ Poverty is another root cause of trafficking to which the non-discrimination principle can be applied, as poverty not only arises from a lack of resources—it may also arise from a lack of access to resources, information, opportunities, power, and mobility... [D]iscrimination may cause poverty, just as poverty may cause discrimination.”²¹⁹ The prohibition on discrimination in law or in fact applies in any field regulated and protected by public authorities,²²⁰ and thus encompasses economic, social, and cultural rights.

Under the CEDAW article 6, States Parties are obliged to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.²²¹ These practices are incompatible with the equal enjoyment of

inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”

²¹⁵ CEDAW Committee (n214 *supra*) expounds on CEDAW art 6 in paras 13-16. Para 14 note that: “Poverty and unemployment increase opportunities for trafficking in women.”

²¹⁶ See CEDAW Committee (n214 *supra*) para 7.

²¹⁷ Differential treatment may occur with respect to educational and employment opportunities, the disproportionate burden economic restructuring places on women, the feminization of migration and poverty due to violence against women. See Chuang (n6 *supra*) 162; see also Chap 3 of this study.

²¹⁸ Frostell & Scheinin “Women” in Eide, Krause & Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2001) 334; Coomaraswamy *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women* UN Doc E/CN 4/2000/68 (2000) 58.

²¹⁹ OHCHR *Human Rights and Poverty Reduction: A Conceptual Framework* (2004) 17.

²²⁰ See UNHCR *General Comment 18 Non-Discrimination* (UN Doc HRI/GEN/1/Rev 6 2003) para 12. See also Frostell & Scheinin (n218 *supra*) 334.

²²¹ CEDAW Committee (n214 *supra*) para 13. Some scholars have criticized the CEDAW for using non-mandatory terms against the crime of trafficking of females into prostitution. They claim that the only provision (art 6) addressing this scourge has given a considerable area of manoeuvring to the States Parties to neglect this provision because of the use of a vague word like “appropriate” in the text. What constitutes “appropriate measures” is time- and country-specific and highly contestable, allowing states to do hardly anything or nothing at all. See generally Toepfer & Wells “The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding in Women” 1994 2 *Journal of Gender and Law* 83 101; see Chang (n3 *supra*) 348. However, having a separate article dealing with trafficking and the exploitation of prostitution in women has given the CEDAW Committee an opportunity, constituted

rights by women and with the respect for their rights and dignity.²²² Article 16 complements article 6 by granting a woman the right to freely choose a spouse and set a minimum age for marriage.²²³ Measures to eliminate discrimination against women are considered to be inadequate if a health care system lacks services to prevent, detect and treat illnesses specific to women.²²⁴ Consequently, women's health care and services especially those belonging to vulnerable and disadvantaged groups,²²⁵ are addressed in article 12²²⁶ of the CEDAW. CEDAW has furthermore underlined the danger of the AIDS epidemic and its effects on the rights and needs of women in general, and their subordinate position in the societies, which makes them more vulnerable to HIV infection.²²⁷ States Parties are therefore requested to intensify efforts on the dissemination of information to increase public awareness of the risk of HIV/AIDS among women and children and formulate programmes to combat AIDS.²²⁸ The full realization of all women's health can be achieved only when States Parties fulfil their obligations to respect, protect and promote their fundamental human right to nutritional well-being throughout their life span.²²⁹

under the Convention to monitor the implementation of the Convention, to inquire into States Parties' action or inaction through their reporting and ask them to do some substantive work to suppress the trafficking in women and exploitation of prostitution. Moreover, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (A/RES/54/4) puts the issue of trafficking for forced prostitution before the CEDAW through a complaint procedure and gives the CEDAW Committee another opportunity to address this issue more vigorously. However, its effectiveness depends on the willingness of countries most affected by trafficking to ratify the Optional Protocol.

²²² CEDAW Committee (n214 *supra*) para 14. CEDAW (n204 *supra*) art 11 gives women the right to free choice of employment. Article 15 underlines equality before the law.

²²³ CEDAW (n209 *supra*) art 16(2) specifically concerns children and states that "the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

²²⁴ See CEDAW (n209 *supra*) para 11.

²²⁵ CEDAW (n209 *supra*) para 6. Vulnerable females are migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities.

²²⁶ The provision reads: "States shall take all appropriate measures 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."

²²⁷ See CEDAW *Avoidance of Discrimination against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS) CEDAW General Recommendation 15* UN GAOR 1990 Doc No A/45/38 <http://www.acpd.ca/compilation/2006/02-cedaw/2b.htm> (accessed 2012-12-28). The CEDAW acknowledges that females' lack of adequate access to information and services, unequal power relations based on gender, and harmful traditional practices are factors contributing to their vulnerability to trafficking and subsequently contracting HIV/AIDS.

²²⁸ *Ibid.* Guidelines to help states deal with HIV/AIDS victims are provided according to the human rights standards. See UNAIDS *International Guidelines on HIV/AIDS and Human Rights* UN Doc E/CN.4/1997/150 (1997) 6.

²²⁹ CEDAW (n211 *supra*) para 7.

States must by all appropriate means and without delay eliminate discrimination by any person, organisation or enterprise and must abolish discriminatory laws, regulations, customs and practices.²³⁰ By ratifying the CEDAW, states have committed themselves to take all legal and other measures to prevent all forms of trafficking in women and girls and punish perpetrators of this offence. The entry into force of the CEDAW Optional Protocol²³¹ enhances the Convention by developing a complaints procedure. This contributes to the practical appeal of the treaty. The Optional Protocol provides individuals alleging violations of their CEDAW rights the opportunity to pursue complaints against States Parties.²³² Using the discrimination framework thus affords rare access to an enforcement mechanism otherwise unavailable for violations of economic, social, and cultural rights.²³³

4.2.2.8 The Declaration on the Elimination of Violence against Women (DEVW)

Closely related to the CEDAW, is the DEVAW.²³⁴ The DEVAW aims to strengthen and complement the elimination of violence against women propagated in the CEDAW. It focuses on physical, sexual and psychological violence occurring in the family,²³⁵ within the general community and/or condoned by the State. It seeks to eradicate; among other forms of violence against women, "trafficking in women and forced prostitution".²³⁶ Violence is intrinsic to trafficking especially for sexual exploitation, which often entails degrading and abusive sexual acts against the victims. Victims are "raped, beaten, kicked in the head, strangled, slammed against objects, lashed until they bleed, burned, verbally abused, urinated or defecated upon, starved and receive threats against their families".²³⁷ The situations that many women and girls are forced into, for instance, prostitution, mail

²³⁰ CEDAW (n209 *supra*) art 2.

²³¹ Adopted on 6 Oct 1999 and entered into force on 22 Dec 2000. It has 79 signatories and 102 parties (as on 8 Apr 2012). South Africa ratified the Optional Protocol on 18 Oct 2005.
<http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm> (accessed 2012-12-28).

²³² Eg, trafficked women in South Africa or someone on their behalf can lodge a complaint before the CEDAW Committee (which conducts inquiries into allegations of systematic and gross violations of those rights) for the redress of the violation of rights provided under the CEDAW. This can only occur when they have exhausted the available local remedies.

²³³ See Chuang (n6 *supra*) 163.

²³⁴ UNGA Res 48/104 was adopted on 3 Sept 1981 and entered into force on 20 Dec 1993. It has 97 signatories and 186 states have ratified or acceded to the treaty (as on 8 Apr 2012). South Africa signed the DEVAW on 29 Jan 1993 and ratified it on 15 Dec 1995.

²³⁵ See DEVAW (n234 *supra*) art 2(a). This includes battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

²³⁶ See DEVAW (n234 *supra*) art 2(b).

²³⁷ O'Connor & Healy *The Links between Prostitution and Sex Trafficking: A Briefing Handbook* (2006) 14.

order brides and contract wives,²³⁸ expose them to violence and abuse which constitutes cruel, inhuman and degrading treatment or punishment.²³⁹

Women and girls trafficked for purposes of sexual exploitation are treated like slaves and exposed to slavery-like conditions where they are subjected to forced or compulsory labour contrary to provisions that prohibit slavery, and servitude or forced labour.²⁴⁰ These females are denied their rights to liberty and security of the person, equal protection under the law, non-discrimination, highest standard attainable of physical and mental health, just and favourable conditions of work and the right not be subjected to torture or cruel, inhuman or degrading treatment or punishment.²⁴¹ The Working Group on Contemporary Forms of Slavery²⁴² in 1998 adopted a Recommendation²⁴³ that declared transnational trafficking of women and girls for sexual exploitation as a contemporary form of slavery as the women and girls are “owned” by the traffickers or the buyers and forced to work under whatever conditions are provided.²⁴⁴

²³⁸ Surtees “Commercial Sex Work” in Rosenberg (ed) *Trafficking of Women and Children in Indonesia* (2003) 63.

²³⁹ These violations (combined with the acts in the torture definition) also are contrary to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art 10), the International Covenant on Civil and Political Rights (art 7), Migrant Smuggling Protocol (n16 *supra*) art 4(1), CEDAW (n209 *supra*) art 5 and the African Charter on Human and Peoples Rights (art 4) which reiterates that human beings are inviolable and entitled to respect of the integrity of the person. Also, under the provisions of the Fourth Geneva Convention of 1949 “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” See Geneva Convention Relative to the Protection of Civilian Persons In Time of War 1949 UNTS (1950) 75 287, entered into force on 21 Oct 1950.

²⁴⁰ These prohibitions are espoused in the International Covenant on Civil and Political Rights (art 8), Migrant Smuggling Protocol (n16 *supra*) art 11, African Charter on Human and Peoples Rights (art 5) and the CEDAW (n209 *supra*) art 4(1) which refers to all forms of exploitation.

²⁴¹ See DEVAW (n234 *supra*) art 3.

²⁴² This structure was replaced in 2007 by the OHCHR’s Special Rapporteur as a mechanism for better addressing the issue of contemporary forms of slavery within the UN system.

²⁴³ UNHRC *Recommendation of the 1998 Session of the Working Group on Contemporary Forms of Slavery* UN Doc E/CN.4/Sub.2/1998/14 (1998).

²⁴⁴ See Fergus *Trafficking in Women for Sexual Exploitation* (2005) 19.

4.2.2.9 The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The CAT²⁴⁵ is an international human rights instrument which requires states to prohibit torture and take effective measures to prevent torture in any territory under its jurisdiction,²⁴⁶ and forbids states to return people to their home country if substantial grounds exist for believing they will be tortured.²⁴⁷ This prohibition is absolute and non-derogable. The definition of torture is:

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 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.²⁴⁸

This definition indicates that the term “torture” can only be invoked where the pain or suffering is instigated at the hands of public officials or persons acting in official capacity, meaning state-sponsored or acquiesced acts.²⁴⁹ However, in human trafficking it is usually non-state actors who torture victims. States still have an obligation to protect people from human-rights violations by third parties.²⁵⁰ Actions which fall short of torture may still constitute cruel, inhuman or degrading treatment under article 16. States Parties must

²⁴⁵ Adopted by UNGA Res 39/46 on 10 Dec 1984 and came into force on 26 Jun 1987. As of 10 Apr 2012, it has 77 signatories and 147 parties. South Africa signed CAT on 29 Jan 1993, and ratified it on 10 Dec 1998.

²⁴⁶ See CAT (n245 *supra*) art 2.

²⁴⁷ See CAT (n245 *supra*) art 3.

²⁴⁸ See CAT (n245 *supra*) art 1.

²⁴⁹ These acts are described in the CAT as those performed by law enforcement personnel, civil or military, medical personnel, public officials (art 10) and those involved in the interrogation practices and arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment (art 11).

²⁵⁰ See CAT (n245 *supra*) arts 12-16. Art 13 provides for a complaint procedure. It states that alleged victims of torture have the right to complain to and have their cases promptly and impartially examined by competent authorities. The monitoring body is the CAT Committee. Complainant and witnesses shall be protected against any consequential ill treatment or intimidation. Art 14 gives redress and right to compensation.

ensure that torture is a criminal offence,²⁵¹ which is extraditable²⁵² and where an alleged torturer cannot be extradited, universal jurisdiction to try these cases of torture must be established.²⁵³

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)²⁵⁴ provides for the establishment of 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,²⁵⁵ to be overseen by a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

4.2.2.10 The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles)

The UN's Basic Principles²⁵⁶ distinguishes between victims of crime and victims of abuse of power. Trafficking victims fall into both categories. Victims of crime are defined as:

[p]ersons who, individually or collectively, have 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.²⁵⁷

Acts or omissions that do not yet constitute violations of national criminal laws but do infringe internationally recognised norms relating to human rights constitute maltreatment of victims through abuse of power.²⁵⁸ A person may be considered a victim, under the

²⁵¹ See CAT (n245 *supra*) art 4.

²⁵² See CAT (n245 *supra*) art 8.

²⁵³ See CAT (n245 *supra*) art 5.

²⁵⁴ Adopted by UNGA Res A/RES/57/199 on 18 Dec 2002 and came in force from 22 Jun 2006. It has 68 signatories and 57 parties, as on 10 Apr 2012. South Africa became a signatory on 20 Sep 2006.

²⁵⁵ See OPCAT (n254 *supra*) art 1.

²⁵⁶ Adopted by UNGA Res 40/34 of 29 Nov 1985.

²⁵⁷ See Basic Principles (n256 *supra*) art A1.

²⁵⁸ See Basic Principles (n256 *supra*) art B18.

Basic Principles, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and despite of any familial relationship between the perpetrator and the victim. The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.²⁵⁹ Victims are entitled to access to the mechanisms of justice as provided for by national legislation and fair treatment which includes being treated “with compassion and respect for their dignity”.²⁶⁰ Access to justice and redress mechanisms is similar to that in the Palermo Protocol.

4.2.3 International human-rights instruments relating to trafficking

It is widely accepted that human-rights violations are the consequence of trafficking and that the trafficking process itself constitutes a serious violation of human rights.²⁶¹ The violations of trafficked persons’ human rights are orchestrated by organised criminal groups or individuals. However the traditional stance under international law is that non-state actors do not have any legal responsibilities.²⁶² International obligations are only binding on states through the doctrine of state responsibility.²⁶³ This position was confirmed by the HRC which held that “obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law”.²⁶⁴ The

²⁵⁹ See Basic Principles (n256 *supra*) art A2.

²⁶⁰ See Basic Principles (n256 *supra*) arts A4-A7.

²⁶¹ See, eg, the Vienna Declaration and Program of Action, World Conference on Human Rights, UN Doc A/CONF/157/23 (1993) 1(18): “Gender-based violence and all forms of exploitation including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person and must be eliminated”. See also Beijing Declaration (n209 *supra*) paras 122, 130. Other UNGA resolutions on this subject assert that “sexual violence and trafficking in women and girls for purposes of economic exploitation, sexual exploitation through prostitution and other forms of sexual exploitation and contemporary forms of slavery are serious violations of human rights” (Traffic in Women and Girls A/RES/55/67 (2000) 2); (Trafficking in Women and Girls A/RES/57/176 (2002) 2); (Trafficking in Women and Girls A/RES/59/166 (2004) 2-3); (Trafficking in Women and Girls A/C 3/61/L11/Rev 1 (2006) 2-3).

²⁶² See Obokata (n48 *supra*) 127.

²⁶³ The doctrine of state responsibility is one of the core tenets of international law, and is “simply the principle which establishes an obligation to make good any violation of international law producing injury”. See Lee “The Right to Compensation: Refugees and Countries of Asylum” 1986 80 *American Journal of International Law* 532 537. Judge Huber in *British Claims in the Spanish Zone of Morocco (Spain v United Kingdom)* (1923) 2 RIAA 615, 641 highlighted the significance of the notion of state responsibility: “Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met”.

²⁶⁴ UN *General Comment No 31[80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev1/Add13 (2005) para 8. See also Obokata (n48 *supra*) 128.

international jurisprudence also demonstrates that claims involving non-state actors have on several occasions been held inadmissible.²⁶⁵ Although the principle of state responsibility historically only applies on a state-to-state level, there is a growing trend to make non-state actors accountable under international human-rights law.²⁶⁶ Consequently, it currently also pertains to the obligations states owe their citizens.²⁶⁷ As such, “states may be held 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”.²⁶⁸

A state can furthermore only be held accountable under a treaty law if it has ratified that treaty without any reservation²⁶⁹ to a contested provision.²⁷⁰ On the other hand, “[i]f a

²⁶⁵ As in *FGG v Netherlands*, Communication No 209/1989 (CCPR/C29/D/209/1986), *GRB v Sweden*, Communication No 83/1997 (CAT/C/20/D/83/1997). See Obokata (n48 *supra*) 128.

²⁶⁶ See Obokata (n48 *supra*) 127.

²⁶⁷ See generally Coomaraswamy (n3 *supra*) paras 50-53; Cook (n3 *supra*) 142-143, 147; Tomuschat (n3 *supra*) 231; Zemanek (n3 *supra*) 362, 362-372.

²⁶⁸ See CEDAW (n211 *supra*) para 9. According to the *Velásquez-Rodríguez* case: —“Illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it” See *Velásquez-Rodríguez* Judgement of 29 Jul 1988, Inter-American Court of Human Rights (Ser C) No 4 (1988) para 172 http://www1.umn.edu/humanrts/iachr/b_11_12d.htm (accessed 2012-12-28). The court further stated: —“Its duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts which, as such, may lead to punishment of those responsible and the obligation to indemnify the victim for damages”. *Ibid* para 175. The due diligence test and its status in international law and practice is also discussed by Coomaraswamy (n3 *supra*) paras 52-53. See also Gallagher —“Contemporary Forms of Female Slavery” in Askin KD & Koenig DM (eds) *Women and International Human Rights Law, Vol 2* (1999) 505. Non-state actors only have a moral responsibility in this regard. See Obokata (n48 *supra*) 128; Shelton (n56 *supra*) 2.

²⁶⁹ Under art 2(1)(d) of the Vienna Convention (n18 *supra*), a reservation is “a unilateral statement, however phrased or named made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. Reservations are thus essentially caveats to a state's acceptance of a treaty; however, a reservation must be included at the time of signing or ratification, not after the party has already joined a treaty. The Vienna Convention further states in art 19 that: —“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

Although most reservations are not substantial, only the CERD has been free of reservations while the CEDAW has received numerous reservations.

²⁷⁰ According to the Vienna Convention (n18 *supra*) art II *‘Reservations’* when a state restricts its treaty obligations through reservations, other States Parties have to either accept, object, or object and oppose the reservations. If the state accepts them (or fails to act at all), both states (reserving and accepting) are relieved of the reserved legal obligation as concerns their legal obligations to each other. If the state opposes, the parts of the treaty affected by the reservation falls away entirely and does not establish any legal obligations on the states. Finally, if the state objects and opposes, there are no legal obligations between the reserving and accepting state parties under that treaty whatsoever.

treaty's principles are broadly accepted, they can become customary international law and, hence, legally binding upon states that are not parties to the convention".²⁷¹ Every state is obliged to honour the norms of customary international law²⁷² (as peremptory norms), which should not be abrogated or violated under any circumstances.²⁷³ Certain human rights²⁷⁴ are regarded as *jus cogens*.²⁷⁵ Once these rights are violated by the process of human trafficking, any state where the breach has taken place can be held responsible.²⁷⁶ Of course, when a state signs and ratifies a particular treaty, and later violates the provision of that treaty, its act creates a responsibility²⁷⁷ for which it can be held answerable before an international body, or in some cases before a domestic court,²⁷⁸ if under the municipal legal provision that treaty has legal force as municipal law.

²⁷¹ Martin, Schnably, Wilson, Simon & Tushnet *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (2006) 25. If the customary international law is violated by states who are not party to a specific treaty, these states will be held accountable in a similar manner to the States Parties and prosecuted by an international tribunal such as the ICJ.

²⁷² See Cook (n3 *supra*) 142-146; Henkin, Pugh, Schachter & Smit (eds) *International Law, Cases and Materials* 3rd ed (1993) 683-686; Harris *Cases and Materials on International Law* 4th ed (1991) 697-699.

²⁷³ Also Nowak *UN Covenant on Civil and Political Rights, CCPR Commentary* 2nd ed (2005) 105; Trebilcock "Slavery" in Bernhardt (ed) *Encyclopaedia of Public International Law (Vol 8)* (1985) 481-484.

²⁷⁴ Eg, the inherent right to life, dignity, privacy, freedom of movement, liberty and freedom from slavery or servitude and from torture or cruel, inhuman and degrading treatment as well as rights to physical, sexual, reproductive, and mental health. See Amiel (n8 *supra*) 27; IOM *Breaking the Cycle of Vulnerability: Responding to the Health Needs of Trafficked Women in East and Southern Africa* (2006) 13. See generally Byrnes —"oward More Effective Enforcement of Women's Human Rights through the Use of International Human Rights Law and Procedures" in Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 189.

²⁷⁵ See n47 *supra*. This was also acknowledged by Sachs J in the South African case of *S v Basson* (CCT 30/03) [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) para 122 where he referred to *jus cogens* as "intransgressible principles of international customary law" that have to be observed by all states, whether or not they have ratified the treaties or not. Also see eg, Frowein "Jus Cogens" in Bernhardt (ed) *Encyclopedia of Public International Law (Vol 7)* (1984) 327; Nowak (n273 *supra*) 105. On the status of *jus cogens* in international law, see Vienna Convention (n18 *supra*) art 53; *Barcelona Traction Light and Power Company Ltd* 1970 ICJ Reports 51 103; the *Nicaragua Case* 1986 ICJ Reports 14 100-101; the *Case of Roach and Pinkerton* 27 Mar 1987 (OAS General Secretariat) 33-36; Dugard *International Law: A South African Perspective* 3rd ed (2005) 43-46.

²⁷⁶ Lamprecht (n36 *supra*) 213 states that "[r]ules of *jus cogens* are ... regarded as laws that are universally applicable in terms of a more monistic outlook. In other words, where rules of *jus cogens* are in conflict with national laws; international law is regarded as the higher law by the rest of the international community, regardless of the specific state's stance". See also International Covenant on Civil and Political Rights (n289 *infra*) arts 2-3.

²⁷⁷ See Chang (n3 *supra*) 345-346.

²⁷⁸ Obokata (n48 *supra*) 132. The force of international treaties does not necessarily have an effect in domestic law. Domestic legal effect is usually defined by domestic constitutional provisions and their judicial interpretation. States can expressly or tacitly transfer jurisdiction to other states through *ad hoc* agreements or bi- or multilateral treaties. Martin *et al* (n271 *supra*) 24-25 contends that "[w]hen a state ratifies a treaty, it may promulgate an 'understanding' or 'declaration' that it is non-self-executing (or its domestic law may so provide generally), which means that domestic courts cannot enforce it in the absence of implementing legislation. Even then, litigants may still ask the court to make use of the treaty as a guide to interpreting domestic law." Lamprecht (n36 *supra*) 3 questions the recognition and punishment of international crimes in national courts, arguing that the legality principle may prohibit this act, unless national laws specifically provide therefore. Furthermore, he queries national courts' jurisdiction or

It is argued that human trafficking must be addressed not only from a criminal-law perspective but also from a human-rights approach. Rights-based strategies to address trafficking include holding governments accountable for the violation of these rights, in their failure to eliminate gender discrimination, failure to punish traffickers and to address the needs and rights of trafficked persons who have escaped.²⁷⁹ Such violations are the direct result of the deficiencies and ineptness of national laws to prevent trafficking and to protect the rights of the victims. Governments should be held responsible for acts committed by its own actors, such as immigration officials, border patrols or police.²⁸⁰ Furthermore, individuals living within the jurisdiction of their respective states can also hold their governments accountable for human rights' violations of any international treaties and international human-rights instruments their states have acceded to.

International human-rights law can also be utilised to provide a conceptual framework for addressing the root causes of trafficking.²⁸¹ Framing the project of alleviating the root causes of trafficking as a human rights issue would encourage more proactive efforts to address these problems²⁸² rather than the traditional assumption that such issues are

competence to adjudicate international criminal matters, especially where these crimes occurred extraterritorially and without a connecting link to the judging state. This situation (known as universal jurisdiction) occurs when a state judges foreign suspects who may possibly be present on their territory for committing crimes abroad against other foreigners. Although this is a controversial issue, generally international law provides for states to exercise jurisdiction on any of the following grounds: territoriality (including subjective and objective territoriality), protection of the state, nationality of the offender or the victim ('active' and 'passive personality'), representation and universality." See Lamprecht (n36 *supra*) 125. All types of jurisdiction of course imply states' concurrence on the definition of the crimes that can be prosecuted and mutual trust in their respective legal systems. When acting against human trafficking (as an international crime which concerns the universal public order), the general principle of territoriality is followed – a state must assert criminal jurisdiction over all national and international criminal acts that occur in its territory and over all persons responsible for such acts, whatever their nationality. See Lamprecht (n36 *supra*) 126; Dugard (n275 *supra*) 151. The Rome Statute furthermore provides for the jurisdiction of the ICC when a crime against humanity has been committed on the territory or by a national of one of its state parties.

²⁷⁹ Askola (n22 *supra*) 136.

²⁸⁰ In the South African case of *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC), it was affirmed that the state (through its state actors) has a duty to protect its citizens. This case will be discussed in Chap 8 of this study.

²⁸¹ The root causes of trafficking can easily be connected to violations of economic, social, and cultural rights. Chuang (n6 *supra*) 155 argues that "... addressing the socio-economic root causes of trafficking means confronting vexing questions concerning the measure and content of states' obligations to achieve 'progressive realization' of the social, economic, and cultural rights [of] half of the human rights corpus."

²⁸² The economic, social, and cultural rights implications of trafficking have persistently been neglected and fallen behind that of civil and political rights: "[D]espite being touted as indivisible, interdependent, interrelated, and of equal importance for human dignity ... [t]he traditional view of economic, social, and cultural rights as merely 'programmatic' or 'aspirational' in nature—in contrast to the apparently immediately realizable civil and political rights—has fed their marginalization in human rights discourse." See Chuang (n6 *supra*) 161.

solely within the province of broader development policy.²⁸³ While development policy can provide detailed prescriptions for action on the ground, international human-rights law offers an important normative framework within which these strategies can be constructed.²⁸⁴

4.2.3.1 The Universal Declaration on Human Rights (UDHR)

The recognition of human rights occurred in the international arena only 63 years ago with the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948. The UDHR establishes the principle that fundamental human rights and basic freedoms are guaranteed to all persons. Although as a declaration, the UDHR is not an internationally binding instrument,²⁸⁵ it is the foundation of human rights contained in binding instruments such as the ICCPR and the ICESCR,²⁸⁶ and it forms part of the International Bill of Human Rights.²⁸⁷ Certain principles in the UDHR need to be emphasised. Article 1 unequivocally states that all human beings are born free and equal in dignity and rights. This article's effect is that all women, men and children are equal and all fundamental rights apply to them equally. Article 2 is the non-discrimination clause which provides that everyone is entitled to all the rights and freedoms in the UDHR without regard to race, colour, sex, language, religion, political opinion, national or social origin, property, birth or status. Every person also have the right to be free from physical violence (rape, sexual assault, domestic violence, forced prostitution, trafficking) as guaranteed in article 3 of the UDHR.²⁸⁸ Article 4 of the UDHR provides that no one shall be held in slavery or servitude, and that slavery and the slave trade shall be prohibited in all their forms. It does not specifically refer to forced labour; however forced labour is regarded as

²⁸³ The Palermo Protocol (n13 *supra*) obliges states to “take or strengthen measures . . . to alleviate the factors that make persons . . . vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.” There are specific instruments concerning development such as the UN’s Millennium Declaration (UNGA Res 55/2 of 8 Sept 2000) and the Declaration on the Right to Development (UNGA Res 41/128 of 4 Dec 1986).

²⁸⁴ See Chuang (n6 *supra*) 157.

²⁸⁵ As a resolution, the UDHR is regarded as a “soft-law” instrument that merely needs to be observed and adhered to only on moral or ethical grounds. The UDHR may be viewed as only binding as part of customary international law (adhered to out of custom and thus treated as law).

²⁸⁶ Bassiouni (n4 *supra*) 445-517.

²⁸⁷ The International Bill of Human Rights consists of the UDHR; the ICESCR; the ICCPR and its Optional and Second Optional Protocol (aiming at the abolition of the death penalty). See Weissbrodt (n77 *supra*) 7.

²⁸⁸ Also found in the International Covenant on Civil and Political Rights art 6 and the CAT (n245 *supra*) arts 2, 5, 15 & 16.

a form of servitude.²⁸⁹ Similarly, the extraction of excessive fees and debt-bondage contravenes this article. Bad conditions of work, poor health and safety measures are against the right to just, safe and favourable working conditions as guaranteed in article 23(1) of the UDHR.²⁹⁰ Contract violations by employers breach the right to equal pay for equal work as regulated in art 23(2) of the UDHR. No or delayed payment violates the right to just and favourable remuneration as in art 23(3) of the UDHR. Forced marriage is prohibited in that “[m]arriage shall be entered into only with the free and full consent of the intending spouse”.²⁹¹ People have the right not to be tortured or submitted to cruel and/or degrading treatment as provided in article 5 of the UDHR.²⁹² Threat of reprisals to family members in the country of origin harms the right to personal autonomy as in article 12 of the UDHR.²⁹³ Physical confinement, confiscation of passport/identity papers, isolation (prohibited from engaging in social contact, interception of letters) infringe the freedom of choosing residence and the right of movement within in one’s own country.²⁹⁴ The deprivation of food, malnourishment, lack of access to medical and health services conflict with the right to enjoy psychological, physical and sexual health as provided in the UDHR’s article 25 UDHR.²⁹⁵ In 2002, the UN’s Office of the High Commissioner on Human Rights (HCHR) issued a set of universally applicable Recommended Principles and Guidelines for Human Rights and Human Trafficking. The document contains practical legal and policy measures that governments can take to meet their international human-rights obligations.

²⁸⁹ This provision is similar to art 8 of the International Covenant on Civil and Political Rights, art 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 6 of the Inter-American Convention on Human Rights (1969), and art 5 of the Banjul Charter (1981).

²⁹⁰ Art 7 of the International Covenant on Economic, Social and Cultural Rights and the CEDAW (n209 *supra*) art 11(f).

²⁹¹ UDHR (n285 *supra*) art 16(2).

²⁹² Similar rights are encountered in the International Covenant on Civil and Political Rights art 7 and the entire CAT.

²⁹³ The UDHR (n285 *supra*) art 12 states that: —None shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

²⁹⁴ UDHR (n285 *supra*) art 13(1). Similarly in the International Covenant on Civil and Political Rights art 12(1).

²⁹⁵ UDHR (n285 *supra*) art 25 declares that: —(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”. See also art 12 of the International Covenant on Economic, Social and Cultural Rights.

4.2.3.2 The International Covenant on Civil and Political Rights (ICCPR)

Instruments such as the ICCPR²⁹⁶ contain explicit provisions obliging States Parties to respect and protect human rights within their territories.²⁹⁷ This includes a duty on states to prevent violations of rights by third parties²⁹⁸ and to ensure effective remedies for violations suffered.²⁹⁹ Under the ICCPR, states are obliged not only to refrain from discriminatory practices, but also to adopt punitive measures to make equality and non-discrimination a concrete reality.³⁰⁰ This is emphasized in article 2 which creates negative as well as positive obligations upon the States Parties with regard to the domestic application of all rights declared in the ICCPR.³⁰¹ The duty to respect human rights underlines the negative character of the obligation in regard to the ICCPR's civil and political rights, whereas duties to ensure them oblige States Parties to take positive steps to give effect to the rights. This provision does not limit its target to active state involvement but holds them responsible for violating its obligation if it does not exercise due diligence to protect the rights guaranteed by the ICCPR.

The ICCPR prohibits all forms of slavery, servitude and forced labour.³⁰² It declares that “no one shall be held in slavery; slavery and slave-trade in all their forms shall be prohibited”.³⁰³ The importance accorded by the ICCPR to the slavery provision is

²⁹⁶ Adopted by UNGA Res 2200 A (XXI) of 16 Dec 1966, entered into force on 23 Mar 1976. It has 72 signatories and 167 parties, as on 10 Apr 2012. South Africa became a signatory on 3 Oct 1994 and ratified it on 10 Dec 1998.

²⁹⁷ ICCPR (n296 *supra*) arts 2(1) states that “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.” Similar duties apply to those who are subject to its jurisdiction. See generally Buergenthal “To Respect and To Ensure: State Obligations and Permissible Derogations” in Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 73-75.

²⁹⁸ Petersmann “Bridging Foundations, Human Rights and International Trade Law: Defining and Connecting the Two Fields” in Cottier, Pauwelyn & Bürgi (eds) *International Trade and Human Rights* (2005) 64.

²⁹⁹ See ICCPR (n296 *supra*) art 2(3) where each State Party undertakes “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.”

³⁰⁰ See ICCPR (n296 *supra*) art 26. Art 3 grants equal rights for men and women in the enjoyment of civil and political rights. See Fariori “The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential” 1997 10 *Harvard Human Rights Journal* 213 225-226.

³⁰¹ See eg, Nowak (n273 *supra*) 27-28. For a detailed discussion on the obligation of state party under art 2 of the ICCPR, see Buergenthal (n297 *supra*) 72-73, Nowak (n273 *supra*) 27-47.

³⁰² ICCPR (n296 *supra*) arts 8(2), 8(3)(a). This prohibition is similar to that contained in the UDHR (n285 *supra*) art 4.

³⁰³ See ICCPR (n296 *supra*) art 8(1).

emphasized by its status as a non-derogable right under article 4(2). Trafficking places victims beyond the protection of the law and reach of law enforcement officers and others who can help them. It violates their right to recognition as a person before the law and right to equal protection before the law.³⁰⁴ For example, the typical process of enslavement, involving either abduction or recruitment through false promises, involves a violation of the individual's right to liberty and security of the person,³⁰⁵ as well as a violation of the right of a person to be treated with humanity and not to be subjected to cruel, inhuman or degrading treatment (rights guaranteed respectively by article 10 and article 7 of the ICCPR). Trafficked persons are often held captive against their will and in perpetual fear of their lives, subjected to violence or threats of violence if they leave or attempt to do so.³⁰⁶ Article 8 contains a provision which forbids the use of forced or compulsory labour subject to certain limited exceptions. To work for long hours without any rest defies the right to work. In this matter, article 8(3) of the ICCPR underscores the ILO C29 by guaranteeing freedom from forced labour. Article 11 guarantees the right to be free from imprisonment for debt or failure to fulfil a contract obligation. Similar to other instruments, the ICCPR specifies that all humans have the right to life, which is protected by law and no one shall be arbitrarily deprived of this right.³⁰⁷ Despite these provisions, trafficked persons are often killed.³⁰⁸

Victims of slavery, servile status and forced labour are, almost by definition, deprived of their right under article 12 of the ICCPR to liberty of movement and freedom to choose their residence. Other rights protected by the law but often violated by traffickers³⁰⁹ are the right to access to justice, legal aid and legal representation; the right to privacy and the right to bodily integrity. Almost invariably, they are deprived of or prevented from exercising their right of access to the courts, equality before the courts and tribunals and to

³⁰⁴ See ICCPR (n296 *supra*) art 3. A similar provision is found in CEDAW (n209 *supra*) art 15(1).

³⁰⁵ Art 9(1) of the ICCPR (n296 *supra*) protects the individual from the arbitrary arrest and guarantees the right to liberty and security of person, while art 12 guarantees freedom of movement.

³⁰⁶ See O'Connor & Healy (n237 *supra*) 8.

³⁰⁷ See ICCPR (n296 *supra*) art 6(1).

³⁰⁸ Kelly (n178 *supra*) 40. According to Europol, hundreds of corpses of trafficked women beaten to death, shot or strangled are found each year. See O'Connor & Healy (n237 *supra*) 14.

³⁰⁹ Ezeilo *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to Development Report submitted by the Special Rapporteur on Trafficking in Persons especially Women and Children* (2009) 16.

a fair trial (articles 14 and 16) by their owners, controllers, employers or the authorities themselves.

The list of aggravating circumstances, of abuses of fundamental rights which accompany slavery and related abuses, is almost endless. In the harshest cases it includes depriving individuals of their identity (by giving them a new name, often one associated with a different religion or ethnic identity), obliging them to speak a new language, and forcing them to change their religion or subjecting them to coercion in violation of article 18 of the ICCPR.³¹⁰ Trafficked victims are often women and girls who are part of familial structures and end up being trafficked as a consequence of their need to earn money and improve the standard of living of their families as well as themselves. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.³¹¹ When women and girls are forcibly trafficked and taken away from their families, the family as a group unit is affected. Moreover women and girls removed from the family's structure and protection are rendered vulnerable to violations. A further consequence of trafficking is that victims are prevented from exercising their right to marry and to establish a family. Similarly, some female victims are sold into marriage against their will, frequently while still being underage.³¹² This violates their full and free consent as well as the requisite attainment of their age of majority.³¹³

4.2.3.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

Although economic and social rights are not enforceable in most countries, many countries are party to the International Covenant on Economic, Social, and Cultural Rights³¹⁴ (ICESCR) and have an obligation to ensure the protection of these rights, which are also

³¹⁰ See ICCPR (n296 *supra*) art 18(2): —None shall be subject to coercion which would impair his freedom to have or to adopt a religion or beliefs of his choice.”

³¹¹ Art 23(1) of the ICCPR (n296 *supra*). See also art 10(1) of the International Covenant on Economic, Social and Cultural Rights and art 18(1) of the African Charter on Human and Peoples Rights.

³¹² Eg, Mozambican girls are sold as wives to mineworkers in South Africa. See Delpoit, Koen & Mackay *Human Trafficking in South Africa: Root Causes and Recommendations* (2007) 21. Other girls become trafficked as mail order brides. See Misra & Rosenberg —Servile Marriage and Mail Order Brides” in Rosenberg (ed) *Trafficking of Women and Children in Indonesia* (2003) 106-107.

³¹³ See ICCPR (n296 *supra*) arts 23(2), (3). Also see the International Covenant on Economic, Social and Cultural Rights art 10(1); the CEDAW (n209 *supra*) art 16(b).

³¹⁴ Adopted by UNGA Res 2200, UN Doc A/6316, on 16 Dec 1966, entered into force on 3 Jan 1976. Its monitoring body is the Committee on Economic, Social and Cultural Rights. It has 69 signatories and 160 parties. South Africa became a signatory on 3 Oct 1994.

applicable to trafficked persons. Many of the rights implicated in the root causes of trafficking are the subject of states' obligations under the ICESCR. Gender equality is emphasized in both articles 2 and 3 where it is respectively stated that there is no distinction based on sex, nation or social origin; and that men and women have equal rights in the enjoyment of economic, social and cultural rights. Under the ICESCR, article 6 recognises the right to do work that one freely chooses under conditions protecting fundamental freedoms of the individual.³¹⁵ However, trafficked women and girls work undocumented in an industry that is largely unregulated. As such, they do not freely choose the work that they perform or the conditions of work.³¹⁶

In articles 5, 7, and 8 the ICESCR further sets certain conditions and rights that must be upheld and protected by the States Parties such as fair wages and equal remuneration for work of equal value and the right to form and join trade unions. Article 7 guarantees the right to just and favourable conditions of work. This provision further provides for remuneration, fair wages, safe and healthy work conditions, rest and decent living, all of which trafficked women in the sex industry do not enjoy or even have the opportunity to negotiate.³¹⁷ The practice of withholding wages or failing to pay an employee is clearly a violation of basic human rights, notably the guarantee in the ICESCR of remuneration which provides all workers, as a minimum, with . . . (i) fair wages and equal remuneration for work of equal value without distinction of any kind,³¹⁸ and may contribute to forced labour or other exploitative employment conditions. Article 8(3)(a) provides that "[n]o one shall be required to perform forced or compulsory labour", subject to certain specified exceptions concerning prisoners, military service, emergencies and normal civil obligations.

Article 10 states that marriage must have the consent of both parties. Article 11 grants the right to a standard of living that is adequate for people's own health and well-being as well as that of their families.³¹⁹ It includes basic needs such as food, housing, clothing,

³¹⁵ ICESCR (n314 *supra*) art 6(1) recognises "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts".

³¹⁶ See Fergus (n244 *supra*).

³¹⁷ Askola (n22 *supra*) 31.

³¹⁸ See the ICESCR (n314 *supra*) art 7(a). Curiously international standards on slavery do not specify that withholding remuneration constitutes a form of slavery.

³¹⁹ ICESCR (n314 *supra*) art 11.

education³²⁰ and medical care in order to survive. Trafficked persons do not have the opportunity to achieve such a standard of living; they rarely reach this level because they are often unpaid and cannot afford basics. Additionally, everyone has the right to attain the highest attainable standard of physical and mental health.³²¹ Trafficked females serving the sex industry usually run a high risk contracting STD's or HIV/Aids. They are forced to attend to a large number of customers on a daily basis with hardly any rest.³²² They are not allowed access to any health care such as contraceptives or medication despite their risky conditions.³²³ Forced drug or substance abuse as well as forced abortions violates this right.³²⁴

4.2.3.4 The Convention on the Elimination of All Forms of Racial Discrimination (CERD)

If there is a common principle to be found in all texts concerning human rights, it is the principle of non-discrimination. CERD³²⁵ is another second-generation human rights instrument³²⁶ guaranteeing full and equal enjoyment of human rights and fundamental freedoms to racial groups or individuals belonging to them.³²⁷ Article 1 of the CERD 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 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". This is important in the light that many trafficked persons are vulnerable to trafficking because of their ethnicity, race, religion or caste.

³²⁰ ICESCR (n314 *supra*) art 13. Also see Chuang (n6 *supra*) 160.

³²¹ ICESCR (n314 *supra*) art 12.

³²² Jonsson "Human Trafficking and Human Security in the Baltic Sea Region" in Jonsson (ed) *Human Trafficking and Human Security* (2009) 93.

³²³ See Busza "Sex Work and Migration: The Dangers of Oversimplification – A Case Study of Vietnamese Women in Cambodia" 2004 7(2) *Health and Human Rights* 231 231-232.

³²⁴ See the ICESCR (n314 *supra*) art 14(1) (c), (d). This right is similar to the right to reproductive self-determination and personal autonomy (a woman's right of control of her body) as provided in the Beijing Declaration (n209 *supra*) para 97.

³²⁵ Adopted by UNGA on 21 Dec 1965 and entered into force on 4 Jan 1969. As of Feb 2012, it has 85 signatories and 174 parties. South Africa became a signatory on 9 Jan 1999. The monitoring body is the Committee on the Elimination of all Racial Discrimination (CERD Committee). The CERD follows a similar structure to the UDHR, ICCPR and ICESCR, with a preamble and 25 arts, divided into 3 parts.

³²⁶ Second-generation human rights are related to equality and are fundamentally social, economic, and cultural in nature.

³²⁷ See CERD (n324 *supra*) art 2. Art 6 specifically provides effective protection and remedies against any act of racial discrimination which violates ones human rights.

Similar to the provisions of other conventions linked to trafficking, article 5 ensures equality before the law, especially the right to equal treatment before all organs of justice. Security of person and protection by the State Party against violence of bodily harm whether inflicted by government officials or by any individual, group or institutions are furthermore guaranteed.³²⁸ Other rights include leave to return to or from one's own country; nationality; marriage and choice of spouse; just and favourable working conditions and remuneration and health services. An individual complaints mechanism similar to that found in CEDAW is found in article 14 of CERD; however it has led to a limited jurisprudence on the interpretation and implementation of the Convention.³²⁹

4.2.3.5 The Rome Statute of International Criminal Court (Rome Statute)

Until the establishment of the International Criminal Court (ICC) by means of the Rome Statute,³³⁰ no international tribunal existed with universal and compulsory criminal jurisdiction to punish crimes worldwide.³³¹ Since national courts had been responsible for prosecuting international crimes such as slavery, the aim of the Rome statute is to complement national criminal jurisdictions in the exercise of their jurisdiction over perpetrators of the most serious crimes of international concern.³³² The ICC exercises mandatory jurisdiction over crimes committed on the territory of a State Party or by a national of a State Party³³³ as well as where a situation is referred to the Court by the UN

³²⁸ The rights in art 5(c) & (d) are similar to the civil and political rights affirmed in the ICCPR, while art 5(e) are alike to the economic, social and cultural rights affirmed in the ICESCR.

³²⁹ So far 45 complaints have been registered with the CERD Committee; 17 of these have been deemed inadmissible, 14 have led to a finding of no violation, and in 10 cases a party has been found to have violated the CERD. 4 cases are still pending. See UN CERD *Status of Communications Dealt with by CERD under Art 14 Procedure* (2010) <http://www2.ohchr.org/english/bodies/cerd/procedure.htm> (accessed 2012-12-28).

³³⁰ The Rome Statute was adopted on 17 Jul 1998 by the majority of the 150 states represented, with only 7 states (including the US, China, Israel and Iraq) abstaining. The Rome Statute entered into force on 1 Jul 2002. As of 10 Apr 2012, there are 139 signatories and 111 ratifications to the Statute. South Africa signed the Rome Statute on 17 Jul 1998 and ratified it on 27 Nov 2000. See ICC — *Coalition for the International Criminal Court*” <http://www.iccnw.org/?mod=romesignatures> (accessed 2012-12-28).

³³¹ Lamprecht (n36 *supra*) 198.

³³² This objective is set out in Rome Statute (n330 *supra*) art 1: “# [the Court] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions”. See UN — *Establishment of the Court*” <http://untreaty.un.org/cod/icc/statute/romefra.htm> (accessed on 2012-12-28).

³³³ Rome Statute (n330 *supra*) art 4 states that the Court may exercise its functions and powers, as provided in the Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Security Council.³³⁴ In these cases, the ICC can only assert jurisdiction with respect to a crime if it has been referred to the Court by either a State Party in accordance with article 14 or by the UN Security Council, or the Prosecutor has initiated an investigation in accordance with article 15.³³⁵ However, it can exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes.³³⁶ As such, it is intended as a court of last resort, investigating and prosecuting only where national courts have failed. The Court's jurisdiction also does not apply retroactively: it can only prosecute crimes committed on or after 1 July 2002 (the date on which the Rome Statute entered into force). Where a state becomes party to the Rome Statute after that date, the court can exercise jurisdiction automatically with respect to crimes committed after the statute enters into force for that state. The ICC may also not try a person that has already been tried by another court –(a) [w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”³³⁷

The Rome Statute does not include provisions specifically directed at trafficking. It includes trafficking in persons or “enslavement” into the category of “crimes against humanity”.³³⁸

³³⁴ Although the ICC is legally and functionally independent from the UN, the Rome Statute grants certain powers to the UN's Security Council such as in Rome Statute (n330 *supra*) art 13 which allows the Security Council to refer to the court affairs that would not otherwise fall under the court's jurisdiction. The Rome Statute authorises the ICC to exercise jurisdiction only over State Parties or those non-State Parties that have agreed to ICC jurisdiction (see n333 *supra*). As such, the ICC does not have general universal jurisdiction. (Although there is no generally accepted definition of universal jurisdiction, it is described by Macedo “Principle 1 – Fundamentals of Universal Jurisdiction” in *The Princeton Principles on Universal Jurisdiction* (2001) 28 as “... based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction.” But when a situation is referred to the Prosecutor by the UN Security Council, “it amounts to virtual universal jurisdiction over a specific incident”. See Lamprecht (n36 *supra*) 248. The UN Security Council will first have to establish (according to Chap VII of the UN Charter) whether the situation in a specific state amounts to a breach of the peace, a threat to the peace or an act of aggression. See Kirsch & Robinson “Trigger Mechanisms” in Cassese, Eser, Gaja, Kirsch, Pellet, Swart (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 623 630-34.

³³⁵ Rome Statute (n330 *supra*) art 15(1) declares that: “The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court”.

³³⁶ As provided in Rome Statute (n330 *supra*) art 17. The states themselves thus possess primacy of jurisdiction.

³³⁷ Rome Statute (n330 *supra*) art 20(3).

³³⁸ Rome Statute (n330 *supra*) arts 7(1)(c)(g) & (2)(c).

These crimes include “enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” (article 7(1)(g)). Enslavement will result from an act committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.³³⁹ It entails “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.”³⁴⁰

However, reading the provisions of genocide, crimes against humanity and war crimes, one can find implied references to different forms or manifestations of trafficking. Article 6(e) includes, within the scope of genocide, the act of forcibly transferring children of a national, ethnical, racial or religious group to another group with the intent to destroy³⁴¹ the said group, in whole or in part. Once there is forced displacement of children for the purpose of their exploitation, and in circumstances where such a displacement would impair the survival of the victim group, the crime will amount to genocide coupled with trafficking.

Article 8(2)(b)(xxvi) gives jurisdiction to the ICC over these offences as well as other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, *inter alia*, conscripting or enlisting children under the age of 15 into the national armed forces or using them to participate actively in hostilities.³⁴² This provision strengthens the articles in the CRC and the OPSC with regard to the prosecution of perpetrators; particularly as the Rome Statute pleads for the extradition of criminals. Provisions prohibiting war crimes list “rape, sexual slavery, enforced prostitution, forced pregnancy ... and any other form of sexual violence also constituting a serious violation of article 3 common to the Four Geneva Conventions”.³⁴³

³³⁹ See Rome Statute (n330 *supra*) art 7(1)(c).

³⁴⁰ See Rome Statute (n330 *supra*) art 7(2)(c).

³⁴¹ The Rome Statute does not define the word “destroy”, but uses it in association with “genocide” which may mean any of the following in art 6: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group”.

³⁴² See Rome Statute (n330 *supra*) arts 8(2)(b)(xxvi) & 8(2)(e)(vii) (A/CONF183/10) (1998): “...children under the age of fifteen years into the national armed forces or [to use] them to participate actively in hostilities”.

³⁴³ See Rome Statute (n330 *supra*) art 8(2)(e)(vi).

Under article 75(1), the ICC can establish “principles” on its own for “reparations to or in respect of, victims, including restitution, compensation and rehabilitation” of crimes within its jurisdiction. Furthermore, the court may issue an order “against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”³⁴⁴ or may order that reparations be made to the victims of crime from an International Trust Fund established under article 79 of the Statute.³⁴⁵ However, there are still considerable hurdles which need to be complied with before the ICC entertains any application.³⁴⁶

The ICC has already investigated several international crimes, and prosecuted deserving cases. However, there are already criticisms lodged against the Prosecutor of the Court’s “practice of selective justice”,³⁴⁷ as well as the ICC’s limited jurisdiction.³⁴⁸ Primarily, the ICC is limited in jurisdiction because States Parties do not want to relinquish their sovereignty in favour of the ICC’s jurisdiction. Furthermore, the ICC is authorised to exercise jurisdiction over only the crimes of genocide, crimes against humanity and war crimes (as defined in arts 6-8 of the Rome Statute). An additional crime, that of aggression

³⁴⁴ See Rome Statute (n330 *supra*) art 75(2).

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.* See Rome Statute (n330 *supra*) arts 17-20 for a detailed procedure for admissibility of a case before the court. For example, art 17 provides that a case is inadmissible if: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.”

³⁴⁷ See Heinlein “African ICC Members Mull Withdrawal Over Bashir Indictment” *Voice of America*, 8 Jun 2009. <http://www.voanews.com/english/news/a-13-2009-06-08-voa30-68788472.html> (accessed 2012-12-28) where the Peace and Security Commissioner of the African Union, Ramtane Lamamra, declared that the ICC was applying “a double standard in pursuing cases against some leaders while ignoring others”. Although the ICC has received complaints about alleged crimes in no less than 139 countries, only 6 investigations were opened by the Prosecutor of the Court – all in Africa. 3 of these 6 were States Parties who referred situations occurring on their territories to the Court (Uganda, Democratic Republic of the Congo and Central African Republic), 2 were referred by the UN Security Council (Darfur and Libya) and only one was begun *proprio motu* by the Prosecutor (Kenya). Because the ICC has up to Jun 2012 only investigated and indicted Africans, apprehension is raised that the ICC targets Africa only. Several African ICC member countries called on their associates to withdraw *en masse* from the Court in protest against the war crimes indictment against Sudan’s President Omar al-Bashir at an ICC Member States meeting held in Jun 2009 (Sudan has not yet accepted the Rome Statute). The grievance is further that African views are not taken into account.

³⁴⁸ Lamprecht (n36 *supra*) 245 comments that “the jurisdiction of the ICC is so limited, that it cannot be regarded as the answer to the question of what action should be taken regarding the situation of impunity of international crimes”. According to Lamprecht (n36 *supra*) ii: “Here is (still) no International Criminal Court with compulsory jurisdiction over all international crimes... some states, governments, individuals and groupings have hitherto shown little respect for international peace and the sanctity of human life”.

has as yet not been defined, accordingly its scope and application must still be established by the States Parties as set out in articles 121 and 123 of the Statute. The ICC is also limited in article 11 in terms of temporal jurisdiction (when the specific crime has been committed). Its jurisdiction *ratione temporis* states that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute in 2002. If a State becomes a Party to the Rome Statute after its entry into force, the ICC may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute for that State, unless that State has made a declaration under article 12, paragraph 3. This jurisdiction is of course limited to crimes committed in that specific state, or to crimes committed by nationals of the State Party. These further preconditions limit the ICC's exercise of jurisdiction in terms of crimes referred to on the basis of territoriality³⁴⁹ and / or nationality.³⁵⁰ Consequently, the ICC may not exercise jurisdiction over a crime on any other basis, such as the protective principle, representation or universality.³⁵¹

4.3 Conclusion

In this chapter, the provisions of various international instruments have been discussed with a view to determine the extent to which they contribute to the effective elimination of modern trafficking in humans. Recent legislative and policy initiatives including the Palermo Protocol, and other treaties, protocols, declarations and resolutions on human trafficking and human rights were examined. These legal instruments were categorised according to their focal areas for instance, international conventions focusing on human trafficking only; international instruments with other focus areas, but addressing also human trafficking and international human rights instruments which recognise in broader terms, basic human rights. It was observed that the rules of international criminal law

³⁴⁹ Rome Statute (n330 *supra*) art 12(2)(a). This applies to acts committed within State Parties' territory.

³⁵⁰ Rome Statute (n330 *supra*) art 12(2)(b). This applies to nationals (either accused or victim) inside the state and outside the state. This qualification is again limited by personal jurisdiction to persons (not other entities – see art 25) who have committed a crime when over the age of 18; as required in Rome Statute (n330 *supra*) art 26: “the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”

³⁵¹ Lamprecht (n36 *supra*) 248. As one of the 4 traditional bases of legislative jurisdiction (the others being territoriality; active and passive nationality) the protective principle is “the right to assert protective jurisdiction over extraterritorial activities that threaten the State's essential interests”. See Zgonec-Rožej *International Criminal Law Manual* (2010) 337. The principle of universality only comes into play when a situation is referred to the Prosecutor by the UN Security Council (see n334 *supra*).

clearly establish and recognise most forms of human trafficking as international crimes, even though such practices continue to exist with ostensible impunity.

It was indicated that human trafficking can be viewed from different perspectives in terms of the provisions of these international instruments. However, the success of the international instruments in combating human trafficking rests on the fulfilment of States Parties' commitments. It was noted that there is not a paucity of international agreements, but rather a lack of commitment of states parties to implement the provisions of these agreements. As voluntary parties to the Palermo Protocol or one of the various binding international instruments or human-rights agreements, governments must give effect to the provisions contained in these treaties at a national level. They have a duty to address the phenomenon of human trafficking by developing various strategies eradicate trafficking in persons. This demands strong political commitment nationally as well as internationally, combined with mutual responsibility and effective cooperation of all governments of countries of origin, transit and destination.

It was noted that some provisions in a number of international instruments are effective to address and combat trafficking in persons. One of these is a complaints procedure whereby interest groups or individuals alleging violations of their rights are given the opportunity to lay complaints against States Parties at the particular international instrument's organising committee. However, this practice is not provided for in all international agreements. Other significant provisions relate to the introduction of systems for improved coordination and communication strategies. For instance, dedicated multi-agency anti-trafficking units, such as the Palermo Protocol's Special Rapporteurs, gather, exchange, and process information on human trafficking as well as monitor States Parties' performance. Other agencies have developed measures aimed at depriving criminals of the proceeds of their crimes in their home country as well as in foreign countries, such as provided for in the OHCHR.

As emphasised, the phenomenon of human trafficking is not only approached from a criminal-law perspective, but of the utmost concern for the protection of human rights. Hence - the prioritisation in international instruments of also the protection of victims of trafficking. The remarkable growth of international humanitarian law in the last fifty years in

the mainstream as well as specific human-rights regimes, has led to the development of extensive norms of formal protection of the rights of especially women and children. The human rights of these and other vulnerable groups are addressed in instruments such as the CRC, the ICCPR, the CEDAW and the ICESCR, such as the right to non-discrimination, equal protection, and equality before the law; the right to life; the right to highest attainable standard of physical and mental health; the right to liberty and security of person; the right to freedom of movement; the right to privacy; the right to marry and establish a family; the right to access to education; and the right to be free from torture and cruel, inhuman or degrading treatment or punishment.

In the context of human trafficking, there is a need to address violations of these guaranteed rights in order to protect victims. Victim protection forms an essential part of combating human trafficking also because of the potential of victims' cooperation in prosecuting their traffickers. This may prevent similar human-rights violations in future. If these issues are not addressed at state level, it is unlikely that perpetrators will be convicted. It has been pointed out that States Parties are obliged in terms of various human-rights instruments to uphold human rights under international law, whether they have ratified international instruments or not. For example, slavery which is similar to human trafficking is a *jus cogens* international crime which is subject to universal jurisdiction by all states. It was suggested that all states are obliged to prosecute and punish offenders of human trafficking.

However, the efficacy of international criminal law in general and, more specifically its enforcement in national courts have been questioned. Governments in some states have turned a blind eye to human trafficking. State governments will have to become more involved in countering human trafficking. The ratification of international instruments which mandate state-imposed punishment for human trafficking and assistance to victims of trafficking is not enough. In the following chapters, the implementation of strategies to combat and punish human trafficking in specific jurisdictions will be considered in more detail.

CHAPTER 5

REGIONAL RESPONSES TO TRAFFICKING IN PERSONS

5.1 Introduction

In the previous chapter international obligations and responsibility around human trafficking was focused on. It was noted that through international treaties, combined with endeavours from both governmental and non-governmental organisations, unprecedented progress has been made to address human trafficking. The plethora of internationally-created anti-trafficking initiatives testifies to these efforts. Governments are furthermore also bound by international human-rights agreements to respect, protect and promote the rights of all people. These human-rights instruments aim to develop trafficking victims' disregarded appeals for legal protection, non-discriminatory treatment, effective legal remedies and access to restitution, compensation and rehabilitation.¹ It is argued that many existing international human-rights laws still have a myopic vision on trafficking and its harms, and especially exhibit gender-blindness.² These deficiencies may extend further to national laws, where the actual implementation of human-rights norms should take place.³

In order to seek coordinated solutions to advance or even strengthen international standards, a number of countries have banded together on a regional basis to prevent, prosecute and punish the trafficking of persons. These regional conventions, agreements and declarations contain similar provisions to the Palermo Protocol and other international covenants on human rights and migration issues. However, the effective application of these legal instruments into concrete action in national law seems to be fraught with difficulties.

¹ See Askola *Legal Response to Trafficking in Women For Sexual Exploitation in the European Union* (2007) 137. See in particular GAATW *Human Rights Standards for the Treatment of Trafficked Persons* (1999) 9-21; UNHCHR *Recommended Principles and Guidelines on Human Rights and Trafficking* Doc E/2002/68/Add 1 (2002) 3-5; Stiftelsen Kvinnoforum *European Good Practice on Recovery, Return and Integration of Trafficked Persons* (2003) 8-24.

² It is argued that persons protected by human-rights instruments have been implicitly (or even explicitly) male (with the exception of CEDAW). See Askola (n1 *supra*) 137, Charlesworth & Chinkin *The Boundaries of International Law: A Feminist Analysis* (2000) 212-231.

³ See Henkin "Introduction" in Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 7: "... the international law of human rights does not replace national institutions ... but parallels and supplements national law, superseding and supplying the deficiencies of national constitutions and laws, and indeed depends on national institutions."

The involvement of most regions in anti-trafficking measures signifies that all of them use law as the natural method to reach a desired goal, in this case the suppression of trafficking. But many states have limited competence in these areas, inadequate powers and conflicting legislation. Some regions have created too many pieces of legislation under various organs which leads to overlapping and duplication of functions. This Chapter aims to examine more closely the interrelated legal discourses and legal frameworks in combating trafficking in the regions in order to clarify their consequences for a more all-encompassing approach to trafficking. It is argued that countries could and indeed should take action against trafficking through regional cooperation, rather than as individual states.

In this Chapter, the manner in which trafficking in human beings is dealt with by the various regional organisations of Europe, the Americas and Africa will be investigated.⁴ The real impact and potential for long-term effectiveness of the regions' treaties on the crime of human trafficking will be assessed. More specifically, the obligations under the regional directives in comparison to those contained in the Palermo Protocol will be compared. Various instruments specifically formulated to combat trafficking as well as instruments that make reference to the issue of trafficking in persons will be looked into. In this regard, the various contributions to combat human trafficking in these different regions will be considered.

5.2 Regional legal framework

The Palermo Protocol has given impetus to a variety of regional anti-trafficking agreements intended to address the Protocol's perceived shortcomings. Such instruments vary in the extent to which they adopt and adapt the most salient features of the Palermo Protocol.

Similar to international agreements, the general problem with a regional instrument is that even though it is intended as a guide for member states, states tend to guard their sovereignty jealously and resent interference with their domestic legislation and policies. However, states often manage to concur at least in principle on significant

⁴ Although the efforts made by other regions are also important, this study focuses on a comparison between Africa, the US and Europe. In Asia, for example, the South Asian Association for Regional Co-operation (SAARC) adopted the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution in 2002. See Obokata *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (2006) 33.

problems on which they should cooperate; human trafficking being one of those problems.⁵ Several European, American and African states have agreed in their various regions to allow legal instruments to prescribe broadly and in some cases specifically, the legislation, programmes and policies member states should introduce. Almost all of these regions apply a two-prong approach to trafficking. Normally, the region initially enacts legislation binding at a regional level that creates minimum standards which states are required to incorporate in their laws. Next, the region tries to enforce this legislation by introducing a set of preventive and law enforcement measures both at national and at regional level.

The world's first regional agreement on human trafficking was signed in the Greater Mekong sub-region in 2004.⁶ Africa, and specifically Southern Africa, is the latest regional group to tackle human trafficking, having drafted a Southern Africa Development Community (SADC) Ten Year Strategic Plan of Action as its blue print. The African region can learn from other established regions' experiences for a more comprehensive and regionally-coordinated approach to trafficking. But first of all, the response to combat human trafficking in the European Union is considered.

5.2.1 The response to combat human trafficking in the European Union

Europe has long constituted a key site of source, transit and, most especially, destination for trafficked persons.⁷ Concurrent with the heightened influx of illegal persons in the 1970's, most Member States developed restrictive control measures which effectively criminalise and marginalise all migrants, whether trafficked or not.

⁵ Österdahl "International Countermeasures against Human Trafficking" in Jonsson (ed) *Human Trafficking and Human Security* (2009) 85.

⁶ See UNICEF "UNICEF Hails World's First Regional Agreement on Human Trafficking" http://www.unicef.org/media/media_23970.html (accessed 2013-01-07).

⁷ See Kelly "'You Can Find Anything You Want': A Critical Reflection on Research on Trafficking in Persons within and into Europe" 2005 43(1/2) *International Migration* 235 240-242. A significant proportion of human trafficking takes place from developing Central and Eastern-European countries to the developed European Union. Trafficking patterns to Western Europe has changed in the last 4 decades. During the 1970's, trafficked women came primarily from East Asia (eg Thailand and the Philippines); the 1980's brought a wave of trafficked women from Latin America and the Caribbean into Europe. The last 2 decades has seen an increase in trafficked people from countries in political and economic transition in Central, Eastern, and South Eastern Europe and the Former Soviet Union. See Kartusch *Reference Guide for Anti-Trafficking Legislative Review* (2001) 20. Governments, international organisations and NGOs also focused mainly on trafficking for sexual exploitation in the first 3 decades. In the last decade these institutions have paid increasing attention to labour trafficking, eg, the European Commission on Human Rights has identified 2 factors that must be present when considering forced or compulsory labour, "firstly, that the work is performed against the complainant's will and secondly, that the work entails unavoidable hardship to the complainant" See *X v Federal Republic of Germany*, Appl No 4653/70, ECHR, *Decisions and Reports* Vol 46 (1974) 22.

These immigration policies perceive trafficking as an internal security threat to the safety of EU citizens, which mandates more monitoring and control. The abolishment of internal borders among the Member States with the *Schengen acquis* system further facilitated transnational criminal activities.⁸ The end of the Cold War and the fall of Communism also saw many individuals seeking to relocate to a new life and numerous traffickers recognised a novel market for trade in humans.

After the adoption of the Palermo Protocol, Europe was especially active in adopting new directives on trafficking. Trafficking in persons is considered to be a priority area at EU level. Even before the conception of the Palermo Protocol, the Treaty of Amsterdam amending the Treaty on European Union (EU Treaty) expressly refers to the fight against trafficking in human beings.⁹ The Lisbon Treaty also makes explicit reference to human trafficking:

The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.¹⁰

In many ways, the European Community (EC) seems to be the ideal forum for devising common efforts against trafficking. Its various instruments on jurisdiction, mutual legal assistance, extradition and transfer of criminal proceedings and enforcement of foreign judgements already provide a legal framework to prosecute traffickers.¹¹ Through the process of “Europeanisation”,¹² the national laws in the EC (and the EU) framework are to a certain degree developing along common lines and being harmonised. The aim is

⁸ *Schengen acquis* was incorporated into the EU legal framework after the entry into force of the Treaty of Amsterdam. See EU Protocol No 2, Integrating *Schengen Acquis* into the Framework of the EU, Brussels 1999. Less strict *Schengen*-visa regimes for certain countries such as Bulgaria and Romania also created fewer restrictions. It is however impossible to control trafficking practices purely at checkpoints with the mechanisms established by the *Schengen acquis*.

⁹ Treaty on the European Union (EU Treaty) art 11 (K1) (Official Journal (OJ) C 340, 10/11/1997), signed in Maastricht on 7 Feb 1992, entered into force on 1 Nov 1993.

¹⁰ Art 79 of Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007), signed on 13 Dec 2007, and entered into force on 1 Dec 2009.

¹¹ Rijken *Trafficking in Persons: Prosecution from a European Perspective* (2003) 8-17.

¹² See Askola (n1 *supra*) 43: “The European Community is founded on the four „fundamental“ freedoms, the free movement of goods, capital, services and workers – not to mention the liberal origins of the „European idea“ itself.” The ease of convergence of European national systems is seen as due to globalising forces, similar economic and social situations, etc.

further to create convergence or approximation of national criminal law systems.¹³ However, the effort to improve cooperation within the EU and the Council of Europe has resulted in numerous proposals, agreements or treaties, often dealing with the same issues. There is a diversity of policies concerning issues such as prostitution, migration, etc examining trafficking through various paradigms. Consequently, it is still asserted that “current EU anti-trafficking policy remains ineffectual, and may in some cases even be counterproductive”.¹⁴

The relevant European legal instruments that will be focused on are those that were developed within the framework of the EU after the introduction of the Palermo Protocol, ie the European Union (EU) Framework Decision on Combating Trafficking in Human Beings, the Council of Europe¹⁵ Convention on Action against Trafficking in Human Beings, and the European Convention for the Protection of Human Rights. Lastly, criminal justice measures against human trafficking will be discussed.

5.2.1.1 The European Union Framework Decision on Combating Trafficking in Human Beings (EU Framework Decision)

Following directives set out in the Palermo Protocol concerning minimum obligations for States to combat trafficking, the EU Council adopted the EU Framework Decision.¹⁶

¹³ See Askola (n1 *supra*) 10. The Presidential Conclusions Tampere European Council, 15 & 16 Oct 1999, General Secretary, SI (1999) 800 Brussels, also underlined the need to harmonize the approach to human trafficking. There are diverging views regarding convergence through harmonisation. Although most researchers believe that legal harmonisation is necessary for effective enforcement action, Legrand contends that legal systems cannot be converged, because law is not merely formal rules but is connected to and a reflection of a specific cultural environment. As such, rules may seem to become harmonised, but that does not mean the legal culture will. See Legrand “European Legal Systems are Not Converging” 1996 45(52) *International and Comparative Law Quarterly* 52 61-62. On the contested notion of criminal law harmonisation, see eg Klip & van der Wilt (eds) *Harmonisation and Harmonising Measures in Criminal Law* (2002). Askola “Violence against Women, Trafficking, and Migration in the European Union” 2007 13(2) *European Law Journal* 204 211 suspects that the EU will play a very restricted role in the actual, practical law enforcement of human trafficking, which means that states themselves will have to ensure that trafficking is a priority.

¹⁴ See Askola (n13 *supra*) 204.

¹⁵ The Council of Europe, based in Strasbourg (France), consists of 47 member countries. Founded on 5 May 1949 by 10 countries, the Council of Europe seeks to develop throughout Europe cooperation on democratic principles (such as human rights, the rule of law etc) based on the European Convention on for the Protection of Human Rights and Fundamental Freedoms, Nov 4 1950, 213 UNTS 222, enforced by the European Court of Human Rights and other reference texts on the protection of individuals. It is an entirely separate body from the EU, which has only 27 member states. Unlike the EU, the Council of Europe cannot make binding laws. See <http://www.coe.int/aboutcoe/index.asp?page=47pays1europe> (accessed 2013-01-07).

¹⁶ Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings (OJ L 203, 01 08 2002). This Framework Decision put into practice art 5(3) of the Charter of Fundamental Rights of the European Union, OJ C 364, 18 Dec 2000 which declares that: “Trafficking in human beings is prohibited”. Although legally binding, they lack direct effect in Member States. See

Although not a treaty, the EU Framework Decision is legally binding on its Member States to the extent that they must conform to its substantive provisions but are allowed to determine the form and methods in achieving the results.¹⁷

The principle purpose of the EU Framework decision is “to promote a common EU approach on trafficking”.¹⁸ This is accomplished by filling the legislative gaps between Member States and by adopting a common definition of human trafficking. In its first article the constitutive elements of the definition of trafficking following the Palermo Protocol are given.¹⁹ By adopting this definition, the EU Framework Decision lays the

Treaty on the European Union, OJ C 325/5 24/12/2002, art 34 (2)(b). The Framework Decision follows on other policy documents and initiatives (which are not discussed here) eg Resolution of 18 Jan 1996 on Traffic in Human Beings OJ C 032, 5/2/1996 88-93; the Joint Action establishing an Incentive and Exchange Programme for Persons Responsible for Combating Trade in Human Beings and the Sexual Exploitation of Children, OJ L 322, 12/12/1996; the Joint Action concerning Action to Combat Trafficking in Human Beings and the Sexual Exploitation of Children, OJ L 063, 4/3/1997; the Joint Action establishing a Mechanism for Evaluating the Application and Implementation at National Level of International Undertakings in the Fight against Organised Crime, OJ L 344, 15/12/1997; the Action Plan to Combat Organised Crime OJ C 251, 15/8/1997; The Implementation of Action Plan to Combat Organised Crime, Brussels, 29 Sept 1998, 11537/1998; the Presidency Conclusions Tampere European Council, 15 & 16 October 1999, General Secretary, SI (1999) 800 Brussels, 16 Oct 1999; the Organization for Security and Cooperation in Europe (OSCE), Trafficking in Human Beings: Implications for the OSCE, Review Conference, Sept 1999, Office for Democratic Institutions and Human Rights (ODIHR) Background Paper; the Proposed Action Plan 2000 for Activities to Combat Trafficking in Human Beings, OSCE-ODIHR, Warsaw, Nov 1999; the Council of Europe, Committee of Ministers’ Recommendation No R (2000)11 of the Committee of Ministers to Member States on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation, adopted on 19 May 2000; the European Commission Communication on Combating Trafficking in Human Beings and the Sexual Exploitation of Children, COM (2000) 854, the Decision No 1 Enhancing the OSCE’s Efforts to Combat Trafficking in Human Beings, MC(8) Journal No 2, Agenda No 10 OSCE (2000); the Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium, OJ C 124, 3/5/2000; the Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking in Human Beings in the EU, OJ C 142, 14/6/2002 Council of Europe, Parliamentary Assembly, Recommendation 1545 (2002) on a Campaign against Trafficking in Women, adopted on 21 Jan 2002. Relevant gender-specific instruments are the Resolution on Violence Against Women, OJ C 176, 14/7/1986 73-83; Resolution on the Exploitation of Prostitution and the Traffic in Human Beings OJ C 120, 16/5/1989 352-355; Resolution on Trade in Women OJ C 268, 4/10/1993 141-142; the Trafficking in Women for the Purpose of Sexual Exploitation (COM (1996) 567, Brussels, 20/11/1996; the Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation, The Hague, 26 Apr 1997 OJ C 304, 6/10/1997 55-59; the New Strategies to Combat Trafficking in Women (COM (1998) 726, Brussels, 09/12/1998; the Report on the Communication from the Commission to the Council; the European Parliament for Further Action on the Fight against Trafficking in Women, 2 May 2000, Final A5-0127/2000.

¹⁷ For an explanation of the legal nature, scope and function of a framework decision, see European Council on Refugees and Exiles *Analysis of the Treaty of Amsterdam in so far as it relates to Asylum Policy* (1997) 197. See also Österdahl (n5 *supra*) 81.

¹⁸ Obokata “EU Action against Trafficking of Human Beings: Past, Present and the Future” in Guild & Minderhoud (eds) *Immigration and Criminal Law in the European Union: the Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (2006) 390.

¹⁹ EU Framework Decision (n16 *supra*) arts 1-4. The definition is as follows: “Each Member State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:
(a) use is made of coercion, force or threat, including abduction, or
(b) use is made of deceit or fraud, or

foundation for effecting maximum uniformity and strengthening cooperation throughout and beyond Europe. Excluded from this definition are the requirements of transnational border crossing and that the crime must be perpetrated by an organised crime group. As such, trafficking committed within a country or within the EU is included. Also absent from the list of trafficking types is the removal of organs. This type and any possible future forms of exploitation may have been provided for if the phrase “there is another form or abuse”; contained in paragraph (d) of Articles 1 and 2 of the Proposal for the Framework Decision had been retained.²⁰ This would have resulted in a broad interpretation of the term “abuse” as well as the term “coercion”. The Framework Decision however introduces a number of provisions not found in the Palermo Protocol, for instance, a stipulation that sanctions be “effective, proportionate and dissuasive”,²¹ precise rules on the appropriate penalisation especially for aggravated offences,²² as well as provisions of jurisdiction. It furthermore creates an obligation on states to criminalise all trafficking-related acts (aiding, abetting or attempting offences),²³ whether committed by a natural or legal entity. It thus extends the global initiative in a criminal-justice manner.²⁴

The EU Framework Decision explicitly provides for liability and sanctions of legal persons, the first time this has ever occurred with regard to trafficking in persons. These penalties include criminal or non-criminal fines as well as other sanctions such

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- (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
 - (d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of other or other forms of sexual exploitation, including in pornography”.

²⁰ See EUR-Lex COM (2000) 854 final/2. The final text of the EU Framework Decision however discarded this phrase. Rijken (n11 *supra*) 69 finds it regrettable that such an open phrase has not been adopted in the final text of the Framework Decision.

²¹ EU Framework Decision (n16 *supra*) art 3.

²² EU Framework Decision (n16 *supra*) art 3(2). Under this art, the penalty of imprisonment for a period of not less than 8 yrs is provided for when:

- (a) the offence has deliberately or by gross negligence endangered the life of the victim;
- (b) the offence has been committed against a victim who was particularly vulnerable. A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;
- (c) the offence has been committed by use of serious violence or has caused particularly serious harm to the victim;
- (d) the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein.

²³ EU Framework Decision (n16 *supra*) art 3(1).

²⁴ Gallagher “Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments” (2006) 8 *European Journal of Migration and Law* 163 167; Obokata (n18 *supra*) 403.

as temporary or permanent disqualification from the practice of commercial activities or a judicial winding-up order.²⁵ The specification of the applicable sanctions clearly sets out what Member States must do while correspondingly offering them ideas on effective measures to fight human trafficking. The sanctions may have a semi-compulsory nature in that those states which fail to implement the measures may have to explain themselves at some point.²⁶ The EU Framework Decision is subject to the jurisdiction of the European Court of Justice (ECJ);²⁷ therefore, where a member state is not implementing the Framework Decision, the matter may be taken before the ECJ.²⁸ This may compel states to implement the provisions of the Framework Decision, thereby ensuring a minimum standard.

Each Member State undertakes to establish its jurisdiction over human trafficking where the offence is committed wholly or partly in its territory; where the offender is one of its nationals or the offence is committed for the benefit of a legal person established in the territory of the member state.²⁹ A Member State that does not extradite its nationals is obliged to prosecute such nationals for offences under the Framework Decision committed outside its territory.³⁰

The EU Framework Decision contains an article on the protection of and assistance to victims.³¹ However it does not contain any substantive victim-protection provisions but merely refers to the fact that investigations into or prosecutions of trafficking offences must not be dependent on reporting or accusations by victims, and that criminal proceedings may continue even if the victim has withdrawn his or her statement. Additionally, this article recognises the vulnerability of children as trafficking victims and requires states to assist them and their families.³² Notably, the EU Framework Decision does not contain a clause requiring member states to grant temporary or permanent residence to trafficking victims.

²⁵ EU Framework Decision (n16 *supra*) art 5 (a)–(e).

²⁶ Österdahl (n5 *supra*) 83.

²⁷ EU Treaty (n9 *supra*) arts 34, 35 & 46(b).

²⁸ Österdahl (n5 *supra*) 84–85.

²⁹ EU Framework Decision (n16 *supra*) art 6(1).

³⁰ EU Framework Decision (n16 *supra*) art 6(3).

³¹ EU Framework Decision (n16 *supra*) art 7(1). This protection extends to adequate legal protection and standing in legal proceedings only.

³² EU Framework Decision (n16 *supra*) art 7(2), (3). Women are not identified as a vulnerable group in the document.

It is argued that the EU Framework Decision on trafficking in persons focuses exclusively on the criminalisation of human trafficking, and not on the rights of trafficked persons or the root causes behind trafficking.³³ A subsequent EU Council Directive³⁴ on residence permits issued to third-country nationals who are human trafficking victims or the subjects of illegal immigration actions and who cooperate with authorities, did not fill the lacuna left by the EU Framework Decision. The Directive was prompted by a mounting concern within the EU “of the inherent obstacles in obtaining and sustaining the cooperation of individuals who fear for their safety and wellbeing and who have little to gain in complaining to the police or otherwise assisting in investigations”.³⁵ Essentially, the Directive grants incentives such as temporary residence for trafficking victims and illegal migrants on the condition that they cooperate with police or judicial authorities in the detection and prosecution of smugglers and human traffickers.³⁶ The victim may only stay in the receiving country for the duration of the investigations and proceedings.³⁷ As such, the Directive issues witness protection instead of victim protection. The Council Directive reflects a lack of concern for the protection of victims’ rights,³⁸ and is more concerned with advancing its

³³ Gallagher (n24 *supra*) 167. Gallagher argues that the EU Framework Decision in this sense denotes a “... substantial retreat from previous commitments of the EU, eg, those contained in the 1997 Joint Action on Trafficking which, as a result of the Framework Decision, has now been repealed” (in accordance with Art 9 of the Framework Decision).

³⁴ EU Council Directive 2004/81/EC on the Residence Permit issued to Third-country Nationals who are Victims of Trafficking in Human Beings or who have been the Subject of an Action to facilitate Illegal Immigration, who Cooperate with Authorities (2004) art 1. It was argued that “the concept of „victim of action to facilitate illegal immigration” has a very specific meaning, in that it does not cover *all* those who seek assistance in illegal immigration, only those who might be reasonably regarded as victims . . . who have suffered harm, for example having their lives endangered or physical injury”. See Proposal for a Council Directive on the Short-term Residence Permit issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings who cooperate with the Competent Authorities, COM (2002) 71 final, 2002/0043 (CNS, Brussels, 11 02 2002), para 2.1.

³⁵ Gallagher (n24 *supra*) 168.

³⁶ EU Council Directive (n34 *supra*) art 5. Gallagher (n24 *supra*) 168 remarks that there “appears no obligation on Member States to inform *all* victims of trafficking of the possibility of obtaining a temporary residence permit and Member States further retain the right to decide whether NGOs can also have a role to play providing such information”. As such, only those victims of trafficking who the particular Member State deem vital or useful for the investigation and prosecution of human trafficking perpetrators will qualify for this incentive. This highly restrictive approach was instituted to minimize abuse of the system.

³⁷ Österdahl (n5 *supra*) 84. Victims are first granted a “reflection period” in order to make an informed decision in assisting criminal justice agencies. During this period, those “who do not have sufficient resources and have special needs, such as pregnant women, the disabled or victims of sexual violence or other forms of violence” are provided emergency medical and psychological care and material assistance; (optional) free legal aid, translation and interpretation services “where appropriate” (see EU Council Directive (n34 *supra*) art 7).

³⁸ Österdahl (n5 *supra*) 84. The Directive is furthermore subordinate to national laws of the Member States, which can define the length of reflection period, manner of assistance, etc. Some EU countries have followed a more generous approach in their national laws. Italy, for example, provides special permits of 6 months or longer to stay when “situations of violence or grave exploitation to a foreigner have been identified and concrete dangers for his or her safety emerged as a result of the intent to withdraw from the circle”. The permit is not issued contingent on cooperation with the criminal justice

criminal-law agenda that is said to be “unsound in principle, and unworkable and repressive in practice”.³⁹

5.2.1.2 The Council of Europe Convention on Action against Trafficking in Human Beings (European Convention)

The European Convention⁴⁰ criminalises trafficking in human beings much like the EU Framework Decision and Palermo Protocol, and many of the provisions are similar. It recognises the Palermo Protocol as an international minimum standard whereupon it aspires to add value to.⁴¹ The Convention

...does not aim at competing with other instruments adopted at a global or regional level but at improving the protection afforded by them and developing the standards contained therein, in particular in relation to the protection of the human rights of the victims of trafficking.⁴²

Whereas the Palermo Protocol (and the Framework Decision) focuses more on the criminal-justice aspects of human trafficking, the European Convention incorporates a

process, though the applicant must make a “simple statement to police which reports that a crime has occurred”. See Pearson *Human Traffic, Human Rights: Redefining Victim Protection* (2002) 141.

³⁹ Askola (n13 *supra*) 213. The author comments that “the current approach actually perpetuates rather than addresses the global inequalities that trafficking exemplifies in the first place.” The Directive is viewed by some Member States as also luring irregular immigrants in the guise of “fake trafficking victims”. See Askola (n1 *supra*) 165.

⁴⁰ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Council of Europe Treaty Series, No 197, 2008. The Convention opened for signature on 16 May 2005, and entered into force on 1 Feb 2008. It has been ratified (as of 30 May 2011) by 34 European states, while a further 9 have signed but not yet ratified. See <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=197&CM=0&DF=&CL=ENG>. It consists of 10 chaps and 47 arts. This adoption again followed many previous initiatives on trafficking; see n16 *supra*. Other major documents preceding the European Convention are the Communication from the Commission to the European Parliament and the Council in View of the European Council of Thessaloniki on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents, COM 92003 323 final, Brussels 3/6/2003; Brussels Declaration on Preventing and Combating Trafficking in Human Beings, Doc 7800/2003; OSCE, Decision No 557 OSCE Action Plan to Combat Trafficking in Human Beings 462 Plenary Meeting Agenda Item 6 (24 Jul 2003) PC DEC/557; Anti-Trafficking Programme (ATP), Public-Private Co-operation in the Prevention of Trafficking in Human Beings OCEEA (Feb 2004).

⁴¹ The European Convention (n40 *supra*) Explanatory Report, arts 28, 36: “The added value provided by the ... Convention lies firstly in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity, and that greater protection is therefore needed for all of its victims. Secondly, the Convention’s scope takes in all forms of trafficking (national, transnational, linked or not to organised crime ...) in particular with a view to victim protection measures and international cooperation. Thirdly, the Convention sets up monitoring machinery to ensure that parties implement its provisions effectively. Lastly, the Convention mainstreams gender equality in its provisions”.

⁴² European Convention (n40 *supra*) Explanatory Report, arts 28, 30 on European Convention (n40 *supra*) art 39.

human-rights approach⁴³ to trafficked persons. Another point of departure from the Palermo Protocol is that the Convention applies to national and transnational human trafficking whether connected to organised crime or not.⁴⁴ Particular reference is also made to the importance of guaranteeing gender equality in relation to both prevention and protection.⁴⁵ Also, child victims of trafficking are provided special protection, more than that set out in the international treaty.⁴⁶

The definition of trafficking in persons follows the provision in the Palermo Protocol; however the accompanying European Convention's Explanatory Report explains certain aspects of the definition in detail. These include:⁴⁷

- The possibility that trafficking may take place even with a legal border-crossing and where the victim's presence on national territory is lawful;⁴⁸
- The abuse of a position of vulnerability comprises: "any state of hardship in which a human being is impelled to accept being exploited" including "abusing the economic insecurity or poverty of an adult hoping to better their own and their family's lot";⁴⁹
- Exploitation need not to have occurred in actual fact for trafficking to take place;⁵⁰
- Certain forms of trafficking such as illegal adoptions are not specifically referred to, however, any "practice similar to slavery"⁵¹ will suffice to qualify as human trafficking;

⁴³ See European Convention (n40 *supra*) preamble & art 1(1). The Convention's status as a human rights instrument is further established by its explicit recognition, in the preamble, of trafficking as a violation of human rights as well as an offence to the dignity and integrity of the human being. This is however not done at the expense of the crime-prevention aspects of the Convention.

⁴⁴ European Convention (n40 *supra*) art 2. See also European Convention (n40 *supra*) Explanatory Report, arts 28, 60–61. The European Convention also makes use of the phrase "trafficking in human beings", whilst the Palermo Protocol employs "trafficking in persons".

⁴⁵ European Convention (n40 *supra*) art 17. According to the European Convention (n40 *supra*) Explanatory Report, art 54: "Gender equality means an equal visibility, empowerment and participation of both sexes in all spheres of public and private life. Gender equality is the opposite of gender inequality, not of gender difference". The Convention applies to all forms of trafficking in women, men and children. It is relevant to note that in all previous proposals, the Council of Europe limited their field of application relating to human trafficking to only women and girls for sexual exploitation. See Gallagher (n24 *supra*) 171.

⁴⁶ Some of the key provisions relating to children are special protection pending the verification of age (art 10(3)); the appointment of a representative who acts in the child's best interests (art 10(4)(a)); distinct efforts to locate the child's family (art 10(4)(c)) and that all considerations must be in the best interest of the child victim (art 14(2)).

⁴⁷ See Gallagher (n24 *supra*) 175-176 who also discusses these aspects.

⁴⁸ European Convention (n40 *supra*) Explanatory Report, arts 28, 80.

⁴⁹ European Convention (n40 *supra*) Explanatory Report, arts 28, 83.

⁵⁰ European Convention (n40 *supra*) Explanatory Report, arts 28, 87.

⁵¹ European Convention (n40 *supra*) Explanatory Report, arts 28, 94.

- A willingness to engage in prostitution does not denote consent to exploitation.⁵²

The European Convention furthermore defines a victim of trafficking for the first time as “any natural person who is subject to trafficking in human beings as defined in this article”⁵³ or “anyone who is subject to trafficking as it is defined in the Convention”.⁵⁴ Correct identification of victims is crucial for the provision of protection and assistance.⁵⁵ Identification failures will likely lead to a denial of that victim’s rights as well as problems in the prosecution process.⁵⁶

The purposes of the European Convention are the prevention and combating of trafficking; the protection of the human rights of victims; the safeguarding of effective investigation and prosecution cooperation, and the promotion of international co-operation.⁵⁷ The Convention’s approach in terms of specific preventive strategies is fairly conventional but too broad. Following the two-prong approach, states are first obliged to strengthen national and international coordination between various bodies in the prevention and combating of trafficking. Bilateral and multilateral agreements are used to ensure cooperation between states of origin, transit and destination. States are subsequently required to either establish or strengthen effective policies to prevent trafficking.⁵⁸ The provisions containing the preventative strategies are too general and unclear in terms of what states are specifically supposed to do.⁵⁹ This creates complications in establishing whether a state has fulfilled its commitments under the Convention; whether they have taken the correct measures or have done enough to implement the agreement. It also gives states leeway in applying the barest minimum standards.⁶⁰

⁵² European Convention (n40 *supra*) Explanatory Report, arts 28, 97.

⁵³ European Convention (n40 *supra*) art 4(e).

⁵⁴ European Convention (n40 *supra*) arts 2, 28, 99.

⁵⁵ Gallagher (n24 *supra*) 176. This includes the necessary legal framework as well as competent personal trained in identification of victims.

⁵⁶ European Convention (n40 *supra*) Explanatory Report, arts 28, 127.

⁵⁷ European Convention (n40 *supra*) art 1(1).

⁵⁸ European Convention (n40 *supra*) Chap II & art 5(1).

⁵⁹ Österdahl (n5 *supra*) 77.

⁶⁰ Österdahl (n5 *supra*) 86. Even where the instruments are clear and precise, other factors still play a role, such as the degree of prioritisation states attach to the trafficking problem and the available resources.

The Convention further requires states to adopt measures that discourage the demand for people,⁶¹ for instance demand for sex workers. Again, it is argued that the problem with this provision is that the language used is “too broad, sweeping and imprecise ... soft ... [and] relate to information campaigns and education.”⁶² Although these measures seem without any force, the Convention’s Explanatory Notes provides that effective dissuasion measures may be legislative, administrative, educational, social or cultural.⁶³ Interestingly, the important role and responsibility of the media and civil society in identifying and raising awareness of demand as a root cause of trafficking, is also acknowledged.⁶⁴

The third chapter of the Convention addresses protection of the rights of victims. In an effort to remedy the weaknesses of the Palermo Protocol, the European Convention is more firmly phrased in terms of its legal obligations to trafficked persons.⁶⁵ The Convention affirms that “States Parties are required to take due account of the victim’s safety and protection needs”.⁶⁶ Legislative measures that ensure the provision of basic assistance to all trafficking victims must be adopted by Member States.⁶⁷ After the identification (or even provisional identification)⁶⁸ of trafficked persons within their territory,⁶⁹ elaborate “protection and support measures are to be provided on a non-discriminatory,⁷⁰ consensual and informed basis”.⁷¹ State authorities may investigate or

⁶¹ European Convention (n40 *supra*) art 6: “To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:
a research on best practices, methods and strategies;
b raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;
c target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;
d preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being.”

⁶² Österdahl (n5 *supra*) 77.

⁶³ European Convention (n40 *supra*) Explanatory Report, art 6.

⁶⁴ European Convention (n40 *supra*) art 6(b).

⁶⁵ Although more strongly worded, the various assistance and protection clauses are very carefully constructed. This reflects certain concerns countries have, as Gallagher (n24 *supra*) 188 explains: “It is a common, and not altogether unreasonable, fear of countries of destination that too much recognition, too much assistance will strain resources and capacities and will create a flood of both valid and fraudulent claims – all requiring expensive and time consuming investigation”.

⁶⁶ European Convention (n40 *supra*) art 12(2).

⁶⁷ Gallagher (n24 *supra*) 176.

⁶⁸ European Convention (n40 *supra*) art 10(2). Once identified, a victim cannot be removed from the Member State until the identification process is completed. Although merely a temporary measure, the safety of victims is ensured while their matter is investigated. This is an application of the principle of *non-refoulement*.

⁶⁹ European Convention (n40 *supra*) art 12.

⁷⁰ European Convention (n40 *supra*) art 3.

prosecute offences under the Convention without the necessity of a complaint from the victim, whether the offence has been committed in its territory in whole or in part.⁷² Victims may even lodge complaints when back in their country of origin or state of residence.⁷³

The European Convention requires states to provide for a 30-day recovery and reflection period for victims in their domestic laws. This allows victims to escape the influence of traffickers and recover while taking an informed decision on cooperating with authorities.⁷⁴ Residency may be extended by states if circumstances require it.⁷⁵ However, when victims are returned (which “shall preferably be voluntary”)⁷⁶ to their country of origin, two specific obligations with regard to repatriation must be adhered to. These countries must facilitate and accept the return of a trafficked national or resident “with due regard for the rights, safety and dignity” of that person and without undue delay.⁷⁷ They also have to verify the victim through nationality or residence and issue the necessary travel documents. Gallagher notes that the practical effect of these provisions is that trafficking victims can indeed be returned against their will, especially since no risk assessment is required.⁷⁸

The European Convention requires member states to ensure their domestic laws provide access to legal assistance and aid for trafficking victims, including compensation. It furthermore requires for the monetary compensation of victims either

⁷¹ Gallagher (n24 *supra*) 177; European Convention (n40 *supra*) art 12(7). Victims are to be assisted in their physical, psychological and social recovery, with access to appropriate and secure accommodation, medical treatment, translation and interpretation services; counselling, information and assistance including in relation to the legal process (European Convention (n40 *supra*) art 12(1)); access to the labour market, vocational training and education (European Convention (n40 *supra*) arts 12 (3), 12(4)). These provisions are not reserved for only those cooperating with judicial authorities, but for all victims and others; including families, witnesses and victim support agencies (see European Convention (n40 *supra*) art 12(6)). This eliminates the coercive, forcing of victims to cooperate with authorities in return for temporary protection or residence.

⁷² European Convention (n40 *supra*) 27(1).

⁷³ European Convention (n40 *supra*) 27(2).

⁷⁴ European Convention (n40 *supra*) art 13.

⁷⁵ European Convention (n40 *supra*) art 14. The circumstances relate to the victim’s personal situation or for the purposes of their cooperation in an investigation or prosecution. As a result, State Parties retain the right to grant residence permits only to those victims who cooperate with authorities. Victims have no legal redress and may not appeal any refusal of permits.

⁷⁶ European Convention (n40 *supra*) art 16(2).

⁷⁷ European Convention (n40 *supra*) art 16(1). There is one exception – child victims must not be returned to a state if it is against the best interest of the child.

⁷⁸ Gallagher (n24 *supra*) 180. As such, there rests no legal or moral responsibility upon states for the safety of returned victims.

by the perpetrators⁷⁹ or other means such as state-compensation schemes funded by the seized proceeds of trafficking, or a victim's fund.⁸⁰

Chapters IV and V of the European Convention concern the substantive criminal-law aspects of trafficking.⁸¹ Legislation must be maximally harmonised to promote cooperation and strengthen the comparability of data.⁸² Apart from trafficking, attempting, aiding or abetting and certain acts committed for the purpose of enabling trafficking such as forging a travel or identity document must be criminalised.⁸³ Similar to the Framework Decision, legal persons are to be held liable for trafficking transgressions.⁸⁴ However, unlike the EU Framework Decision, the Convention requires Member States to consider also criminalising the use of the services of a trafficked person.⁸⁵ This is aimed at discouraging the demand for exploitable people that fuels human trafficking.⁸⁶ Under this provision, brothel owners or pimps exploiting trafficked persons, or those procuring sexual services or even an organ, may be prosecuted. It is argued that even the buyers of clothing made by means of exploited labour (such as a sweatshop) may be prosecuted.⁸⁷ However, prosecution in such a case will prove challenging as both the act (use of service) and knowledge of unlawfulness (of the fact the service was made available through trafficking) must be established.

Replicating the Framework Decision, all offences are to be made punishable by “effective, proportionate and dissuasive” sanctions – this includes the “deprivation of liberty which can give rise to extradition”.⁸⁸ In determining the penalties for trafficking offences, a number of situations are to be regarded as “aggravating circumstances”. These include where the offence deliberately or by gross negligence endangered the life of the victim; where it was committed against a child; or by a public official in the

⁷⁹ European Convention (n40 *supra*) art 15(3). This is in terms of both material injury and suffering.

⁸⁰ European Convention (n40 *supra*) art 15(4).

⁸¹ The provisions concerning criminalisation are almost identical to those in the Palermo Protocol.

⁸² European Convention (n40 *supra*) Explanatory Report, arts 28, 216; Gallagher (n24 *supra*) 182.

⁸³ European Convention (n40 *supra*) arts 18, 20, 21.

⁸⁴ European Convention (n40 *supra*) art 18. Corporate liability is limited to situations in which the offence was committed for the benefit of the legal person by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, and/or where lack of supervision and control by a natural person made possible the commission of an offence.

⁸⁵ European Convention (n40 *supra*) art 19. The wording of this article provides that member states shall “consider” adopting legislation to criminalise the use of services in domestic labour, prostitution and other forms of labour such as agriculture.

⁸⁶ European Convention (n40 *supra*) Explanatory Report, art 19.

⁸⁷ European Convention (n40 *supra*) art 31; Gallagher (n24 *supra*) 183.

⁸⁸ European Convention (n40 *supra*) art 23(1).

performance of her/his duties; or where it was committed within the framework of a criminal organisation.⁸⁹ The provisions providing sanctions also include an obligation on Member States to adopt legislative and other measures to enable it to confiscate or deprive the instrumentalities and proceeds of trafficking offences (or property the value of which corresponds to such proceeds) and to temporary or permanent close of any establishment used for trafficking.⁹⁰ Previous final sentences imposed in the courts of other Member States are also recognised in deciding upon an appropriate sentence.⁹¹ The Convention overtly acknowledges the importance of preventing the prosecution of victims of trafficking. States Parties are required, in accordance with the basic principles of their legal systems, to: “provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”.⁹² The criminal procedure chapter concludes with an article on compulsory jurisdiction. The jurisdictional elements of the Convention are extremely broad and cover territoriality, nationality or passive personality.⁹³ States are required to either prosecute or extradite.

Unlike its international equivalent, the European Convention provides for a monitoring mechanism which consists of two observer groups. These two groups are the primary monitoring body, the Group of Experts against Trafficking in Human Beings (GRETA)⁹⁴ and its support unit, the Committee of the Parties.⁹⁵ The monitoring measure is meant to ensure state compliance with the provisions of the European Convention individually and in its entirety.⁹⁶

⁸⁹ European Convention (n40 *supra*) art 24. Criminal organisation is not defined in this Convention. However, the European Convention (n40 *supra*) Explanatory Report, art 264 makes specific reference to the definition contained in the Palermo Protocol art 2(a).

⁹⁰ European Convention (n40 *supra*) Explanatory Report, art 264.

⁹¹ European Convention (n40 *supra*) art 25.

⁹² European Convention (n40 *supra*) art 26; European Convention (n40 *supra*) Explanatory Report, arts 272-274. The use of the words “provide for the possibility” again weakens this provision in terms of protection.

⁹³ Gallagher (n24 *supra*) 182. In other words, a States Party must establish jurisdiction over an offence when committed in its territory; or by one of its nationals or against one of its nationals. This covers all cases involving victims or perpetrators who are present in the territory, or citizens of States Parties. The only exception relates to the fact that the Convention provides for no specific jurisdiction over persons involved in trafficking while carrying out functions as part of an international military or peacekeeping or related force.

⁹⁴ European Convention (n40 *supra*) art 36. GRETA does the bulk of the monitoring of the implementation of the Convention. The body consists of 10 to 15 members elected by the States Parties “composed of independent technical experts elected by the Committee of the Parties on the basis of their expertise with attention given to gender balance, geographical balance and the need to ensure representation from the main legal systems”. See Gallagher (n24 *supra*) 186.

⁹⁵ European Convention (n40 *supra*) art 37. The Committee of the Parties is a body directly linked to the Council of Europe’s Committee of Ministers. It adds political weight to GRETA and can request states to implement GRETA conclusions with regard to implementation. See Gallagher (n24 *supra*) 186.

⁹⁶ Gallagher (n24 *supra*) 176.

5.2.1.3 European Convention on Human Rights (ECHR)

From the previous two regional agreements, it can be concluded that in Europe trafficking in persons is viewed as a practice which ought to be addressed essentially from a criminal-justice perspective. Victim protection is beneficial in the sense “that it allows law enforcement agencies to obtain evidence to prosecute and punish traffickers.”⁹⁷ However, combating human trafficking is also important from a human-rights point of view. In this regard, the discussion will focus on the ECHR,⁹⁸ the most important human-rights document in Europe.

The ECHR sets forth a number of fundamental rights and freedoms.⁹⁹ It also has several protocols.¹⁰⁰ The acceptance of the various protocols differ from country to country, however it is encouraged that State Parties should assent to as many protocols as possible. The ECHR consists of three parts.¹⁰¹ Section II of the ECHR establishes the European Court of Human Rights (ECtHR). Any person, non-governmental organisation or group of individuals may apply to the ECtHR claiming their rights have been violated under the ECHR.¹⁰² This provision is particularly innovative as it makes the individual an active role-player in the international arena. At present, the ECHR is still the only international human rights agreement with this high degree of individual protection.¹⁰³

⁹⁷ Obokata (n18 *supra*) 401.

⁹⁸ The ECHR (formally the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No 005) opened for signature on 4 Nov 1950, and entered into force on 3 Sept 1953. All 47 Member States of the Council of Europe signed and ratified it. <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (accessed 2013-01-07).

⁹⁹ Among these rights are the right to life, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination.

¹⁰⁰ More rights are granted by additional protocols to the ECHR (Protocols 1 (ETS No 009), 4 (ETS No 046), 6 (ETS No 114), 7 (ETS No 117), 12 (ETS No 177) and 13 (ETS No 187)). As of Jan 2010, 15 protocols to the Convention have been opened for signature.

¹⁰¹ As amended by Protocol 11 (1 Nov 1998). S1 (arts 2-18) contains the main rights and freedoms.

¹⁰² ECHR (n98 *supra*) art 34. The Court receives 5000 to 10 000 applications annually. See Martin, Schnably, Wilson, Simon & Tushnet *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (2006) 17.

¹⁰³ The case law of the ECtHR illustrates its recognition of contracting States’ liability for acts committed by individuals or group of individuals when these States failed to take appropriate measures of protection. In *Case X and Y v The Netherlands* (8978/80) 26 Mar 1985, the Court held that state failure to adopt criminal-law provisions to secure the effective protection of individuals gives rise to violation of art 8 (the right to private life and respect for family life) of the ECHR. In this case, a mentally-handicapped minor girl and her father instituted proceedings against the national authority because of state-imposed impediments which did not give them any recourse to remedies (as required by art 13) against a man who had sexually assaulted her. This situation was discriminatory and contrary to art 14. The daughter had also been subjected to inhuman and degrading treatment (as contained in art 3). In the case *Young, James and Webster v The United Kingdom* (7601/76; 7806/77) 13 Aug 1981, the Court found that the respondent State was responsible for the breach of art 11 of ECHR (freedom of

Under the Convention, State Parties may take cases against one another to the ECtHR.¹⁰⁴ Judgments finding violations are final¹⁰⁵ and binding on the States concerned and they are obliged to abide with and execute them.¹⁰⁶ The Committee of Ministers of the Council of Europe supervises the execution of final judgments, which includes the payment of compensation awarded by the ECtHR.

According to the European Convention Explanatory Notes, trafficking “has become one of Europe’s major scourges. This phenomenon affecting men, women and children has reached such an unprecedented level that we can refer to it as a new form of slavery.”¹⁰⁷ Slavery and forced labour are explicitly prohibited in terms of the ECHR.¹⁰⁸ Although the ECHR does not contain a pertinent provision on trafficking in persons, this prohibition on slavery, servitude and forced or compulsory labour in Article 4 has formed the basis of ECtHR judgments concerning human trafficking. In the *Siliadin v France*-case,¹⁰⁹ a young girl from Togo was lured to France under a false pretext and kept as an unpaid maid for years. The Court held that:

There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.¹¹⁰

assembly and association) in that its domestic law permitted the applicants’ dismissal for refusal to join 1 of 3 trade unions at British Rail. Para 49 explicitly holds state parties responsible for non-observation of obligations where legislation is necessary to protect rights established by the Convention. In a similar manner, trafficked persons may frame a complaint against a state party for failing to implement legislation necessary to protect their rights under the ECHR. See European Convention (n40 *supra*) Explanatory Notes, art 44.

¹⁰⁴ ECHR (n98 *supra*) art 33.

¹⁰⁵ ECHR (n98 *supra*) art 44.

¹⁰⁶ ECHR (n98 *supra*) art 46(1).

¹⁰⁷ European Convention (n40 *supra*) Explanatory Notes art 45.

¹⁰⁸ ECHR (n98 *supra*) art 4: “1. No one shall be held in slavery or servitude; 2. No one shall be required to perform forced or compulsory labour [...]”. This provision corresponds exactly to art 5 of the EU Charter of Fundamental Rights, however, this Charter contains art 5(3) which expressly prohibits trafficking in human beings.

¹⁰⁹ *Siliadin v France* [2005] ECHR 73316/01 ECtHR (26 Jul 2005).

¹¹⁰ *Siliadin v France* (n109 *supra*) para 282.

The Court found that the Member States' positive obligations under Article 4 of the Convention must be seen as requiring "the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation".¹¹¹ In the case of *Rantsev v Cyprus and Russia*,¹¹² the ECtHR confirmed unanimously that human trafficking falls within the scope of Article 4.

Article 3 of the ECHR forbids torture, inhumane or degrading treatment or punishment. This provision applies to trafficking situations which involves cases of severe violence and poor incarceration conditions.¹¹³ There are no exceptions or limitations on this right. It is argued that this right may even extend to the right of trafficked persons to seek asylum.¹¹⁴ Expulsion from a destination country is prohibited if victims should face inhumane treatment or persecution in their country of origin.¹¹⁵ Although there have only been a few cases of asylum granted to trafficked persons, relevant case law confirms the applicability of Article 3 to the principle of *non-refoulement*.¹¹⁶ Victims of trafficking facing deportation may invoke Article 3 in national courts to stop the procedure. If governments fail to adequately respond, the Article 13 right to an effective remedy before a national authority may be transgressed.¹¹⁷

¹¹¹ *Siliadin v France* (n109 *supra*) paras 111-113.

¹¹² *Rantsev v Cyprus and Russia* [2010] ECHR 25965/04 (7 Jan 2010). This case concerned a father's complaint against the Republic of Cyprus and Russia regarding the death of his daughter. On the pretext of working as a cabaret artiste, she was trafficked into Cyprus. After pleading to return home, her manager took her to the local police station claiming she was illegally residing in Cyprus. The police sent her back with her manager, where she tried to escape during the night and fell to her death from a balcony. Both Cypriot and Russian authorities were held responsible of violating the ECHR art 4 for failing to investigate the allegation of trafficking and consequently to protect the daughter as a trafficking victim.

¹¹³ Captivity is also expressly prohibited in art 5 which provides that everyone has the right to liberty and security of person.

¹¹⁴ *Askola* (n1 *supra*) 95.

¹¹⁵ This may be supported by art 2 from ECHR (n98 *supra*) Protocol 4 "Civil Imprisonment, Free Movement, Expulsion" which provides for the right to freely move within a country once lawfully there and for a right to leave any country. Art 4 furthermore prohibits the collective expulsion of foreigners.

¹¹⁶ Eg, *Soering v United Kingdom* (Case No 14038/88) ECHR 7 Jul 1989; *Cruz Varas v Sweden* (1992) 14 EHRR 1; *Vilvarajah v UK* (1992) 14 EHRR 248; *Chahal v UK* (App No 22414/93) ECHR 15 November 1996; *Ahmed v Austria* (1997) 24 EHRR 278; *HLR v France* (1998) 26 EHRR 29; *Jabari v Turkey* (2000) 40035/98 ECHR 11 Jul 2000; *Saadi v Italy* (App No 37201/06) ECHR 28 Feb 2008. If the state of origin cannot provide adequate protection, there is an obligation on the destination state not to return the person according to art 3. This was found to be the case in *Josephine Ogbeide v Secretary of State for the Home Department* (2002) HX/08391/2002 (10 May 2002) where a 16-year-old Nigerian girl was trafficked to the UK for prostitution. There was a serious risk that if she were returned to Nigeria, she would be re-trafficked or forced into prostitution so that the traffickers could recover their investment in her. She was granted asylum. Similarly, in *Secretary of State for the Home Department v K* [2003] UKIAT00023 (7 Aug 2003), the UK Immigration Appeal Tribunal accepted that an Albanian woman was faced with a real risk of persecution (and violations of arts 3 and 8 of the ECHR) and was not being given sufficient protection by the Albanian authorities. She was also granted asylum.

¹¹⁷ ECHR (n98 *supra*) art 13: "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".

5.2.1.4 Criminal-justice response to human trafficking

The European region has utilised the existing institutions within the regional bodies and coordinated collaborative efforts on various aspects of trafficking. As such, Europe is home to some of the best law-enforcement units specialising in investigation of human trafficking. The EU was one of the first regions to realise that better police cooperation between destination and origin countries may lead to more traffickers being caught and punished, since many cases are dropped for lack of evidence. In this regard, the supranational police organisation European Police Office (Europol);¹¹⁸ and also Eurojust¹¹⁹ have been set up and equipped with competencies in area of trafficking.¹²⁰

Europol is a support service for the law enforcement agencies of the EU member states. As such, it has no executive powers. Europol's operational field is criminal intelligence linked specifically to the prevention of and fight against international organised crime such as trafficking in human beings.¹²¹ The mandate of Europol is primarily to facilitate the exchange of information among the different national police forces of the Member States. It further provides crime data analysis and promotes awareness of the results with the competent authorities. Europol also strives to harmonise their analytical methods. This is accomplished mainly with a union-wide computerised data-collection system. Europol is a multi-disciplinary agency, comprising not only regular police officers but staff members from the member states' various law enforcement agencies: customs, immigration services, border and financial police, etc.

¹¹⁸ Convention Based on Article K3 of the Treaty on European Union, on the Establishment of a European Police Office (Europol Convention), OJ C 316, 27/11/1995. The Europol Convention was adopted on 18 Jul 1995, and entered into force on 1 Oct 1998. It became fully operational on 1 Jul 1999.

¹¹⁹ Council Decision of 28 Feb 2002, Setting up Eurojust with a View to Reinforcing the Fight against Serious Crime, 2002/187/JHA, OJ L 63 6/3/2002.

¹²⁰ Europol Convention (n118 *supra*) art 2(2) states that its aim is "to improve ... the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved and two or more Member States are affected by the forms of crime in question". This mandate was extended to trafficking in human beings with the Joint Action of 16 Dec 1996 Adopted by the Council on the Basis of Article K3 of the Treaty on European Union, Extending the Mandate Given to the Europol Drugs Unit, OJ L 342, 31/12/1996.

¹²¹ Arts 29 & 30(2) of the EU Treaty confirms the role of Europol, stating that "... the Council shall promote cooperation through Europol by [enabling] Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity; [adopting] measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime; [promoting] liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime ...; [establishing] a research, documentation and statistical network on cross-border crime".

Lastly, Europol helps to overcome the language barriers in international police co-operation.

In order to fight organised crime more effectively, Europol cooperates with a number of other organisations, such as Interpol. Europol was reformed as a full EU agency on 1 January 2010. This gave Europol increased powers to collect criminal information and the European Parliament more control over Europol activities and budget.¹²² Europol acknowledges that criminal groups are “increasingly multi-commodity and poly-criminal in their activities. Strong levels of cooperation exist between different organised-crime groups, more than ever before, transcending national, ethnic, and business differences.”¹²³ Similarly, the regional law enforcement organ has to diversify and cooperate with other organs across national boundaries.¹²⁴

Addressing the EU as a unified region of freedom, justice and security, the Tampere Conclusions¹²⁵ strengthened the key role of Europol in fighting international organised crime.¹²⁶ Cross-border crime must be combated by joint investigative teams. A European Police Chiefs Operational Task Force must be established to exchange, in cooperation with Europol, experiences, best practice and information on current trends in cross-border crime and contribute to the planning of operative actions.¹²⁷

The Tampere Conclusions also create a judicial-cooperation agency (Eurojust) to regionally support and facilitate the coordination of EU investigations into and prosecutions of major criminal offences.¹²⁸ Trafficking in human beings is explicitly recognised as belonging to this group of crimes. The Eurojust body is composed of national prosecutors, magistrates or police officers of equivalent competence from each Member State according to its legal system. It is as such an important tool for fighting human trafficking.¹²⁹ Its task is to enhance the efficiency of the national authorities with regard to the investigation and prosecution of organised cross-border

¹²² Europol “A Stronger Europol” 5 Jan 2010 <http://www.europol.europa.eu/index.asp?page=news&news=pr100105.htm> (accessed 2013-01-07).

¹²³ Europol *EU Organised Crime Threat Assessment* (2011) 8.

¹²⁴ Europol “Europol joins the Virtual Global Taskforce” 6 Apr 2011 <https://www.europol.europa.eu/content/press/europol-joins-virtual-global-taskforce-455> (accessed 2013-01-07).

¹²⁵ Tampere Conclusions (15 & 16 Oct 1999), Council of the European Union (12 10 2004), 200/1/99.

¹²⁶ Tampere Conclusions (n125 *supra*) part IX. Provision is especially made for Europol in stepping up cooperation against crime; it is emphasized in art 45: “Europol has a key role in supporting union-wide crime prevention, analyses and investigation”.

¹²⁷ Tampere Conclusions (n125 *supra*) art 44.

¹²⁸ Tampere Conclusions (n125 *supra*) art 46.

¹²⁹ See Rijken (n11 *supra*) 115.

crime.¹³⁰ Similar to Europol, Eurojust does not have any real operational powers (such as arrest, etc.) and its success depends on their cooperation with the law enforcement agencies of the different domestic systems.

On the basis of Eurojust, a proposed post of European Public Prosecutor (EPP)¹³¹ has also been created. When in force, this office will work in liaison with Europol and be responsible for investigating, prosecuting and bringing to judgment the perpetrators and accomplices of transnational offences. Eurojust justifies a centralised EPP's Office as a potential solution to the problem of cross-border crime in the EU,¹³² as national laws are too fragmented and diverse, and police and judicial authorities are authorised to operate only on their own territory. The prosecution of trafficking in persons may be more effective when it is undertaken at the EU level.

Tasked with interpreting EU law and ensuring its equal application across all EU member states is the ECJ,¹³³ the highest regional court in the EU. It is composed of 27 judges - one per member state - although cases are normally heard in judiciary panels consisting of three, five or thirteen judges.¹³⁴ State parties, individuals, companies or organisations can bring cases before the Court if they feel their rights have been infringed by an EU institution.¹³⁵ It is not possible to appeal the decisions of national courts to the ECJ, but rather national courts of final appeal refer questions of EU law to the ECJ.¹³⁶ However, it is ultimately for the national court to apply the resulting interpretation to the facts of any given case. The ECJ's rulings have mainly been on

¹³⁰ Treaty establishing a Constitution for Europe (EU Constitutional Treaty) OJ of the EU, C 310, Vol 47, 16 12 2004. Art III-273 increases the powers of Eurojust: "European laws shall determine Eurojust's structure, operation, field of action and tasks. Those tasks may include:

- (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions, conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
- (b) the coordination of investigations and prosecutions referred to in point (a);
- (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network."

¹³¹ EU Constitutional Treaty (n130 *supra*) art III-274.

¹³² Pop "Europe lacks Resources to tackle Cross-Border Crime, says Eurojust" *Euobserver* 2010-03-17 <http://euobserver.com/9/29703> (accessed 2013-01-07).

¹³³ The court was created on 18 Apr 1951 by the Treaty establishing the European Coal and Steel Community (ECSC Treaty), and came into force on 23 Jul 1952. Although this treaty expired on 23 Jul 2002, the ECJ became part of the EU Treaties. The treaties give the ECJ the power to consistent application of EU law across the EU as a whole. The ECJ is based in Luxembourg. The ECJ's official name was changed from the "Court of Justice of the European Communities" to the "Court of Justice" although it is still most common to refer to the European Court of Justice. See Treaty of Lisbon (n10 *supra*) art 9.

¹³⁴ Treaty of Lisbon (n10 *supra*) art 9F(2).

¹³⁵ Treaty of Lisbon (n10 *supra*) art 9F(3)(a).

¹³⁶ Treaty of Lisbon (n10 *supra*) art 9F(3)(b), (c).

principles of community law, institutional law, internal markets, social policy, etc.¹³⁷ Research has however demonstrated that the ECJ's rulings have stimulated integration amongst EU nations.¹³⁸ Its rulings have also exerted profound effects on policy processes and outcomes within the EU.

The EU has since 1996 adopted and funded a series of regional programmes (for example, STOP,¹³⁹ AGIS,¹⁴⁰ DAPHNE¹⁴¹) to combat trafficking in human beings within the EU.¹⁴² For instance, the DAPHNE III programme¹⁴³ funds transnational, multidisciplinary projects to combat all types of violence against children and women, including sexual exploitation and human trafficking. Activities include, but are not limited to the exchange, identification and dissemination of information and good practice, setting up and supporting sustainable multidisciplinary networks and research.¹⁴⁴ Similarly, the defunct STOP programme¹⁴⁵ intended to prevent and combat the trade in human beings and all forms of sexual exploitation. It created a framework for training, information, study and exchange programmes for persons responsible for combating human trafficking and the sexual exploitation of children.¹⁴⁶ Although the use of NGO's facilitates the implementation of policies at a grass-roots level, channelling funds to NGO's and designating trafficking as an NGO problem to solve is not the

¹³⁷ Cases concerning fundamental rights or movement of persons may be applicable to the crime of trafficking, eg, in the cases of *Adoui v Belgian State and City of Liège* (Case 115), and *Cornuallie v Belgian State* (Case 116/8) ECR 1665, 2 French women were refused residence permits in Belgium on the grounds that there were (suspected of being) prostitutes.

¹³⁸ Sweet "The European Court of Justice and the Judicialization of EU Governance" 2010 2(2) *Living Reviews in European Governance* 1 5.

¹³⁹ Council Decision of 28 Jun 2001 establishing a second phase of the programme of incentives, exchanges, training and cooperation for persons responsible for combating trade in human beings and the sexual exploitation of children (STOP II), OJ L 186, 07-07-2001. The STOP and STOP II Programmes was established by the EU to help prevent and combat trade in human beings and all forms of sexual exploitation. It expired in 2002.

¹⁴⁰ Council Decision 2002/630/JHA of 22 Jul 2002 establishing a framework programme on police and judicial cooperation in criminal matters (AGIS), OJ L 203, 1 Aug 2002. AGIS concerns "best practice in fighting and preventing corruption of public figures in the administration of immigration regulations".

¹⁴¹ Following the Daphne initiatives (1997-1999) and the Daphne Programmes I (2000-2003) and II (2004-2006), the Daphne III Programme aims to prevent and combat violence against children, young people and women and to protect victims and groups at risk. The last programme is intended to run until 2013. http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l33600_en.htm (accessed 2013-01-07).

¹⁴² See Europol "Trafficking in Human Beings, A European Response" <http://www.europol.europa.eu> (accessed 2013-01-07).

¹⁴³ Decision No 779/2007/EC of the European Parliament and of the Council of 20 Jun 2007 establishing for the period 2007-2013, as part of the General Programme Fundamental Rights and Justice, OJ L 173 of 3-7-2007.

¹⁴⁴ DAPHNE III (n143 *supra*) Objectives.

¹⁴⁵ STOP is now subsumed under the AGIS Programme which is to help legal practitioners, law enforcement officials and representatives of victim assistance services from the EU Member States to set up Europe-wide networks and exchange information and best practices.

¹⁴⁶ EU Council "STOP II" http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_trafficking_in_human_beings/l33015b_en.htm (accessed 2013-01-07).

answer.¹⁴⁷ However, it is also clear that states, civil society and NGO's should collectively address trafficking domestically as well as in regional structures.

5.2.2 The response from the Americas to human trafficking

In this section, a brief selection of the most relevant instruments by which cooperation in criminal matters between and within the Inter-American nations will be provided. In the Americas, the Organisation of American States (OAS)¹⁴⁸ is the principal supranational body responsible for governing regional affairs in the Western hemisphere. It is a well-developed institution and the oldest regional human-rights organisation in the world, dating back to 1889.¹⁴⁹ Any American state can become a member of the OAS by ratifying the Charter of the Organisation of American States (OAS Charter).¹⁵⁰

In creating the OAS, the objective of the Member States was "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."¹⁵¹ Presiding over a mostly under-developed region, its judgments demonstrate concern about and respect for the fundamental rights of the individual as well as economic, social, and cultural rights.

While the Caribbean includes mainly source and transit countries, North America is a source, transit and destination region similar to Latin America which is rapidly

¹⁴⁷ Obokata (n4 *supra*) 81-83.

¹⁴⁸ The OAS came into being in 1948 with the signing of the OAS Charter. The OAS's members are the 35 states of the American continent. Its headquarters are in Washington, USA.

¹⁴⁹ OAS "Who We Are" http://www.oas.org/en/about/who_we_are.asp (accessed 2013-01-07).

¹⁵⁰ Charter of the Organisation of American States, 30 Apr 1948, art 4(2) UST 2394 119 UNTS 3 (1967) (entered into force Dec 13 1951), 6 1 LM 310. The OAS Charter was adopted at the 9th International Conference of American States in Bogota in 1948 by the 21 American states who participated: Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, US and Venezuela. All 35 American states have currently ratified the OAS Charter. The 14 later additions are: Barbados, Trinidad & Tobago (1967); Jamaica (1969); Grenada (1975); Suriname (1977); Dominica, St. Lucia (1979); Antigua and Barbuda, St. Vincent and the Grenadines (1981); Bahamas (1982); St. Kitts and Nevis (1984); Canada (1990); Belize, and Guyana (1991). Cuba however was excluded from the OAS by a resolution of the 5th Meeting of Consultation of Ministers of Foreign Affairs in 1962. This resolution was revoked in 2009, thereby allowing Cuba to participate again in the OAS, if it so chooses. The OAS Charter was amended in 1967 and entered into force in 1970. See General Secretariat of the Organization of the American States, Organization of American States & Human Rights 1960-1967 601, 605 (1972) (hereinafter OAS Charter 1967). See also Pasqualucci "The Americas" in Moeckli, Shah & Sivakumaran (eds) *International Human Rights Law* (2010) 434.

¹⁵¹ OAS Charter (n150 *supra*) art 1.

becoming an area of destination.¹⁵² Very few countries in the Central America and the Caribbean have implemented anti-trafficking legislation in their countries, while almost all of the South American countries have introduced some kind of prohibition on human trafficking in their laws. The first convictions for trafficking-in-persons offences in the region were registered only from 2005 onwards, with the Dominican Republic accounting for the largest number of convictions.¹⁵³ This region (especially Central and South America) is notorious for its criminality which includes forced disappearances and all types of trafficking.¹⁵⁴ The Inter-American region does not have a general anti-trafficking treaty *per se*,¹⁵⁵ but it does have many resolutions on human trafficking¹⁵⁶ and a Convention on International Trafficking in Minors. There are other agreements that relate to various aspects of trafficking,¹⁵⁷ but these will not be elaborated on here. Except for the Inter-American Court, the Inter-American region does not have any specific criminal-justice systems in place to address the trafficking of human beings.

¹⁵² OAS "Trafficking of Women and Children for Sexual Exploitation in the Americas"

<http://www.oas.org/en/cim/docs/Trafficking-FactSheet%5BEN%5D.pdf> (accessed 2013-01-07).

¹⁵³ UNGIFT "Central America and the Caribbean" <http://www.ungift.org/knowledgehub/about/central-america-and-the-caribbean.html> (accessed 2013-01-07).

¹⁵⁴ See, eg, Amnesty International's *Annual Reports* on the countries within the region from 1975-2011. <http://www.amnesty.org/en/annual-report/2012/americas> (accessed 2013-01-07).

¹⁵⁵ An Inter-American Convention on the Prevention and Eradication of Trafficking of Persons in General and of Women and Children in Particular is planned. A study on The Trafficking of Women and Children for Sexual Exploitation in the Americas was completed in 2002. This survey investigated trafficking in 14 countries in order to attain and analyse the data to fully address the scope and nature of trafficking in the Americas. The study results will be used as a draft for the Convention.

¹⁵⁶ In Apr 2002, the Inter-American Commission for Women adopted resolution AG/RES 1948 (XXXIII-O/03) "Fighting the Crime of Trafficking in Persons, especially Women, Adolescents, and Children" which urges the member states to take action against trafficking, through "multidimensional actions" under domestic legislation, and the establishment of national, bilateral and multilateral coordination mechanisms. The resolution also noted the lack of effective legislation. Based on this resolution, the GA of the OAS adopted a similar-named resolution AG/RES 2019 (XXXIV-O/04) at the 4th plenary session, held on 8 Jun 2004 wherein states are requested to adopt the necessary measures to enhance their legal, judicial and administrative systems to combat the crime of trafficking. "Fighting Transnational Organized Crime in the Hemisphere" AG/RES 2026 (XXXIV-O/04) and "Fighting the Crime of Trafficking in Persons" AG/RES 2118 (XXXV-O/05) were both also adopted at the 4th plenary session. A draft resolution on "Hemispheric Efforts to Fight Trafficking in Persons" (CP/CG-1675/06 rev 5) was proposed by the OAS on 22 May 2006. It is comprehensive and recognises that trafficking "violates the human rights of victims and affects society at large." It requires governments to respect the human rights of trafficked persons and to strengthen international cooperation and requests governments "to adopt an integrated and cross-cutting approach to the matter of trafficking in persons." It also recognizes the important role of civil society in combating trafficking in persons. At its 2nd Meeting of National Authorities on Trafficking in Persons, held on 25 Mar 2009, no permanent resolution was yet adopted.

¹⁵⁷ These instruments are, eg, the Inter-American Convention to Prevent and Punish Torture of 9 Dec 1985 (OAS Treaty Series No 67); the Inter-American Convention on the Forced Disappearance of Persons of 9 Jun 1994; the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities of 7 Jun 1999; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 17 Nov 1988 (OAS Treaty Series No 69). Further legislation includes the world's first general human-rights instrument namely the American Declaration of the Rights and Duties of Man (1948) [hereinafter the American Declaration]; and the Inter-American Action on Behalf of Refugees (Res AG/RES 838 (XVI-O/86) 1986). The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (1994) explicitly names trafficking in persons and forced prostitution as forms of violence against women.

Some jurisdictions, such as the USA, does however have excellent criminal-justice cooperation, which includes the courts, prosecutors, private practitioners, police, legal aid organisations and correctional systems. The position in the USA will however be discussed in the following chapter.

5.2.2.1 The Inter-American Convention on International Trafficking in Minors (Inter-American Convention)

The Inter-American Convention¹⁵⁸ is a regional treaty aiming at the protection of minors against trafficking. The instrument reiterates and guarantees the fundamental rights relating to the security of persons. The Convention consists of four chapters; namely its general provisions, penal aspects, civil aspects and final clauses. Its mandate is the protection of minors' fundamental rights and their best interests,¹⁵⁹ "the prevention and punishment of the international traffic in minors as well as the regulation of its civil and penal aspects".¹⁶⁰ This must be accomplished through a system of mutual legal assistance and the prompt return of trafficked minors to their home country.

The Convention applies to any trafficked minor resident in a State Party below the age of eighteen. International traffic in minors is explained as "the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes¹⁶¹ or by unlawful means¹⁶²". Interestingly, the Convention also covers the civil aspects of the wrongful removal, transfer, or retention of minors internationally, not dealt with by other international conventions on this subject.¹⁶³ Cooperation amongst Member States as well as non-member states are encouraged; and Member States are obliged to inform the competent authorities of a state which is not a party to the

¹⁵⁸ Adopted on 18 Mar 1994 (OAS Treaty Series No 79) in Mexico at the 5th Inter-American Specialized Conference on Private International Law. This Convention came into force on 15 Aug 1997 in accordance with art 33 of the Convention. As of Jul 2011, 14 of the 35 states have ratified and 2 are only signatories to the Convention. Neither the US nor Canada has signed or ratified the Convention.

¹⁵⁹ This includes the confidentiality of all procedures applied pursuant to the Convention, (see Inter-American Convention (n158 *supra*) art 6) as well as preventive measures "to ensure that the minor is not improperly removed to another State" (see Inter-American Convention (n158 *supra*) art 16).

¹⁶⁰ Inter-American Convention (n158 *supra*) art 1.

¹⁶¹ Unlawful purposes include "prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of the minor's habitual residence or the State Party where the minor is located". See Inter-American Convention (n158 *supra*) art 2(c).

¹⁶² Inter-American Convention (n158 *supra*) art 2(b). Unlawful means comprise "kidnapping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institution having care of the child, or any other means unlawful in either the State of the minor's habitual residence or the State Party where the minor is located". See Inter-American Convention (n158 *supra*) art 2(d).

¹⁶³ Inter-American Convention (n158 *supra*) art 3.

Convention if its minor citizens are found in their country.¹⁶⁴ In pursuance of better cooperation and advancement of common interests, each State Party must select a Central Authority,¹⁶⁵ a specific government office which deals only with this issue.¹⁶⁶ State Parties should criminalise international trafficking in minors and pursue policies to prevent, punish and eradicate it.¹⁶⁷ When litigating a human-trafficking case, four parties will have competence: the country in which the human trafficking occurred; the state of origin of the trafficked minor, the state where the alleged perpetrator resides or is found (ie, if the perpetrator has not been extradited)¹⁶⁸ and the country where the minor was finally discovered.¹⁶⁹

The third chapter concerns extensive civil aspects regarding the request for locating and returning a minor,¹⁷⁰ where the request should be filed,¹⁷¹ processing the request,¹⁷² the position as regards adoption or custody¹⁷³ and responsibilities in terms of costs in returning the minor.¹⁷⁴

The final chapter is more of an administrative nature and concerns the signature and ratification of or accession to the Convention. The Inter-American Convention does not establish any monitoring systems to guarantee the full implementation of the

¹⁶⁴ Inter-American Convention (n158 *supra*) arts 4, 17.

¹⁶⁵ Inter-American Convention (n158 *supra*) art 5.

¹⁶⁶ The Central Authority of the States must assist one another in judicial and administrative proceedings, taking evidence or procedural steps. They must exchange information regarding their various countries' statutes, case law, administrative practices, statistics, etc about trafficking in minors. See Inter-American Convention (n158 *supra*) arts 8, 17.

¹⁶⁷ Inter-American Convention (n158 *supra*) art 7.

¹⁶⁸ Extradition is explained in Inter-American Convention (n158 *supra*) art 10. This Convention takes precedence above other treaties where one State Party has an extradition treaty and the other not. However, where no such treaty exists at all, "extradition shall be subject to the other conditions required by the domestic laws of the requested State".

¹⁶⁹ Inter-American Convention (n158 *supra*) art 9.

¹⁷⁰ Inter-American Convention (n158 *supra*) art 12. The request for the minor's location and return must be lodged by those entitled to do so from the country of origin.

¹⁷¹ The request may be heard by the judiciary of either the home country or the country where the minor is supposed to be or actually is located. Only in urgent situations may the request be filed where the wrongful act occurred. See Inter-American Convention (n158 *supra*) art 13.

¹⁷² The Central Authorities or the judiciary where the request was lodged will process the request. These institutions must do everything possible to locate and return the minor with care and without delay. Curiously, a deadline for a request is given: the cut-off date for requesting the return of a minor is 120 days (for entitled parties), and 180 days (for States Parties) after the wrongful removal of the minor has been detected. However, if the child still needs to be located, the period runs from the day when the child has been found. See Inter-American Convention (n158 *supra*) art 14.

¹⁷³ Inter-American Convention (n158 *supra*) arts 18, 19. Both adoptions and care or custody of a minor may be annulled or revoked if the procedures have their origin in the international traffic in minors.

¹⁷⁴ The Inter-American Convention (n158 *supra*) art 21 provides that "the person or organization responsible for international traffic in minors" may be ordered to "to pay the costs and expenses of locating and returning the minor", if that person or organisation is also part of the proceedings. Otherwise, a civil action for damages to recover costs, including legal fees and the expenses of locating and returning the minor may be brought against the trafficker. States further have to adopt measures ensuring that no costs are charged for the proceedings to return a minor.

instrument. This is strange as state implementation of all other Inter-American conventions is monitored and enforced by the Inter-American Commission and the Court. There is furthermore no blueprint in the Convention as to how information will be collected and disseminated in the different states, which may disaggregate data as an end result.

The Inter-American Convention has again emphasised that as a regional problem regional action and solutions for human trafficking are absolutely indispensable. Although human trafficking has been addressed several times in Inter-American Summit documents,¹⁷⁵ it seems as if heads of state merely passively acknowledge the problem without any proactive responses. These governments need to develop a thorough all-inclusive regional plan to combat trafficking in the Americas. In this regard, the GA of the OAS has adopted and issued several resolutions on human trafficking. The first resolution “Hemispheric Efforts to Combat Human Trafficking in Persons: Conclusions and Recommendations of the First Meeting of National Authorities on Trafficking in Persons” (2006),¹⁷⁶ and its follow-up “Hemispheric Efforts to Combat Human Trafficking in Persons: Conclusions and Recommendations of the Second Meeting of National Authorities on Trafficking in Persons” (2009)¹⁷⁷ provide regional guidelines for anti-trafficking mechanisms.

Both resolutions recognise that human trafficking is on the increase, that certain factors intensify the vulnerability to trafficking, that victims’ human rights are violated and that the scourge affects society at large. Both documents require governments to implement juridical instruments on trafficking in persons and to strengthen inter-state and international cooperation. Governments are urged to implement a cross-cutting, integrated, shared-responsibility perspective on human trafficking. Civil society’s function in combating trafficking in persons is acknowledged as essential. The resolutions consequently present civil society with important prospects to induce their governments to be active, as governments and OAS bodies have to implement the recommendations, monitor activities and give progress reports. The second meeting’s

¹⁷⁵ Summit documents are created at Summit meetings which are regular, high-level OAS forums where heads of states gather to discuss a wide range of issues. The crime of human trafficking first appeared in the 2001 Summit Declarations and has continually surfaced in subsequent Summit Declarations.

¹⁷⁶ OAS AG/RES 2256 (XXXVI-O/06), adopted at the 4th plenary session, held on 6 Jun 2006. The draft resolution was developed at the 1st meeting of governments and civil society at Porlamar, Island Margarita, Bolivarian Republic of Venezuela, 14-17 Mar 2006 on the issue.

¹⁷⁷ OAS AG/RES 2456 (XXXIX-O/09), adopted at the 4th plenary session, held on 4 Jun 2009. The draft document was developed at the 2nd Meeting of National Authorities on Trafficking in Persons, Buenos Aires, Argentina on 25-27 Mar 2009.

resolution however extends the first by recognising the factor of demand, focussing attention on “the negative behavior of the so-called clients or users of trafficking in persons for purposes of sexual exploitation.”¹⁷⁸ Whereas the original resolution urged states to implement either the CRC or the Inter-American Convention or the ILO C182; the new document merely takes note of these documents. It seems as if the OAS and its mechanisms are ideally suited for advancing such a design; however, whether they will meet the challenge will have to be seen.

5.2.2.2 The American Convention on Human Rights (ACHR)

The ACHR¹⁷⁹ is a human rights instrument that accords protection against trafficking, both in the international sphere and under domestic law. Closely modelled on the ECHR, the ACHR aims to impact directly on human rights policies, and also anti-trafficking strategies in its area.¹⁸⁰ According to its preamble, the purpose of the Convention is “to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.” Human trafficking involves violations of most of the fundamental rights in the Convention, and is as such applicable.

The ACHR consists of three parts,¹⁸¹ subdivided into eleven chapters. The general obligation of States Parties to uphold the fundamental rights of all persons under their jurisdiction without discrimination, and to adapt their domestic laws to bring them into line with the provisions in the ACHR in order “to give effect to those rights and freedoms”¹⁸² is established in Chapter I. National authorities consequently have the primary responsibility to give effect to the rights subject to international supervision.

The Convention defines the various human rights which the ratifying States have agreed to respect and ensure in Chapter II.¹⁸³ The 23 articles listed here provide a

¹⁷⁸ See OAS AG/RES 2456 (XXXIX-O/09) (n178 *supra*) 1, 6, 11.

¹⁷⁹ OAS Treaty Series No 36, UN Register 08/27/1979 No 17955 (also known as the Pact of San José). Adopted on 22 Nov 1969, and entered into force on 18 Jul 1978. As of 2011, 24 of the 35 OAS's member states have ratified the Convention. Canada has not ratified the Convention, and the US became a signatory in 1977, but did not ratify it. The failure of the United States to ratify the ACHR has deprived the system of a significant degree of legitimacy needed to increase the authority of the Court.

¹⁸⁰ Bol “Using International Law to Fight Child Labor: A Case of Guatemala and the Inter-American System” (1998) 13 *American University International Law Review* 1135 1199.

¹⁸¹ These parts are I “State Obligations and Rights Protected”, II “Means of Protection”, III “General and Transitory Provisions”. See ACHR (n179 *supra*) 1-28.

¹⁸² ACHR (n179 *supra*) art 2.

¹⁸³ ACHR (n179 *supra*) arts 3-25. This chap consists of the listing of 22 different human rights.

scope of substantive guarantees regarding individual civil and political rights and entitlements due to all persons, including the right to life “in general, from the moment of conception”,¹⁸⁴ to humane treatment,¹⁸⁵ freedom from slavery,¹⁸⁶ right to personal liberty,¹⁸⁷ to privacy,¹⁸⁸ freedom of movement and residence,¹⁸⁹ right to equal protection,¹⁹⁰ etc. Finally, Article 25 of the ACHR guarantees judicial protection of an individual's rights.

Economic, social and cultural rights are located Chapter III of the ACHR, and it consists of one article only. States pledge only to “adopt measures ... with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States”.¹⁹¹ The cautious handling of the second-generation rights was developed further in the Protocol of San Salvador,¹⁹² which came into effect some twenty years later. The Protocol of San Salvador contains detailed provisions on civil rights such as the right to work,¹⁹³ the right to just, equitable, and satisfactory conditions of work,¹⁹⁴ and the right to health.¹⁹⁵

Chapter V in the ACHR concerns certain rights and freedoms that may be suspended, even temporarily, in times of emergency such as war.¹⁹⁶ However, non-derogable rights such as freedom from slavery, right to life, right to humane treatment, etcetera, as well as “the judicial guarantees essential for the protection of such rights, may not be suspended under any circumstances”.¹⁹⁷

¹⁸⁴ ACHR (n179 *supra*) art 4(1).

¹⁸⁵ ACHR (n179 *supra*) art 5.

¹⁸⁶ ACHR (n179 *supra*) art 6.

¹⁸⁷ ACHR (n179 *supra*) art 7.

¹⁸⁸ ACHR (n179 *supra*) art 11. Nobody shall be deprived of physical liberty except under conditions established before hand by law.

¹⁸⁹ ACHR (n179 *supra*) art 22.

¹⁹⁰ ACHR (n179 *supra*) art 24.

¹⁹¹ ACHR (n179 *supra*) art 26.

¹⁹² Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador) OAS Treaty Ser No 69. Opened for signature on 17 Nov 1988; came into effect on 16 Nov 1999. As on 2011-07-24, the Protocol has 16 signatories and 15 ratifications.

¹⁹³ Protocol of San Salvador (n192 *supra*) art 6.

¹⁹⁴ Protocol of San Salvador (n192 *supra*) art 7.

¹⁹⁵ Protocol of San Salvador (n192 *supra*) art 10.

¹⁹⁶ ACHR (n179 *supra*) art 27(1).

¹⁹⁷ ACHR (n179 *supra*) art 27(2).

The ACHR creates two permanent bodies in Chapter VI which will function as the Inter-American Human Rights System. These two autonomous organs are the Inter-American Court of Human Rights (Inter-American Court)¹⁹⁸ and the Inter-American Commission on Human Rights (IACHR).¹⁹⁹ They are authorized to supervise national authorities' compliance with and implementation of the human rights obligations set out in the OAS.²⁰⁰ The ACHR defines the structure, competence and procedure of the IACHR in Chapter VII.

The IACHR is composed of seven people "of high moral character and recognized competence in the field of human rights",²⁰¹ representing all member countries of the OAS.²⁰² These members are elected by the General Assembly of the OAS for four-year terms²⁰³ from candidates submitted by OAS member states.²⁰⁴ The independent commissioners do not represent the interest of any particular country.²⁰⁵

The primary function of the IACHR is the promotion and protection of human rights in the hemisphere.²⁰⁶ The Commission does not rely solely on reports from states' parties, but accepts petitions from individuals or groups alleging violations of the rights enunciated in the ACHR and/or the American Declaration.²⁰⁷ The power to examine complaints or petitions regarding specific cases of human-rights violations was conferred on the IACHR in 1965, when its statute was amended.²⁰⁸ This capacity made

¹⁹⁸ ACHR (n179 *supra*) art 33(a). The Inter-American Court is based in San Jose, Costa Rica.

¹⁹⁹ ACHR (n179 *supra*) art 33(b). The IACHR's mandate is also found in the OAS Charter 1967 (n150 *supra*) art 53 which strengthens the powers of the Commission and makes it a principle organ of the OAS. Art 112 states that the Commission's principle function shall be "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters". It has its headquarters in Washington, DC. It was created in 1959 at the 5th Meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile (Final Act OAS Off Rec OEA/Ser C/II 5) and held its 1st session in 1960. Up until 2012, the IACHR has held 142 regular sessions. See IACHR "Inter-American Commission on Human Rights" <http://www.cidh.oas.org/what.htm> (accessed 2013-01-07).

²⁰⁰ See Addo *The Legal Nature of International Human Rights* (2010) 409.

²⁰¹ ACHR (n179 *supra*) art 34.

²⁰² ACHR (n179 *supra*) art 35.

²⁰³ ACHR (n179 *supra*) art 37. The members may be re-elected only once, and no 2 nationals of the same state may be members at the same time.

²⁰⁴ ACHR (n179 *supra*) art 36.

²⁰⁵ See Mendez & Vivanco "Disappearances and the Inter-American Court: Reflections on a Litigation Experience" 1990 13 *Hamline Law Review* 507 520.

²⁰⁶ ACHR (n179 *supra*) art 41.

²⁰⁷ ACHR (n179 *supra*) art 44. In processing cases brought against Member States of the ACHR, the IACHR applies the ACHR. For those non-member states, the IACHR applies the American Declaration. The IACHR has up until 2012 received thousands of petitions, which have lead to more than 12,000 processed cases. See IACHR (n199 *supra*).

²⁰⁸ OAS Charter 1967 (n150 *supra*) art 9, which gives the IACHR the authority "[t]o examine communications submitted to it and any other available information, so that it may address to the government of any American State a request for information... so that it may make recommendations... with the objective of bringing about a more effective observance of fundamental human rights." See

the IACHR the first human-rights structure to permit individual petitions.²⁰⁹ It further continues to be the only system to allow automatic and mandatory individual petitions.²¹⁰ Furthermore, any group of persons or NGO recognised in a Member State may present a petition to the Commission.²¹¹ This will assist vulnerable trafficked victims in presenting a petition personally, or to allow a NGO to act on behalf of the victims.

Before a petition may be presented to the IACHR, it has to be proved that all domestic remedies have been exhausted.²¹² If resolving the situation domestically was not possible, it must be shown that the failure was due to either a lack of adequate due process; or that effective access to those remedies was denied, or that there has been undue delay in the decision on those remedies.²¹³ If an application is successful, the IACHR will write a report with recommendations to the State concerned and give it a period of time to apply the proposals and resolve the situation for a friendly settlement.²¹⁴ If this is not given adherence to, the IACHR may write a second report, or refer the case to the Inter-American Court.²¹⁵

Besides examining complaints, the IACHR may hold hearings with respect to human-rights violations,²¹⁶ conduct investigations on human rights conditions, which include

also Padilla "The Inter-American Commission of Human Rights of the Organization of American States: A Case Study" 1993 9(4) *American University Journal of International Law and Policy* 95 96.

²⁰⁹ According to Shelton "Improving Human Rights Protection: Recommendations for Enhancing the Effectiveness of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights" 1988 3 *American University Journal of International Law and Policy* 323 327, this element has the greatest potential for improving human rights: "[t]he provisions governing private access to the Inter-American system afford greater possibility in filing petitions than in any other international human rights system and give the Commission great flexibility in implementing its procedures".

²¹⁰ The HRC and the ECHR may only examine individual complaints if the state in question has expressly accepted that body's competence to do so. See ECHR (n98 *supra*) art 25(1). See also Medina "The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture" 1990 12 *Human Rights Quarterly* 439 441-442.

²¹¹ See ACHR (n179 *supra*) art 44.

²¹² ACHR (n179 *supra*) art 46(1)(a). The petition must also be presented within 6 months after the final domestic proceedings decision. See ACHR (n179 *supra*) art 46(1)(b).

²¹³ ACHR (n179 *supra*) art 46(2)(a)-(c).

²¹⁴ ACHR (n179 *supra*) art 41(e), 48(1)(f), 49.

²¹⁵ ACHR (n179 *supra*) art 48. This must be done within 3 months from the date when the first report was submitted (art 51).

²¹⁶ In a friendly settlement reached with the Brazilian government, the Commission in effect handled a human trafficking-case. The forced-labour case of *Jose Pereira v Brazil*, Oct 2003, N 95/03 Petition 11 289 10/24/03 concerned the trafficking of the petitioner and 60 other men into slavery in northern Brazil. After being lured there, the men were held captive and forced to work without any pay in terrible conditions. Those trying to escape were shot. Brazil admitted its failure to respond adequately to its responsibility to prevent slavery. Reparations were made to the petitioner in the form of compensation and a pledge to prosecute the perpetrators, improve anti-slavery legislation and to develop a national plan to eliminate the practice.

on-site visits,²¹⁷ provide provisional measures,²¹⁸ write reports and make recommendations for the promotion and protection of human rights. It also serves as a consultative organ of the OAS on human rights matters, and advises the Inter-American Court in both contentious cases and advisory opinions.²¹⁹

Chapter VIII establishes the Inter-American Court as “an autonomous judicial institution”²²⁰ aimed at the application and interpretation²²¹ of the ACHR and other similar treaties. Its mandate is in an advisory²²² and adjudicatory²²³ capacity. The Court consists of seven part-time judges²²⁴ from OAS member states who are elected for six-year terms by states who are parties to the ACHR.²²⁵ The Court has the authority to hear contentious cases between states, or against one state at the request of the Commission, regarding violations of the ACHR.²²⁶ As with the ICJ and the European Court, however, states must accept the jurisdiction of the Court *ipso facto* - either for a

²¹⁷ The country reports and on-site investigations are one of the most successful parts of the Inter-American system. Shelton notes that an on-site investigation in El Salvador discovered torture chambers and disappeared persons, while a visit to Panama succeeded in obtaining the repeal of an objectionable law affecting the right to a fair trial. See Shelton (n209 *supra*) 327. She goes on to note that in Nicaragua: “The strength of the Commission report resulted in a resolution of the OAS calling for the overthrow of the country’s government. As characterized by the Commission, this resolution, for the first time in OAS history, deprived an incumbent government of a member state of legitimacy based on that government’s human rights violation, committed against its own population.” *Ibid.* Any OAS state may be the subject of a country report that may arise via individual or inter-state petitions, via requests of the OAS General Assembly, via the Commission’s own motion, or at the request of the government involved. Nearly half of the member states have been the object of country reports so far.

²¹⁸ Both the Commission and the Court have the authority to order immediate, interim measures where there is immediate danger, according to ACHR (n179 *supra*) art 63(2). This authority allows them to act with a speed “unparalleled in other human rights institutions”. See Shelton (n209 *supra*) 330. Shelton notes, eg, that it took the Commission 3½ weeks to get a representative in Chile after the 1973 coup whereas it took the UN 5 yrs. Shelton also notes, however, that quick responses have been more positive with respect to country studies than in individual cases. The Inter-American Court is the only system that authorizes such measures to be taken before the Court is seized of the case. For a comparison, see ECHR (n98 *supra*) s IV. See also Buergenthal “The Inter-American Court of Human Rights” 1982 76 *American Journal of International Law* 231 232.

²¹⁹ ACHR (n179 *supra*) art 57. The Commission will appear in all proceedings before the Court. See also Buergenthal (n218 *supra*) 231-233.

²²⁰ Statute of the Inter-American Court on Human Rights (1979), adopted by the GA of the OAS at its 9th Regular Session, held in La Paz Bolivia, Oct 1979 (Res No 448) art 1.

²²¹ See ACHR (n179 *supra*) art 62(3).

²²² See ACHR (n179 *supra*) art 64.

²²³ See ACHR (n179 *supra*) arts 61, 62 read together with arts 44, 45.

²²⁴ See ACHR (n179 *supra*) art 52(1). The limitation of the Court to 7 judges has created some political problems, which may always surface in a system designed as part of a political organisation. One commentator observed that political considerations may be more difficult to escape in a court with 7 judges than in the European Court, which has 32 judges. See Pasqualucci “The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law” 1994 26 *University of Miami Inter-American Law Review* 297 360.

²²⁵ See ACHR (n179 *supra*) art 54. They may be re-elected only once.

²²⁶ ACHR (n179 *supra*) arts 61-64.

specified period or for a specific case - before it can hear a dispute.²²⁷ In resolving human rights disputes, its judgments are final²²⁸ and binding.²²⁹

Similar to the ECJ, the Inter-American Court has already made an impact with its transformative jurisprudence on international human rights. Its increased legitimacy and success may be accredited to the esteem and support it enjoys within the region for its equal and just processes and decisions.²³⁰ The judgments of the Court exhibit a commitment to the substance of human rights²³¹ as well as to the region's distinctive social, cultural and political environment. A seminal and precedent-setting case settled by the Inter-American Court is the *Velásquez Rodríguez v Honduras*-case.²³² The Court, by interpreting article 1(1) of the ACHR,²³³ held that states can be deemed responsible for human-rights violations committed by non-state actors or third parties in some cases. States have to apply the due-diligence standard to ensure the free and full exercise of rights to the persons within its jurisdiction.²³⁴ States are thus obligated to respond appropriately to potential or actual private violations of rights, and "to organize the governmental apparatus and, in general all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."²³⁵ The Court held that article 1(1) encompassed three distinct obligations for the state: the obligation to refrain from violating rights, the obligation to prevent the violation of rights, and the obligation to investigate and punish

²²⁷ ACHR (n179 *supra*) art 62. Of the 25 parties of the ACHR, 21 have accepted the compulsory jurisdiction of the Court. These states are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

²²⁸ See ACHR (n179 *supra*) art 67: "The judgment of the Court shall be final and not subject to appeal".

²²⁹ See ACHR (n179 *supra*) art 68(1): "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties".

²³⁰ Pasqualucci *The Practice and Procedure of the Inter-American Court of Human Rights* (2003) 8-9.

²³¹ The Inter-American Court has reaffirmed its commitment to the individual's human rights: "[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality" Inter-American Court *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts 74 and 75)*, Advisory Opinion OC-2/82, September 2 1982, Inter-Am Ct HR (Ser A) No 2 (1982) para 29.

²³² *Velásquez Rodríguez v Honduras* (Judgment of 29 July 1988) Inter-American Court of Human Rights Series C No 4 (1988). This case concerned the state's responsibility regarding the disappearance of Rodríguez at the hands of one of the notorious Latin American death squads. See *Velásquez Rodríguez v Honduras* para 3.

²³³ ACHR (n179 *supra*) art 1(1) concerns the obligation to respect rights and reads: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition". Also see *Velásquez Rodríguez v Honduras* (n232 *supra*) paras 165-169.

²³⁴ *Velásquez Rodríguez v Honduras* (n232 *supra*) para 176.

²³⁵ *Velásquez Rodríguez v Honduras* (n232 *supra*) para 176.

violations which have occurred.²³⁶ The elements of due diligence was reiterated in the case of *María da Penha Maia Fernandes v Brazil*,²³⁷ where it was found that the case could be viewed as “part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors” and that it involved “not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices”.²³⁸ Similarly, in the *Caso González y otras v México (Campo Algodonero)*²³⁹-case, the Inter-American Court ruled that Mexico had violated the ACHR²⁴⁰ and ordered the country to comply with specific injunctive measures.²⁴¹ Although the Inter-American Court has never addressed the issue of human trafficking, a similar interpretation of this Article should also apply in this context.

Trafficking in persons logically violates the right to, and respect for life in article 4²⁴² and the right to physical, mental, and moral integrity in article 5.²⁴³ The prohibition against forced and compulsory labour in article 6(2)²⁴⁴ may also be relevant. Trafficked persons

²³⁶ *Velásquez Rodríguez v Honduras* (n232 *supra*) paras 166-176.

²³⁷ *María da Penha Maia Fernandes v Brazil* (Case No 12 051, Report No 54/01, OEA/Ser LV/III 111 Doc 20) Inter-American Commission of Human Rights (2001) 704. This case concerned a woman who was a victim of domestic violence at the hands of her husband.

²³⁸ *María da Penha Maia Fernandes* (n237 *supra*).

²³⁹ This case concerns hundreds of unsolved disappearances, rapes, and murders of mainly migrant young girls and women in Juárez, Mexico. See *Case of González et al (“Cotton Field”) v Mexico* Judgment of 16 Nov 2009 Series C No 205 (2009).

²⁴⁰ Violated substantive law provisions included ACHR (n179 *supra*) art 1(1) (obligation to respect rights), art 2 (duty to adopt domestic legal effects), art 4 (life), art 5 (personal integrity), art 7 (personal liberty), art 19 (child), arts 8, 25 (judicial protection and due process).

²⁴¹ Unlike the European Court, the Inter-American Court can order specific remedial relief, which in this case included new investigations, monetary reparations to the families, as well as a national memorial. Compensation is awarded to victims under art 63(1) of the ACHR (n179 *supra*): “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”. The Court has held in the *Velásquez Rodríguez*-case that the right to a remedy in international law was based on the principle of *restitutio in integrum*, which requires restoration of the prior situation, reparation of the consequences of the breach, and indemnification for damages, including emotional harm. See Shelton “The Jurisprudence of the Inter-American Court of Human Rights” 1994 10 *American University Journal of International Law and Policy* 362-363. However in this case, the Court restricted reparation to only an award of compensatory damages to the direct relatives of the victim. See *Velásquez Rodríguez v Honduras* (n232 *supra*) para 192.

²⁴² ACHR (n179 *supra*) art 4: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”.

²⁴³ This includes the right against cruel, inhuman punishment. See ACHR (n179 *supra*) art 5(2): “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.

²⁴⁴ Eg, the Commission has recognised that forced overtime in the *maquila* industry (cheap labour in Latin and Central America) violates art 6. See *Fourth Report on the Situation of Human Rights in Guatemala*, Inter-Am CHR, OEA/Ser LV/III 83, Doc 16 (1993) 90. In its Country Report on Chile, the Inter-American Commission further noted that “Article 5 should be read together with article 6 of the American Convention, in order to correctly delimit the content of the right being examined: accordingly, forced

usually work in inherently dangerous occupations. Trafficked children particularly are more likely to suffer injury or death due to their physical or mental immaturity. Article 19 of the ACHR imposes a positive (but vague) obligation on the state to provide a minor with “the measures of protection required by his condition as a minor on the part of his family, society, and the state”. Other rights enumerated in the ACHR as well as in international obligations, such as the CRC, may be used to interpret the scope of article 19.²⁴⁵ This is consistent with article 29 of the ACHR, which states that no provision shall be interpreted as “excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have”. However, outside the context of individual cases of forced disappearances, violence, rape, kidnapping and torture, the obligation to protect trafficked persons under the ACHR and the American Declaration has “not been subject to particularly close scrutiny or analysis by the Commission or Court”.²⁴⁶

Besides its contentious jurisdiction, the Inter-American Court has “the most extensive advisory jurisdiction of any international juridical body”.²⁴⁷ It is entitled to give advisory opinions on not only OAS treaties but also on any UN or other international treaties where one or more American states are parties.²⁴⁸ This expansive jurisdiction of the Court²⁴⁹ is justified by the endorsement of universal basic standards, as “it would be improper to make distinctions based on the regional or non-regional character of the international obligations assumed by States, and thus deny the existence of the

labour may also be considered injurious to person integrity.” See Buergethal & Norris (eds) *Human Rights: The Inter-American System* (1986) 59.

²⁴⁵ This was done, eg, in the case of *Anstrum Villagran Morales (Los Bosques de San Nicolas) v Guatemala* (where state agents kidnapped, tortured and killed street children in Guatemala). See Case 11 383, Inter-Am CHR (1997).

²⁴⁶ See Davidson *The Inter-American Human Rights System* (1997) 329. Although many subsequent cases concern elements of human trafficking, eg, in the case of the *Serrano-Cruz Sisters v El Salvador*, Inter-Am Ct HR (ser C) No 120, (1 Mar 2005) the disappearance of the sisters could have put them at serious risk of sexual trafficking, nothing of this concern was not raised by any of the parties or the Court. But see the IACHR’s *Jose Pereira v Brazil*-case (n216 *supra*) indicating that this standard may be changing.

²⁴⁷ Shelton (n241 *supra*) 325. Any OAS member state or organ can request advisory opinions with respect to the interpretation of instruments concerning the protection of human rights in the Americas. See ACHR (n179 *supra*) art 64(1). States can also seek to test the compatibility of their domestic law with Inter-American instruments, see ACHR (n179 *supra*) art 64(2).

²⁴⁸ Although advisory opinions are not binding, they are a guide for future government action, carry considerable moral force, help focus international attention on human rights violations, and defuse political tensions in impasse situations. See Wash, Suagee & Schlanger “Conference Report: The Inter-American Human Rights System: Into the 1990s and Beyond” 1988 3 *American University Journal of International Law and Policy* 517 528.

²⁴⁹ Inter-American Court “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court (art 64 of the American Convention to Human Rights)*, Advisory Opinion OC-1/82, September 24 1982, Inter-Am Ct HR (Ser A) No 1 (1982) paras 14, 17 & 37.

common core of basic human rights standards”.²⁵⁰ The Inter-American Court has already expanded its mandate by rendering opinions about the American Declaration,²⁵¹ which is neither a convention nor any other treaty as specified by article 64 of the ACHR.²⁵² The influence and potential impact of the Court’s opinions is hereby affirmed beyond those states that have ratified the OAS treaties. The Court may consequently assess the human rights performance of any state, whether they have ratified any OAS Convention or not. However, the Court “lacks an effective formal institutional mechanism to enforce state compliance with its orders and judgments”.²⁵³

Although very similar to the European regional human rights system upon which it was modelled,²⁵⁴ the “later development of the Inter-American system, combined with the specific political situation in the region, allowed it to improve on the framework of both the European and the UN systems”.²⁵⁵ The system attempts to correct many of the deficiencies of other international organs. One advantage of the Inter-American system is its two-tiered structure. If the Commission’s recommendations are not adopted, the Commission can refer the case to the Inter-American Court for a binding judgment.²⁵⁶ However, a two-tiered system also causes lengthy delays.²⁵⁷ In the *Velasquez Rodriguez*-case, it took four-and-a-half years from the submission of the petition to the Commission and its referral to the Court²⁵⁸ and another four years until the judgment was rendered.²⁵⁹ This has led to criticism that: “they hobbled [the court] by interposing the impediment of the Commission, by establishing a veritable obstacle course that is almost insurmountable, on the long and arduous road that the basic rights of the individual are forced to travel”.²⁶⁰ Another drawback of the two-tiered system is that in

²⁵⁰ Inter-American Court (n249 *supra*) para 40.

²⁵¹ See n208 *supra*.

²⁵² Inter-American Court *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, 14 Jul 1989, Inter-Am Ct HR (Ser A) No 10 (1989).

²⁵³ Pasqualucci (n150 *supra*) 447. The Court does not have an equivalent of the Committee of Ministers of the Council of Europe which supervises the execution of the order. See ACHR (n179 *supra*) art 46(1).

²⁵⁴ See ECHR (n98 *supra*) art 19.

²⁵⁵ Bol (n180 *supra*) 1196. But see Newman & Weissbrodt (eds) *International Human Rights: Law, Policy, and Process* 2nd ed (1996) 481 (stating that the European Court is “unique among international bodies because routinely it imposes sanctions on governments for violating the human rights of their nationals”).

²⁵⁶ This may only happen if the state in question has ratified the ACHR and accepted the jurisdiction of the Court. See ACHR (n179 *supra*) art 62.

²⁵⁷ The Commission sits for only 2 sessions a year, due to financial constraints. It also receives only 2% of the budget of the OAS. Pecuniary problems may also hamper the effectiveness of both the Commission and the Court. See Pasqualucci (n230 *supra*) 358.

²⁵⁸ See Pasqualucci (n230 *supra*) 358.

²⁵⁹ *Ibid.*

²⁶⁰ Comment made by Rodolfo Piza Escalante J in *re Viviana Gallardo, et al*, Costa Rica, Advisory Opinion No G 101/81 (Nov 131981) Inter-Am HR (Ser A/B), OEA/ser/L/III 5, Doc 13.

contrast to the European human rights system, individuals of the OAS member states do not have standing to take cases directly to the Court.²⁶¹ Petitions or a complaint must first be sent to the Commission, whereupon the Commission elects cases to be sent to the Court.²⁶² As such, the Commission has unlimited discretion which cases to refer to the Court. The Commission's legal reasoning and the irregularity of the procedural rules applied have also been slated by some scholars.²⁶³ Lastly, the lack of publicity surrounding activities of the Commission and the Court has been criticized.²⁶⁴ The critique has culminated in a reappraisal of the efficacy of the Inter-American system and major procedural modifications at the end of 2009 where "their rules of procedure [were amended] to enhance the role to victims, expedite the processing of cases, and provide for transparency".²⁶⁵ Although there are many improvements still to be made, the Inter-American system is functional and effective in its region and "has evolved into the most ambitious institutional framework in the world for promoting and protecting human rights."²⁶⁶ The jurisprudence established by the Inter-American system should serve as a model for other human-rights systems around the world.²⁶⁷

5.2.3 The response from Africa to human trafficking

Similar to some Latin American states, the African continent has been the scene of brutal dictatorships where countless injustices and gross human-rights abuses have been prevalent. Similar to the Inter-American system, the African regional treaties have to be applied in an underdeveloped region with many political, social and economic problems where traditional and modern strands of society have to co-exist.²⁶⁸ Several African countries have evolved to current-day democracies where the protection of human beings' basic rights is increasingly recognised. However, "despite widespread formal commitment to human rights across the continent in the form of bills

²⁶¹ See ACHR (n179 *supra*) art 61(1): "Only the States Parties and the Commission shall have the right to submit a case to the Court". Individuals of the OAS member states may directly and individually approach the IACHR (the Commission), but not the Court. See *supra* n209.

²⁶² See ACHR (n179 *supra*) art 48, 50.

²⁶³ See Shelton (n241 *supra*) 328, 332.

²⁶⁴ Shelton (n241 *supra*) 334; Wash *et al* (n248 *supra*) 562.

²⁶⁵ Pasqualucci (n150 *supra*) 434.

²⁶⁶ Shelton (n241 *supra*) 323. Martin *et al* (n102 *supra*) 18 remarks: "The Inter-American system has been surprisingly effective given the fact that it has had to cover two continents, deal with numerous undemocratic governments, and work within substantial financial and staff restraints."

²⁶⁷ Pasqualucci (n150 *supra*) 452.

²⁶⁸ In traditional societies, eg, people are not considered individual bearers of human rights which can be enforced. Similarly, in these societies, "[a]busive governments, in the often used term, have to be endured „like the weather.“ See Heyns & Killander "Africa" in Moeckli, Shah & Sivakumaran (eds) *International Human Rights Law* (2010) 479.

of rights, establishment of national human rights in institutions, declarations by intergovernmental organizations, and the establishment of a regional human rights system”,²⁶⁹ the region still struggles to realise these rights. Reasons for this include no or limited precedents in human-rights heritage, tensions surrounding the particularities of African human rights,²⁷⁰ and insufficient political will to enforce these rights.

The Organisation of African Unity (OAU)²⁷¹ regulates territorial affairs in Africa. The OAU Charter gives a prominent place to the principles of sovereignty, territorial integrity and independence.²⁷² The document aims to promote the unity and solidarity of African States;²⁷³ and to eradicate all forms of colonialism²⁷⁴ and apartheid from Africa. Limited and selective attention is given to the issue of human rights, but this was corrected with the adoption of the African Charter on Human and Peoples’ Rights (ACHPR) in 1981, as well as in the Constitutive Act of the African Union (AU Act).²⁷⁵

The African continent consists of a combination of source, transit, and destination countries for trafficked persons. Conditions conducive to trafficking exist in many African regions. These include rampant poverty, unemployment, large family size, lack of education opportunities, and low status of children and women. Regions such as West Africa are plagued by corruption and socio-political instability. For example, since independence, sixteen West African states have experienced forty-four successful military-led coup d’états, forty-three failed coups, at least eighty-two coup plots and seven civil wars.²⁷⁶ Africa is furthermore a migratory region where people often have to relocate, under duress or voluntarily, to escape from armed conflict, civil war, natural

²⁶⁹ Heyns & Killander (n268 *supra*) 480.

²⁷⁰ This entails: “... tension between the desire for the benefits of human rights and the unwillingness or inability to facilitate the realisation of these rights; as well as the tension between the human rights wishes, aspirations and expectations of the individuals and peoples in Africa on the one hand, and the limited visions of their leaders on the other.” See Addo (n200 *supra*) 388.

²⁷¹ Established on 25 May 1963 in Addis Ababa, on signature of the Charter of the Organisation of African Unity (OAU Charter) by 32 countries. A further 21 states joined over the years, with South Africa becoming the 53rd member on 23 May 1994. The OAU was disbanded and replaced by the African Union (AU) on 9 Jul 2002 in Durban by its last chairperson, South African President Mbeki. See <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/law/oau.htm> (accessed 2013-01-07).

²⁷² OAU Charter (n271 *supra*) art II(1)(c). This is supported by art III, which declares: “The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles: 1. The sovereign equality of all Member States. 2. Non-interference in the internal affairs of States. 3. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.”

²⁷³ OAU Charter (n271 *supra*) art II(1)(c).

²⁷⁴ OAU Charter (n271 *supra*) art II(1)(d).

²⁷⁵ Constitutive Act of the African Union (AU Act), signed on 11 Jul 2000 at Lomé, Togo. See AU Act Preamble, arts 3(h), 4(m).

²⁷⁶ McGowan “Coups and Conflict in West Africa: 1955-2004” 2006 32(2) *Armed Forces and Society* 234 234.

disaster and famine. The problem is exacerbated by the lack of reliable data in terms of the extent and magnitude of the problem, as well as the lack of anti-trafficking legislation in some countries.

Although the issue of human trafficking has never been a prevalent concern for African governments,²⁷⁷ the African region has, in the last decade also made significant strides to address human trafficking. In collaboration with the UN, regional economic communities (RECs)²⁷⁸ in Africa, especially the African Union (AU), the Economic Community of West African States (ECOWAS), and the Southern African Development Community (SADC) have adopted several instruments and launched numerous programmes to address the scourge.²⁷⁹ The West and Central African governments signed the Libreville Common Platform of Action of the Sub-regional Consultation of the Development of Strategies to Fight Child Trafficking for Exploitative Labour Purposes in West and Central Africa in 2000.

Because of the transnational dynamics and convolution of trafficking in persons, a holistic and regional approach, which should include clear and consistent communication about trafficking; its risks to the population as well as the status of response activities, is called for.

²⁷⁷ At the 1995 Beijing Conference, eg, trafficking was a major concern for Asian and Latin American countries only. See Olateru-Olagbegi *Brief Overview of the Situational Analysis of Human Trafficking in West Africa* (2004) 1.

²⁷⁸ Although originally established as structures enhancing economic integration, trade, and development; RECs are increasingly playing an important role in matters such as peace and security. See Ancas "The Effectiveness of Regional Peacemaking in Southern Africa – Problematising the United Nations-African Union-Southern African Development Community Relationship" 2011 11(1) *African Journal on Conflict Resolution* 129 130.

²⁷⁹ The UN has always been an active supporter of African strategies; however, there are some tensions in the working relationships between the UN, the AU and REC"s, which are undermining the chances of successful resolution efforts. Ancas (n278 *supra*)138 observes that some AU members consider themselves to have absolute primacy in all African cases and as such show no deference to any other regional body. Other regional organisations such as SADC and ECOWAS, which established their regional structures before the establishment of the AU in 2002, believe that they have more experience and expertise in their region than the AU. Hence, AU recommendations are not always followed, despite the fact that it is supposed to be the coordinating organisation.

5.2.3.1 The Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children (Ouagadougou Action Plan)

The Ouagadougou Action Plan²⁸⁰ resulted from the commitment by AU State Members in collaboration with the EU Partnership on Migration, Mobility and Employment (MME) to construct comprehensive, actionable measures to fight human trafficking, involving countries of origin, transit, and destination.²⁸¹ Consequently, the Plan's recommendations are supported by the Joint Africa-EU Strategy for Partnership and the Lisbon Action Plan.²⁸²

The Ouagadougou Action Plan reaffirms the principles of the Palermo Protocol and is based on the similar three-pronged strategy of preventing human trafficking, protecting victims and potential victims, and prosecuting offenders. The Action Plan is structured on these three principles, plus an additional section on cooperation and coordination. The Plan of Action commences with prevention strategies. A variety of proactive actions are prescribed to combat trafficking in human beings, including education, training, capacity-building of those in key positions, and awareness raising. Efforts to improve the livelihood opportunities for youth and economic conditions of families are also focused on. Particular emphasis is placed on the protection and empowerment of girls and women.²⁸³ The support of families, NGOs, members of civil society and local communities ought to be mobilised to combat trafficking.²⁸⁴ Respect for human rights is further advocated and a gender approach encouraged. In this regard, the

²⁸⁰ Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, adopted by the AU Ministerial Conference on Migration and Development in 22-23 November 2006, Tripoli. The Action Plan is a non-binding instrument. In January 2007, the AU endorsed the Ouagadougou Action Plan, Executive Council Decision EX CL/Dec 324 (X). As of April 2010 ECOWAS, UNODC and the IOM are also included. See AU "Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children" <http://www.au.int/en/dp/sa/content/ouagadougou-action-plan-combat-trafficking-human-beings-especially-women-and-children-0> (accessed 2013-01-07). Also see HRC *Report submitted by the Special Rapporteur on Trafficking in Persons, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* UN Doc A/HRC/14/32 (2010) 5, 11, 15.

²⁸¹ Ouagadougou Action Plan (n280 *supra*) preamble. It identifies key areas of intervention as: (a) prevention and awareness raising; (b) victim promotion and assistance; (c) legislative framework, policy development and law enforcement; and (d) co-operation and co-ordination at national and regional levels.

²⁸² Ouagadougou Action Plan (n280 *supra*). In this regard, the IOM and other partners (concerned with harnessing migration) collaborate with the AU Commission.

²⁸³ Ouagadougou Action Plan (n280 *supra*) s II(1) & General Principles.

²⁸⁴ Gallinetti *Child Trafficking in SADC Countries - The Need for a Regional Response* (2008) 49.

Ouagadougou Action Plan is more holistic²⁸⁵ and victim-centred than other regional instruments.

Among the preventative measures is the provision that states should establish rehabilitation centres to assist victims of human trafficking in their social reintegration, safety and recovery.²⁸⁶ This is supplemented by the victim-assistance stipulations which specify that short or long-term psychological, medical and social assistance should be supplied to victims in appropriate cases.²⁸⁷ Every trafficked person's special vulnerabilities, rights and needs should be taken into account.²⁸⁸ This includes adopting a HIV/AIDS-sensitive approach toward victims.²⁸⁹ States are instructed to avoid the criminalisation of trafficked persons²⁹⁰ and to provide information to them on their legal and other rights in both the country of origin and country of destination.²⁹¹ As regards the prosecution of traffickers, victims should be encouraged to testify giving due consideration to their safety and security.²⁹² States are also required to consider adopting legislative or other appropriate measures that permit victims to remain in their territory, temporarily or permanently, in a similar manner to the Palermo Protocol.²⁹³

Unlike the Palermo Protocol, the Ouagadougou Action Plan requires states to "consider legislation to provide for administrative, civil or criminal liability of legal persons or their representatives for trafficking offences in addition to the liability of natural persons".²⁹⁴ National legislation should define the crime of trafficking and criminalise its various aspects. Countries are urged to improve domestic legislation in respect of confiscating the proceeds of trafficking, providing protection and compensation for victims and punishing offenders.²⁹⁵ It further advocates the development of a National Action Plan

²⁸⁵ It considers the causes of trafficking, encourages the empowerment of females, and contains specific measures on rehabilitation.

²⁸⁶ Ouagadougou Action Plan (n280 *supra*) s I(10).

²⁸⁷ Ouagadougou Action Plan (n280 *supra*) s (7).

²⁸⁸ Ouagadougou Action Plan (n280 *supra*) s II(2). States should also give appropriate consideration to humanitarian and compassionate factors regarding these victims, see Ouagadougou Action Plan (n280 *supra*) s II(8).

²⁸⁹ Ouagadougou Action Plan (n280 *supra*) s II(10).

²⁹⁰ Ouagadougou Action Plan (n280 *supra*) s II(6).

²⁹¹ Ouagadougou Action Plan (n280 *supra*) s II(4).

²⁹² Ouagadougou Action Plan (n280 *supra*) s II(5).

²⁹³ Ouagadougou Action Plan (n280 *supra*) s II(8) & art 7(1)(2) of Palermo Protocol. This stipulation is reinforced by the general requirement for states to sign, ratify and fully implement the Palermo Protocol and its principal Convention (Ouagadougou Action Plan (n280 *supra*) s III(1)). States' policies, programs and other measures should comply with the international human rights instruments which protect especially women and children (Ouagadougou Action Plan (n280 *supra*) s II(1)).

²⁹⁴ Ouagadougou Action Plan (n280 *supra*) s III(7).

²⁹⁵ Ouagadougou Action Plan (n280 *supra*) s III(9)(8). States are required to legislate for victims to obtain compensation and for the state to confiscate the proceeds of trafficking.

with its own multi-disciplinary National Task Force which can monitor and report on the implementation of the National Action Plan to regional and international bodies.²⁹⁶ States should “consider the establishment of joint investigation units and enact laws for the extradition of traffickers”.²⁹⁷ The Plan of Action suggests that the special units be created within existing law enforcement structures, with a specific mandate to target operational activities towards fighting human trafficking.²⁹⁸

The battle against human trafficking requires a coordinated policy response at national, international and regional levels to ensure a collaborative, integrated approach.²⁹⁹ The Action Plan lays the foundation for the establishment of a special regional unit to coordinate efforts to combat trafficking in human beings.³⁰⁰ This notion was given effect with the launch of the AU Commission’s Initiative against Trafficking (AU.COMMIT)³⁰¹ in 2009. This initiative is dedicated to the operationalisation and galvanisation of the Ouagadougou Action Plan,³⁰² to increase awareness and popularise its strategies to combat human trafficking throughout the continent and globally.³⁰³

As a reference document, the Ouagadougou Plan of Action is very comprehensive in scope, demonstrating that it recognises the threats facing Africa as a result of human trafficking. However, there are a number of concerns about its potential impact on, and utility for eradicating human trafficking.³⁰⁴ The very broad directives and proposals set forth in the Plan are non-specific and no implementation procedures are given. The responsibility for developing implementation strategies is left to individual states,

²⁹⁶ Ouagadougou Action Plan (n280 *supra*) s III(16)(17)(18). It is envisaged that the National Task Force will bring together relevant ministries, agencies, NGOs and civil society organizations to formulate and implement anti-trafficking policy.

²⁹⁷ Ouagadougou Action Plan (n280 *supra*) s III(22).

²⁹⁸ Gallinetti (n284 *supra*) 50.

²⁹⁹ Ouagadougou Action Plan (n280 *supra*) s IV(1). Bilateral and multilateral cooperation should exist between countries of origin, transit and destination in terms of identification, assistance, protection, repatriation and reintegration.

³⁰⁰ Ouagadougou Action Plan (n280 *supra*) s VI(7). In this regard, states and regions should also improve data collection, analysis and distribution in respect of trafficking. See Ouagadougou Action Plan (n280 *supra*) s VI(5).

³⁰¹ *AU Launch of the AU Commission Initiative against Trafficking (AU.COMMIT Campaign)*, Media Advisory, 16 Jun 2009. AU.COMMIT is funded by UNHCR, IOM & UNODC.

³⁰² As stipulated in the Ouagadougou Action Plan (n280 *supra*) s VI(9).

³⁰³ Partnerships with civil society, sub-regional groups and international organisations must also be increased. See Brown *Human Slavery’s New Era in Sub-Saharan Africa* (2010) 23, Gallinetti (n284 *supra*) 50. In Mar 2010 the AU.COMMIT Campaign was also launched with REC’s in Abuja, Nigeria. See *AU Operationalising the Ouagadougou Action Plan to Combat Trafficking in Human Beings Especially Women and Children and Launching of the AU Commission Initiative against Trafficking in Persons (AU COMMIT) Campaign within Regional Economic Communities* (2010) 2.

³⁰⁴ Gallinetti (n284 *supra*) 51.

placing on them significant cooperation, financial and resource constraints.³⁰⁵ Although the Action Plan mentions that the implementation thereof is monitored by the AU Commission,³⁰⁶ there is no “formal system of oversight and accountability..., nor is there a clear proposal for developing a formal monitoring and evaluations system. This means that it will be difficult to assess its usefulness in the long term”.³⁰⁷ This has already been experienced. In the Africa-EU Partnership on MME 2011 report, it was found that: “actual results are uneven and scattered, depending very much on the political interests and institutional capacities of the concerned African and EU States”.³⁰⁸ There is a need for more careful consideration of its substance and revision of particular key aspects. Lastly, as the principal sponsor of the partnership, “[t]he EU has influenced the development of African frameworks and also influences the type of initiatives the African Union can take, because of the limited amount of funding provided by African member states. This raises questions of ownership and accountability”.³⁰⁹

The Joint Africa-EU Partnership on MME augmented its action to combat trafficking in persons with a second Action Plan (2011-2013).³¹⁰ The new Action Plan will have two main components: enhancing and synergising the political and policy dialogue; and identifying and implementing concrete actions. Among the initiatives envisaged, is a human trafficking initiative, in terms of which the European Commission will partner with the African Commission to assist RECs in developing and implementing anti-trafficking regional action plans. In addition, for effective measurement of the action plan’s implementation and impact at a regional level, a monitoring and evaluation tool will be designed.³¹¹ This will also assist in the identification of best practices for the African Continent.

³⁰⁵ These constraints further burden other commitments. Member States must allocate adequate resources for the implementation of the Plan (Ouagadougou Action Plan (n280 *supra*) Preface - This request was repeated at the Banjul Summit EX.CL/276 (IX)/ Assembly/AU/JUN 2006); states must allocate the necessary budget funds needed to combat the crime in poverty reduction strategies at national level (Ouagadougou Action Plan (n280 *supra*), s III(19)); states must provide for the specialization of police services in combating the crime (Ouagadougou Action Plan (n280 *supra*), s III(23)).

³⁰⁶ Ouagadougou Action Plan (n280 *supra*) 2, Preface. The AU Commission reports periodically to the AU Summit, to other AU policymaking organs and to member states on the Plan, but it was not mandated to develop implementation mechanisms. Reiterated in AU (n 275 *supra*) 2.

³⁰⁷ Gallinetti (n284 *supra*) 51.

³⁰⁸ Joint African-EU Strategy *JAES Action Plan 2011 – 2013, Partnership on Migration, Mobility and Employment* (2010) 61.

³⁰⁹ Klavert *African Union Frameworks for Migration: Current Issues and Questions for the Future* (2011) iv.

³¹⁰ Joint African-EU Strategy (n308 *supra*) 61.

³¹¹ Joint African-EU Strategy (n308 *supra*) 63.

5.2.3.2 The Economic Community of West African States" Declaration on the Fight against Trafficking in Persons (ECOWAS Declaration)

One of the first sub-regional organisations, ECOWAS,³¹² became increasingly concerned about the menace of human trafficking and especially its implications for socio-economic development in West Africa.³¹³ In 2001 ECOWAS proclaimed their commitment against trafficking by adopting the ECOWAS Declaration,³¹⁴ as well as the ECOWAS Plan of Action Against Trafficking in Persons (2002-2003).³¹⁵ This Declaration determines trafficking as a criminal act and a violation of fundamental human rights, it acknowledges that causes such as poverty, lack of education and equal opportunities render victims vulnerable to trafficking, and grants them, especially children, special protection for their development and wellbeing.³¹⁶ The ECOWAS Declaration commits its respective governments to speedy signature and ratification of first of all appropriate ECOWAS conventions, followed by the African Charter on the Rights and Welfare of the Child and finally relevant international instruments that strengthen laws against human trafficking.³¹⁷

Specific legislative, protective and preventative measures are further stipulated. These include the criminalisation of trafficking in persons, the care and repatriation of trafficking victims from the ECOWAS region, the protection and support of victims to enable them to recover from their physical, psychological and social damage, and the

³¹² The ECOWAS is a regional group founded in 1975 and consists of 15 countries. Its Member States are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Guinea, Ghana, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Among its institutions are the Community Parliament and the Community Court of Justice.

³¹³ ECOWAS" key purpose is mainly to set up a monetary association as means to encourage economic development in West Africa. This objective is encumbered by trafficking, and it has moved beyond its primary aim to include stability and security in the community.

³¹⁴ Adopted at the 25th Ordinary Session of Authority of Heads of State and Government held in Dakar on 20–21 Dec 2001. The Ouagadougou Plan of Action is potentially similar in nature to the ECOWAS instrument.

³¹⁵ ECOWAS Initial Action Plan against Trafficking in Persons. Adopted on 17 Dec 2001 at a Ministerial Meeting in Dakar, Senegal, by Ministers of Foreign Affairs of the ECOWAS countries. This initial Plan of Action was followed by subsequent plans every triennium, the latest for the period 2008-2011. The plans focus, amongst others, on protective and preventive measures, the formulation and implementation of appropriate legal and institutional mechanisms to address trafficking, cooperation and collaboration, training and capacity building, as well as creating a structure for monitoring and evaluation. See *UN Report Summary of Regional and Sub-Regional Structures and Initiatives to Counter Trafficking in Persons* (2010) 5. The main characteristics and causes of trafficking are identified and government commitment in several areas specified such as advocacy and sensitisation campaigns; monitoring the incidence of trafficking through collecting data and improved research; improving inter-governmental and inter-ministerial cooperation. See Bhagat *Human Trafficking - Biggest Social Crime* (2009) 42.

³¹⁶ ECOWAS Declaration (n314 *supra*) paras 3, 5, 7 of prologue (respectively).

³¹⁷ ECOWAS Declaration (n314 *supra*) arts 1, 2, 3.

establishing of comprehensive policies and programmes to combat trafficking.³¹⁸ Further awareness-raising includes state and media campaigns and training for government officials, such as the police, immigration officials, prosecutors, and judges.³¹⁹ The Declaration calls for new special anti-trafficking units within law enforcement agencies, such as the police, to combat trafficking of persons. Better border controls and cooperation between border control agencies is advocated.³²⁰ ECOWAS countries agreed to set up direct communication between their border control agencies and expand effort to gather data on human trafficking.³²¹ These countries are encouraged to develop and advance endeavours to collect, analyse and exchange “data on the situation, magnitude, nature, and economics of trafficking in persons, particularly of women and children, and on the means and methods used in the trafficking of persons”.³²² The Declaration emphasises the importance of co-operation between States, NGO’s and other elements of civil society to make efforts to reduce the demand for trafficking.³²³ A special ECOWAS unit for the coordination of sub-regional efforts to combat trafficking in persons must be created by the ECOWAS Secretariat, who must also organise a sub-regional anti-trafficking convention.³²⁴

The initial ECOWAS Plan of Action (2002–2003)³²⁵ commits ECOWAS countries to urgent criminal-justice actions for controlling trafficking in persons in the sub-region, with special attention to the situation of trafficked children. The Plan also takes into account human rights and gender-sensitive issues. Focusing on the ECOWAS Declaration specifications, the Plan outlines achievable goals and objectives. One aspiration was the creation of an anti-trafficking unit within the Commission to act as a focal point for counter-trafficking issues and to direct and monitor the ongoing implementation of the Action Plan. This task-force was subsequently set up in 2006 under the Social Affairs Division of the Department of Humanitarian and Social Affairs of the ECOWAS Commission. The Plan provides useful monitoring and evaluation

³¹⁸ ECOWAS Declaration (n314 *supra*) arts 5, 6, 7, 8. Repatriation of victims is made in consultation with them.

³¹⁹ See ECOWAS Declaration (n314 *supra*) arts 9, 10.

³²⁰ ECOWAS Declaration (n314 *supra*) art 12.

³²¹ Adepoju “Review of Research and Data on Human Trafficking in sub-Saharan Africa” 2005 43 (1/2) *International Migration* 75 94.

³²² ECOWAS Declaration (n314 *supra*) arts 13, 14.

³²³ ECOWAS Declaration (n314 *supra*) arts 15, 16, 17.

³²⁴ ECOWAS Declaration (n314 *supra*) arts 18, 19.

³²⁵ This plan is structured around 7 themes, which are (i) Legal Framework and Policy Development; (ii) Protection and Support of Victims of Trafficking in Persons; (iii) Prevention, Awareness-Raising; (iv) Collection, Exchange and Analysis of Information; (v) Specialization and Training; (vi) Travel and Identity Documents, and (vii) Monitoring and Evaluation of the initial Plan of Action.

systems that are absent in the Ouagadougou Action Plan. For example, it indicates the responsibility of each government department in terms of achieving directives. It furthermore details the indicators of success, and provides a timeframe for completion.³²⁶ The document appears well-thought out and contains the necessary substance to activate steps to combat trafficking.³²⁷ The initial ECOWAS Plan of Action against Trafficking in Persons was extended until 2011, when revisions would have been effected.

On the basis of an in-depth evaluation of the implementation of the original Plan of Action, a more comprehensive Action Plan was developed in 2006. The Plan was updated in collaboration with ECCAS (Economic Community of Central African States), as the ECOWAS/ECCAS Joint Plan of Action against Trafficking in Persons, especially Women and Children in West and Central Africa (2006-2009).³²⁸ The second bi-regional Action Plan endorses the original Plan of Action, but extends its objectives to both West- and Central African regions.³²⁹ It contains a multilateral cooperation agreement and a resolution against trafficking in persons,³³⁰ and comprises of obligations not only for Member States but also for regional bodies. The definition clause is comprehensive and provides for general as well as specific obligations for origin, transit and destination states.³³¹ The Plan dedicates a section to instituting a monitoring mechanism.³³² It adds additional interlinked strategies for each of the seven focus areas to achieve its objective.³³³

³²⁶ Gallinetti (n284 *supra*) 36; Bhagat (n315 *supra*) 42.

³²⁷ Gallinetti (n284 *supra*) 1. A relatively simple, but effective step is ensuring that travel and identity documents cannot be easily falsified, copied or altered by States.

³²⁸ Sesay & Olayode *Regionalisation and the War on Human Trafficking in West Africa* (Paper presented at the GARNET Conference on "Mapping Integration and Regionalism in a Global World: The EU and Regional Governance outside the EU" Bordeaux, 17 -19 Sept 2008) 13.

³²⁹ See HRC (n280 *supra*) 5.

³³⁰ UNGIFT "A Regional Response to Trafficking in West Africa" <http://www.ungift.org/ungift/en/stories/a-regional-response-to-trafficking-in-west-africa.html> (accessed 2013-01-07).

³³¹ See ECOWAS Declaration (n314 *supra*) art 1, where trafficking in persons is defined as: "the recruitment, transport, transfer, accommodation 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 which includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

³³² ECOWAS Declaration (n314 *supra*) art 21 provides that the State Parties agree to establish a Joint Permanent Regional Monitoring Commission (JPRMC), with a joint Secretariat created in ECCAS and ECOWAS.

³³³ See Gallinetti (n284 *supra*) 40. The 7 strategies correlate to the initial Action Plan's priority areas: prevention and awareness-raising; legal framework and policy development; collection and analysis of information; training and specialized capacity building; victim assistance and protection; travel and identity documents; monitoring and evaluation of implementation. See HRC (n280 *supra*) 5-17.

In its aim to achieve an integrated, borderless region where the movement of goods, capital and people is unhampered, ECOWAS has harmonised documents and border regulations, and created ECOWAS Passports and ECOWAS Travel Certificates.³³⁴ Although ECOWAS is praised for having gained a lead on the AU in terms of migration policy, the uncontrolled borders have been exploited by traffickers to perpetrate their criminal activities unhindered. This has led to ECOWAS developing further tools such as the Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans-border Trafficking.³³⁵ ECOWAS has also adopted in April 2010 a Regional Policy on Protection and Assistance to Victims of Trafficking in Persons in West Africa.³³⁶

ECOWAS presents the authoritative standard and benchmark for anti-human trafficking efforts within the region. Amongst the ECOWAS successes have been a visible rise in trafficking prosecutions. In 2010 “Member States reported a total of 474 prosecutions recorded in 2009 for the offence of trafficking in persons. This was over a 300% improvement on the previous year”.³³⁷ The progress that West-African countries have made regarding inter-state cooperation provides a constructive guide for endeavours in the Southern African region, especially with regards to cross-border migration.³³⁸

5.2.3.3 The SADC 10-Year Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (SADC Action Plan)

Southern Africa as a region is addressing human trafficking through the SADC,³³⁹ a regional political organisation that is largely based on socio-economic cooperation

³³⁴ See ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment A/P 1/5/79 (1979). It guarantees free entry without visa for 90 days, provided the person has a valid travel document and an international health certificate.

³³⁵ Based on the UNICEF Regional Office West and Central Africa Guidelines of 2004, the agreement was developed with the aid of the UNOHCHR in 2010. See Klavert (n309 *supra*) 11.

³³⁶ Adopted by the ECOWAS Commission on 3 Apr 2009 in Accra. The policy elaborates 12 core areas of intervention strategies for reception, identification, sheltering, health, counselling, family tracing, return/repatriation, integration, empowerment, follow-up, after care and disengagement of victims. Another policy on guidelines on witness protection, support and assistance was also developed in 2009.

³³⁷ Olayemi *Imperatives in Combating Trafficking in Persons: An ECOWAS Perspective* (2010) 2.

³³⁸ Gallinetti (n284 *supra*) 44.

³³⁹ Adopted in Aug 1992 in Windhoek, Namibia. Its headquarters is in Gaborone, Botswana. Current membership consists of 14 countries (Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe). The SADC has its origins in the SADCC (Southern Africa Development Coordination Conference), a socio-economic group established on 1 Apr 1980 in Lusaka, Zambia, with 9 member states (Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe). Its main aim was “of coordinating development projects in order to lessen economic

among its member states. The SADC Treaty³⁴⁰ does not make any specific reference to the combating of trafficking in persons. Although there is a collection of instruments that do have potential application for this purpose,³⁴¹ the first substantive sub-regional anti-trafficking instrument for Southern Africa is the 10-Year SADC Action Plan (2009-2019).³⁴²

In order to avoid the time-frame hindrances experienced by the ECOWAS Action Plan, the SADC Plan employs a two-phase implementation strategy.³⁴³ The bisection sets more realistic goals for its Member States, which allows for better planning, budgeting and fund-raising. The first stage 2009 – 2014 of the two five-year periods has already been developed and is included in the document,³⁴⁴ while the second stage will only be detailed in 2014, before the end of the first phase.

The ten-year comprehensive Plan establishes a framework for combating human trafficking in the SADC region and incorporates guidelines which are human rights-based and child- and gender-sensitive.³⁴⁵ A definition similar to that of the Palermo Protocol has been adopted³⁴⁶ but unlike the ECOWAS Plan local cultures and traditions are not considered. Trafficking in persons is regarded as “a grave international penal crime that deserves harsh punishment in all countries without exceptions”.³⁴⁷ The Action Plan recognises particularly the vulnerability of children, women and people with disabilities. The inclusion of disabled people is a novelty; however, no information on

dependence on the then apartheid South Africa”. See Gallinetti (n284 *supra*) 45. Regional integration in Southern Africa must be viewed from a historical and political perspective, which resulted in strong bonds of solidarity, which still affects current alliances. See Madakufamba “SADC in the Twenty-First Century” 2002 *Open Society Initiative for Southern Africa* 90 90-94.

³⁴⁰ Treaty of the Southern African Development Community (SADC Treaty) adopted in 1992 and entered into force in 1993. The Treaty was modified by the 2001 Agreement Amending the Treaty of SADC.

³⁴¹ See eg, the Protocol on Mutual Assistance in Criminal Matters (2002); the Protocol on Extradition (2002); the Protocol on Corruption (undated); the Declaration on Gender and Development (1997); the Prevention and Eradication of Violence against Women and Children (1998). However, none of the Protocols mentioned have yet been implemented.

³⁴² Adopted in Aug 2009 by SADC Ministerial Committee. The SADC Plan has been aligned to the SADC Regional Indicative Strategic Development Plan (RISDP), a regional development plan designed to deal with development and poverty reduction. Similar to other Plans of Action, it is not a legally binding instrument.

³⁴³ SADC Action Plan (n342 *supra*) s 1.1. The ECOWAS Plan was extended because new additions were not finalised.

³⁴⁴ See SADC Action Plan (n342 *supra*) s 10. The first 5-year implementation matrix is extremely comprehensive (more so than information on Strategic Priorities) with extensive specifications as to indicators, time frames, responsible partners and the allocated budget.

³⁴⁵ SADC Action Plan (n342 *supra*) s 3.1. Except for repetitive suggestions that the policies, strategies and programmes of Member States should incorporate the guiding principles, the substance of these principles is not elucidated in the framework.

³⁴⁶ SADC Action Plan (n342 *supra*) Glossary of Terms.

³⁴⁷ SADC Action Plan (n342 *supra*) 3.1.6.

the trafficking of disabled persons is as yet available. Although women are included as a focal point, the Plan does not specifically address trafficking for sexual exploitation.³⁴⁸ Similarly, the root causes of trafficking do not feature prominently in the principles of the Plan.³⁴⁹

Minimum requirements are established to address “the spectrum of causal factors and effects of trafficking in persons”³⁵⁰ in the source, transit and destination countries. These are prevention, advocacy and awareness-raising, protection, rehabilitation, integration, repatriation and investigation and prosecution.³⁵¹ The standard non-criminalisation stipulation of victims is inserted,³⁵² as well as the support offered to the victim’s family, which in this Plan concerns especially counselling. Interestingly, offenders also have to receive “counselling and other rehabilitative services to ensure that they give up the practice of trafficking in persons”.³⁵³ Contrary to the Plan’s objective of creating a harmonised regional framework, the Plan advances the conception of national policies, legislation and laws.³⁵⁴ No specific legislative prototype is supplied which may create a situation whereby different countries interpret the various regional and international instruments in a dissimilar manner resulting in disparate laws.³⁵⁵ Moreover, the Action Plan does not identify which standards in these instruments it recommends national laws should incorporate. A more appropriate solution would have been the creation of a single, uniform regional instrument which all Member States could use as a model and apply nationally. Whether Southern African countries would abide by a regional instrument, or implement regional programmes is another question.

³⁴⁸ In its response analysis of international and regional instruments, the Action Plan does cite some provisions on sexual exploitation; eg, the Palermo Protocol, the CRC, the CEDAW, the African Youth Charter, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child and the SADC Protocol on Gender and Development. The last document also makes specific reference to trafficking in persons in art 20(5)(a)-(e).

³⁴⁹ The root causes are briefly discussed in the Introduction; but mention is only made in SADC Action Plan (n342 *supra*) s 3.1.5 under “Inter-State Cooperation”: “Conditions must be put in place to ensure that all countries cooperate fully and effectively between themselves to prevent and address the causes and effects of trafficking in persons”, and SADC Action Plan (n342 *supra*) s 3.2: “A comprehensive response to trafficking in persons should address the spectrum of causal factors and effects of trafficking in persons on the victims including prosecution of the perpetrators”.

³⁵⁰ SADC Action Plan (n342 *supra*) s 3.2.

³⁵¹ SADC Action Plan (n342 *supra*) ss 3.2.1-3.2.4.

³⁵² SADC Action Plan (n342 *supra*) s 3.1.6.

³⁵³ SADC Action Plan (n342 *supra*) s 3.2.3.

³⁵⁴ SADC Action Plan (n342 *supra*) ss 3.2.1 & 4.3.

³⁵⁵ The Plan does, however, encourage states to standardize their legislation. See SADC Action Plan (n342 *supra*) 3.1.6: “Legislation and laws on trafficking in persons particularly to punish offenders must be standardized across countries and enforced consistent with international and regional conventions.”

The Plan is aimed at increased multi-sectoral cooperation, coordination and support,³⁵⁶ and the enactment of national legislation and policies to curb the practice.³⁵⁷ In this regard, the Action Plan is intended to assist Member States to adopt and implement legislative and other mechanisms to combat trafficking in persons.³⁵⁸ Other key priority areas address law enforcement and prosecution of traffickers; training and capacity building for national criminal justice systems; prevention and deterrence; advocacy and awareness-raising; victim support and witness protection; research, information and expertise sharing, monitoring and evaluation, and finally, resource mobilisation.

The objectives of the strategic Action Plan comprise, inter alia, the facilitation of the establishment of enabling legislation and policies as well as the application of evidence-based, gender and age-relevant information on human trafficking. Strengthening regional coordination and enhancing the capacity of Member States and the SADC Secretariat for effective implementation and monitoring mechanisms conclude the targets.³⁵⁹ The stated objectives are rather vague and too general, for instance, states are required to establish policies and programmes but no detail or examples are provided. The call for the harmonisation of laws³⁶⁰ between the various domestic jurisdictions may also prove problematic. For instance, Namibia and South Africa apply a hybrid system consisting of Roman-Dutch and English law; Mozambique has a civil-law system while Malawi, Zimbabwe and Zambia as well as a number of other countries have a common-law system.³⁶¹ To harmonise disparate criminal provisions from different legal systems may require some initial adjustments. The SADC Plan also does not make provision for litigation by the SADC Tribunal.³⁶² If the prosecution of traffickers is intended to be handled nationally, procedures may differ between the various national courts. Furthermore, human trafficking is a transnational

³⁵⁶ SADC Action Plan (n342 *supra*) s 4.1 - the goal of the Plan.

³⁵⁷ SADC Action Plan (n342 *supra*) s 4.2 - the purpose of the Plan.

³⁵⁸ Of the current 14 Member States, only Mauritius, Mozambique, Tanzania and Zambia have enacted laws criminalising trafficking. While Malawi, South Africa and Swaziland are in the process of developing or finalising legislation, the rest of the Member States have either no legislation, or address trafficking to a limited extent by means of existing laws.

³⁵⁹ SADC Action Plan (n342 *supra*) s 4.3.

³⁶⁰ SADC Action Plan (n342 *supra*) s 4.3.

³⁶¹ Church, Schulze & Strydom *Human Rights from a Comparative and International Law Perspective* (2007) 48-53.

³⁶² The SADC Tribunal was established in 1992 by the SADC Treaty (n340 *supra*) art 9. Its seat is in Windhoek, Namibia. The inauguration and swearing in of the Tribunal took place on 18 Nov 2005 in Windhoek, Namibia. The 1st dispute lodged was on 27 Aug 2007. See <http://www.sadc-tribunal.org/pages/about.htm> (accessed 2013-01-07). On 23 Aug 2010 all presiding judges of the Tribunal were discharged and the Tribunal effectively suspended over Zimbabwe's refusal to honour its 2008 ruling (see n372 *infra*). Although a 6-month review was ordered of the role, functions and terms of reference of the Tribunal, at present the SADC Tribunal is still not functioning.

crime operating across borders which might involve more than one country. This would require a regional response to trafficking in persons.

In line with its principles, the SADC Action Plan systematically outlines activities and expected outputs on legislation and policy measures.³⁶³ It finally suggests the development of “regional model legislation” on human trafficking.³⁶⁴ It is unclear whether the regional legislation will be binding on member states or would simply be an exemplar for states to use. Other strategic priorities pertain to policies on training, public awareness-raising, victim and witness protection, regional cooperation, information sharing, monitoring and evaluation and resource mobilisation.³⁶⁵ However, despite undertaking to maximise efforts towards prevention through public awareness-raising campaigns, the Plan itself has not been publicised and is not readily accessible to the general public. The Plan further draws attention to national, regional and international partners and describes their roles.³⁶⁶ The main partners include the SADC Secretariat, African Union and undefined international cooperating partners.³⁶⁷

The SADC Plan provides a two-stage monitoring mechanism.³⁶⁸ At a national level, Ministers in charge of Homeland Security; Gender, Children and Youth have to review and monitor implementation of the Plan. However, the Organ on Politics, Defence and Security Affairs Unit has to coordinate monitoring and evaluation and will give progress reports to the SADC Secretariat, who again have to report to the SADC Council and Summit every two years.³⁶⁹ The two bodies intended to oversee implementation at a national level appear to be replicating each other’s functions. Not only is the duplication counter-productive in terms of time and costs factors, but there is no guarantee that these two bodies are specialists in human trafficking and related fields. The involvement of *ad hoc* consultants recruited on need basis may alleviate this potential obstacle.³⁷⁰

³⁶³ SADC Action Plan (n342 *supra*) s 5 “Strategic Priorities for Action”.

³⁶⁴ SADC Action Plan (n342 *supra*) s 5.

³⁶⁵ SADC Action Plan (n342 *supra*) ss 5.2, 5.3, 5.4, 5.5, 5.6, 5.7 & 5.8.

³⁶⁶ SADC Action Plan (n342 *supra*) s 7.

³⁶⁷ SADC Action Plan (n342 *supra*) s 7.2.

³⁶⁸ SADC Action Plan (n342 *supra*) s 8.

³⁶⁹ SADC Action Plan (n342 *supra*) s 5.7. A regional Ministerial Task Force will also be established to oversee the implementation of the Plan at both regional and national levels. See SADC Action Plan (n342 *supra*) s 8.

³⁷⁰ SADC Action Plan (n342 *supra*) s 8.

The SADC Action Plan is mainly aimed at combating trafficking from a crime-control perspective, as crime undermines development. The SADC's mandate concerning crime prevention and prosecution should be extended to existing organs or protocols such as the Protocol on Mutual Legal Assistance in Criminal Matters,³⁷¹ to encourage cooperation and coordination among states in trafficking matters. Institutions such as the SADC Tribunal or even Southern Africa Regional Police Chiefs Organisation (SARPCCO) could be utilised to investigate and prosecute trafficking allegations. The tribunal could further facilitate victims' claims for compensation against state or non-state actors. The success of these efforts depends on the SADC Plan becoming a legally-binding instrument, or being supported by such an instrument to give it force and to compel the compliance of Member States.³⁷² Whether the SADC Plan of Action is an appropriate answer to human trafficking at a regional level will have to be seen. Since trafficking in Africa entails the circulation of people on the entire mainland, the ideal response would be under the auspices of the AU, with the SADC in a complementary role.

5.2.3.4 The African Charter on Human and Peoples Rights (ACHPR)

Protecting and promoting human rights at the African regional level is the ACHPR.³⁷³ This instrument is unique in that it not merely reproduces the standards of other human-rights treaties, but attempts to create an African system for human rights.³⁷⁴

³⁷¹ SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002). Unfortunately, many SADC Protocols are not as yet in operation.

³⁷² From previously-decided cases on human-rights violations, it is clear that Member States ignore SADC decisions if it doesn't suit them. Eg, in its 1st decision *Campbell, M & 1 Other v Govt of Zimbabwe* (Case No 02/07), the Tribunal ruled in favour of Campbell, who was contesting the compulsory state acquisition of his property. Thereupon the Zimbabwean government declared that it would be bound only by its own laws and the decisions of its national superior courts. Against court rulings, the Zimbabwean government persisted during the year with prosecuting farmers for staying on government-confiscated farms. In Nov 2008 the SADC tribunal again ruled in favour of the 79 farmers in the *Campbell*-case, which prompted the government to claim that the tribunal was not validly constituted and, therefore, had no jurisdiction over the country. It consequently declared the SADC tribunal ruling "null and void". See US Dept of State "2010 Human Rights Report: Zimbabwe" <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154377.htm> (accessed 2013-01-07).

³⁷³ African Charter on Human and Peoples' Rights (ACHPR), also known as the Banjul Charter. Adopted by the Organisation of African Unity (OAU) on 27 Jun 1981; entered into force on 21 Oct 1986. South Africa signed and ratified the charter on 9 Jul 1996. The ACHPR has been ratified by all 53 member states of the AU. The ACHPR was revised and re-established as The Constitutive Act of the African Union (AU Constitutive Act), adopted in 2000 at Lome, Togo, entered into force in 2001.

³⁷⁴ Mutua "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" 1995 35 *Virginia Journal of International Law* 339 339. See Addo (n200 *supra*) 387 who states that "[t]his African context is, in truth, an unsettled one in which the culture of the rule of law as traditionally understood is a recent phenomenon and so is rather insecure. Important institutions such as courts and tribunals tend to be basic and peripheral actors who are usually open to abuse. Until fairly recently, international human rights law was represented and perceived as yet another tool in the arsenal of imperialist domination".

The ACHPR incorporates a concern for protecting collective rights,³⁷⁵ but also imposes broad duties on individuals towards the community.³⁷⁶ The Preamble of the ACHPR underlines the necessity to establish “bodies to promote and protect human and peoples’ rights”.³⁷⁷ It covers not only the traditional first and second generation rights,³⁷⁸ but also third generation rights such as the right to development,³⁷⁹ peace³⁸⁰ and a decent environment.³⁸¹

The African Charter consists of three parts;³⁸² the first section defines specific substantive law rights, prescriptions and prohibitions. The ACHPR pledges the general substantive guarantees for human and peoples’ rights, such as personal liberty,³⁸³ respect for life,³⁸⁴ inhuman treatment or torture,³⁸⁵ freedom of movement,³⁸⁶ safe working environment,³⁸⁷ right to health,³⁸⁸ and the prohibition of discrimination.³⁸⁹ All of these provisions may be employed to prevent human trafficking and protect its victims. For example, the prominence slavery is given in the Charter acknowledges the history the African Continent has experienced with this bondage. Slavery further impairs the right to liberty and security of the person, and leads to the arbitrary and unlawful detention of human beings for the purpose of exploitation. In advancing equal protection by the law for the benefit of individuals,³⁹⁰ slavery may also be countered. Interestingly, the Charter undertakes to promote and protect the “morals and traditional values recognized by the community”.³⁹¹ The ACHPR also provides prominence to the

³⁷⁵ Peoples’ rights are more fully developed than individual rights. See Bennett “Human Rights and the African Cultural Tradition” in Schamle (ed) *Human Rights and Cultural Diversity* (1993) 273.

³⁷⁶ ACHPR (n373 *supra*) arts 27-29. These rights and duties entail a mixture of complementary positive and negative responsibilities.

³⁷⁷ This commitment is replicated in the AU Constitutive Act (n373 *supra*) art 3.

³⁷⁸ First generation rights relate to civil and political rights and second generation rights involve economic, social and cultural rights. The ACHPR does not mention the right to privacy and the right against forced labour. The last-mentioned right is a serious shortcoming in terms of human trafficking.

³⁷⁹ ACHPR (n373 *supra*) art 22.

³⁸⁰ ACHPR (n373 *supra*) art 23.

³⁸¹ ACHPR (n373 *supra*) art 24.

³⁸² Sub-divided into 4 chaps and 68 arts.

³⁸³ ACHPR (n373 *supra*) art 6: “Every 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”. Note that this guarantee is not absolute and is restricted by law.

³⁸⁴ ACHPR (n373 *supra*) art 4: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

³⁸⁵ ACHPR (n373 *supra*) art 5: “All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

³⁸⁶ ACHPR (n373 *supra*) art 12.

³⁸⁷ ACHPR (n373 *supra*) art 17.

³⁸⁸ ACHPR (n373 *supra*) art 16(1).

³⁸⁹ ACHPR (n373 *supra*) art 18(3), (4).

³⁹⁰ ACHPR (n373 *supra*) art 3(2).

³⁹¹ ACHPR (n373 *supra*) art 17(3).

family as “the natural unit and basis of society”³⁹² and “the custodian of morals and traditional values recognized by the community”.³⁹³ Although safeguarding the family unit is important, especially as family failure may lead to trafficking, certain traditional values or practices reinforces human trafficking.³⁹⁴

The second part of the ACHPR establishes the African Commission on Human and Peoples’ Rights (African Commission) as an institutional structure. Its mandate as well as the procedural processes and mechanisms the Commission must follow in implementing the substantive norms are established. The African Commission consists of eleven members,³⁹⁵ elected for a six-year period and eligible for re-election³⁹⁶ in a related manner to the other regional commissions. Like the Inter-American Commission, the African Commission has three tasks – it monitors the implementation of treaty obligations by national authorities;³⁹⁷ issues advisory opinions and investigate cases submitted by both states parties and individuals.

Concerning contentious case procedure, prior to filing a petition to the Commission “within a reasonable period”,³⁹⁸ a petitioner must first exhaust all domestic remedies³⁹⁹ “unless it is obvious that this procedure is unduly prolonged”.⁴⁰⁰ However, the Commission does not give any guidelines as to what “unduly long” or “a reasonable time” constitute. The interpretation of these temporal constraints should be informed by the specific circumstances of each individual case, provided the remedy is available, effective and sufficient, and Charter guarantees are not undermined.⁴⁰¹ The Commission is furthermore not required to consider all individual cases; it will take action only in those cases where a majority of the commissioners so decide.⁴⁰² If “the

³⁹² ACHPR (n373 *supra*) art 18(1).

³⁹³ ACHPR (n373 *supra*) art 18(2).

³⁹⁴ These causes were discussed in Chap 3 of this study.

³⁹⁵ ACHPR (n373 *supra*) art 31.

³⁹⁶ ACHPR (n373 *supra*) art 36.

³⁹⁷ As with other human rights treaties, governments have the primary responsibility to implement treaty obligations, see ACHPR (n373 *supra*) arts 1, 50, 56(5).

³⁹⁸ ACHPR (n373 *supra*) art 56(6).

³⁹⁹ ACHPR (n373 *supra*) art 50.

⁴⁰⁰ ACHPR (n373 *supra*) art 56(5).

⁴⁰¹ In the *Wiwa*-case, the Commission ruled that the death of the 9 leaders of the Ogoni minority (which included Ken Saro Wiwa, a Nobel Peace Prize laureate), who were executed after a secret trial, annulled the need to first exhaust local remedies. See *International Pen, Constitutional Rights Project, Inter-rights and Civil Liberties Organisation v Nigeria* (Com No’s 137/94, 139/94 & 161/97) 12th Annual Activity Report of the African Commission on Human and Peoples’ Rights (1999) 62. This case drew international criticism of the Commission as it failed to condemn the Nigerian government’s violations.

⁴⁰² ACHPR (n373 *supra*) art 55.

existence of serious or massive violations”⁴⁰³ is revealed in a case, the African Commission must notify the OAU’s General Assembly. However, unlike the American Charter, the African Charter does not make any provision for interim measures in terms of protection while violations are being investigated.

Member States are also required to submit to the ACHPR a report on its efforts every two years.⁴⁰⁴ Providing information “affords national authorities the opportunity to redress the shortcomings in their own legal system”.⁴⁰⁵ However, reporting has been very sluggish and some states have never submitted a report.⁴⁰⁶ States’ introspection should be followed by inspections by the Commission into the states’ performance. On-site visits are also performed by Special Rapporteurs, which the Commission appoints periodically to examine specific human rights issues.⁴⁰⁷

The Commission has not yet pronounced itself on a human-trafficking topic, but have considered related aspects such as torture,⁴⁰⁸ which may be of value also for the interpretation of trafficking issues. The duty to protect individuals from being trafficked requires governments to be proactive, preventative and curative,⁴⁰⁹ and “entails the creation and maintenance of an atmosphere or framework for effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms”.⁴¹⁰ Its jurisprudence reveals that the African Commission draws not only from treaties and resolutions, but also from the judicial practice of other international tribunals.⁴¹¹ The Commission has thus far been deemed not too successful by researchers.⁴¹² The lack of legal analysis in its decisions seems to be the primary defect and its recommendations are often vague.⁴¹³ The Commission also does not

⁴⁰³ ACHPR (n373 *supra*) art 58.

⁴⁰⁴ ACHPR (n373 *supra*) art 62.

⁴⁰⁵ Addo (n200 *supra*) 366. This viewpoint is confirmed in African Commission *Rencontre Africaine Pour la Défense des droit de l’Homme v Zambia* Com No 71/92 (1997) para 11.

⁴⁰⁶ Heyns & Killander (n268 *supra*) 489-490.

⁴⁰⁷ This is done in accordance with its mandate in ACHPR (n373 *supra*) art 45.

⁴⁰⁸ In another *Wiwa*-case, the victim was horsewhipped and tortured while in detention, from where he escaped to the USA. See *Rights International v Nigeria* (Com No 215/98) 13th Annual Activity Report of the African Commission on Human and Peoples’ Rights (2000) para 24.

⁴⁰⁹ Addo (n200 *supra*) 351. In case of breach of rights, victims must have access to redress.

⁴¹⁰ African Commission *The Social and Economic Rights Center and the Center for Economic and Social Rights v Nigeria* (Com No 155/96), 15th Annual Activity Report of the African Commission on Human and Peoples’ Rights (2002) para 46.

⁴¹¹ Eg, the ECtHR (*Zimbabwe Human Rights NGO Forum v Zimbabwe* (Com No 245/2002), 21st Annual Activity Report of the African Commission on Human and Peoples’ Rights (2007) para 207; the Inter-American Court (*ibid* paras 144-147).

⁴¹² See Addo (n200 *supra*) 367-372; Martin *et al* (n103 *supra*) 19.

⁴¹³ When it sometimes recommends compensation, it does not stipulate the amount that should be awarded. See Heyns & Killander (n268 *supra*) 489.

have any compliance control mechanism to monitor and enforce its recommendations. This is important in establishing its authority and credibility. Lastly, although the Commission has handled relatively few cases, it often takes more than five years to decide a case.⁴¹⁴

Unlike the European and Inter-American human-rights systems where a regional judicial body was incorporated into the initial instrument as a vital component, the ACHPR did not provide for a court *ab initio*. Because a judiciary institution is central to the effective implementation of Charter obligations, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol)⁴¹⁵ was adopted. The African Court had its first judgment in December 2009 and has since finalized twelve cases.⁴¹⁶ In 2008, the African Court was merged with the African Court of Justice with the adoption of the Protocol on the Statute of the African Court of Justice and Human Rights.⁴¹⁷ This Protocol has not yet entered into force.

The African Court was the last of the regional courts created. Consequently, it had the opportunity to rectify some problem areas experienced by the other courts. It rescinded in particular some restrictions placed on other courts, for example on actions brought to the Court. The African Court Protocol provides that this may be done on the basis of any instrument, which includes any relevant international human-rights treaty ratified by the State Members concerned.⁴¹⁸ Likewise, any applicable human-rights instrument ratified by the State concerned can be applied by the Court as a source of law.⁴¹⁹ In this manner, the African Court provides states with stronger dispute resolution and performance-regulation systems than some international agreements which do not include judicial mechanisms ensuring their implementation.

⁴¹⁴ Heyns & Killander (n268 *supra*) 489.

⁴¹⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), adopted by the OAU on 10 Jun 1998 at Ouagadougou, Burkina Faso, entered into force on Jan 1, 2004 upon its ratification by 15 member states. Signed by South Africa on 9 Jun 1998. So far, 26 states have acknowledged the Court's jurisdiction. The seat of the Court is in Arusha, Tanzania.

⁴¹⁶ See African Court "African Court in Brief" <http://www.african-court.org/en/court/history/> (accessed 2013-01-07).

⁴¹⁷ The need for a merger was to be more cost-effective. The new court will replace the African Court, once established. See Heyns & Killander (n268 *supra*) 492.

⁴¹⁸ African Court Protocol (n415 *supra*) art 3(1).

⁴¹⁹ African Court Protocol (n415 *supra*) art 7. This means that all UN human rights agreements or any other relevant legal instrument codifying human rights (eg, the various conventions of humanitarian law adopted by the ILO) can be utilised.

The Court consists of eleven judges, nominated by AU Member States and elected by the AU Assembly.⁴²⁰ Unlike any other judicial body, individuals and those acting on their behalf (such as NGOs) can submit petitions directly to the Court if the state party concerned has made a declaration accepting the jurisdiction of the Court to hear such cases.⁴²¹ In addition to its contentious jurisdiction, advisory opinions can be requested not only by Member States, the African Commission and other OAU organs, but by any OAU-recognised organisation,⁴²² provided that at the time of ratifying the Protocol or thereafter, the state at issue agrees to it. The Court can award damages⁴²³ and order provisional protective measures and injunctive relief.⁴²⁴ The AU Council of Ministers is responsible for monitoring state compliance with the court's orders.⁴²⁵

Issues relating to women and children are not particularly addressed in the ACHPR. As such, the AU has adopted other human-rights instruments providing specifically for those in society who are the most vulnerable to trafficking. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women Protocol)⁴²⁶ provides protection to girls and women from any form of violence,⁴²⁷ discrimination⁴²⁸ and even the adverse effect of globalisation.⁴²⁹ Women should be protected from any form of sexual exploitation, especially in an armed-conflict situation.⁴³⁰ In a single article, it states that States must "prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk."⁴³¹ Appropriate and effective processes should be put into place to

⁴²⁰ African Court Protocol (n415 *supra*) art 11. The first judges of the Court were elected in Jan 2006. All the judges act on a part-time basis, except for the president.

⁴²¹ At present, only 2 states (Mali and Burkina Faso) have made such a declaration.

⁴²² African Court Protocol (n415 *supra*) art 4(1). The Protocol does not specify whether these "organisations" are NGOs or REC's.

⁴²³ African Court Protocol (n415 *supra*) art 27(1): "...the payment of fair compensation or reparation".

⁴²⁴ African Court Protocol (n415 *supra*) art 27(2).

⁴²⁵ African Court Protocol (n415 *supra*) art 29(2).

⁴²⁶ The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, also known as the Maputo Protocol (African Women Protocol); adopted on 11 Jul 2003 at the AU 2nd Summit in Maputo, Mozambique and entered into force on 25 Nov 2005, after the ratification of the required 15 Member States. As of Aug 2011, 46 of the 53 AU states have signed the African Women Protocol, while 28 have ratified the instrument. South Africa signed on 16 Mar 2004, ratified it on 17 Dec and deposited the Protocol on 14 Jan 2005. See <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed 2013-01-07).

⁴²⁷ African Women Protocol (n426 *supra*) art 1(k).

⁴²⁸ African Women Protocol (n426 *supra*) arts 2, 18(3).

⁴²⁹ African Women Protocol (n426 *supra*) art 19(f). Also see Amollo *A Critical Reflection on the African Women's Protocol as a Means to Combat HIV/AIDS among Women in Africa* (Unpublished MA-dissertation University of Pretoria 2006) 54.

⁴³⁰ African Women Protocol (n426 *supra*) art 11.

⁴³¹ African Women Protocol (n426 *supra*) art 4(2)(g).

protect women who are at risk of trafficking.⁴³² States should employ preventive measures which range from socio-economic measures to the reduction of poverty and inequalities of women.⁴³³

Another OAU instrument, the African Charter on the Rights and Welfare of the Child⁴³⁴ (ACRWC) protects the rights of the African child,⁴³⁵ and contains explicit provisions against child labour;⁴³⁶ the sexual exploitation of children⁴³⁷ and the sale, trafficking and abduction of children.⁴³⁸ Trafficking for any purpose or in any form or by any person such as parents and legal guardians of the child is prohibited. The ACRWC elaborates that “any person” as potential perpetrators may even include the child’s parent or guardians. This is not explicitly stated as such in the CRC.⁴³⁹ Particular forms and purposes of trafficking are responded to in this Charter, such as the custom of child placement or their early marriage,⁴⁴⁰ the use of children in armed conflicts,⁴⁴¹ and refugee children.⁴⁴² Adoption as a form of trafficking is also illegal and governments are required to “take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child” .⁴⁴³

Analogous to the instruments on trafficking, the human-rights protocols adopted demonstrate the recognition of human rights” violations in Africa. The standards and

⁴³² African Women Protocol (n426 *supra*) art 4(2)(g).

⁴³³ Österdahl (n5 *supra*) 86.

⁴³⁴ The African Charter on the Rights and Welfare of the Child (ACRWC), also known as the Children’s Charter, was adopted by the OAU in 11 Jul 1990 and entered into force on 29 Nov 1999. 45 of the 53 AU members signed the Charter, while 37 ratified it. South Africa signed the Charter on 10 Oct 1997, ratified on 7 Jan 2000 and deposited its instrument of accession on 21 Jan 2001. See http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf (accessed 2013-01-07).

⁴³⁵ ACRWC (n434 *supra*) art 2. A child is every human being below the age of 18. Children are however not protected against life imprisonment without the possibility of release, and no provision is made for alternative sentences such as community rehabilitation.

⁴³⁶ ACRWC (n434 *supra*) art 15. The prohibition is aimed at child labour exploitation at the formal as well as the informal service sectors (art 15(2)), a valuable insertion as the informal sector is the mainstay in some parts of Africa.

⁴³⁷ ACRWC (n434 *supra*) art 27. Even encouraging a child to engage in any sexual activity is criminalised.

⁴³⁸ ACRWC (n434 *supra*) art 29. This includes the use of children in all forms of begging.

⁴³⁹ Kamidi *A Legal Response to Child Trafficking in Africa: A Case Study of South Africa and Benin* (Unpublished LLM-dissertation University of Western Cape 2007) 25. Also see CRC art 35. This is an important contribution since these 2 documents are the only human rights instruments that encompass the entire spectrum of civil, political, economic, social and cultural rights.

⁴⁴⁰ ACRWC (n434 *supra*) art 21.

⁴⁴¹ ACRWC (n434 *supra*) art 22. The abuse of girl children as wives and sex slaves in armed conflict is not mentioned here.

⁴⁴² ACRWC (n434 *supra*) art 23.

⁴⁴³ ACRWC (n434 *supra*) art 24(d).

protection mechanisms have laid the foundation for enforcement of these rights. However, the problem remains primarily one of implementation, especially the policies addressing the root causes of trafficking, such as poverty and gender discrimination.⁴⁴⁴

5.3 Conclusion

In this chapter, some of the most important regional instruments dealing with the combating of human trafficking were discussed. The treaties, charters, conventions and actions plans of Europe, the Americas, and Africa were focussed on. Many of these legal documents explicitly address the crime of trafficking in persons, and contain concrete guidelines in order to achieve effective prosecution and prevention of human trade. From a broader perspective, one human-right treaty per region was also examined in order to determine the contribution of these instruments to tackle the phenomenon of human trafficking.

It was observed that these particular areas have a growing number of regional organisations addressing human trafficking and also an extensive range of regional instruments addressing varying aspects of trafficking. While a plethora of instruments can be interpreted as reflecting international concern and resolve to contend with human trafficking, the proliferation can also lead to confusion, contradiction, overlapping and difficulty in coordination. States or individuals may become confused as to which instrument applies to a particular trafficking situation, and whether to utilise only one, or more than one instrument simultaneously. Furthermore, several instruments contain different provisions on related matters. This makes the concurrent application of instruments also problematic. Also, despite the fact that many instruments comprise similar provisions (generally on issues relating to criminal cooperation and mutual assistance), many differ in their application thereof. For example, most conventions have provisions on mutual legal assistance, but many provide their own system as to the communication channels. It also appears that anti-trafficking policies quite often seem to stem from narrow analyses of the phenomenon, its underlying causes, its characteristics and its consequences. These hindrances may undermine the very efforts these legal instruments serve. In combating human trafficking, conflicting or competing interests must be reconciled which necessarily requires the integration of a cross-disciplinary perspective. Cooperation between the

⁴⁴⁴ Heyns & Killander (n268 *supra*) 496.

regional organisations is another concern. In some areas it was noticeable that the main regional agency harmonizes the various national laws better than the different sub-regional organisations. In other areas, different sub-regional systems did not collaborate or concur with the main regional body on certain issues. The designation of a main regional anti-trafficking organisation which is informed by sub-regional structures is recommended.

It was established that many of these anti-trafficking instruments are essentially based on and therefore compatible with the Palermo Protocol. Yet many of these instruments contain provisions that may result in inconsistent standards being applied in a region. This may be because some instruments focus more on certain issues, areas, persons or criminal acts than others. In this regard it may be mentioned that some treaties contain provisions only on certain themes such as criminal justice, human rights or migration, while others may deal with only children or women. Some treaties comprise all types of human trafficking, while others exclude certain selected criminal acts. Almost all of the instruments discussed repeat similar obligations to that contained in the Palermo Protocol or advocate that the imperatives in the Protocol be observed. However, these obligations are not always applied correspondingly in the various documents. Sometimes obligatory stipulations are replaced with recommendatory suggestions. It is especially as regards prevention and protection strategies where these instruments appear to deviate from one another. These sections tend to be general in nature, and do not attend to particular forms of trafficking.

Despite the numerous initiatives that have been introduced to combat human trafficking, some states are either reluctant or incapable to implement them efficiently. It was observed that some policy documents which focus directly on the fight against trafficking in persons (such as action plans) lack legal force. Although the good intentions of the regions are reflected in the policy documents, there is no strong obligation to comply with these recommendations. States in these regions are generally not committed to non-binding obligations. When the obligations are of a binding nature, the state parties are hesitant to adopt the comprehensive provisions. It further seems that almost all regional instruments lack direct effect as most institutions and organisations do not have the power to transform the recommendations into concrete actions. This is evident in that trafficking in persons is still on the rise in each of the regions discussed.

Europe's approach to the combat of trafficking was illustrated by way of the EU Framework Decision, the European Convention and the ECHR. Although these instruments seem similar, they differ in that the latter is human-rights based while the former two concentrate on a criminal-law approach to trafficking in persons. Each one of these instruments is modelled on the Palermo Protocol but extends beyond the provisions of the Protocol. The research has indicated that the EU region is the only region that has extended its legislative efforts with quality law-enforcement units and functional criminal-justice structures. The framework of police and judicial cooperation in criminal matters within the EU also includes crime-intelligence agencies as support structures. But similar to almost all the other regions, the prosecution of human-trafficking suspects in Europe is still problematic. The research has indicated, however, that EU states are willing to intensify regional cooperation in criminal matters. Regional cooperation and collaboration, and convergence of laws are relatively easy because of internal EU harmonisation systems. The proposal to establish an EPP will further bolster regional cooperation in that some of the states' powers in terms of criminal matters will be transferred to the regional level. This will hopefully lead to more effective prosecution of human-trafficking transgressors.

The Americas present a well-established regional organisation, the OAS, but as yet no comprehensive human trafficking treaty has been adopted. The Inter-American Convention focuses only on the trafficking of children, and more specifically on civil procedures regarding these trafficked youths' return to their country of origin. The Americas experience similar trafficking problems to that of other regions which are exacerbated by substantial underdevelopment and a high percentage of criminality in some countries. In order to address these challenges, an effective human-rights system consisting of the Inter-American Court and the Inter-American Commission has been developed. These two bodies have dealt with the phenomenon of trafficking quite successfully, as was indicated in the discussion of cases handed down by the court. The Court's jurisprudence reflects the region's characteristic social, cultural and political setting as well as its firm adherence to human rights. Criticism was lodged against exceptionally lengthy case completion; however, new mechanisms have been put in place to rectify this obstacle. The Inter-American Court also has the most extensive advisory jurisdiction of all regional courts. The Inter-American system is also responsible for the monitoring of states' implementation of the ACHR. In this regard,

member states" laws and policies are harmonised. There is however a need for an appropriate transnational law enforcement agency in the Americas, such as encountered in the EU.

The African region"s response to the problem of trafficking is of course of particular significance to South Africa. It consists mainly of the Ouagadougou Action Plan and the ACHPR. Regional efforts are enhanced by sub-regional initiatives, such as the ECOWAS Declaration and the SADC Action Plan. The Ouagadougou Action Plan, although wide-ranging, is not binding on Member States. Similar to other anti-trafficking instruments it urges African governments to ratify the Palermo Protocol and human rights instruments concerned with combating human trafficking at international and regional levels. Furthermore, countries are encouraged to develop and implement national plans of action to combat all forms of trafficking. Unfortunately, the distrust and internal strife between regional and sub-regional organisations hamper effective cooperation and coordination to combat trafficking on the continent. As a guideline for member states, the SADC Action Plan recommends the adoption of policies, programmes and legislation that address human trafficking. Much of the Plan is set out in vague, broad terms, which may be an indication that states should shape these provisions more precisely when addressing issues of national concern. However, the Plan needs to be more specific in establishing certain minimum standards such as the particular policies states should adopt so as to ensure uniformity in the Plan"s implementation and coordination. The harmonisation of laws and policies is another pressing concern, especially in areas such as extradition and border control. The African region does not make provision for a multi-agency task force such as Europol to strengthen border control through information-sharing and improved communication strategies. The ACHPR is unique in that it creates an African human-rights system which also gives effect to communal rights. The African Commission (which is structured similarly to the Inter-American Commission) and the African Court were created in terms of this instrument. Although the Court is very progressive in terms of aspects such as dispute resolution, its success cannot as yet be determined because very few judgments have been delivered.

The human-rights violations intrinsic to trafficking situations – not only in Africa, but universally - necessitate the protection of victims and their safe return to society, while ensuring the prevention of similar violations to others. This requires the involvement

and cooperation of not only regions, NGOs and citizens equally, but especially governments as key players. For regional human-rights systems to function optimally, it is submitted that all states should undertake to uphold the same criteria and principles of human-rights protection. This includes the ratification of applicable regional and universal human-rights treaties by all states in the particular region, as well as the acceptance of the specific regional court's jurisdiction. The process starts with states' assimilation of the substantive rights of these treaties into their legal systems. Any judgments of the regional court also need to have binding force for domestic courts. The adjudication of human-rights encroachments on a domestic level will alleviate an already burdened regional court system. Regional access to justice must be available to these victims in this regard. There should furthermore be no impunity for any human rights violations by the states themselves, which is of course highly idealistic on a continent such as Africa.

This chapter focussed also on regional anti-trafficking efforts in terms of international standards. Although international instruments served as a paradigm for regional responses, the relationship was found to be mutually reinforcing. Regional cooperation is problematic since some member states, especially in Africa, see it as impinging on their sovereignty. Additionally, the application of best practices for one region may not be appropriate in another, as every country has its intrinsic peculiarities, culture and beliefs. One may merely consider the diverging national policies on prostitution in this regard. Lastly, it was noted that regional organisations can play an important role in combating human trafficking by promoting policy coherence and assisting governments in developing national legislation. It is here where the crux of the success of all initiatives rest. States Parties must fulfil their commitments by giving effect at national level to the provisions of both the regional and international trafficking instruments. The failure of some regional initiatives is ascribed to the fact that the strategies to combat trafficking are based on national competences, while the crime is transnational in nature. While seeking the solution beyond national borders may be part of the answer, there is a need for more sustainable solutions, and not short-sighted stop-gap measures. A regional response should especially devote serious attention to root causes of trafficking. In the next two chapters, the effectiveness of combating trafficking within domestic borders will be examined and obstacles to effective, pro-active and dissuasive national trafficking strategies will be identified.

CHAPTER 6

COMBATING HUMAN TRAFFICKING IN THE UNITED STATES, GERMANY AND NIGERIA

6.1 Introduction

Previous chapters in this study have highlighted the manner in which international, regional and sub-regional organisations have attempted to combat this crime. International legal instruments such as the Palermo Protocol have thus far not been very effective in halting human trafficking. Some regional instruments have produced better results; however these agreements also have shortcomings. At the African level, for example a non-binding Action Plan has been introduced. International and regional human-rights instruments have more effect as their legislative measures are utilized more effectively to safeguard the human rights of victims. In this chapter, specific countries' approaches to effectively prohibit and penalize trafficking nationally will be considered. National legal frameworks may provide answers to correct the weaknesses in the international systems. The results drawn will inform South Africa's need to develop comprehensive anti-trafficking legislation and enforcement mechanisms.

This chapter presents a case study of the US, Germany and Nigeria, analysing the legal measures taken to address human trafficking. When evaluating the three countries' approaches and policies towards the combating of human trafficking, one will necessarily have to look at the various ratifications of international treaties by these jurisdictions, as well as the number of ratifications. Not only is this important to determine the countries' commitment and progress made towards actual accomplishments in this field, but it also underscores the relevancy of a particular instrument.

The jurisdictions selected have all implemented anti-trafficking legislation. However, even in these countries with human-trafficking laws, such legislation may be underused or

poorly implemented.¹ Relatively little independent assessment has been done of the counter-trafficking policies and programmes in these jurisdictions. Consequently research in this regard is crucial in order to identify best practices from the various jurisdictions. Each jurisdiction will be examined to establish whether the measures adopted are successful and if not, possible reasons will be furnished as to why judicial systems are failing in their endeavours to fight trafficking and prosecute perpetrators.

The three countries were selected mainly on strategic, historical and geographical grounds (with one locality each in the Americas, Europe and Africa). However in all three countries human trafficking is of great concern. The countries also differ in terms of socio-economic factors. The US and Germany are seen as first-world countries, while Nigeria is a third-world developing country. As such, one may assume that the people in these countries are vulnerable to trafficking for diverse reasons. In all three the countries examined, the effects of globalisation are witnessed. While a demand for cheap labour is evident in developed countries; poverty and a high rate of unemployment in developing countries create ideal opportunities for human trafficking to flourish.² In Nigeria, for example, one would expect that in the pursuit of a better life abroad, people would fall victim to human traffickers. This is indeed the pattern of trafficking, as will be shown in the sections that follow. Human-trafficking intensifiers such as migration will also be considered. Strict national anti-immigration laws force people to cross borders illegally. This again makes them vulnerable to deceptive traffickers who offer false assistance. The issue of migration is also connected to globalisation for “[a]s long as the current economic globalization process privileges movement of finance capital while restricting the movement of labour or human capital across national borders, trafficking of people will continue.”³ One would expect that national anti-trafficking frameworks would consider these issues in attempting to solve this problem.

¹ Askola *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (2007) 165.

² Makarenko “Organized Crime or Crimes Organized? Isolating and Identifying Actors in the Human Trafficking Chain” in Jonsson (ed) *Human Trafficking and Human Security* (2009) 26. The polarisation of the world economy through globalisation has created further gaps between the rich and the poor. For further information, see Chap 3, para 3.15.

³ Jana, Bandyopadhyay, Dutta & Saha “A Tale of Two Cities: Shifting the Paradigm of Anti-Trafficking Programmes” in Masika (ed) *Gender, Trafficking and Slavery* (2002) 69 70.

The Nigerian attempt to counter trafficking will also provide important evidence for development of legislation measures. If implementing laws against trafficking is not adequate to contain the problem, what further legal measures must be undertaken for effective combating? This study will show that clear principles in legislative texts, for example, those contained in Germany's Basic Law,⁴ guide the development of applicable human trafficking legislation and add value to the provisions and how they are implemented. These principles in the Basic Law are justiciable and provide the *Bundesverfassungsgericht*⁵ with the means to adjudicate the constitutionality of the legislation.

In most of the countries examined, the majority of offenders are nationals of the same country in which the trafficking case is investigated.⁶ In Europe, groups operating in the field of human trafficking are mainly loose networks rather than mafia-type, hierarchical organizations. They include different nationals operating in their area of competence and, while they specialize in human trafficking, they also operate in related crimes such as pimping, forgery of documents, smuggling of migrants and money-laundering. Traffickers can be men or women, but in a country such as Nigeria it is significant that the trafficking of women from Nigeria to Italy is managed mainly by women, with men relegated to largely secondary functions.⁷ According to the German Federal Office of Criminal Investigation (BKA), more than 20 per cent of suspects in German human-trafficking cases are women.⁸ Relatively few offenders in human-trafficking cases are prosecuted successfully, resulting in a very small number of convictions of traffickers. In recent years, many countries have revised their legislation in order to comply with the requirements of the Trafficking Protocol. However, the implementation of this legislation is still pending in many countries.

⁴ The Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) was approved on 8 May 1949, and came into effect on 23 May 1949. It is Germany's constitutional law.

⁵ The Federal Constitutional Court (or BVerfG) is a special court established by the *Grundgesetz*.

⁶ UNODC *Global Report on Trafficking in Persons* (2009) 45.

⁷ *Ibid.* See also United Nations Interregional Crime and Justice Research Institute (UNICRI) *Trafficking of Nigerian Girls in Italy* (2010) 37-39; Prina *Trafficking of Nigerian Girls to Italy-Trade and Exploitation of Minors and Young Nigerian Women for Prostitution in Italy* (2003) 30; Okojie CEE *Trafficking of Nigerian Girls in Italy- Report of Field Survey in Edo State, Nigeria* (UNICRI Report Benin City 2003) 56-58.

⁸ Bundeskriminalamt *Bundeslagebild Menschenhandel 2005* (2006) 8. The BKA investigates organised and severe crimes, such as trafficking in human beings and pimping.

6.2 The United States of America (US)

The US has a long history of slavery which pre-dates its founding in 1776.⁹ The southern states of the US continued practising its slavery tradition until after the American civil war when the legal institution was outlawed. This happened in 1865 with the passage of the Thirteenth Amendment to the United States Constitution. Section 1 of the Amendment proclaims that “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”. In the early twentieth century, slavery again became a concern in the country. However, the slavery focused on white females enslaved by foreigners (especially Arabs and Asians) for sexual exploitation. In reaction to this crime, the White Slave Traffic Act (or Mann Act) was passed in 1910.¹⁰ This Act first introduced the phrase “human trafficking for sexual enslavement”. Since the passage of the Mann Act, the country has been plagued by slavery in all possible forms. Consequently, the umbrella term “human trafficking” has been broadened to include all types of coercive behaviour.

The US became a signatory to the Palermo Protocol on 13 December 2000, and became an official party to the instrument on 3 November 2005.¹¹ The US has also signed, but not

⁹ The earlier slaves were mainly white Europeans in contrast to the African slaves of the 1800s. See Jordan & Walsh *White Cargo: The Forgotten History of Britain's White Slaves in America* (2007) 11-20. However, Deer “Relocation Revisited: Sex Trafficking of Native Women in the United States” 2010 36(2) *William Mitchell Law Review* 621 628-629 explicates further that: “[t]rafficking in the US long predates the current legal regime in power; the tactics used by sex traffickers today were used against Native peoples from the first moment of contact. These tactics were pioneered by the Spanish and Portuguese, the French and the English, the Dutch and the Russians... Colonial legal systems historically protected (and rewarded) the exploiters of Native women and girls and therefore encouraged the institutionalization of sexual subjugation of Native women and girls”.

¹⁰ See Chap 2 for further information.

¹¹ See UNTS “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime” http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en (accessed on 2013-01-10). The CTOC and Migrant Smuggling Protocol were also signed on the same date, with reservations. In its ratification, the US reserved the right to limit application of certain provisions of the CTOC and Palermo Protocol (art 15, para 1(b)) to a manner consistent with already existing federal law. This holds that although the US does not provide for plenary jurisdiction over offences that are committed on board ships flying its flag or aircraft registered under its laws, in a number of circumstances US law does provide for this type of jurisdiction. In view of its reservations, the US declared that it would not enact new legislation to fulfil its obligations under the Protocol. The government believes that US federal criminal functions effectively as the principal legal regime within the US for combating human trafficking. However, where the situation may evolve that US federal and state criminal law may not be entirely adequate to cover trafficking situations, it will utilize the Protocol’s obligations.

ratified, the ICESCR, CEDAW and the CRC.¹² Similarly, the government has only signed the Rome Statute on 31 December 2000, stating specifically that it is not a Party to this particular treaty. According to the Vienna Convention on the Law of Treaties,¹³ while it is not legally bound to implement the specific provisions of those treaties, the US as a signatory must not act to defeat their object and purpose. The US has however only signed but not ratified the Vienna Convention on the Law of Treaties.¹⁴ Still, it regards this convention as “the authoritative guide to current treaty law and practice”.¹⁵ The US government has also accepted that it is bound by customary international law not to defeat a treaty’s object and purpose. Similarly, while not a party to the 1977 Additional Protocols to the Geneva Conventions, the US has indicated that it considers certain provisions in this treaty to reflect customary international law.

There are a few treaties that the US did not sign nor ratified. These are the Optional Protocol to ICESCR, the Migrant Workers Convention, and the Optional Protocol to CEDAW. Other than signing the CTOC and the Palermo Protocol, it is evident that the US has chosen not to become a party to the latest treaties which also, indirectly, address human trafficking. Amongst these is the Migrant Workers Convention, an important treaty in that it controls the illegal immigration and employment of migrant workers, but it also highlights several very useful anti-trafficking measures. The Convention’s framework on especially forced labour, addresses human trafficking more concretely than even the Palermo Protocol, which was specifically created to address the issue. The treaty grants migrant workers - even when they are not citizens and are of illegal status - basic human rights. This is a dissimilar position to that propagated by the US which allows certain migrant workers to be treated differently than its national workers. Although many aspects of the treaty are already encoded in US law, the adoption of the Migrant Workers Convention would require a complete overhaul of existing US labour legislation.

¹² The US signed the ICESCR on 5 Oct 1977; the CEDAW on 17 Jul 1980; the CRC on 16 Feb 1995. The US has refrained from ratifying the CRC based on concern over the treaty’s impact on state and national authority and the possible eroding of parental rights and “traditional” family values. See Green “Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap between US Immigration Laws and Human Trafficking Laws” 2008 12(2) *UC Davis Journal of Juvenile Law & Policy* 309 375.

¹³ Vienna Convention on the Law of Treaties 1155 UNTS 331 (adopted 22 May 1969, entered into force 27 Jan 1980) art 18.

¹⁴ The US signed the Vienna Convention on the Law of Treaties on 24 Apr 1970.

¹⁵ See Briggs “United States Ratification of the Vienna Treaty Convention” 1979 73(3) *The American Journal of International Law* 470 471.

The US has signed and ratified quite a few conventions, though almost always with extensive reservations. Most of these reservations revolve around the country not being bound by certain provisions in conflict with their constitution or federal laws, or where US laws were considered sufficient to address the particular problem. But as a matter of international law, reservations to treaties may not contradict the object and purpose of the treaty at issue.¹⁶ One example of a treaty with reservations is the ICCPR, which the US signed on 5 October 1977, and ratified on 8 June 1992.¹⁷ The US asserts in connection with its ratification of the ICCPR that the treaty is not “self-executing”. Nevertheless, the laws of the US and its states as well as their implementation must be consistent with the ICCPR. This follows directly from the US Constitution (article 6, section 2) which declares that “all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land”. Furthermore, the UNHRC, responsible for interpreting and monitoring compliance with the ICCPR, has contended that reservations or interpretive declarations should not “seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical or to be accepted only in so far as they are identical, with existing provisions of domestic law”.¹⁸ This stipulation will also be applicable to the OPCC, the OPSC, the CAT and the CERD which the US has all signed and ratified.¹⁹ The US has almost completely ignored international labour treaties. The country has not ratified the ILO’s Forced Labour Conventions C29 (Forced Labour) or C138 (Minimum Age Convention). The US has ratified the 1957 C105 (Abolition of Forced Labour) on 29 August 1991, and the C182 (Worst Forms of Child Labour) on 2 December

¹⁶ Vienna Convention on the Law of Treaties (n13 *supra*) art 19(3).

¹⁷ The reservations are quite extensive, but generally focus on the idea that the US’ policy and practice are generally in compliance with the Covenant’s provisions, eg, “(3) [t]hat the US considers itself bound by art 7 to the extent that „cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the US”; or that it does not adhere to a specific provision, eg, “(4) [t]hat because US law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of para 1 of art 15”. The US further reserves the right to treat juveniles as adults in the US, in exceptional circumstances, and with respect to juveniles younger than 18 who volunteer for military service. The US does prohibit the forced recruitment of child soldiers and recognizes that juveniles can be victims of human rights abuses and crimes as a matter of domestic law.

¹⁸ See UNHRC *General Comment 24 on Reservations to ICCPR* UN Doc CCPR/c/21/Rev 1/Add 6 (1994) para 19.

¹⁹ The OPCC and the OPSC were signed on 5 Jul 2002; ratified on 23 Dec 2002 with reservations. In its lengthy reservations, the US makes it very clear (in capital letters) that it assumes no obligations under the CRC by becoming a party to the Protocol. It specifically differs from the various definitions provided in the OPSC for “child pornography” and “sale of organs”. The US signed the CAT on 18 Apr 1988 and ratified on 21 Oct 1994. It signed the CERD on 28 Sep 1966 and ratified it on 21 Oct 1994 with reservations.

1999. Regionally, the US has signed and ratified the OAS Charter,²⁰ but the country is not a signatory to the Inter-American Convention on Traffic in Minors. The US is a signatory to the American Convention on Human Rights but has never ratified it.²¹ The US does not recognize the jurisdiction of the Inter-American Court of Human Rights nor does it recognise the competence of the Inter-American Commission on Human Rights.

It seems that though the US has attempted to establish itself as an international leader in the struggle to abolish human trafficking, the treaties that the country has chosen to sign have been limited to those that address human trafficking from a narrow, law-enforcement perspective. While appearing tough on human trafficking, the US does not fully commit itself to the problem by adopting fundamental treaties especially on labour and immigration laws. Ratification of these treaties will bring the US into agreement with internationally accepted standards.

The US has been listed as a human-trafficking source, transit, and destination country for men, women, and children.²² Although precise figures are difficult to determine, an estimation of people trafficked annually to the US has been determined at 14 500 to 17 500.²³ According to US law-enforcement sources, trafficking occurs mainly for forced labour, especially for domestic servitude, but also for employment in agriculture, manufacturing, janitorial services, hotel and food services, construction, landscaping, health and elder care, hair and nail salons, and strip-club dancing.²⁴ Federal and state human-trafficking information however indicate that more investigations and prosecutions have been instituted for sex-trafficking offences than for labour-trafficking offences.²⁵ There

²⁰ The US has signed the OAS Charter on 30 Apr 1948 and ratified it on 15 Jun 1951 with reservations.

²¹ The American Convention on Human Rights was signed on 1 Jun 1977 by the US.

²² See US Dept of State *Trafficking in Persons Report 2011* (2011) 372; US Dept of State *Trafficking in Persons Report 2012* (2012) 359.

²³ Bialik "Suspect Estimates of Sex Trafficking at the World Cup" *The Wall Street Journal* 19 Jun 2010. Correct information seems difficult to ascertain as the US government only keeps a count of survivors, who have been assisted by the government in acquiring immigration benefits by receiving a "T-visa". Only 25% of the confirmed victims of human trafficking were officially certified by obtaining a "T-visa". While the findings represent the government's best estimate and only reliable data. Banks & Kyckelhahn *Characteristics of Suspected Human Trafficking Incidents 2008-2010* (2011) 7 caution that "... the data described in this report reflect the information that was available to, and entered by, these state and local law enforcement agencies," and such data systems are still being established and are likely not recording all incidents.

²⁴ See US Dept of State *Trafficking in Persons Report 2010* (2010) 338.

²⁵ Banks & Kyckelhahn (n23 *supra*) 1 found that in this period 2515 suspected cases of human trafficking were opened by federal anti-trafficking task forces. Of these cases, 82% were classified as sex trafficking with nearly 50% of victims under the age of 18. Only about 10% of the incidents were classified as labour

may be many reasons for this discrepancy. One possible explanation could be that labour cases often involve large numbers of victims per case. It is also mostly foreigners who are trafficked for forced labour, and these victims tend to avoid law enforcement agencies.²⁶ If US citizens are trafficked, these persons are found to be more in the sex industry than in labour trafficking.²⁷ Another clarification could be the fact that some institutions regard forced prostitution and sex services as falling under the category of forced labour.²⁸

It has been projected that there are at any given time about 10,000 forced labourers in the US, of whom around one-third are domestic servants.²⁹ These workers may be victims of fraudulent recruitment practices which lead to involuntary servitude or debt bondage. Trafficking in children for especially domestic labour seems to be an extension of a common (but illegal) practice in Africa, which has spread as more well-to-do Africans immigrate to the US.³⁰ The persons trafficked to the US originate mainly from Mexico and East Asia,³¹ while a number of people come from South Asia, Africa, Central America, and Europe as well. The largest concentrations of trafficking victims are located in high-population hubs such as California, New York, Texas, and Florida.³²

trafficking. Previous research undertaken by Clawson, Dutch & Cummings *Law Enforcement Response to Human Trafficking and Implications for Victims: Current Practices and Lessons Learned* (2006) 27 also indicate that forced prostitution formed the majority of trafficking cases; however the bulk of these incidents (73%) concerned adult victims. It seems that in the US child trafficking for sexual purposes has increased drastically in the period 2006 – 2011.

²⁶ Clawson *et al* (n25 *supra*) 28 note that victims hardly report abuse to law-enforcement. A third (32%) of trafficking cases were identified during the course of other investigations, another third (30%) came from information received by citizens, while 25% were referrals by other law-enforcement officers. A reason for this could be that the vast majority of those who illegally enter the US borders are smuggled rather than trafficked. As such, they do tend to avoid law enforcement. See Torg “Human Trafficking Enforcement in the United States” 2006 14 *Tulane Journal of International and Comparative Law* 503 505.

²⁷ Banks & Kyckelhahn (n23 *supra*) 1, 6 confirm that 83% of victims in sex-trafficking cases were identified as US citizens, while most confirmed labour-trafficking victims were identified as undocumented immigrants (67%) or legal immigrants (28%). Victims who were US citizens had a disproportionately high number of reported cases compared to victims from other countries, which may be attributed to an increased likelihood of media coverage and ease of detection.

²⁸ See eg HRC *Hidden Slaves - Forced Labour in the United States* (2004) 1.

²⁹ HRC (n28 *supra*) 10, 15.

³⁰ Callimachi “Child Maid Trafficking Spreads from Africa to US” *Associated Press* 28 Dec 2008 <http://wnnbreakingnewsportal.wordpress.com/2008/12/28/child-maid-trafficking-spreads-from-africa-to-us/> (accessed 2013-01-10).

³¹ See HRC (n28 *supra*) 13 stating that in terms of forced labour China seem to contribute the most (estimated) victims, followed by Mexico and Vietnam. The US is also the major destination country for the kidnapping and trafficking of young children for adoption by childless couples unwilling to wait for a child through legitimate adoption procedures and agencies. See Miko *Trafficking in Persons: The US and International Response* (2006) 11.

³² HRC (n28 *supra*) 1. See also US Dept of State *Trafficking in Persons Report 2011* (n22 *supra*) 373.

6.2.1 The legal framework to combat human trafficking in the US

As in the international community, human-trafficking crimes came to be developed in the US only in the late 1990's. The US federal government has taken a firm stance against human trafficking both within its borders and beyond. Furthermore, more than half of the states in the US currently criminalize human trafficking.³³

Human trafficking is prohibited by the US Constitution in the Thirteenth Amendment which outlaws slavery and involuntary servitude.³⁴ Reinforcing the Constitutional prohibition are criminal statutes such as the United States Code (USC) Title 18 - the criminal and penal code of the US federal government. Laws relating to slavery, migration, organised crime, prostitution and child sexual abuse were commonly used to prosecute traffickers. Amongst these laws are the Racketeer Influenced and Corrupt Organisations Act;³⁵ the Travel Act;³⁶

³³ States that have introduced human-trafficking legislation are Arizona, California, Colorado, Columbia, Connecticut, Illinois, Indiana, Iowa, Vermont, Massachusetts, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Texas, Virginia, and Washington. States where no bills on human trafficking have been introduced are Alabama, Alaska, Arkansas, Delaware, Idaho, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin and Wyoming. There are states that have introduced bills (not specifically anti-trafficking), but which will contribute towards combating human trafficking. These states are Arizona, Florida, Georgia, Hawaii, Kentucky, Maryland, Nevada, New Hampshire, Rhode Island and Utah. After being identified in 2010 as having the highest rate of child-sex trafficking in the US, (with 375 persons exploited for the commercial sex industry every month), Atlanta, Georgia enacted a human trafficking bill (HB 200) on 1 Jul 2011. Yet the problem is that state law, in comparison to federal laws, is not as strict in terms of penalties. See US Dept of State *Trafficking in Persons Report 2011* (n22 *supra*) 377.

³⁴ This Amendment was promulgated in 1865 with the proscription of slavery. Further attempts to stamp out "any other kind of slavery, now or hereafter" were issued in a series of opinions in the *Slaughter-House Cases*, 83 US 36, 72 (1872). Also, in 1874 the "Padrone statute" was adopted by Congress to combat the kidnapping of boys in Italy for use as "shoeblocks, street musicians, and beggars on the streets of American cities". See HRC (n28 *supra*) 19. The Court in *US v Lewis* 644 F Supp 1391 CR No G85-133 (1986) 1400 emphasized the continued applicability of this statute: "The 13th Amendment and its enforcing statutes are designed to apply to a variety of circumstances and conditions. Neither is limited to the classic form of slavery. Both apply to contemporary as well as to historic forms of involuntary servitude. The amendment and statutes were intended not merely to end slavery but to maintain a system of completely free and voluntary labour throughout the United States ... [I]n general, the defence against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the labourer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh over-lordship or unwholesome conditions of work [quoting in part *Pollock v Williams* 322 US 4, 17-18, 64 S Ct 792, 799-800, 88 L Ed 1095 (1944)]."

³⁵ The Racketeer Influenced and Corrupt Organisations (RICO) Act 18 USC ss 1961–1968. The Act seeks to eliminate the infiltration of organised crime and racketeering into legitimate commercial organisations. Human trafficking resorts under this Act as the crime often comprise of organised criminals involved with foreign commerce.

³⁶ The Travel Act 18 USC s 1952 prohibits travelling between states or using an interstate facility in aid of any crime.

the Conspiracy and Attempt Act;³⁷ the Immigration and Nationality Act (INA);³⁸ the Alien Smuggling Act;³⁹ the Mann Act (White Slave Traffic Act);⁴⁰ the Anti-Peonage Act;⁴¹ the

³⁷ The Conspiracy and Attempt Act 21 USC s 846 - here an agreement of 2 or more people to commit a crime or to accomplish a legal outcome through unlawful acts is punished. There is furthermore a specific statute called Conspiracy against Rights 18 USC (s 241) which deals with conspiracies to deprive a US citizen of rights justified by the Constitution.

³⁸ The Immigration and Nationality Act (INA) 18 USC s 274 concerns specifically the smuggling of aliens.

³⁹ The Alien Smuggling Act 18 USC s 1324 defines several distinct offenses related to aliens. Although crimes committed under this title were quite severe, sentences received were very lenient. Eg, in *US v Crawford* 769 F2d 253 CR No 85-2105 (5th Cir 1985), the defendants were convicted on one count of conspiring to transport illegal aliens (18 USC s 371), 9 counts of knowingly transporting illegal aliens (18 USC s 1324), and 11 counts of holding persons in involuntary servitude (18 USC s 1584). They were sentenced to only 5 yrs imprisonment and a fine of US\$1000 to the state. Adding to this Act as s 1324(a)(3)(A) is the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), enacted on 30 Sept 1996 which makes it an offence for any person to knowingly hire at least 10 individuals with actual knowledge that these individuals are unauthorized aliens during any 12-month period. Recent legislation passed includes the SAVE Act (HR 4088/S 2366/S 2368) amending both the INA s 274 (expanding its scope) and Title 18 of the US Code (further sentencing provisions).

⁴⁰ See Chap 2 for further information. The Mann Act was designed to regulate interstate and foreign commerce by prohibiting the transportation of women and girls across interstate-lines for immoral purposes. The vague wording of the Act gave rise to politically-motivated prosecutions of especially suspected communist sympathizers. Eg, Charlie Chaplin was charged in 1944 under the Mann Act for producing a baby out of wedlock (which was proved not to be his after paternity tests). Also the first African-American heavyweight champion, Jack Johnson, and the guitar player Chuck Berry were charged under the Mann Act for consorting with white women (their girlfriends). Johnson was sentenced to 1 year in prison. See Holman "The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively" 2008 44 *Texas International Law Journal* 99 109. The Mann Act is currently still used to charge anyone who knowingly transports any person in interstate or foreign commerce for prostitution or any sexual activity. Because the Mann Act does not require proof of force, fraud, or coercion, it is sometimes utilized to prosecute problematic trafficking cases. Eg, in both *US v Daneman* 06 Cr 717 (AKH) 2008 US Dist (SDNY 30 May 2008) and *US v Pipkins* 378 F 3d 1281, 1295 (11th Cir 2004); 412 F 3d 1251 (11th Cir 2005); (ND Ga 31 Oct 2007), insufficient evidence regarding coercive methods used warranted employing the Mann Act to charge the defendants, which succeeded on both counts.

⁴¹ The Anti-Peonage Act 1867 currently exists as 18 USC s1581 "Peonage; Obstructing Enforcement", which falls under USC Chap 77 "Peonage, Slavery, and Trafficking in Persons". The Act declares the holding of any person to service or labour under the peonage-system as prohibited. It makes it a crime to use force, a threat of force or a threat of legal coercion to make a person to work against his will. Eg, in *US v Booker* 655 F 2d 562, 564 (4th Cir 1981), 3 defendants were found guilty of kidnapping 2 persons with false promises of work. The victims were then transported to a labour camp with the intent of holding them as slaves, where they worked under constant threat of physical harm and pervasive fear without any compensation. The court determined that the defendants violated 18 USC s 1583 "Enticement into Slavery" and its counterpart statutes, s1582 "Vessels for Slave Trade" and s 1584 "Involuntary Servitude". These statutes and the Thirteenth Amendment to the Constitution all sought to prevent the coerced labour or involuntary servitude of any person by another. 18 USC s1584 makes it unlawful to hold a person in a condition of slavery against their will. In *US v Kozminski* 487 US 931 (1988), the Supreme Court found that s 1584 should be narrowly interpreted with the result that this section only criminalises servitude brought about through use or threatened use of physical or legal coercion, and excludes other conduct that can have the same purpose and effect. However, in *US v Lewis* 644 F Supp 1391 CR No G85-133 (1986), aggravated child abuse was even categorized under s 1584. In this case, a religious sect leader, William Lewis (aka My Lord Prophet), forced adolescent boys to endure various forms of physical punishment (including death, imprisonment, beating, burning, hanging or stoning). One victim died from repeated beatings. The climate of fear that pervaded in the camp established conditions of involuntary servitude, even though the nature of work done in the camp was "non-commercial", and the children's parents were present. Sex trafficking of children is elaborated on in 18 USC s 1591.

Federal Kidnapping Act⁴² and the Protection of Children Against Sexual Exploitation Act.⁴³ In 1994 the largest crime bill in the history of the US was enacted, namely the Violent Crime Control and Law Enforcement Act.⁴⁴ Amongst others, this Act contains substantive criminal provisions regarding gang crimes, alien smuggling, sexually violent offenders and sexual acts with a juvenile. Although a number of the above legislation such as the Anti-Peonage Act, the Federal Kidnapping Act and the Protection of Children Against Sexual Exploitation Act may address some trafficking concerns, these laws are not directly applicable to human trafficking.⁴⁵ They are less serious offences and consequently carry less severe sentences which do not reflect the serious harm done to victims. None of the existing federal laws were comprehensive enough to effectively protect victims of trafficking or to prosecute their traffickers.

⁴² The Federal Kidnapping Act 18 USC s 1201 allows federal law enforcement intervention once state lines were crossed with the victim.

⁴³ The Protection of Children Against Sexual Exploitation Act (1977) was amended several times and is now codified as 18 USC ss 2251-2253. This Act criminalises any conduct where a minor is used to engage in sexually-explicit conduct, especially for the purpose of producing any visual depiction of the conduct.

⁴⁴ HR 3355 Pub Law 103-322. Loopholes in certain provisions made it difficult to bring cases to trial, eg where the requirement of intent complicated the crime to travel with intent to engage in sexual acts with a juvenile. It is very noticeable that in the US, laws on prostitution and related activities (pimping, pandering, procuring, maintaining a brothel, etc) are all state-generated laws. There are no federal laws prohibiting prostitution and related activities. See Ontiveros, Wolfe, Lederer, & Zarembka "Women and Children First? New Strategies in Anti-trafficking Initiatives" 2005 6(2) *Georgetown Journal of Gender & the Law* 193 199.

⁴⁵ The enforcement of available legislation to combat trafficking has also been not very effective in the past. It seems that offences resembling trafficking violations were mainly prosecuted under 18 USC s 1584 - whether labour trafficking or sex-trafficking. Most of the cases before the enactment of the Trafficking Victims Protection Act 2000 (TVPA) concerned involuntary servitude in the form of forced labour, eg *US v Alzanki* 54 F 3d 994, 998-1000 (1st Cir 1995) (finding an employer guilty of committing involuntary servitude where he and his wife brought a Sri Lankan native to the US to clean their home for 15 hours a day for US\$120); *US v John Lester Harris* CR No 81-11 (EDNC 1989) (kidnapping and forcing undocumented migrant farm labourers to work on a labour farm); *US v Esperanza Vargas* CR No 91-521-02-RMB (1991) (keeping a minor Mexican domestic servant as slave by means of threats and violence); *US v Flores* CR No 96-806 (1997) (kidnapping and forcing undocumented Mexican migrant farm labourers to work through threats and violence); *US v Supawan Veerapol* CR No 98-00334 (1999) (Thai workers were forced to work long hours performing childcare, house-and restaurant-work under extremely coercive and abusive conditions). The *El Monte*-case of Sept 1995 involved the trafficking of 72 Thai nationals working in slave-like conditions in a garment factory. While the operators were charged with involuntary servitude, criminal conspiracy, kidnapping, smuggling and harbouring individuals in violation of US immigration law, the workers were imprisoned in terms of INS regulations. Before they could file a civil lawsuit against the operators, they first faced a legal struggle alleging false imprisonment by the US. After winning this first battle, they were issued with S-visas, which allowed them to stay in the country legally while pursuing their claims. See Chacón "Misery and Myopia: Understanding the Failures of US Efforts to Stop Human Trafficking" 2006 74 *Fordham Law Review* 2977 2988. The only major sex-trafficking case decided before the present TVPA is *US v Joseph Morales* 916 F Supp 336 CR No 95-52 (1996). In this case, the defendant smuggled Thai women into the US. Although many were prostitutes in Thailand, the victims were coerced and threatened to perform commercial sex acts in a prostitution trafficking ring, and worked under slavery conditions.

6.2.1.1 The Victims of Trafficking and Violence Protection Act of 2000 (TVPA)

To address the inadequacy of existing legislation and law enforcement to deter trafficking, and to acknowledge the gravity of trafficking in human beings, the US adopted the Victims of Trafficking and Violence Protection Act of 2000 or Trafficking Victims Protection Act.⁴⁶ Similar to the international community, the US also struggled with constructing a comprehensive definition of human trafficking. In order to guide policy development, a working definition of trafficking in persons was first produced by the President's Interagency Council on Women:⁴⁷

Trafficking is all acts involved in the recruitment, abduction, transport, harbouring, transfer, sale or receipt of person; within national or across international borders; through force, coercion, fraud or deception; to place persons in situation of slavery or slavery-like conditions, forced labour or services, such as prostitution or sexual services, domestic servitude, bonded sweatshop labour or other debt bondage.⁴⁸

This policy definition was substituted by the more restricted trafficking definition in the TVPA which defines "severe forms of trafficking in persons"⁴⁹ as:

(A) sex trafficking⁵⁰ in which a commercial sex act⁵¹ is induced by force, fraud, or coercion,⁵² or in which the person induced to perform such act has not attained 18 years of age; or

⁴⁶ Victims of Trafficking and Violence Protection Act of 2000 (Pub Law 106–386 HR 3244). Adopted by US Congress on 28 Oct 2000, enacted as 22 USC s 7101. This federal law is divided into 3 sections: Division A, the Trafficking Victims Protection Act (TVPA); Division B, the Violence Against Women Act of 2000 (VAWA); and Division C, Miscellaneous Provisions. See <http://www.state.gov/documents/organization/10492.pdf> (accessed 2013-01-10). The bulk of the Act is actually based on older laws. Chacón (n45 *supra*) 2980 comments that though "... legislative revisions brought the crime of „trafficking“ into the prosecutorial mainstream, [it] did nothing to address the ways in which the pre-existing legal regime upon which the TVPA is built actually facilitates trafficking”.

⁴⁷ The Clinton Administration assigned this body with coordinating US domestic and international policy on human trafficking. See Clinton *Memorandum on Steps to Combat Violence against Women and Trafficking in Women and Girls* Pub Papers 358-360 11 Mar (1998) 412-413.

⁴⁸ Goździak & Collett "Research on Human Trafficking in North America: A Review of the Literature" in IOM *Data and Research on Human Trafficking: A Global Survey* (2005) 99 105.

⁴⁹ TVPA (n46 *supra*) s 103(8).

⁵⁰ TVPA (n46 *supra*) s 103(9). Sex trafficking means the recruitment, harbouring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

(B) the recruitment, harbouring, transportation, provision or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude,⁵³ peonage, debt bondage,⁵⁴ or slavery.

This definition classifies human trafficking into only two categories - sex trafficking and labour trafficking. The new definition allows the charge of human trafficking to be brought against anyone involved in any of the steps of the trafficking process – whether a recruiter, a harbourer, a transporter, a buyer, a seller, or any trafficking-related activity such as a brothel owner or manager. The reach of law enforcement is further extended to include accomplices who are involved with only one part of the process to be charged with trafficking. Unlike the Palermo Protocol, the Act adopts a more restrictive outlook in its definition of the means of trafficking as it requires proof of the elements of force, fraud or coercion for the existence of “severe forms of trafficking”.⁵⁵ For children, the elements of force, fraud, or coercion are not required. However, this is applicable to children involved in sex-trafficking prosecutions.⁵⁶ The law also distinguishes human trafficking, where victims are coerced into entering the US, from human smuggling, where migrants enter the

⁵¹ TVPA (n46 *supra*) s 103(3). Commercial sex act means any sex act on account of which anything of value is given or received by any person. The TVPA’s definition thus rejects the distinction between forced and voluntary prostitution or sex work.

⁵² TVPA (n46 *supra*) s 103(2). Coercion means (a) threats of serious harm to or physical restraint against any person; (b) any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (c) the abuse or threatened abuse of the legal process.

⁵³ TVPA (n46 *supra*) s 103(5). Involuntary servitude includes a condition of servitude induced by means of (a) any scheme, plan, or pattern intended to cause a person to believe that, if that person did not enter into or continue in such condition, that person or any other person would suffer serious harm or physical restraint; or (b) the abuse or a threatened abuse of the legal process.

⁵⁴ TVPA (n46 *supra*) s 103(4). Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

⁵⁵ The Palermo Protocol defines the means of trafficking more extensively as “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”. See Chap 2 para 2.3.2. The TVPA does not only allow evidence of physical force but also of fraud and psychological coercion to sustain human trafficking charges. For a discussion on “severe forms of trafficking”, see n97 *infra*. The TVPA does not provide for any “ordinary forms” of trafficking.

⁵⁶ See TVPA (n46 *supra*) s 112 “Strengthening Prosecution and Punishment of Traffickers” 18 USC 1591. The TVPA mirrors the UN’s definition of child trafficking and “concur[s] with the general agreement in the international community that, in the case of minors, the trafficking term applies whether a child was taken forcibly or voluntarily, simply because children do not have volition and cannot consent to being smuggled”. See Gozdziaik “On Challenges, Dilemmas, and Opportunities in Studying Trafficked Children” 2008 81(4) *Anthropological Quarterly* 903 903. All 50 states prohibit the prostitution of children under state and local laws that predate the enactment of the TVPA.

country without authorization.⁵⁷ Different to the Palermo Protocol, the TVPA does not specify movement across international boundaries as a condition of trafficking. It also does not require the transportation of victims from one locale to another. The purpose of the TVPA is to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims”.⁵⁸ To accomplish this purpose, the US follows the familiar three-pronged approach of prevention, prosecution, and protection.

(i) Prevention

The TVPA has three main measures to help mitigate the factors that contribute to people becoming vulnerable to human-trafficking situations. These methods comprise administering economic alternatives,⁵⁹ increasing public awareness and information,⁶⁰ and consultation.⁶¹ Most importantly, this Act aims to prevent trafficking by fostering international cooperation with foreign governments in their efforts to combat human trafficking. This is accomplished mainly by establishing an annual country report on human-rights practices.⁶² Foreign countries receiving either economic⁶³ or security

⁵⁷ Human trafficking is a crime against the individual while human smuggling constitutes a crime against the state, which different implications. See TVPA (n46 *supra*) s 101(b)(17) & (19); 107(c)(1)(A). See also HRC (n28 *supra*) 21.

⁵⁸ TVPA (n46 *supra*) s 102(a). Goździak (n56 *supra*) 904 remarks: “It is interesting that women and children are lumped together in anti-trafficking legislation and the dominant trafficking paradigm when in all other instances, including labour laws, great care is taken to separate child from adult labour”.

⁵⁹ TVPA (n46 *supra*) s 106(a)(1)-(5). See TVPA (n46 *supra*) s 101(b)(4) which states that economic deprivation is one of the primary reasons for victims falling prey to human trafficking. It is argued that with the altering of poverty issues, subsequent decrease of victims and consequently also traffickers could result. Possible initiatives include micro-lending, giving the underprivileged job-training and counselling; providing programs that promote the possibility of women’s input on economic decision making as well as programs to keep children, especially young girls, in school. Others include the development of a curriculum that will warn outsiders of the dangers of human trafficking, and the giving of grants to NGO’s in order to advance the political, economic, social, and educational roles and capacities of women in their countries.

⁶⁰ TVPA (n46 *supra*) s 106(b). This is mainly attained through educational programs.

⁶¹ TVPA (n46 *supra*) s 106(c). Consultation consists of the President consulting with NGO’s regarding economic alternatives and awareness.

⁶² TVPA (n46 *supra*) s 104. The assessment of the countries’ efforts details the facilitation of trafficking and steps taken to prohibit and punish such activities domestically, as well as international cooperation in trafficking investigations, extradition of traffickers and assistance to victims. The countries are then ranked according to set minimum standards in a tier-system. The tier-system is discussed in Chap 2 of this study. The US was included for the first time as one of the ranked countries in the 10th annual report on 24 Jun 2010. See Ryf “The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000” 2002 34 *Case Western Reserve Journal of International Law* 45 53.

⁶³ TVPA (n46 *supra*) s 104(a). To accommodate this purpose, s 116(f) of the Foreign Assistance Act of 1961 (22 USC 2151(f)) was amended.

assistance⁶⁴ from the US are obliged to annually give a description of the nature and extent of severe forms of trafficking in persons in their country. The efforts by the governments of these countries to combat trafficking are to be assessed annually in the report. To evaluate the progress the US and foreign countries have made in addressing the crime, an Interagency Task Force to Monitor and Combat Trafficking has been established.⁶⁵ Minimum standards for the elimination of trafficking applicable to governments of countries of origin, transit, or destination are set,⁶⁶ and provision is made for assistance to foreign countries to meet the minimum standards.⁶⁷ However, if governments do not comply with the minimum standards set or are not making significant efforts to bring themselves into compliance with such standards, certain actions are taken against them.⁶⁸ These actions consist mainly of withholding non-humanitarian or nontrade-related foreign assistance, or multiple, broad-based restrictions on assistance.⁶⁹

(ii) Protection

As protection and assistance to trafficking victims were the primary goals of the TVPA, these measures are quite extensive.⁷⁰ Differentiation is made between protection granted to victims of human trafficking in foreign countries⁷¹ and those in the US.⁷² Trafficking victims of a severe form of trafficking in persons are eligible for US immigration relief and

⁶⁴ TVPA (n46 *supra*) s 104(b). S 502B of the Foreign Assistance Act of 1961 (22 USC 2304) was amended by adding at the end a new subsection.

⁶⁵ TVPA (n46 *supra*) s 105(a)-(e). This Task Force creates political will at the highest levels. It is chaired by the Secretary of State, also includes the National Security Advisor, the Attorney-General, CIA Director, US AID Administrator, and the Secretaries of Health and Human Services, Labour, Defence, and Treasury. The Task Force collects and organizes data on human trafficking, facilitates and enhances cooperation amongst all partaking countries, consults with NGO's and other entities and researches the role of "sex tourism" and the sexual exploitation of women and children internationally.

⁶⁶ TVPA (n46 *supra*) s 108.

⁶⁷ TVPA (n46 *supra*) s 109.

⁶⁸ TVPA (n46 *supra*) s 110.

⁶⁹ TVPA (n46 *supra*) s 110(d)(1), (2). Foreign assistance will be withheld for the subsequent fiscal year until such government complies with the minimum standards or makes significant efforts to bring itself into compliance. Broad-based restrictions are imposed in response to continued human rights abuses. However, critics such as Chuang "The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking" 2006 14(27) *Michigan Journal of International Law* 437 439 views these measures as "[a] powerful but blunt weapon for influencing the behaviour of other states, unilateral sanctions have long been criticized as inconsistent with international law and ineffective in practice".

⁷⁰ See TVPA (n46 *supra*) s 107. The TVPA authorizes and appropriates \$60 million in resources to address trafficking.

⁷¹ TVPA (n46 *supra*) s 107(a)(1), (2). Assistance consists mainly of anti-trafficking programs and initiatives and enhancing cooperative efforts between countries.

⁷² TVPA (n46 *supra*) s 107(b). "United States" means the 50 States of the US, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the US. See TVPA (n46 *supra*) s 103(12).

government benefits under Federal or State grant programs.⁷³ To qualify as a “victim of a severe form of trafficking”, the victim must have been subjected to an act or practice described in section 103(8) of the TVPA⁷⁴ and not yet attained 18 years of age, or a subject of certification. Certification implies that the victims, after making a *bona fide* application for a visa,⁷⁵ have complied with requests to participate in the investigation and prosecution of their traffickers and their continued presence in the US in order to ensure that the prosecution of traffickers is guaranteed.⁷⁶ Regardless of their potentially illegal or undocumented position, trafficking victims in US custody are granted status as crime victims,⁷⁷ not criminals (as illegal immigrants). They are guaranteed comprehensive victim services,⁷⁸ such as medical care, legal services, interpreting services, appropriate facilities

⁷³ TVPA (n46 *supra*) s 107(b)(1)(A), (B). These benefits include employment authorization, housing, mental health services, and Supplemental Security Income. Victims are also eligible for compensation from state and federal crime-victims programs.

⁷⁴ TVPA (n46 *supra*) s 107(b)(1)(C)(i). S 103(8) sets out the definition of a victim of a severe form of trafficking in persons. See n49 *supra*.

⁷⁵ The TVPA provides for 2 types of temporary immigration relief for victims: (1) continued presence, which allows for victims’ assistance as witnesses in an investigation or prosecution (2) Category T non-immigrant status or “T-visa”. This 3-year visa is only available to victims of a severe form of trafficking who cooperate with law enforcement and participate in prosecutions (if they are at least 15 yrs old), and would suffer extreme hardship if deported. The prescriptions for a T-visa are found in s 101(a)(15)(T) of the Immigration and Nationality Act (INA). According to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), a trafficking victim is likely to be inadmissible if she is HIV-positive (8 USC s 1182(a)(1)(A) i), or a prostitute (8 USC s 1182(a)(2)(D)), or has the potential to become a public charge (8 USC s 1182(a)(4)(A)). Although the TVPA amends the INA in that the Attorney-General (AG) may waive these health-related and public-charge grounds, admissibility still depends on the AG’s discretion. See Hartsough “Asylum for Trafficked Women: Escape Strategies beyond the T-Visa” 2002 13(1) *Hastings Women’s Law Journal* 77 99. Certification is done by the Office of Refugee Resettlement (ORR), through the joint efforts of the US Dept of Justice (DOJ) and Dept of Health and Human Services (HHS). Although generally referred to as a T-visa, it is technically not a visa because it is conferred to aliens present in the US by the Dept of Homeland Security (DHS) who does not have the authority to issue visas. Only the Dept of State may issue visas through consular offices. As such, aliens present in the US receive T-status, while only aliens situated outside of the US can receive T-visas. For further information, see Siskin & Wyler *Trafficking in Persons: US Policy and Issues for Congress* (2010) 24. T-visa holders may after 3 yrs apply for adjustment of status such as permanent residency or legal immigration status.

⁷⁶ TVPA (n46 *supra*) s 107(b)(1)(E)(i)(I), (II). This is also known as the “migrant model” approach, which requires that trafficking victims provide legal cooperation before being granted protection and assistance. See Jordan “Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings” in Masika R (ed) *Gender, Trafficking and Slavery* (2002) 29-30.

⁷⁷ TVPA (n46 *supra*) s 107(c)(1)(A). See also TVPA (n46 *supra*) s 102(b)(17), (18), (19) stating that these victims must not be inappropriately incarcerated, fined, or otherwise penalized for unlawful acts committed as a direct result of being trafficked. However, when applying for T-status, trafficking victims have to be admissible to the US or obtain a waiver of inadmissibility, according to TVPA (n46 *supra*) s 107(e)(3). This waiver is available for health related-, public charge-, or criminal grounds if the victim’s trafficking included possible illegal activities. The waiver is especially important for those involved in sexual trafficking since prostitution is one of the grounds of inadmissibility specified in the INA s 212(a)(2)(D). Also see Siskin & Wyler (n75 *supra*) 25.

⁷⁸ In order to maintain or improve on protection standards, officials undergo regular training in trafficking-victim identification and treating victims according to their specific needs. For child and adolescent victims, appropriate and victim-sensitive interviews are conducted by child forensic-interview specialists. The US government also funds an NGO-operated national hotline and referral service.

for detainment, and protection if their safety is in danger or they are at risk of recapture. They are also provided with education and vocational training, and employment placement. These benefits can also be extended to a victim's family when appropriate. If the victim is younger than 21 years of age, derivative T-visas are granted to the victim's spouse, minor children, and to the victim's parents.⁷⁹ If the victim is 21 years of age or older, these visas are awarded to the victim's spouse and children. No more than 5,000 visas or non-immigrant status may be awarded in any fiscal year. However, since the first visas were issued in 2002, the highest number of applicants received was 475 applicants (in 2009), of which 313 were approved.⁸⁰

Trafficking victims may also be eligible to apply for another form of immigration relief, known as U non-immigrant status or "U-visa".⁸¹ Victims of certain criminal activities,⁸² who have suffered substantial physical or mental abuse which can be verified, must also confirm by means of certification through law enforcement or immigration officials that they possess information about the criminal activity involved, and that they are cooperative in the investigation and prosecution of the criminal activity. If the victim is a child under the age of 16, the child's parent, guardian or friend may apply on behalf of the child. Under

⁷⁹ TVPA (n46 *supra*) s 107(e)(1)(C). The derivative visas are called T2-visas (for the spouses of T1-applicants); T3- visas (for T1-applicants' children) and T4-visas (for the parents of T1-applicants who are under 21 yrs of age).

⁸⁰ US Dept of State *Trafficking in Persons Report 2009* (2009) 57. The 313 certified victims came from 47 countries. The primary countries of origin for these foreign victims were Thailand, Mexico, Philippines, Haiti, India, Guatemala, and the Dominican Republic. Interestingly, labour-trafficking victims formed the largest group of foreign adult victims (82%), and most of these were men (58%) vs women (42%). Only 15% were adult sex-trafficking victims (all women), and 3% were both sex-trafficking and labour-trafficking victims. Of the foreign child victims, 56% were labour-trafficking victims (50% boys and 50% girls); 38% were victims of sex trafficking (16% of these victims were boys); and 6% were victims of both labour-and sex-trafficking. From 2002 to 2012, there were in total 2968 applications for T-status. Of these applications, 1862 were approved. During the same period, 1891 applications were made for derivative T-status, of which 1566 were approved. Of the adjudicated applications for T1 status, 68% were approved. In addition, of the adjudicated applications for derivative T-status, 84% were approved. See also Siskin & Wyler (n75 *supra*) 27. Some critics want more T-visas to be awarded - see Ontiveros *et al* (n44 *supra*) 106, 198.

⁸¹ This type of status or visa is created by The Violence Against Women Act of 2000, found in Div B of the TVPA. See INA s 101(a)(15)(U).

⁸² The criminal activity must have violated the laws of the US or occurred in the US. These activities may include any one or more of the following: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter, murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. See Siskin & Wyler (n75 *supra*) 29.

statute only 10 000 victims may receive the U-category per year.⁸³ Similar to T-status holders, those in U-status may apply for legal permanent residency. However, U-status holders are only eligible for assistance through programs offered by the Department of Justice's Office for Victims of Crime. The number of trafficking victims who receive U-visa relief is unknown, as information regarding the type of crime suffered by the victims is not disaggregated.

(iii) Prosecution

The TVPA contains numerous provisions regarding strengthening efforts to prosecute human traffickers.⁸⁴ Not only are penalties for existing crimes enhanced under the TVPA, but additional and stricter criminal statutes are created to apprehend and prosecute human traffickers, to deter recidivism and correspondingly decrease human-trafficking activities. The new or amended laws offer a variety of tools to increase the ability of federal prosecutors to charge, prosecute and convict traffickers and to streamline prosecutorial efforts.⁸⁵

The Federal Criminal Code (Chapter 77 of Title 18 USC) was amended in order to pursue traffickers more effectively and increase the penalties they can face. To begin with, the TVPA doubled the length of imprisonment for human-trafficking convictions. If convicted of human trafficking, a defendant can be sentenced up to twenty years in prison.⁸⁶ However, if death resulted from any act of human trafficking, or if the contravention included kidnapping and/or aggravated sexual abuse, the defendant can be imprisoned for any term of years up to life.⁸⁷ Moreover, 18 USC 1591 is amended to severely punish perpetrators who make use of children younger than fourteen for sex-trafficking purposes. These traffickers can receive any term of imprisonment up to life. If the child is older than fourteen

⁸³ INA s 214(o)(2). From Oct 2008 to Jun 2010, there were 18,126 applications for U-1 status and 10,712 (83%) were approved. See Siskin & Wyler (n75 *supra*) 30.

⁸⁴ Punishment and prosecution for trafficking-related offences are enhanced under the penal code for peonage and slavery.

⁸⁵ Tiefenbrun "The Domestic and International Impact of the US Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?" 2005 2 *Loyola University Chicago International Law Review* 1 38. See also Clawson, Dutch, Lopez & Tiapula *Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices* (2008) 28.

⁸⁶ TVPA (n46 *supra*) s 112(a)(1)(A).

⁸⁷ TVPA (n46 *supra*) s 112(a)(1)(B).

but has not yet attained the age of eighteen, punishment consists of a fine or a prison penalty of up to twenty years, or both.⁸⁸

Because the existing three criminal provisions of “peonage,” “enticement into slavery,” and “sale into involuntary servitude” were insufficient to effectively prosecute human traffickers, four additional criminal acts were criminalized: “forced labour,” “trafficking with respect to peonage, slavery, involuntary servitude, or forced labour,” “sex trafficking of children or by force, fraud, or coercion,” and “unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labour”.⁸⁹

The definition of involuntary servitude as interpreted by the US Supreme Court in *United States v Kozminski*⁹⁰ was expanded to criminalize a broader range of actions constituting involuntary servitude. The court held in the *Kozminski*-case that violations of involuntary servitude must include threats or acts of physical or legal coercion. The TVPA further includes non-violent coercion such as psychological coercion in the definition.⁹¹ Traffickers’ use of psychological coercion, trickery, and the seizure of documents are held as sufficient proof that trafficking has occurred. Whereas, prior to the TVPA, the penalties for placing people in involuntary servitude were a maximum prison term of ten years, punishment was extended to twenty years (or a fine, or both). For those who unlawfully destroy, conceal, remove, confiscate, or possess another’s official documents (i.e. passport), a maximum 5-year penalty is provided for.⁹² The TVPA also called for amending immigration statutes to punish traffickers who entrap victims by taking their passports and identification from them. There is also a five-year maximum penalty for the related offence of fraud in foreign labour contracting under 18 USC s 1351.

The statute also permits a court to require a defendant to pay restitution to a victim of human trafficking for the full amount of the victim’s losses as determined by a court.⁹³ Traffickers also face the possibility that trafficked victims may seek restitution from them by

⁸⁸ TVPA (n46 *supra*) s 112(a)(2) s 1591 “Sex Trafficking of Children or by Force, Fraud or Coercion”.

⁸⁹ TVPA (n46 *supra*) s 112(a)(2) ss 1589-1592.

⁹⁰ See *United States v Kozminski* (n41 *supra*) 487.

⁹¹ TVPA (n46 *supra*) s 112(a)(2) s 1589 “Forced Labour”.

⁹² TVPA (n46 *supra*) s 112(a)(2) s 1592 “Unlawful Conduct with respect to Documents in furtherance of Trafficking, Peonage, Slavery, Involuntary Servitude, or Forced Labour”.

⁹³ TVPA (n46 *supra*) s 112(a)(2) s 1593 “Mandatory Restitution”.

means of private civil lawsuits. Funds derived from the sale of assets seized from and forfeited by trafficking are made available for victims' assistance programs. This law further includes the possibility of severe economic sanctions for those persons convicted of operating trafficking enterprises within the US.

By strengthening and modifying trafficking legislation, the TVPA not only aims at correcting weak enforcement policies domestically, but also to influence other countries by legislative example and to harmonize trafficking legislation internationally.⁹⁴ The domestic impact of the TVPA can be measured by examining the effect the statute had on advancing human-trafficking proceedings. The number of human-trafficking investigations since the passage of the TVPA (between 2001 and 2004) has increased more than three times, more than twice as many defendants were prosecuted, and double the number of convictions were attained.⁹⁵ The positive international impact of the TVPA can only be assessed by examining the enactment and enforcement of new foreign anti-trafficking laws, and whether the result is an increase in investigations, prosecutions, and convictions abroad, and as well as the overall reduction in the international crime of human trafficking.

(iv) Shortcomings of the TVPA

It is generally agreed that the TVPA is a positive step towards the global diminution of human trafficking, yet it has shortcomings. The limitations of the TVPA are however

⁹⁴ Tiefenbrun "The Saga of Susannah - A US Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000" 2002 *Utah Law Review* 107 115.

⁹⁵ Prosecutions from 2000 to 2003 were as follows: 4 prosecutions (2000), 8 prosecutions (2001), 17 prosecutions (2002), 54 prosecutions (2003). See Clawson *et al* (n85 *supra*) 12. See also US Dept of State *Trafficking in Persons Report 2005*. From 2001 to 2003, the Dept of State charged, convicted, or secured sentences against 92 traffickers in 21 cases. 65 of those charged, convicted, or sentenced were for sex-trafficking offences in 14 separate cases. See US DOJ "Accomplishments in the Fight to prevent Trafficking in Persons" http://www.usdoj.gov/opa/pr/2003/February/03_crt_110.htm (accessed 2013-01-10). However, only 3 indictments in this period include charges under the new criminal statutes, ie *US v Kil Soo Lee* 159 F Supp 2d 1241 (2001) (250 Vietnamese and Chinese workers, mostly women, were held in involuntary servitude for 2 years in the US Territory of American Samoa); *US v Kennard* No 01-30346 2002 WL 1994523 (9th Cir 2002) (Russian girls were trafficked to Anchorage, Alaska, to dance nude) and *US v Gasanova* 332 F3d 297 (5th Cir 2003) (Uzbekistan women were forced to work in El Paso strip clubs and bars to pay back a \$300 000 debt and smuggling fee). Tiefenbrun "Updating the Domestic and International Impact of the US Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?" 2007 38 *Case Western Reserve Journal of International Law* 249 260 adds that only 1 of the cases tried in 2001 and 3 of the cases tried in 2002 were under the TVPA, and those convicted received only up to 10 to 12 yrs in prison. The penalties given for human-trafficking cases in the US are light in comparison to drug-trafficking. While the statutory maximum sentence for involuntary servitude is only 10 yrs per count in the US, the statutory maximum for dealing in 10g of LSD or distributing a kilo of heroin is a life sentence. See Tiefenbrun "Sex Sells But Drugs Don't Talk: Trafficking of Women Sex Workers" 2002 24 *Thomas Jefferson Law Review* 161 178.

neither new nor unique, but characteristic to most anti-trafficking initiatives worldwide.⁹⁶ Firstly, a few concerns exist regarding the structural aspects of the federal legislation. Some scholars argue that the qualification of “severe” in the definition of “severe forms of human trafficking” implies that a lesser kind of trafficking (i.e. that is not so severe) is permissible.⁹⁷ The TVPA does not criminalize “ordinary forms” of trafficking. The Act also “contains narrow definitions of „victim“ and „victimization“ that select for sexually exploited, passive females”.⁹⁸ Several researchers suggest that this could be the reason why fewer than one thousand victims have been identified under this legislative statute.⁹⁹ With the two-tiered definition consisting only of sex- and labour trafficking, there are doubts as to whether sufficient efforts are applied to addressing other forms of human trafficking such as child soldiering, forced marriages or illegal adoption. Furthermore, not all forms of commercial sexual exploitation (i.e. of children and adults) are included in the trafficking definition. There are also reservations about the adequacy of the law and services to deal with the emerging issue of domestic minor sex trafficking (i.e. the prostitution of children in the US).¹⁰⁰

Another issue is the TVPA’s conception of „coercion“, „fraud“ and „force“ which refers only to the differential dynamics between traffickers and victims and more specifically to the conduct of the trafficker in luring the victim into a trafficking network.¹⁰¹ Informed

⁹⁶ See Bruch “Models Wanted: The Search for an Effective Response to Human Trafficking” 2004 84(40) *Stanford Journal of International Law* 1 1.

⁹⁷ Chapkis “Trafficking, Migration and the Law - Protecting Innocents, Punishing Immigrants” 2003 17(6) *Gender and Society* 923 927 contends that the TVPA distinguishes between 2 categories of victim: “victims of trafficking” and “victims of severe forms of trafficking”. The first type of victims are those whose presence in the US is due to “sex trafficking”, and includes anyone who has received assistance with migration for the purposes of prostitution (“sex trafficking” is defined in the TVPA without reference to force, coercion, or deception). However, only those involved in “severe forms of trafficking” are covered in the TVPA.

⁹⁸ Zimmerman “Situating the Ninety-Nine: A Critique of the Trafficking Victims Protection Act” 2005 7(3) *Journal of Religion & Abuse* 37 37. See also Goździak & Collett (n48 *supra*) 107-109. More attention is given to sex-trafficked females than to male- or child victims in other forms of trafficking. Chapkis (n97 *supra*) 923 argues that the law “makes strategic use of anxieties over sexuality, gender, and immigration to further curtail migration ... through the use of misleading statistics creating a moral panic around „sexual slavery“, through the creation of a gendered distinction between „innocent victims“ and „guilty migrants“. The author suggests (at 935) that “[f]eminists should look critically at legislation such as the Trafficking Victims Protection Act, which relies heavily on narratives of female powerlessness and childlike sexual vulnerability”.

⁹⁹ Goździak & Collett (n48 *supra*) 109-110; Zimmerman (n98 *supra*) 49.

¹⁰⁰ Smith, Vardaman & Snow *Domestic Minor Sex Trafficking – America’s Prostituted Children* (2009) 74.

¹⁰¹ Zimmerman (n98 *supra*) 44. Giampolo “The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight against Human Trafficking” 2007 16(1) *Temple Political & Civil Rights Law Review* 195 217. The author criticises the fact that although non-physical threats or psychological pressure is implied in the definition of “coercion”, these elements are not explicitly enumerated. She concludes: “In

exclusively by criminal perceptions, these categories disregard any economic, political, and/or social factors that may have contributed to a victim's actions – the fact that a person might self “decide to enter a trafficking circuit is implicitly ruled out ... because coercive or constraining economic conditions that might push a woman to enter a trafficking circuit are not considered legitimate forms of coercion or force under the statute”.¹⁰² It is proposed that “[a] more complete and effective redress must include more complex conceptions of victimization, coercion, and harm in order to adequately grasp the socio-political and economic dynamics that structure global human trafficking”.¹⁰³ The Act does not require transportation or movement of the victim for trafficking to occur. The point is raised that if the requirement of movement from one locale to another is completely eliminated, any minor engaged in prostitution can be identified as a victim of human trafficking, regardless of citizenship or whether or not movement has taken place.¹⁰⁴ There is also no approach to ensure that the legal definition of trafficking in persons as set out in the TVPA is uniformly interpreted and enforced.¹⁰⁵

Although the TVPA broadens the field of application through its definition, it is claimed that prosecutors should also be given the power to go after all those who profit from trafficking, not just those directly involved in trafficking.¹⁰⁶ While punishment has doubled for certain crimes in the TVPA, critics detect low prosecution levels and relatively mild penalties.¹⁰⁷

sum, the United States’ definition of human trafficking is inconsistent with its declared purpose of protecting human trafficking victims. The definition should at least meet the minimum standard set by the Trafficking Protocol and above and beyond that, it should set an example to the international community by including an exhaustive list of additional means of exploitation. In addition, the definition should contain an all-inclusive phrase that incorporates „all other forms of exploitation that violate the rights of citizens as protected by the state“.

¹⁰² Zimmerman (n98 *supra*) 44-45. This is also the reason why the full protections of the Act were restricted to “severe victims of trafficking in persons” only. Chacón (n45 *supra*) 3022 views this as “a deliberate effort to deny immigration benefits to individuals who, while exposed to conduct that constitutes trafficking, gave consent at some point during the process of their transportation or employment”.

¹⁰³ Zimmerman (n98 *supra*) 37.

¹⁰⁴ Smith *et al* (n100 *supra*) 5, 7. The definition specifies that an element of force must still be present as well as a limitation on the victim’s movement.

¹⁰⁵ Tiefenbrun 2002 (n95 *supra*) 186.

¹⁰⁶ Miko (n31 *supra*) 9.

¹⁰⁷ Clawson *et al* (n85 *supra*) 7, 24. It is also conspicuous that in cases involving labour trafficking (eg, *US v Tyson Foods Inc* 2002 US Dist LEXIS 26896 (ED Tenn May 22, 2002) (No 4:01-CR-61) and *Zavala v Wal-Mart Stores Inc* 2005 393 F Supp 2d 295 (DNJ 2005)) smuggling laws instead of trafficking legislation are made use of. Chacón (n45 *supra*) 3035 explains this situation as follows: “There are two related explanations. First, the harsh sentences and political rhetoric surrounding the TVPA may actually operate to limit prosecutions under the Act, even in cases where the conduct in question seems to violate the letter of the TVPA... Because most people in the US are not conditioned to view the general exploitation of migrant labour as an evil on par with sex trafficking, prosecutors may be reluctant to attach the harsh

The actual level of punishment for those who participate in trafficking crimes remains hardly unaltered – for example, perpetrators received an average of eleven years for each count of involuntary servitude.¹⁰⁸ In addition, the lack of an enforcement component in the TVPA is questioned especially in terms of whether the Act has the power to truly enact and enforce its three-pronged strategy of prevention, prosecution, and protection. It is further pointed out that while the Act has the potential to do much good, there is no guarantee that its provisions will be enforced.¹⁰⁹

The TVPA's establishment of the Office to Monitor and Combat Trafficking and its annual trafficking report which provides assessment and implementation of anti-trafficking programs has been lauded as advancing the battle against trafficking internationally. However, the TVPA has been accused of being culturally imperialistic by setting international (Western) standards and minimum thresholds for other countries and by imposing US requirements and values on other cultures.¹¹⁰ Although some argue that the US shows a lack of any recognized perception of cultural differences, others emphasize that although "[c]ultural attitudes vary ... cultural relativism cannot and should not excuse criminal activity that rises to the level of a universal crime like slavery".¹¹¹ The usefulness of the annual report is also questioned as the report provides no in-depth analysis of the nature of trafficking and offers little aside from fact sheets, and commentary on conference

penalties and high stigma of the TVPA to all but the most unpopular and politically powerless offenders... Second, noncitizens are easier targets for harsh sanctions such as those required by the TVPA than are US citizens or US corporations".

¹⁰⁸ US DOJ *Assessment of US Governments Activities to Combat Trafficking in Persons in Fiscal Year 2004* (2005) 16-17.

¹⁰⁹ The TVPA allocates funds for these purposes, establishes international and domestic programs, offers real economic and social incentives to victims who are willing to assist in the prosecution of traffickers, and creates economic disincentives to the perpetrators in the form of increased penalties for those convicted of sex trafficking. These goals and measures are laudable. But if they are not enforced or if they prove to be unenforceable, the TVPA will have little, if any, impact domestically and internationally on the deterrence of sex trafficking. See Tiefenbrun (n85 *supra*) 3-4.

¹¹⁰ Tiefenbrun (n94 *supra*) 113. Desyllas "A Critique of the Global Trafficking Discourse and US Policy" 2007 34(4) *Journal of Sociology and Social Welfare* 57 74 supports the view that people in the west are setting the agenda for the rest of the world, as evidenced in the TVPA's tier system for monitoring international progress to prevent trafficking. She argues that marginalized groups have the right to speak for themselves and the right to set their own agendas and their own experiences. Chuang (n69 *supra*) 439 states that the US "... has proclaimed itself global sheriff on trafficking", which according to her, "... raises grave concerns both as a matter of international law and as a matter of global anti-trafficking strategy... By injecting US norms into the international arena, the sanctions regime risks undermining the fragile international cooperation framework created by the Palermo Protocol... [and allows the US to impose] its own anti-trafficking paradigm on other states."

¹¹¹ Tiefenbrun (n85 *supra*) 25.

proceedings.¹¹² Many complain that the trafficking reports list certain countries as Tier 2 while they do not meet minimum requirements, but are making efforts to do so. However, giving these countries a Tier 2 ranking sends a false message to the rest of the world that these countries are not engaging in the worst forms of human trafficking. In this manner, the ranking system works counter-productively against those countries' citizens who are fighting against human trafficking, especially as no sanctions are applied to these countries.¹¹³ The trafficking reports also do not distinguish between smuggling of migrants and trafficking *per se*, which is a consistently difficult problem that skews statistics generally on trafficking.

The creation and implementation of the T-status or T-visa generated diverse responses. Opponents of the T-status contend that the status rewards criminal behaviour in that obtaining a visa could potentially influence a victim's testimony (for example, encourage false testimonies). They assert that potential for abuse of T-status is vast – immigrants who have committed unlawful, intentional crimes may claim that they were coerced into the illicit situation when arrested.¹¹⁴ Since immigrant benefits are scarce, some critics argue that more meritorious people such as those who have been waiting to enter the US and have followed the correct legal procedures deserve these benefits more.¹¹⁵ Advocates for T-status are concerned that the Act provides protections almost exclusively to witnesses who assist with investigations and prosecutions, and that trafficked persons who have not yet decided to become witnesses are not protected.¹¹⁶ Similarly, some voice

¹¹² Goździak & Collett (n48 *supra*) 111. The early 2001 and 2002 reports failed to measure in a concrete manner precisely how many people were actually investigated, prosecuted and convicted for sex trafficking and forced prostitution in specific foreign countries. See Tiefenbrun (n85 *supra*) 23. These reports also failed to state the degree to which government employees and law enforcement in foreign countries were complicit in the sex trafficking industry. Eg, some countries received a passing grade of Tier 2 but are some of the worst offending countries. In these countries a significant percentage of brothel owners and agents are actually government employees, usually policemen. This may explain the disproportionate number between the vast number of victims and the low number of prosecutions in Tier 2 countries. See Tiefenbrun (n94 *supra*) 129-132.

¹¹³ Tiefenbrun (n94 *supra*) 136.

¹¹⁴ US Immigration and Customs Enforcement (ICE) agents are also concerned that some advocacy groups are able to ask ICE headquarters to have a person certified as a trafficking victim without any input from ICE agents, contending that some of these applications are not truly trafficking victims. See Siskin & Wyler (n75 *supra*) 40.

¹¹⁵ Cooper "A New Approach to Protection and Law Enforcement under the Victims of Trafficking and Violence Protection Act" 2002 51 *Emory Law Journal* 1041 1042-1044.

¹¹⁶ See Hartsough (n75 *supra*) 102. The author notes that the limitations of the T-visa may be counteracted by an alternative strategy of assisting trafficked persons via US asylum law. Even those who cooperate are not guaranteed to receive a T-visa. Those who do not cooperate face deportation - once deported, they face a 10-year ban on re-entering the US. See 8 USC s 1101.

concern about the burden of proof being placed on victims willing to assist, and the strict eligibility requirements (especially the extreme hardship threshold) to obtain a T-visa that the TVPA specifies.¹¹⁷ This may also account for the comparatively small number of T-visas issued relative to the estimates of trafficking into the US.¹¹⁸

The TVPA has been further criticized for not granting victims sufficient financial restitution as the Act does not specifically award actual and punitive damages, litigation expenses, etcetera to victims.¹¹⁹ It has been suggested that victims of trafficking do not receive the protection and services infrastructure that exists for other crime victims in the US.¹²⁰ Furthermore, even though a federal victim protection framework is set forth in the TVPA, there is no guarantee that such protections are uniformly applied at state and local levels.¹²¹ Some argue that all trafficking victims are not treated equally – there seems to be more focus on sex-trafficking victims than labour victims. Also, foreign nationals are being

¹¹⁷ Clawson, Small, Go & Myles “Human Trafficking in the United States: Uncovering the Needs of Victims and the Service Providers who Work with them” 2004 4 *International Journal of Comparative Criminology* 68 69. Victims must demonstrate that they “suffer *extreme* hardship involving *unusual* and *severe* harm upon removal from the US” (TVPA (n46 *supra*) s 107 (F)(i), emphasis added). No definition is given in the TVPA of what exactly “extreme hardship” entails. Chapkis (n97 *supra*) 932 believes that the “T-visa, then, is designed not so much as a means to assist the victim as it is a device to assist prosecutors in closing down trafficking networks”. In requesting comments on the interim rule, the US DOJ acknowledges: “In view of the annual limit imposed by Congress for T-1 status, and the standard of extreme hardship involving unusual and severe harm, [DHS] acknowledges that the T-1 status will not be an appropriate response with respect to many cases involving aliens who are victims of severe forms of trafficking.” See US DOJ “New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for „T” Nonimmigrant Status” 2002 67(21) *Federal Register* 4784 4785.

¹¹⁸ See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 341. Although it is estimated that at least 14,500 persons are trafficked into the US each year, only 1862 T-status applications were approved between 2002 and 2010. Although the reason may be an overestimation of noncitizen trafficking victims in the US, a more logical explanation is that the US government’s efforts to locate and identify victims are inadequate: “[v]ictim identification, given the amount of resources put into the effort, is considered to be low.” See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 338.

¹¹⁹ Hyland “Protecting Human Victims of Trafficking: An American Framework” 2001 16 *Berkeley Women’s Law Journal* 29 50, 51, 58, 68. Hyland argues for further legislation, primarily to create a private right of action, to make sanctions discretionary, and to permit asset forfeiture in trafficking cases. Such provisions might provide an increased incentive to testify against traffickers and would contribute to victims’ early self-sufficiency. She encourages trafficking victims to seek punitive damages from their former traffickers, in addition to bringing civil suits. The writer argues (at 51) that “actual damages are grossly inadequate as a means of compensating victims for the traumatizing experiences.” The example of *US v Cadena* (Cr No 98-14015 23 Apr 1998) is given, where each victim received nominal compensation from US\$6 750 to US\$198 000, based on the government’s conservative estimate of 90 clients per woman per week to whom the owner charged US\$25 per sex act. One could, on the other hand, argue also that these provisions might inadvertently result in a larger number of illegitimate claims. See Gozdziaik & Collett (n48 *supra*) 118-119.

¹²⁰ Hyland (n119 *supra*) 53.

¹²¹ See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 342: “Only nine of 50 states offered state public benefits to trafficking victims. Eighteen permitted victims to bring civil lawsuits in state court. Seven encouraged law enforcement to provide the required accompanying documentation for T-visa applications. Eighteen instituted mandatory restitution.”

given more access to public benefits and funding than US citizens and their relatives. More and better financial support for victims and TVPA initiatives seem to be a general problem.¹²²

Additionally, some question whether the TVPA effectively balances the human rights of trafficking victims with its law enforcement obligations. Most critics contend that the humanitarian aims of the Act have been underemphasized in favour of prosecution.¹²³ Others again posit that the TVPA treats trafficking as a human-rights issue, instead of fighting the problem by means of less restrictive immigration policies.¹²⁴ The Act does little to strengthen the rights of most migrant workers, both in the sex industry and elsewhere. The law punishes trafficking victims for their immigration violations and prostitution activities more harshly than their captors, thus maintaining human trafficking as a low risk and high profit industry.¹²⁵

It is also argued that the TVPA does not adequately address economic and gender inequalities, and virtually disregard the increasing customer demand for the sex trade.¹²⁶ The legalized commercial sex industry (exotic dance clubs, pornography, sexually exploitative advertising, etc) is considered by many as a dominant factor in bolstering the demand for illegally trafficked sex workers in the US. US lawmakers should also focus on curbing the demand, and not only prosecute the suppliers. Furthermore, since the majority of human trafficking is the result of poor economic systems where many do not have the option to do anything else but use human trafficking as a source of money, there is an obvious inequality of the economics. As for gender inequalities, in societies where gender

¹²² While the TVPA proposes certain economic alternatives to combat human trafficking (see n59 *supra*), appropriations of only US\$15 million over 2 yrs were authorized to fund all of these initiatives. In contrast, the federal government spends nearly US\$1 billion annually to patrol the US/Mexican border - see Chapkis (n97 *supra*) 933.

¹²³ Dalrymple "Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act" 2005 25(2) *Boston College Third World Law Journal* 451 472-473. Hartsough (n75 *supra*) 102 concurs that the crime-fighting mechanism in the TVPA compromises the protection and assistance needs of trafficking victims. While not explicitly acknowledging the rights of humans to be free from punishment, mistreatment, cruel and inhuman treatment, and torture, the Act does name several international human rights treaties.

¹²⁴ See Ryf (n62 *supra*) 48; Goździak & Collett (n48 *supra*) 118. Chacón (n45 *supra*) 2977 laments the fact that: "The United States has never developed an immigration strategy that effectively grapples with the global forces that drive migration."

¹²⁵ Ryf (n62 *supra*) 48.

¹²⁶ Adelman "International Sex Trafficking: Dismantling the Demand" 2004 13(2) *Review of Law and Women's Studies* 387 391, 396. Chacón (n45 *supra*) 3017 remarks that "... the fact that the Act exists, and that millions of dollars are spent to combat trafficking each year, diverts political pressure from the task of changing the legal regime to eliminate legal incentives for the exploitation of human beings".

discrimination and inequality have become ingrained in their customs and traditions, “implementing programs to improve educational and economic opportunities is comparable to putting the cart before the horse”.¹²⁷ These issues could be addressed within the anti-trafficking laws in order to give women the opportunity to have a say in the acts of the trafficking industry. The general consent after the operationalization of the TVPA was that further legislation was required to rectify some of the shortcomings identified.¹²⁸ This was accomplished by a series of reauthorization acts.

6.2.1.2 Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003)¹²⁹

The original TVPA of 2000 was reinforced in 2003 by reauthorizing appropriations for the fiscal years 2004 and 2005. Substantial increases in funding for anti-trafficking programs were authorized for this period (over \$100 million for each fiscal year).¹³⁰ The renewed and enhanced policy allowed the US “to fund public awareness campaigns for foreign countries and to provide funding for research on international and domestic trafficking”.¹³¹ The research initiatives include, but are not limited to, the economic causes and consequences of trafficking in persons, the effectiveness of programs and initiatives to prevent trafficking and protect victims, as well as the interrelationship between trafficking in persons and global health risks.¹³² By supporting more research to be conducted on economic and gender disparities, this Act attempts to remedy some of the critique against the TVPA.

Generally, the TVPRA 2003 requires greater responsibility from law enforcement to investigate and prosecute human-trafficking cases, but especially better coordination with

¹²⁷ McClain “An Ounce of Prevention: Improving the Preventative Measures of the Trafficking Victims Protection Act” 2007 *Vanderbilt Journal of Transnational Law* 579 596.

¹²⁸ See Hyland (n119 *supra*) 70. Desyllas (n110 *supra*) 72 summarizes the position as follows: “The current US government prefers repressive strategies because they are simple and in accordance with other agendas, such as immigration control, ending organized crime, imposing ideologies onto other countries, and maintaining women's morality and sexuality”.

¹²⁹ Trafficking Victims Protection Reauthorization Act of 2003, Pub Law 108-193, 117 Stat 2875 (2003) (codified as amended in scattered sections of USC), enacted 19 Dec 2003. This Act and subsequent reauthorizations of the TVPA are supplementary to the original TVPA of 2000. The Act must be renewed every 2-3 years so as to stay current with the latest developments in technology and evolution of the crime. After every Act's cycle, it expires and is replaced by a new reauthorization which mainly deals with funding distribution, but may also amend or add provisions to the TVPA 2000. The last reauthorization expired on 1 Oct 2011, and has not as yet been renewed.

¹³⁰ Miko (n31 *supra*) 13.

¹³¹ Desyllas (n110 *supra*) 70. See TVPRA 2003 (n129 *supra*) s 6(f), (g).

¹³² See TVPRA 2003 (n129 *supra*) s 6(g)(1)(1)-(3). TVPA (n46 *supra*) s 112 is amended by inserting a new section on research on domestic and international trafficking in persons.

victim service providers to accommodate the needs of trafficking victims.¹³³ In order to enhance the prosecution of trafficking-related crimes further, human trafficking is included under the federal Racketeering Influenced and Corrupt Organization (RICO) statute.¹³⁴ The TVPRA refines and expands on the TVPA's minimum standards for eliminating trafficking to be used in the Secretary of State's annual trafficking report.¹³⁵ Previous criticism regarding certain Tier 2 countries which do not comply with all requirements was remedied by the creation of a Tier 2 watch list.¹³⁶ This "special watch list" consist of countries that the Secretary of State determined should require special scrutiny during the following year. The list is composed of countries where (i) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; (ii) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year (evidence of increased investigations, prosecutions and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials); or (iii) the determination that a country is making significant efforts to bring itself into compliance with minimum standards is based on its commitments to take additional future steps over the next year.¹³⁷ Foreign governments are now pressed to provide more extensive evidence regarding their anti-trafficking efforts. Unlike the TVPA, the TVPRA requires the US State Department to consider not only investigations and prosecutions, but also convictions and sentences in determining whether a country is complying with the minimum standards for the elimination

¹³³ Clawson *et al* (n25 *supra*) 9.

¹³⁴ TVPRA 2003 (n129 *supra*) s 5(b). The crime of human trafficking is a predicate offence for RICO charges. Chap 77 of the USC "Peonage, Slavery, and Trafficking" is amended to enhance US efforts to combat trafficking. However, the very low rate of conviction in many trafficking cases under the TVPRA suggests that the legislation is still inadequate. Overall, the conviction rates from 2001 to 2004 varied widely from 57% to 81%. However, during years with high conviction rates, few cases were prosecuted. Eg, in 2003, the year with the highest conviction rate overall, there were only 32 defendants charged nationwide, resulting from just 7 cases. Again in 2005, even though 95 defendants were charged under various statutes for human trafficking, only 35 were convicted, a rate of only 37%. See Brenner *Captive Workforce: Human Trafficking in America and the Effort to End it* (2006) 163.

¹³⁵ TVPRA 2003 (n129 *supra*) s 6(a)(1)(A)-(G); Miko (n31 *supra*) 13. Trafficking reports from 2003 to 2005 remedied the deficiency of an objective assessment of actual data; ie actual people investigated, etc by providing the statistics, wherever available. Contributing factors to trafficking in certain countries such as corruption and police complicity were integrated into the 2003 report, and referred to in subsequent reports. The problem of "demand" was not sufficiently discussed until the 2005 trafficking report. There is still a lack of accurate evaluation applied to some government initiatives, where ineffective and superficial anti-trafficking strategies are put forward. See Tiefenbrun (n94 *supra*) 129, 133, 134, 137.

¹³⁶ TVPRA 2003 (n129 *supra*) s 6(e).

¹³⁷ TVPRA 2003 (n129 *supra*) s 6(e)(3)(A)(i)-(iii).

of trafficking or whether a country is making significant efforts to bring itself into compliance with such standards.¹³⁸

The TVPRA remains committed to the protection and assistance of victims exploited through labour-and sex trafficking in the US, however it recognises difficulties experienced by these victims in obtaining assistance, especially the T-visa.¹³⁹ Still, the TVPA stipulations regarding immigrant status remain unaltered. The only amendment at this point is that the Secretary of Health and Human Services (HHS) may also consider whether victims who have been willing to assist in every reasonable way with respect to the investigation and prosecution by the State, may receive federally-funded benefits and services.¹⁴⁰ A further improvement in criminal law and civil action is that victims are allowed under the TVPRA to sue their traffickers in a federal district court.¹⁴¹

The prevention strategies of the TVPRA focus on border interdiction, public information programs, and combating international sex tourism. Border interdiction laws were added in order to enforce the protection of victims of transnational trafficking and prevention of future smugglers. It provides for transit shelters at certain key border crossings to house these victims. Survivors of trafficking in persons are to be trained to tutor border guards and other officials such as law enforcement authorities, prosecutors, and members of the judiciary, to identify traffickers and victims of severe forms of trafficking. The training includes the appropriate manner in which to treat such victims.¹⁴² The TVPRA prescribes that public awareness programs be established via television productions and radio programming in order to inform vulnerable populations abroad of the dangers of

¹³⁸ Gallagher "A Shadow Report on Human Trafficking in Lao PDR: The US Approach vs International Law" 2007 16(1) *Asian and Pacific Migration Journal* 1 5 is troubled by the fact that the US standard equates a high prosecution and conviction rate with a more effective criminal-justice response. Not only is it well known that trafficking cases are extremely difficult to investigate and prosecute, but the "success-by-numbers approach" fails to recognize the fundamental difference between countries of origin and countries of destination. It is easier to prosecute traffickers in the country of exploitation. There is furthermore no explicit qualitative element for determining which type of prosecutions count towards the rating.

¹³⁹ TVPRA 2003 (n129 *supra*) s 2(3): "On the other hand, victims of trafficking have faced unintended obstacles in the process of securing needed assistance, including admission to the United States under section 101(a)(15)(T)(i) of the Immigration and Nationality Act."

¹⁴⁰ TVPRA 2003 (n129 *supra*) s 4(a)(3).

¹⁴¹ TVPRA 2003 (n129 *supra*) s 4(a)(4). The TVPRA 2003 does not add that a victim of trafficking shall also be entitled to file a civil action asking for punitive damages. However, in *Ditullio v Boehm* (10-36012 9th Cir 7 Nov 2011), the court held that the "TVPA permits recovery of punitive damages because it creates a cause of action that sounds in tort and punitive damages are available in tort actions under the common law".

¹⁴² TVPRA 2003 (n129 *supra*) s 3(a)(2).

trafficking.¹⁴³ The use of international media to educate and alert potential victims as propagated by the TVPRA further extends to inform individuals travelling to foreign destinations where sex tourism is significant about US laws against sex tourism.¹⁴⁴ The TVPRA contains an “escape clause” relating to international affairs, which authorizes a US federal body that has entered into a contract with a private contractor to terminate that contract should it be discovered that the private party has engaged in severe forms of human trafficking, procured commercial sexual services while the contract was in force, or used forced labour during the period of time that the contract was in effect.¹⁴⁵

Critics have been most vocal about the TVPRA’s restriction of anti-trafficking funds to abolitionist groups that oppose prostitution.¹⁴⁶ Any foreign organization or NGO that advocates the legalization or practice of prostitution are not funded, and grantees are asked to state their position on prostitution in writing.¹⁴⁷ By excluding people directly

¹⁴³ TVPRA 2003 (n129 *supra*) s 3(a)(2)(d) “International Media”.

¹⁴⁴ TVPRA 2003 (n129 *supra*) s 3(a)(2)(e) “Combating International Sex Tourism”. Information regarding illegal sex tourism was followed by more aggressive law enforcement. The *Trafficking in Persons Report 2005* states that from the passage of the TVPRA in 2003 to June 2005, there were 20 indictments and over 12 convictions of child-sex tourists. See US Dept of State *Trafficking in Persons Report 2005* (n95 *supra*) 23. Supporting the provisions in the TVPRA, the Protect Act (Prosecutorial Remedies and Tools Against the Exploitation of Children Today (Protect) Act of 2003, Pub Law 108-21, 117 Stat 650) makes it a crime for a US citizen (or any US permanent-residence holder) to travel abroad for the purpose of engaging in illicit sexual conduct with another person. This Act has extraterritorial reach which allows for the investigation, prosecution and conviction of offenders in the US, even if the illicit sex act was performed abroad and even if sex trafficking is legal in that country. If convicted, offenders may be fined or imprisoned for up to 30 yrs, or both. Together the Protect Act and the TVPRA increase penalties to 20 yrs in prison for engaging in child sex tourism. See Tiefenbrun 2007 (n95 *supra*) 265. The Protect Act was held constitutional in that its extraterritorial application does not violate international law in *US v Clark* 315 F Supp 2d 1127 (WD Wash 2004); *US v Clark* 435 F 3d 1100 (9th Cir 2006) where a 71-year-old US military veteran was arrested in Phnom Penh, Cambodia for sexually molesting underage boys and extradited to the US. See also *US v Frank* 486 F Supp 2d 1353 (2007) where s 2423(c) of the Act was challenged on the basis that it violated international law because it fails to recognize that the age of consent in Cambodia is 15. Frank was found guilty on 5 counts for travelling to Cambodia to engage in illicit sexual conduct with females under the age of 18. His appeal did not succeed. However, in *US v Jackson* 2007 WL 925730 (9th Cir 2007), the sex tourism indictment was dismissed for although the “engaging in illicit sexual conduct” occurred after the enactment of the statute, the “travel in foreign commerce” was complete in 2001 as Jackson had at that time travelled to Cambodia intending to resettle there permanently. The 2 statutory terms have to be interpreted as 1 substantive element.

¹⁴⁵ TVPRA 2003 (n129 *supra*) s 3(b) “Termination of Certain Grants, Contracts and Cooperative Agreements”. This section states that the grant will be terminated if “if the grantee or any sub-grantee, or the contractor or any subcontractor (i) engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect, or (ii) uses forced labour in the performance of the grant, contract, or cooperative agreement”. See Clawson *et al* (n85 *supra*) 12.

¹⁴⁶ See Desyllas (n110 *supra*) 70.

¹⁴⁷ Ditmore “Trafficking in Lives: How Ideology Shapes Policy” in Kempadoo, Sanghera & Pattanaik (eds.) *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (2011) 107 114-117. The new Bush Administration considers programs that utilize the term “sex work” as

involved within the sex industry who are most able to report and combat abuses, the success of well-established anti-trafficking programs may be hindered. This also demonstrates that the focus of the US policy is still primarily on sex trafficking, to the detriment of trafficking in other industries, such as sweatshops, agriculture and domestic labour.¹⁴⁸ Furthermore, funding is closely linked to religious ideologies allied with conservative views on prostitution.

6.2.1.3 Trafficking Victims Prevention Reauthorization Act of 2005¹⁴⁹

In 2005, the TVPA was refined again to authorize additional appropriations for the fiscal years of 2006 and 2007, and to close further loopholes in previous anti-trafficking legislation.¹⁵⁰ The law commences with the findings that “[t]he United States has demonstrated international leadership in combating human trafficking and slavery,¹⁵¹ and the government’s estimations “that 600,000 to 800,000 individuals are trafficked across international borders each year and exploited through forced labour and commercial sex exploitation”.¹⁵² This version of the TVPA focuses on enhancing specified US efforts to combat trafficking in persons, which include combating trafficking activities in post-conflict

“inappropriate partners for USAID anti-trafficking grants or contracts” since they accept prostitution as employment choice. NGOs that forcibly removed women from prostitution in order to “save” them have been among those given funding preferences. See Saunders & Soderlund “Threat or Opportunity? Sexuality, Gender and the Ebb and Flow of Trafficking as Discourse” 2003 22(3/4) *Canadian Woman Studies* 16 16. Human trafficking is for the first time linked to terrorism (after Sept 11 attacks), as Keefer *Human Trafficking and the Impact on National Security for the United States* (2006) 3 explains: “The thread of trafficking runs through Al Qaeda’s tapestry of terror. Since the start of the war in Afghanistan, reports have indicated that the Taliban engaged in open abduction of women and girls, taking them as war booty. There are numerous accounts of forced marriages, rapes, women and girls forced to act as concubines, and numerous killings. Many of those girls who were not used as concubines were sold as sexual slaves to wealthy Arabs through contacts arranged by the Al Qaeda terrorist network. Proceeds from these sales allegedly helped keep the cash-strapped Taliban afloat”. See also Shelley “Human Trafficking: Transnational Crime and Links with Terrorism” (Testimony given before the US House Committee on International Relations, Subcommittee on International Terrorism, Non-proliferation, and Human Rights 25 Jun 2003).

¹⁴⁸ The reason for the emphasis on sex trafficking may be attributed to “local law enforcement relying on its pre-existing vice units devoted to prostitution enforcement, whereas there were no comparable pre-existing structures for involuntary servitude in labour sectors”. See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 340. Also, more sex-trafficking investigations are conducted by state law enforcement than labour-trafficking investigations, and often the criminal statutes applied predate the passage of state anti-trafficking statutes.

¹⁴⁹ Trafficking Victims Prevention Reauthorization Act of 2005 (TVPRA 2005) Pub Law 109-164, enacted 10 Jan 2006. Similarly to the TVPRA, this TVPRA 2005 amends the original TVPA of 2000.

¹⁵⁰ Miko (n31 *supra*) 13-14. Previous laws are amended to strengthen anti-trafficking policies and programs.

¹⁵¹ TVPRA 2005 (n149 *supra*) s 2(1).

¹⁵² TVPRA 2005 (n149 *supra*) s 2(2). A further estimation is that 80% of such individuals are women and girls. The unreliability of such estimations has been illustrated in Chap 2 of this study. Furthermore, these figures are only for sex-and labour trafficking, no other trafficking-related forms have been taken into consideration.

settings and humanitarian emergencies by international peacekeepers, armed forces and aid workers.¹⁵³

The involvement of especially US citizens abroad in certain types of trafficking activities is inconsistent with US laws and policies and undermines the credibility and mission of US Government programs in post-conflict regions. For that reason, the law seeks to extend US extra-territorial jurisdiction over certain human trafficking offences, such as sex tourism.¹⁵⁴ The TVPRA 2005 provides US prosecutors with additional transnational mechanisms to successfully apprehend, prosecute, and convict human traffickers. Criminal jurisdiction is granted over US Government personnel as well as contractors accompanying US employees who are complicit in trafficking acts in foreign countries while doing work for the government. If the affected foreign government is already prosecuting the offender for the offence of trafficking in persons, the US may not commence another prosecution.

A grant program totalling US\$50 million is established for states- and local law enforcement agencies to investigate and prosecute acts of severe forms of trafficking in persons and related offences.¹⁵⁵ However, grants may only be made to law enforcement- and prosecutorial task forces that work collaboratively with relevant social-service providers and NGOs “with experience in the delivery of services to persons who are the

¹⁵³ TVPRA 2005 (n149 *supra*) s 2(7)-(10). TVPA (n46 *supra*) s 106 is amended by adding at the end of the section a new subsection under s 101 “Prevention of Trafficking in Conjunction with Post-Conflict and Humanitarian Emergency Assistance”.

¹⁵⁴ TVPRA 2005 (n149 *supra*) s 103. Part II of 18 USC is amended with the insertion of Chap 212A (s 3271 “Trafficking in Persons” offences committed by persons employed by or accompanying the Federal Government outside the United States” & s 3272 “Definitions”). The need for extraterritorial jurisdiction was already identified in the *Trafficking in Persons Report 2004* where it was pointed out that the US had a leading role to play in fighting sex tourism by identifying and prosecuting their own nationals who travel abroad to engage in commercial sex with children – thus “American paedophiles that exploit foreign children around the globe for commercial sex are no longer beyond the reach of US prosecution.” See US Dept of State *Trafficking in Persons Report 2004* “Letter from Secretary Colin L Powell”. Attempt to commit sex tourism is also punished. In *US v Seljan* 497 F 3d 1035 (9th Cir 2007), an 87- year- old retired businessman was arrested in Los Angeles airport on his way to the Philippines to have sex with 2 girls, ages 8 and 12. It was determined that he had travelled to the Philippines 43 times between 1992 and 2003, and 52 photographs of him engaged in sex acts with Filipino children were discovered on him. He admitted that he had been “sexually educating” children (aged between 8 and 13) for about 20 yrs, and that he intended “sexually educating” these children on this trip as well. Seljan was sentenced to 20 yrs in prison.

¹⁵⁵ TVPRA 2005 (n149 *supra*) s 204(a)(1)(A). Trafficking acts must involve US citizens, or foreigners admitted for permanent residence, and must occur, in whole or in part, within US territorial jurisdiction. Related offences is defined under TVPRA 2005 (n149 *supra*) s 204(a)(2) as: “including violations of tax laws, transacting in illegally derived proceeds, money laundering, racketeering, and other violations of criminal laws committed in connection with an act of sex trafficking or a severe form of trafficking in persons”.

subject of trafficking in persons”.¹⁵⁶ Federal and local law enforcement is also enhanced with increased investigative powers. Both the Federal Bureau of Investigation (FBI) and Homeland Security’s Bureau of Immigration and Customs Enforcement (BICE) are directed to investigate domestic trafficking in persons as well as any acts which qualify as severe forms of trafficking in persons.¹⁵⁷

As mandated by the TVPA, the TVPRA 2003 and the TVPRA 2005,¹⁵⁸ annual reports have to be submitted by the Secretary of State proclaiming the recent trends in trafficking as well as the rating of countries’ anti-trafficking efforts. The TVPRA 2005 amended and supplemented the fourth minimum standard in that governments have to make serious and sustained efforts to eliminate trafficking.¹⁵⁹ The reports for this period show progression

¹⁵⁶ TVPRA 2005 (n149 *supra*) s 204(b). This satisfies the requirement in the provision of a multidisciplinary approach. The TVPRA 2003 restrictive “anti-prostitution pledge” (that international NGOs do not „promote, support or advocate” the legalization or practice of prostitution or else they will not receive governmental funding to support their anti-trafficking efforts), is now extended to domestic NGOs. This provision was challenged as unconstitutional by both *Alliance for Open Society International Inc and Open Society Institute v USAID* 430 F Supp 2d 222 (SDNY 2006) and *DKT International Inc v USAID* 435 F Supp 2d 5 (DDC 2006) . Both lawsuits charged that the provision violates their First Amendment right to free speech by forcing them to adopt the government’s point of view in order to receive funding, and that the terms are unconstitutionally vague, thereby permitting arbitrary enforcement. Finally, the stipulation undermines efforts to provide preventative health information and services to sex workers at risk of contracting and spreading HIV/AIDS, therefore the pledge is presents a serious public health danger. The courts ruled in favour of the NGOs, however, these rulings do not extend to foreign organisations. See Chang & Kim “Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)” 2007 3 *Stanford Journal of Civil Rights & Civil Liberties* 317 322-324.

¹⁵⁷ TVPRA 2005 (n149 *supra*) s 301(h),(i). This section resorts under “Title III - Authorizations of Appropriations”, whereby the FBI is granted US\$15 000, 000 and the BICE US\$18 000,000 per annum to conduct trafficking investigations. Erstwhile TVPA anti-human trafficking task forces are also funded. Even though the grants are spread more evenly than previous years, it is odd that the number of trafficking prosecutions steadily decreased during the TVPRA 2005 period. The total prosecutions for 2005 is 88; 55 (2006) and 49 (2007). See Clawson *et al* (n85 *supra*) 12. The majority (77%) of cases resulted in guilty dispositions, with 47% by plea negotiations and 30% by verdict. Sentences ranged from probation to 50 yrs incarceration. The average sentence was 6½ yrs in prison, while the median sentence was 3 yrs incarceration. In general, California (26%) and New York (20%) prosecuted the most TVPA cases. See Clawson *et al* (n85 *supra*) 16.

¹⁵⁸ TVPRA 2005 (n149 *supra*) s 101(b)(2). Gallagher (n138 *supra*) 6 believes that the TVPRA 2005 still do not carry much credibility, especially in its data collection and analysis: “Sloppy assessments that are not backed up by a reliable and replicable methodology play directly into the hands of those who argue that the US uses the TIP process to demonize its opponents and to reward supporters”. Also see Chuang (n69 *supra*) 481-488. Giampolo (n101 *supra*) 218 argues that trafficking reports “employ selective criticism of country practices, turning a blind eye to US allies and sanctioning countries with which the US either has a strained relationship, or no strategic interests. Countries whose anti-trafficking efforts are minimal or almost non-existent pass muster year after year, avoiding because the US has interests in those regions. Thus, as US allies shift, so do TIP Report tier rankings”.

¹⁵⁹ The other minimum standards are that governments must prohibit and punish acts of trafficking; prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault; and prescribe punishment that is sufficiently stringent to deter, and that adequately reflects the offense’s heinous nature. See Miko (n31 *supra*) 14.

and are more comprehensive than previous years.¹⁶⁰ The number of countries covered in the trafficking reports has also increased; for example, in 2006 the report focused on 158 countries, although only 149 were ranked. The other nine countries were “special cases” and could not be ranked because of insufficient information. Greater emphasis is placed on labour trafficking,¹⁶¹ which the report for the first time suggests may be larger than for sex trafficking.¹⁶² Previous reports employed the anti-trafficking policy of the “3 Ps” (prosecution, protection, and prevention), however new reports focus on the “3 Rs” (rescue, rehabilitation, and reintegration).

While the trafficking reports seem to be more victim-orientated, the TVPRA 2005 does not direct much new attention to the plight of victims.¹⁶³ The 2005 bill increases assistance to foreign trafficking victims in the US,¹⁶⁴ which includes access to legal counsel and better information on programs to aid victims.¹⁶⁵ The special needs of juvenile victims,¹⁶⁶ especially child labour,¹⁶⁷ as well as Americans trafficked within the US¹⁶⁸ are considered.

¹⁶⁰ However, there is criticism that the “...State’s explanations for its ranking decisions are incomplete, and the report is not used consistently to develop government-wide anti-trafficking programs. ... [S]ome of the minimum standards are subjective, and the report does not comprehensively explain how they were applied, lessening the report’s credibility and hampering its usefulness as a diplomatic tool. For example, country narratives for most countries in the top category (Tier 1) failed to clearly explain compliance with the second minimum standard, regarding prescribed penalties for sex trafficking crimes, established in the TVPA”. See US Government Accountability Office (GAO) *Human Trafficking, Better Data, Strategy, and Reporting Needed to Enhance US Anti-trafficking Efforts Abroad* (2006) 3, 17.

¹⁶¹ Labour trafficking is also singled out in the TVPRA 2005 (n149 *supra*) s 105.

¹⁶² Miko (n31 *supra*) 15.

¹⁶³ Desyllas (n110 *supra*) 75 demurs that the TVPRA 2005 allocates “more funds to support a morally driven policy that does not take into account the individuals it claims to serve”. Critics observe that while there has been a 210% increase in certifications of foreign victims over the past five years, there has been no corresponding increase in funding for victim protection services. US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 341.

¹⁶⁴ This is mainly done by means of a grant program to develop, expand, and strengthen assistance programs “for certain persons subject to trafficking”. See TVPRA 2005 (n149 *supra*) s 202.

¹⁶⁵ TVPRA 2005 (n149 *supra*) s 102(a). The US Department of HHS, as of May 2006, had certified 1000 trafficking victims for special status and the DHS issued 112 T-visas to foreign survivors of trafficking. See Miko (n31 *supra*) 15.

¹⁶⁶ TVPRA 2005 (n149 *supra*) s 203. This renewed focus on granting benefits to child victims was effected as the US has since the enactment of the TVPA granted trafficking victim’s relief to only 82 children. See Sensenbrenner *Committee on the Judiciary Report House Report No 109-317 Part 2* (2005) 26.

¹⁶⁷ TVPRA 2005 (n149 *supra*) s 105.

¹⁶⁸ TVPRA 2005 (n149 *supra*) Title II. An interesting case involving the national trafficking of US citizens is *US v Marcus* 487 F Supp 2d 289, 292-97 (ED NY 2007), where the Court determined that the term “commercial sex act” as applied in the TVPA pertains not only to sex acts, but also to photographs of sex acts. In this case, the defendant and complainant engaged in a consensual relationship that involved bondage, dominance/discipline, submission/sadism, and masochism (“BDSM”). After enticing the complainant to move to his home, she unwillingly became one of his sex slaves and was forced to maintain a BDSM website called “Slavespace” for him. When Marcus was unhappy with her work on the website, he would severely punish her. One such punishment consisted of putting a safety pin through her labia and attaching a padlock to it, thereby closing her vagina. The incident was photographed, the pictures were

However, while the TVPRA 2005 embodies extensive endeavours to provide more comprehensive protection and concern for the needs of these victims, in the case of especially foreign child victims, the Act fails to amend the corresponding immigration laws.¹⁶⁹

6.2.1.4 The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008¹⁷⁰

The TVPRA 2008 is the most recent TVPA reauthorization Act sanctioning increased funding for fiscal years 2008 to 2011. Similar to previous versions, the bill is divided into titles. However, instead of the usual three titles pertaining to combating international trafficking, domestic trafficking and authorizations of funding, a fourth title is added, the “Child Soldiers Prevention Act of 2008”. Under Title I, a few new provisions are added. The responsibility to prevent human trafficking is directly extended to specified entities to ensure that US citizens do not use any item, product, or material produced or extracted

posted on the website and she was forced to post a daily entry about it on the website. The defendant was convicted on charges of violating the forced labour and sex trafficking provisions of the TVPA. On appeal (*US v Marcus* 130 S Ct 2159, 2163 (2010)), the sex-trafficking conviction was set aside on the grounds that it violated the *ex post facto* clause. (The sex-trafficking incidents occurred before 28 Oct 2000 when the TVPA was enacted, though the most violent punishment episodes transpired post-enactment, when the complainant was forced to work on the website).

¹⁶⁹ Foreign child victims of trafficking (who are mostly unable to speak the language) are still entangled in statutory and regulatory administrative provisions. In many cases, alien child victims seek protection status in the Special Immigrant Juvenile (SIJ) provisions of the US Immigration Code 8 USCA s 1 101(a)(27)(J) as these provisions assure a more accessible remedy to these victims. However, the eligibility requirements under the SIJ as compared to the same under the Code of Federal Regulations (8 CFR 214.11 “Alien Victims of Severe Forms of Trafficking in Persons”) conflict. The foreign child victim is not required to assist with the prosecution of traffickers under the SIJ if he is under 18 yrs of age (8 USCA s 1101 (a)(15)(T)(i)(III)(bb)) yet the CFR provisions indicate that he is not required to assist if he is less than 15 yrs of age (8 CFR s 214.11 (d)(2)(vii)). Furthermore, under the CFR, child trafficking victims are still required to provide evidence of their age in the form of either an official copy of their birth certificate, passport or certified medical opinion, and evidence demonstrating that they face extreme hardship if removed from the US (8 CFR s 214.11(h)(3)). Compiling an application package for T-status also presents rigorous procedures. There are filing deadlines, fingerprinting procedures, application form, photographs and fingerprinting fees, personal interviews, demonstrating that the child is a victim of a severe form of trafficking and will suffer extreme hardship if he is removed from the US, and evidence that he has complied with any reasonable request for assistance in investigation and prosecution of traffickers (unless he is under 15 yrs of age). For an alien child to practically implement these requirements satisfactorily is almost impossible without assistance from an informed adult. Green (n12 *supra*) 315 quite rightly asserts that “[i]n effect, the law constructs a roadblock rather than a resolution”. See also Green (n12 *supra*) 333-338.

¹⁷⁰ The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Pub Law 110-457, 122 Stat 5044-5091 (2008)) (TVPRA 2008) was signed into law on 23 Dec 2008. This law was named in honour of William Wilberforce, an English member of parliament who was a social reformer and leading abolitionist.

with the use of labour from victims of severe forms of trafficking.¹⁷¹ In the efforts to prevent and prosecute trafficking in foreign countries, the reauthorization increases technical assistance and other support to help these governments investigate, identify and carry out inspections at labour recruitment centres; provide information and legal protection to foreign migrant workers and register vulnerable populations.¹⁷² The President is directed by the legislation to develop a system to evaluate the effectiveness of anti-trafficking assistance domestically as well as internationally.¹⁷³ The TVPRA 2008 also removes the requirement that the minimum standards are applicable to the governments of countries where there are “a significant number of victims” of severe forms of trafficking.¹⁷⁴ Additional actions against governments failing to meet minimum standards were appended – those countries that have been on Tier 2 “Watch-List” for 2 consecutive years may be downgraded to Tier 3 unless special conditions are adhered to.¹⁷⁵ The trafficking report should now also be translated in the principal languages of as many countries as possible and made available on the Internet.¹⁷⁶ An effective, integrated research mechanism in the form of a database for quantifying the number of victims of domestic and international

¹⁷¹ TVPRA 2008 (n170 *supra*) s 102(3). Partnerships will be entered into by the Office to Monitor and Combat Trafficking (the former Interagency Task Force) with foundations, universities, corporations, community-based organizations, and other NGOS to attain this goal.

¹⁷² TVPRA 2008 (n170 *supra*) s 103(a).

¹⁷³ See TVPRA 2008 (n170 *supra*) s 105 which amends the TVPA by inserting s 107A. S 107A(c) directs the President to “establish a system to evaluate the effectiveness and efficiency of the assistance provided under anti-trafficking programs established under this Act on a program-by-program basis in order to maximize the long-term sustainable development impact of such assistance”. Despite all previous anti-trafficking efforts and programs, the US Dept of State’s *Trafficking in Persons Report 2010* (n24 *supra*) indicates that 62 countries have not yet convicted a single human trafficker under trafficking laws in compliance with international standards and 104 countries continue to lack laws, policies or regulations to prevent victims’ deportation. See Siskin & Wyler (n75 *supra*) 6, 10-11.

¹⁷⁴ TVPRA 2008 (n170 *supra*) s 106(1) amends TVPA (n46 *supra*) s 108(a). This amendment in the TVPA reporting requirements has led to an increase in rated countries. More countries (193) were rated in 2009 than before - 20 up from 2008 (173). The requirement of “a significant number of” victims was taken by previous reports as at least 100 cases per year. See Wyler, Siskin & Seelke *Trafficking in Persons: US Policy and Issues for Congress* (2009) 10, criticizing that the “inconsistent application of the minimum standards and superficial country assessments has compromised their [TIP reports] credibility and effectiveness as a tool to influence government behaviour”. See Chuang (n69 *supra*) 474. It is also difficult to determine which particular standards make a country qualify for Tier 1. According to Siskin & Wyler (n75 *supra*) 36, many criticize that the Tier 2 and Tier 2 “Watch List” have “become „catch-all” categories that include countries which should really be placed on Tier 3”.

¹⁷⁵ TVPRA 2008 (n170 *supra*) s 107(a). The President may waive the relegation if the specific country shows that it is making significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking; or its plan to eliminate trafficking, if implemented, would constitute making such significant efforts; and the country is devoting sufficient resources to implement the plan. Sanctions continue as determined by the TVPA: In 2010, President Obama resolved that 2 Tier 3 countries (Eritrea and North Korea) will be sanctioned for 2011 without exemption, and that 4 Tier 3 countries will be partially sanctioned (Burma, Cuba, Iran, and Zimbabwe). See Siskin & Wyler (n75 *supra*) 15.

¹⁷⁶ TVPRA 2008 (n170 *supra*) s 107(c).

trafficking in persons is established by this law.¹⁷⁷ Finally, a “Presidential Award for Extraordinary Efforts to Combat Trafficking in Persons” is created which will be awarded annually to not more than five individuals or organizations.¹⁷⁸ Selections may be made from US citizens or foreign nationals, and US or foreign NGOs.

Under the TVPRA 2008 Title II, positive amendments are made to the requirements for a T-visa. Foreigners, who are unable to comply with requests for assistance in their trafficking investigations and prosecution due to physical or psychological trauma, would now be eligible for T-visas.¹⁷⁹ Both T-visa and U-visa status may be extended beyond initial three-years by the DHS in certain circumstances.¹⁸⁰ Furthermore, the “extreme hardship” requirement is tempered in that consideration is given to the ability of the foreigners’ countries to adequately address their needs in terms of security, mental- and physical-health requirements.¹⁸¹ If a trafficked person was present in the US after being allowed entry to assist in the prosecution of traffickers, this person is also now eligible for a T-visa. Continued presence requirements are extended to facilitate the parole of the victim’s relatives to the US.¹⁸² Trafficked persons with pending T-status applications (with a *prima facie* case for approval) are granted a stay of removal until the adjudication of the application.¹⁸³ For those T-visa holders who want to adjust their status to permanent immigrant status (LPR-status), the prerequisite of a “good moral character” may be waived by the Secretary of the DHS.¹⁸⁴ A “continuation of presence”¹⁸⁵ status is granted to prospective immigrants in order to sue perpetrators who committed any of the criminal acts

¹⁷⁷ TVPRA 2008 (n170 *supra*) s 108(a). This database is located within the Human Smuggling and Trafficking Centre to „(A) improve the coordination of the collection of data related to trafficking in persons by each agency of the United States Government that collects such data; (B) promote uniformity of such data collection and standards and systems related to such collection; (C) undertake a meta-analysis of patterns of trafficking in persons, slavery, and slave-like conditions to develop and analyze global trends in human trafficking; (D) identify emerging issues in human trafficking and establishing integrated methods to combat them; and (E) identify research priorities to respond to global patterns and emerging issues.”

¹⁷⁸ TVPRA 2008 (n170 *supra*) s 109.

¹⁷⁹ TVPRA 2008 (n170 *supra*) s 201(a)(1)(D)(bb).

¹⁸⁰ TVPRA 2008 (n170 *supra*) s 201(b) amending s 214(o)(7) of INA (8 USC 1184(o)(7)) for T-status. Relief may be granted to a T-status victim because of a delay in issuing the adjustment regulations, or there is a pending status application, or merely because of meriting exceptional circumstances. TVPRA 2008 (n170 *supra*) s 201(c) amending s 214(p)(6) of INA (8 USC 1184(p)(6)) for U-visa (non-immigrant visa). This type of visa may be extended for similar reasons, except for that of exceptional circumstances.

¹⁸¹ TVPRA 2008 (n170 *supra*) s 201(c).

¹⁸² TVPRA 2008 (n170 *supra*) s 205.

¹⁸³ TVPRA 2008 (n170 *supra*) s 201(a)(C); s 204. These pending T-status applicants are also eligible for public benefits.

¹⁸⁴ TVPRA 2008 (n170 *supra*) s 201(d)(6).

¹⁸⁵ TVPRA 2008 (n170 *supra*) s 203(c)(1)(A); s 205(a)(1).

defined in Chapter 77.¹⁸⁶ These acts include not only trafficking, but also various forms of slavery, peonage, and involuntary servitude.

Additional provisions are further made to provide support to domestic workers as possible trafficking witnesses and informants.¹⁸⁷ Assistance consists mostly of producing and handing-out pamphlets on the rights and responsibilities of the employee to foreigners applying for employment- or educational-based non-immigrant visas.¹⁸⁸ Specific provisions are also set forth relating to protections, remedies, and limitations on issuance for A–3 and G–5 visas.¹⁸⁹ Request for these types of visas must be denied if the particular diplomatic mission or international institution requesting the visas has any record or history of trafficking or exploitation.¹⁹⁰ Because of previous criticisms and confusion regarding the exclusion of US nationals from any TVPA assistance, the TVPRA 2008 generates new grant programs for US trafficking victims.¹⁹¹ A report detailing any gaps between services provided to US-citizen and noncitizen-victims of trafficking must be submitted to Congress within a year of the law's enactment.¹⁹²

¹⁸⁶ TVPRA 2008 (n170 *supra*) s 221(1). The civil remedy provision (s 1595) is expanded to accommodate this action. Furthermore, a 10-year statute of limitations is included for the first time in the statute. Although a civil remedy has been provided for from 2003 to 2009, not a single suit filed under the TVPA in federal court by sex trafficking survivors has reached the merits. Kim “The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers” 2009 *University of Chicago Legal Forum* 247 310 alleges that up until 2009 approximately 30 civil suits have been brought under s 1595, however none of them alleged sex trafficking. To date, only 1 suit alleging sex trafficking has been filed. This is unusual as a civil action holds many advantages for the victims such as lower burden of proof, more control over the legal process and substantial civil awards.

¹⁸⁷ TVPRA 2008 (n170 *supra*) s 202. Title II concerns “Combating Trafficking in Persons in the United States” and is sub-divided into 4 sub-titles: (A) “Ensuring Availability of Possible Witnesses and Informants”, (B) “Assistance for Trafficking Victims”, (C) “Penalties Against Traffickers and Other Crimes”, and (D) “Activities of the United States Government”.

¹⁸⁸ TVPRA 2008 (n170 *supra*) s 202(a)-(f). These type of visas are created in INA s 101(a)(15) and are named after the letter and numeral that denotes their subsection in the Act. As such, A-3 visa holders (INA s101(a)(15)(A)(iii)) are attendants, servants or personal employees of Ambassadors, public ministers, career diplomats, consuls, other foreign government officials and employees or the immediate family of such workers; G-5 visa holders (INA s101(a)(15)(G)(v)) are attendants, servants, or personal employees and their immediate family of foreign government representatives or foreign employees of international organizations; H-visa holders (INA s101(a)(15)(H)) form the main category for different types of temporary workers; and J-visa holders (INA s101(a)(15)(J)) are foreign exchange visitors and include diverse occupations as *au pairs*, foreign physicians, professors and teachers. McCabe *The Trafficking of Persons: National and International Responses* (2008) 71 argues that unique to the US trafficking problem is the numerous types of visas available. These are areas of vulnerability which present opportunities for human traffickers. Eg, the K-visa (for fiancé(s) and mail-order brides) remains essentially unregulated, and is being exploited by way of marriage fraud and spousal prostitution.

¹⁸⁹ TVPRA 2008 (n170 *supra*) s 203.

¹⁹⁰ TVPRA 2008 (n170 *supra*) s 203(b). The Secretary of State has to keep records on the presence of A-3 and G-5 visa holders in the US, including information regarding any allegations of abuse.

¹⁹¹ TVPRA 2008 (n170 *supra*) s 213(a)(1).

¹⁹² TVPRA 2008 (n170 *supra*) s 213(b).

The TVPRA 2008 authorized new measures to combat human trafficking by strengthening and enhancing trafficking-related criminal statutes to punish traffickers.¹⁹³ A new criminal offence related to human trafficking, namely conspiring to traffic humans, is introduced.¹⁹⁴ This statute prohibits conspiring with another person to commit the offences of peonage, enticement into slavery, forced labour, trafficking, and document servitude. The penalty for violating the conspiracy provision is commensurate to the penalty for the underlying substantive offence.¹⁹⁵ The Act creates the new offence of “obstructing or attempting to obstruct enforcement of anti-trafficking laws”, and imposes significant penalties on perpetrators.¹⁹⁶ A new crime prohibiting “fraud in foreign labour contracting” is established which imposes criminal liability on those who, knowingly and with intent to defraud, recruit workers from outside the US for employment within the US by means of materially false or fraudulent representations.¹⁹⁷

Except for newly-introduced statutes, a number of important expansions to the criminal provisions are included in the Act. The TVPRA 2008 clarifies the application of the forced labour provision by adding the element of “force” as a fourth prohibited means of violating

¹⁹³ The new federal laws instigated the highest number of prosecutions and defendants charged since the TVPA’s inception. Federal human-trafficking task forces opened 2515 suspected incidents of human trafficking for investigation between Jan 2008 and Jun 2010. These suspected incidents were classified as sex trafficking (82%), which includes more than 1200 incidents with allegations of adult sex trafficking, and more than 1000 incidents with allegations of prostitution or sexual exploitation of a child; labour trafficking (11%) and unknown trafficking type (7%). See Banks & Kyckelhahn (n23 *supra*) 1. In 2009, the Human Trafficking Prosecution Unit (a specialized anti-trafficking unit of DOJ’s Civil Rights Division) charged 114 individuals and obtained 47 convictions in 43 human-trafficking prosecutions (21 labour trafficking and 22 sex trafficking). The average prison sentence imposed for federal trafficking crimes in 2009 was 13 yrs and prison terms imposed ranged from two months to 45 yrs. See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 339. However, Siskin & Wyler (n75 *supra*) 11 comment that even though efforts to combat trafficking were enhanced in the TVPRA 2008, the number of prosecutions reported per year worldwide against trafficking offenders has declined on average 5.6% per year since the first collection globally in 2003 (from 7 992 prosecutions in 2003 to 5 606 in 2009).

¹⁹⁴ TVPRA 2008 (n170 *supra*) s 222(c). Conspiracy to traffic in persons could previously only be charged under the general conspiracy statute for all federal crimes, which provides for a maximum of just 5 yrs imprisonment.

¹⁹⁵ TVPRA 2008 (n170 *supra*) s 222(c)(2)(b)-(c). This section states that whoever conspires with another to violate the crimes of peonage, enticement into slavery, forced labour, trafficking with respect to the aforementioned crimes, and unlawful conduct with respect to documents in furtherance of these crimes, shall be punished in the same manner as a completed violation of the crimes. Unfortunately, there is no minimum mandatory penalty for conspiring to commit sex trafficking. The section continues by averring that whoever conspires with another to violate the crime of sex trafficking of children or by force, fraud, or coercion, shall be fined, or imprisoned for any term of years or for life, or both. These penalties are sufficiently stringent and proportionate to penalties prescribed under US law for other serious offences.

¹⁹⁶ TVPRA 2008 (n170 *supra*) s 222(b). Perpetrators shall be fined, imprisoned for not more than 20 yrs, or both.

¹⁹⁷ TVPRA 2008 (n170 *supra*) s 222(e). This provision will be codified at Chap 63 of 18 USC as s 1351. The statute provides for a fine, or a maximum term of 5 yrs” imprisonment, or both.

the statute (in addition to serious harm; abuse of the legal process or law; and scheme, plan or pattern as means of inducement).¹⁹⁸ As only the sex-trafficking statute contained a provision that imposed criminal liability on those who knowingly benefitted financially from participating in a venture that engaged in sex trafficking acts, this prohibition necessitated expansion in other trafficking statutes as well. This is accomplished in the new legislation, which penalize anyone who knowingly benefit financially from any trafficking crimes.¹⁹⁹ The new sentencing guidelines lower the standard of proof to “reckless disregard”²⁰⁰ for anyone who financially benefits through participation in a trafficking venture. Prosecutors do not have to prove that defendants who come into contact with victims engaging in any trafficking conduct actually had knowledge that these persons were trafficked, mere *dolus eventualis* is sufficient. The *mens rea* requirement for sex trafficking is similarly broadened to include both actual knowledge that force, fraud, or coercion would be used to cause a person to engage in a commercial sex act, or reckless disregard of the fact that such means would be used.²⁰¹ The knowledge-of-age requirement in the sex trafficking of children is also eliminated in certain instances. Whereas prosecutors had to prove that the defendant had actual knowledge that the person engaged in the commercial sex act was a minor, the new legislation provides that where “the defendant had a reasonable

¹⁹⁸ TVPRA 2008 (n170 *supra*) s 222(b) s 1589 (a)(1)-(4). The statute may be violated by one of, or by any combination of, these 4 prohibited means. Finally, in TVPRA 2008 (n170 *supra*) s 222(b) s 1589 (c)(1)-(2) the terms “abuse or threatened abuse of law or legal process” and “serious harm” are expounded on. “Abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.” “Serious harm” is given as “any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm”.

¹⁹⁹ TVPRA 2008 (n170 *supra*) s 222(d). Chap 77 of title 18 USC is amended by inserting s 1593A “Benefitting Financially from Peonage, Slavery, and Trafficking in Persons”.

²⁰⁰ The US courts have explained “reckless disregard” as meaning “deliberate indifference to fact which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the US illegally”. See *US v Perez* 443 F 3d 772, 781 (11th Cir 2006); *US v Garcia-Gonon* 443 F 3d 587, 590 (8th Cir 2006) where the concept was further described as “to be aware of, but to consciously or deliberately ignore facts and circumstances clearly indicating that the person being transported was an alien who had entered or remained in the US in violation of law”. See also *US v Guerra-Garcia* 336 F 3d 19, 25-26 (1st Cir 2003). This principle covers instances of the US concept of “wilful blindness” as a basis for the knowledge element. “Wilful blindness” describes situations where evidence shows that a defendant was presented with facts that the activity was likely criminal, but deliberately ignored the facts or intentionally failed to investigate; similar to a situation of “burying one’s head in the sand”. See *US v Whitehill* 532 F 3d 746, 751 590 (8th Cir 2008); *US v Mir* 525 F 3d 351, 358-359 590 (4th Cir 2008); *US v Flores* 454 F 3d 149, 159 (3th Cir 2006); *US v Heredia* 483 F 3d 913, 918 (9th Cir 2007).

²⁰¹ TVPRA 2008 (n170 *supra*) s 222(b)(5)(A). As in the provision for “forced labour”, definitions of the terms “serious harm” and “abuse of law or legal process” are added on to. See TVPRA 2008 (n170 *supra*) s 222(b)(5)(E)(iii)-(iv). There is no need to show proof of “force, fraud, or coercion” for the sex trafficking of children. The burden of proof however remains for involuntary servitude of children.

opportunity to observe the person so recruited, enticed, harboured, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of eighteen years”.²⁰²

The reauthorization expands the Government’s authority to detain defendants charged with trafficking offences pending trial. Any charge of a Chapter 77 offence (i.e. the crimes of peonage, enticement into slavery, forced labour, trafficking with respect to the aforementioned crimes, and unlawful conduct with respect to documents in furtherance of these crimes) with a maximum term of imprisonment of twenty years or more, will give rise to a rebuttable presumption of pre-trial detention.²⁰³ US extra-territorial jurisdiction is further attached to certain trafficking crimes (or any attempt or conspiracy to commit such an offence) committed outside the United States by US nationals or US immigrants, or by any offender present in the US, irrespective of the nationality of the alleged offender.²⁰⁴

The provision comprising the annual *Trafficking in Persons* report by the Attorney-General contains very minor amendments.²⁰⁵ Of more importance at this juncture in the TVPRA 2008 is protecting child victims of trafficking and enhancing efforts to combat trafficking in children. Seeing that the best interests of the trafficked child are of primary concern, the Secretary of HHS has to make a prompt determination of eligibility for interim assistance for juvenile trafficking victims.²⁰⁶ The interim assistance and protection of trafficked foreign

²⁰² TVPRA 2008 (n170 *supra*) s 222(b)(5)(D)(c). Critics of the TVPRA 2008 consider this provision inadequate since it does not sufficiently address the prosecution pillar of the Act. It is argued that this should be a strict liability provision that would eliminate the need to prove the defendant’s knowledge of age. This inclusion should be accompanied by an expansion of the definition of sex trafficking to include child prostitution. See Nguyen “The Three Ps of the Trafficking Victims Protection Act: Unaccompanied Undocumented Minors and the Forgotten P in the William Wilberforce Trafficking Prevention Reauthorization Act” 2010 *Washington & Lee Journal for Criminal Review & Social Justice* 187 215-216.

²⁰³ TVPRA 2008 (n170 *supra*) s 222(a)(6)(D).

²⁰⁴ TVPRA 2008 (n170 *supra*) s 223(a).

²⁰⁵ TVPRA 2008 (n170 *supra*) s 231. The TVPRA 2008 should have provided better indicators to establish a more standardized data collection for trafficking crimes or numbers of victims among US federal, state and local law enforcement agencies. Research shows that trafficking statistics are not uniformly collected or reported. Although most, but not all of the DOJ task forces collect trafficking information in a single database, these records are still incomplete as full task force participation or nationwide coverage is required. While 6 states (Florida, Minnesota, New Mexico, New York, Rhode Island and Texas) mandate data collection and reporting on trafficking cases, the process has not yet been fully implemented. The lack of uniform data collection remains an impediment to a comprehensive understanding of the enforcement and victim service response to US trafficking. See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 340.

²⁰⁶ TVPRA 2008 (n170 *supra*) s 212(a)(2)(F)(i),(ii).

children is further improved as a process to grant eligibility letters is created.²⁰⁷ Benefits and services are received upon identification without delay and without the requirement that the child cooperate with law enforcement.²⁰⁸

In combating child trafficking at the borders and ports of entry of the US, any unaccompanied minor who is a national or habitual resident of a country that is contiguous with the US will first be detained and then returned to the child's country of nationality, contingent on the Secretary of DHS's final decision.²⁰⁹ It is contended that this action will protect these children from possible abuse and severe forms of trafficking.²¹⁰ The Act directs the Government to enter into agreements with neighbouring countries regarding the safe repatriation of their minor nationals.²¹¹ Special screening procedures for children suspected of being trafficking victims are stipulated.²¹² In addition, the law requires the Secretary of HHS to provide legal counsel and appoint child advocates and custodians to child-trafficking victims and other vulnerable unaccompanied foreign children, to the greatest extent practicable.²¹³

²⁰⁷ TVPRA 2008 (n170 *supra*) s 212(a)(2)(F)(iv)(III).

²⁰⁸ TVPRA 2008 (n170 *supra*) s 212(a)(2)(G).

²⁰⁹ TVPRA 2008 (n170 *supra*) s 235(a)(2)(A)-(B). The decision is made on a case-by-case basis by considering stipulated procedures. It must be determined that there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality; that the child does not have a fear of being returned to the child's country, and the child can independently decide to withdraw the application for admission to the US. The number of unaccompanied minors in US custody has increased 225% since 2003 when 5000 children were detained. See Hill "The Right to be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children" 2011 31(1) *Boston College Third World Law Journal* 41 45.

²¹⁰ These unaccompanied alien children are sometimes subjected to detention in the US of days, months or even yrs. Statistics reflect average stays between 12 and 99 days for children in the various types of facilities, where conditions may be below minimum standards and children may be subjected to sexual, physical and emotional abuse. See Hill (n209 *supra*) 41-43, 47-48. The TVPRA 2008 attempts to correct these deficiencies by codifying the standard of detention that a child "be promptly placed in the least restrictive setting that is in the best interest of the child". See TVPRA 2008 (n170 *supra*) s 235(c)(2).

²¹¹ TVPRA 2008 (n170 *supra*) s 235(a)(2)(C). This has successfully been done. A program established by provisions of the TVPRA and funded by the Dept of State – the Return, Reintegration, and Family Reunification Program for Victims of Trafficking – assisted 2 victims in returning to their home country and reunited 128 family members with trafficked persons in the US in 2009. Since commencing in 2005, the program has assisted 15 victims in returning to their country of origin and has reunified 378 family members from 41 countries of origin.

²¹² TVPRA 2008 (n170 *supra*) s 235(a)(4). The procedures in n188 *supra* must be considered within 48 hours of the apprehension of such a child but before repatriation. In 2009 the Innocence Lost Initiative (a collaboration of federal and state law enforcement authorities and victim assistance providers), conducted a national operation to detect child trafficking victims – this resulted in to the identification of 306 children and led to the convictions of 151 traffickers in state and federal courts. See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 339.

²¹³ TVPRA 2008 (n170 *supra*) s 235(c)(4),(5),(6). After *Reno v Flores* 507 US 292, 315 (1993), (a class action challenging both the detention and federal release for immigrant children), the *Nationwide Settlement Regulating INS Treatment of Detained Minors: Flores v Ashcroft* (Centre for Human Rights & Constitutional

Individuals convicted of violating 18 USC 2423 (“Transportation of minors with intent to engage in criminal or illicit sexual activity”) are ineligible to receive a passport until they have completed their sentences if the persons used a passport or crossed an international border in committing the offence of sex tourism.²¹⁴ If such a perpetrator is in possession of a passport, it will be revoked.²¹⁵ There are however exceptions to the rule. The Secretary of State may issue a passport in emergency circumstances or for humanitarian reasons; or prior to revocation, limit a previously issued passport or issue a limited passport permitting only for return travel to the US.²¹⁶

There are a number of new provisions in the Act specific to data collection and reporting. The Act requires the FBI to classify the new category of “Human Trafficking” in the serious crimes category (“Group A offences”) for the purpose of the National Incident-Based Reporting System.²¹⁷ The Act also mandates the FBI to break down the categories of prostitution and commercial sex acts reports in the Uniform Crime Reports (UCR) to show how many prostitutes, johns (purchasers of sex), pimps and traffickers were arrested.²¹⁸ Several new reports and studies are required by the law. Federal agencies have to report on the enforcement of the offenses relating to prostitution and pandering set forth in DC Code 22–2701 *et seq.*²¹⁹ The DOJ also has to conduct a comprehensive study on the application of human-trafficking statutes including the statutes based on the model law

Law) directed that these children must be treated with dignity, respect, and special concern for their vulnerability as minors in the least restrictive setting. The agreement appointed a list of custodians which includes: (1) a parent, legal guardian, or adult relative (sibling, aunt, uncle, or grandparent); (2) an adult individual designated by a parent or guardian; (3) a licensed care program; and (4) other adults or entities when there is no other likely alternative to long term detention and no reasonable possibility of family reunification. Although the TVPRA 2008 provides that advocates represent the interests of unaccompanied alien children, counsel has to be *pro bono* or paid, which may be difficult to secure. It is reported that less than 10% of lawyers in the US accept *pro bono* cases. See Hill (n209 *supra*) 52. Courts have in the past interpreted an immigrant minor’s right to counsel negatively. Eg, in *Perez-Funez v District Director INS*, 619 F Supp 656, 659–60 (CD Cal 1985) it was stated *in dicta* that there is no right to public counsel.

²¹⁴ TVPRA 2008 (n170 *supra*) s 236(b)(1)(A).

²¹⁵ TVPRA 2008 (n170 *supra*) s 236(b)(1)(B).

²¹⁶ TVPRA 2008 (n170 *supra*) s 236(b)(2)(A),(B). The implementation of the TVPRA 2008 led to 11 criminal arrests, 5 indictments, and 10 convictions in child-sex tourism cases in 2009. See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 344.

²¹⁷ TVPRA 2008 (n170 *supra*) s 237(a)(3).

²¹⁸ TVPRA 2008 (n170 *supra*) s 237(b).

²¹⁹ TVPRA 2008 (n170 *supra*) s 237(c)(1)(D). This information will include the number of prosecutions, the number of convictions, an identification of multiple-defendant cases and the results thereof. This specific legislation makes all acts of pimping and pandering *per se* crimes, even without proof of force, fraud or coercion or a victim’s minor age.

developed by the DOJ, cases prosecuted there-under, and its impact on enforcement of other criminal statutes.²²⁰

As an appendage, Title IV of the reauthorization incorporates the Child Soldiers Prevention Act of 2008. The Child Soldier Prevention Act defines a child soldier as anyone under the age of eighteen who takes a direct part as a member of a state army, or who has been forcibly recruited into a state army, or who has been recruited or used in conflicts by non-government armed forces.²²¹ A child soldier is also anyone under the age of fifteen who has been voluntarily recruited into governmental armed forces. The definition is further extended to anyone under the age of eighteen who do not take a direct part in the combat, but is involved in armed-forces hostilities in any capacity, for example in a support role, such as a cook, porter, messenger, medic, guard or sex slave.²²² The legislation calls on the US government to condemn the conscription, forced recruitment, or use of child soldiers by governments, paramilitaries, or organisations; support and lead efforts to establish and uphold international standards related to the abuse of children as soldiers; and expand ongoing services to rehabilitate and reintegrate recovered child soldiers back into their respective communities.²²³ Moreover, the Child Soldier Prevention Act requests US diplomatic missions in countries in which the use of child soldiers is an issue to develop a strategy in their plans to assist child soldiers based on global best practices.²²⁴ The US is prohibited from providing foreign assistance or issuing licenses for direct commercial sales of military equipment to any foreign government that recruits, uses or permits the use of child soldiers.²²⁵ The proscription includes the annual publication of a list

²²⁰ TVPRA 2008 (n170 *supra*) s 237(c)(2)(B).

²²¹ TVPRA 2008 (n170 *supra*) s 402(2)(A).

²²² TVPRA 2008 (n170 *supra*) s 402(2)(B).

²²³ TVPRA 2008 (n170 *supra*) s 403(1),(2),(3). However; asylum for child soldiers has been opposed by DHS on the grounds that their military service subjects them to the “persecutor bar”. This provision from the Refugee Act 8 USC s 1101(a)(42)(B)(2006) determines that those who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion” will be excluded from refugee protection. This situation penalizes former child soldiers as trafficking crime victims and denigrates all efforts to protect them. See Lonagan “Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum after *Negusie v Holder*” 2011 31(1) *Boston College Third World Law Journal* 71 71, 78, 99.

²²⁴ TVPRA 2008 (n170 *supra*) s 403(6),(7),(8).

²²⁵ TVPRA 2008 (n170 *supra*) s 404(a).

of countries in violation of the standards regarding the use and recruitment of child soldiers.²²⁶

6.2.2 Criminal-justice responses from the US

Except for anti-trafficking coordinating bodies created by the TVPA,²²⁷ responsibility for implementing efforts in combating trafficking in persons domestically and abroad is shared by the US Departments of State,²²⁸ Justice,²²⁹ Labour,²³⁰ Health and Human Services (HHS), Homeland Security, Defence,²³¹ Education,²³² and the US Agency for International Development (USAID).²³³ Each agency addresses one or more of the three prongs of the US anti-trafficking approach. Furthermore, the US Equal Employment Opportunity Commission (EEOC) investigates discrimination charges against employers. The Human

²²⁶ TVPRA 2008 (n170 *supra*) s 404(b). A list of 6 countries that recruit, use, or harbour child soldiers were included in the US Dept of State's *Trafficking in Persons Report 2010* (n24 *supra*) 10 for the first time. The listed countries that may be subjected to US sanctions are: Burma, Chad, Democratic Republic of Congo, Somalia, Sudan, and Yemen. Pres Obama waived sanctions for 4 of these countries on 25 Oct 2010 – Burma and Somalia however will be sanctioned in terms of the Child Soldier Prevention Act. See Siskin & Wyler (n75 *supra*) 15-16. However, Siskin & Wyler (n75 *supra*) 6 report that child soldiers have reportedly been used in more than 300 ongoing or recent armed hostilities worldwide.

²²⁷ Amongst these mechanisms are the Interagency Task Force to Monitor and Combat Trafficking in Persons (coordinates the TVPA's implementation), the Office to Monitor and Combat Trafficking in Persons (assist in coordination of anti-trafficking efforts esp. by publishing an annual trafficking report), the Senior Policy Operating Group (implements and coordinates the Interagency Task Force's efforts to combat human trafficking). The FBI is also mandated to provide comprehensive human trafficking statistics to these agencies, as well as all-encompassing anti-trafficking training to their agents.

²²⁸ The Dept of State has the main responsibility of coordinating all federal anti-trafficking efforts, as well as the annual *Trafficking in Persons Report*.

²²⁹ The DOJ is responsible for enforcing TVPA legislation, but also funds 38 anti-trafficking task forces in the US comprising of federal, state, and local law enforcement investigators and prosecutors, labour representatives and NGOs for victim services. These task forces conduct case coordination in certain geographic areas as well as law enforcement training to identify, investigate, and prosecute cases through a victim-centred approach. See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 340. The Innocence Lost National Initiative (a joint project by DOJ's Child Exploitation and Obscenity Section, the FBI and National Centre for Missing and Exploited Children) was responsible for the arrest of 356 individuals and the recovery of 21 children in 2008. See US Dept of State *Trafficking in Persons Report 2009* (n80 *supra*) 57.

²³⁰ The Dept of Labour is involved at all levels with the prevention of child labour or forced labour in violation of the TVPA and international standards.

²³¹ The Dept of Defence (DOD) mandated general human trafficking awareness training for all military members and civilian employees. At the federal level, DOD launched a demand reduction campaign to help make contractors, government personnel, and military members aware of common signs of human trafficking and a hotline number to report suspected incidents.

²³² The Dept of Education generally engages in instruction whether by lectures, information sessions or conferences where school teachers, students, nurses, and law enforcement are informed about human trafficking and individuals' role in identifying and preventing trafficking.

²³³ The USAID conducted audits of a representative sample of contracts.

Smuggling and Trafficking Centre²³⁴ houses several agency data systems to collect and disseminate information to build a comprehensive picture of certain transnational issues, including, among other things, human trafficking.

The US government funds an NGO-operated national hotline and referral service. The DOJ has set up the Trafficking in Persons and Worker Exploitation Task Force, a hotline that provides interpreters in various languages and the ability to talk to any individuals in need, regardless of one's status as a citizen in the United States.²³⁵ However, the service is offered only on weekdays between 9 am and 5 pm. The HHS also funded an NGO (Polaris Project) to operate the National Human Trafficking Resource Centre, which operates a national, toll-free hotline available to answer calls from anywhere in the US.²³⁶ The hotline is valuable not only in the sense of offering victims assistance and protection, but also because it provides data on where cases of suspected human trafficking are occurring within the United States. A national map of calls is updated daily to reflect the sources of calls to the hotline. Many other organizations also provide toll-free hotlines open for the public to call for help if they find themselves in trafficking situations. The US National Coalition against Domestic Violence provides aid for victims of domestic violence (a category in which many trafficking victims fall into). The Office for Victims of Crime (OVC) also serves as a valuable source of assistance as it co-sponsors the toll-free Trafficking in Persons and Worker Exploitation Complaint Line. Also, along with other organisations such as Free the Slaves and the Freedom Network's Safe Horizon, the

²³⁴ The Centre was formally established under s 7202 of the Intelligence Reform and Terrorism Prevention Act of 2004 in order to unify intelligence collection and investigative efforts on human trafficking. It is jointly run by experts from federal agencies in the Dept of State, DOJ and DHS, and has access to national and international databases on human trafficking, human smuggling and terrorism.

²³⁵ The call-centre technology used by law enforcement and victim-centred services are modelled on similar strategies used in anti-domestic violence and child protection movements to promote self-identification of victims, however trafficking victims have "found it difficult to self-report and numbers of victim callers remain very low", according to Lange "Research Note: Challenges of Identifying Female Human Trafficking Victims using a National 1-800 Call Centre" 2011 14 *Criminologist* 47 47. Although hotline-initiatives have "shown success in reducing incidences of domestic violence and providing help to victims, their use to combat sex trafficking has not produced the same level of results". Eg, The average monthly call volumes for the first 6 months of 2005 were approximately 239. In 2006, the average monthly number dropped to 186, and in Jun to Dec 2007 the average fell again to 174. Furthermore, very few of these calls were from victims themselves. See Lange (*supra*) 51.

²³⁶ This service operates 7 days a week for 24 hours a day. Callers can report tips and receive information on human trafficking. In 2009, the Centre received a total of 7 257 phone calls. These calls included 1 019 tips, of which approximately 300 were referred to law enforcement, and 697 requests for victim care referrals. See Polaris Project "Hotline Successes" <http://www.polarisproject.org/what-we-do/national-human-trafficking-hotline/the-nhtrc/hotline-successes> (accessed 2013-01-10).

government helps locate organisations with an established record of assisting with these incidents.

There are further numerous proactive programs and training courses established by the US government in order to eliminate human trafficking. One such strategy is the Operation Predator program which was established by the DHS in order to protect children from becoming victims of international sex tourism and traffickers. Another focuses more on public-awareness campaigns to promote border security and increase awareness of human trafficking and labour-trafficking whereby immigration officials warn people about the dangers of purchasing products made by trafficked labour at the land borders of the US.²³⁷ There are also several regional and international NGO networks and databases on trafficking, including support to assist NGOs in establishing service centres and systems that are mobile and extend beyond large cities.

6.2.3 Summary

Human trafficking is a high-profile issue in the US. The country is regarded as a leader in combating trafficking in persons and its efforts are viewed as revolutionary. However, it also faces great problems. In combating human trafficking, the government utilises mainly the migrant model along with strong law-enforcement efforts. The crime of trafficking is tackled on a federal as well as state level in a multi-disciplinary manner and with a coordinated, integrated and sustained approach. Legislation such as the TVPA and its reauthorizations of 2003, 2005 and 2008 has contributed tremendously to fight sex- and labour trafficking. Anti-trafficking legislation has progressed through the years to include also a more comprehensive victim-centred approach. However, a more complete human-rights approach including the relevant human-rights provisions of the Palermo Protocol against gender discrimination ought to be included in the US legislation. Traffickers are successfully prosecuted under the TVPA and its reauthorizations, which shows progress towards eliminating initial obstacles contained in the original Bill. Not only does the Act serve as an example internationally, but also as a model for the US states to follow. Offenders involved in human trafficking are prosecuted under a myriad of state laws, but

²³⁷ McCabe (n188 *supra*) 96.

these laws unfortunately make use of varying definitions and a range of diverse penalties. The TVPA made provision in 2000 for the creation of the annual *Trafficking in Persons Report* - a very comprehensive global anti-trafficking review. The Trafficking Report rates the US as a Tier 1 country which fully complies with the minimum standards for the elimination of trafficking. Since the passage of the TVPA of 2000, the US government has invested hundreds of millions of dollars in various law enforcement and social programs aimed at combating the problem home and abroad. Still, this does not seem to be enough to halt the crime domestically as well as internationally.

6.3 Germany

As in many other European countries, slavery has existed in German civilization since antiquity.²³⁸ After the collapse of the Roman Empire in the West, privileged Germanic classes kept Roman subjects as house slaves.²³⁹ Ancient German people (Franks) themselves were captured and enslaved by mainly the Vikings in AD 793 to be kept as personal servants (thralls) or to be sold on the Byzantine or Islamic markets. This practice continued into the Middle Ages until the thrall system was finally abolished in Scandinavia in the mid-fourteenth century. In addition, the tradition of serfdom (*Leibeigenschaft*) existed in feudal Germany (and Europe) for centuries. However, in about 1650, the Germanic region recognized that the system was not merely a slave-like condition, but literally equivalent to slavery. As the Serfs were emancipated and the feudal system abolished, the institution began to decline and finally disappeared in the mid-nineteenth century.²⁴⁰

²³⁸ See history of slavery in Chap 2. The term "Germany" is used here to designate specifically what was previously known as the 1st (the Holy Roman Empire or *Heiliges Römisches Reich*), 2nd (*Zweites Deutsches Reich under von Bismarck*) and 3rd German Empire (*das Dritte Reich under Hitler*), West Germany, the Federal Republic of Germany and the now-reunified federal Germany (Germany is a federal parliamentary republic with 16 states or *Länder*). The situation in East Germany from 1945-1990 is not discussed here.

²³⁹ This is clearly delineated in Germanic codes of the 6th and 7th centuries which regulate the Roman slaves' laws according to folk-right. During the eastward expansion of the Germans in the 10th century, so many Slavs were captured that their racial name becomes the generic term for a "slave". The German word for slave is "Sclafe" from the original root for Slavonic tribes or Slavs. Compare French "esclave"; Danish "slave" or "sclave"; Swiss "slaf"; Armenian "slaff"; Italian "schiavo"; Spanish "esclavo"; Portuguese "esclavo". See Sawyer *Southern Institutes: An Inquiry into the Origin and Early Prevalence of Slavery and the Slave-Trade* (1858) 27.

²⁴⁰ See Luebke "Serfdom and Honour in Eighteenth-Century Germany" 1993 18(2) *Social History* 143 157.

There is no record that Germany was directly involved as financiers, shippers or profiteers during the trans-Atlantic slave trade from the sixteenth to the nineteenth century.²⁴¹ German imperial policy towards slavery seems to extend to colonialism, as Bismarck repeatedly emphasized his - and the *Reichstag*'s (German Parliament) - disinterest in colonial conquests.²⁴² Only in 1884 did he reluctantly consent to the German Empire's acquisition of colonies.²⁴³ As a consequence, Germany was a late entry to the colonial race, and acquired the last unchartered territories in the "scramble for Africa".²⁴⁴ One of the main reasons advanced for expanding its reach into Africa was - similar to other European colonial states - a humanitarian concern to abolish the regional slave trade and slavery.²⁴⁵ However, Germany never banned slavery completely or made the practice criminal in its protectorates.²⁴⁶ Non-violent or domestic slavery remained legalised as a regulated institution until long after the end of German rule.²⁴⁷ German abolitionist policy between 1890 and 1905 consisted of adopting a series of proclamations that barred the bondage of new slaves and banned slave raiding and trading. They gave partial freedom to children of slaves (*Halbfreie*) and full legal freedom to the children of the *Halbfreie* slaves.²⁴⁸ Slaves

²⁴¹ Wiedemann "Fifty Years of Research on Ancient Slavery: The Mainz Academy Project" 2000 21(3) *Slavery & Abolition: A Journal of Slave and Post-Slave Studies* 152-152.

²⁴² Otto von Bismarck (Chancellor of the German Empire from 1860-1890 and founder of the 2nd German Empire or *Reich* in 1871) voiced his concern that colonies were only a burden and an expense, as such he stated: "...I am no man for colonies", as quoted in Taylor *Bismarck: The Man and the Statesman* (1985) 215. His fear became reality and he even tried to give German South West Africa away to the British in 1889. See Taylor (*supra*) 221.

²⁴³ This was done in order to protect trade, to safeguard raw materials and export markets and to take opportunities for capital investment, among other reasons. See Washausen *Hamburg und die Kolonialpolitik des Deutschen Reiches: 1880 bis 1890* (1968) 115. Bismarck immediately regretted his decision and withdrew personally from the colonial endeavours.

²⁴⁴ Germany obtained Togoland (Benin) and Kamerun (Cameroon) in 1884, central or German East Africa (Tanzania) and German South West Africa (Namibia).

²⁴⁵ Eg, the British Colonial Secretary from 1895-1903, Joseph Chamberlain, bluntly articulated the British manipulation of anti-slavery rhetoric for imperial purposes: "Sooner or later we shall have to fight some of the slave-dealing tribes and we cannot have a better *casus belli*. Public opinion here requires that we shall justify imperial control of these savage countries by some serious effort to put down slave dealing" (Minute, 5 Apr 1900, no 1 conf, 28 Jan 1900, Colonial Office 520/1) as quoted in Weiss "The Illegal Trade in Slaves from German Northern Cameroon to British Northern Nigeria" 2000 28 *African Economic History* 141-141.

²⁴⁶ The German administration was concerned about the social and political impact of a forced abolition of slavery. They feared possible consequences which may arise from such massive social disruption, eg, a "threat of social upheaval by unfettered capitalism" (see Deutsch *Emancipation without Abolition in German East Africa c 1884-1914* (2006) 129) and disorder from an "unattached African working class" (Deutsch (*supra*) 112) made up partly of former slaves. However, the colonial dependence on a slave-owning class of African functionaries and plantation owners seems to be the main reason.

²⁴⁷ It was argued that the domestic slavery in the German colonies "could not be compared with the chattel slavery of the Americas; since slavery was relatively mild and an integrated part of African society, its abolition would mean the ruin of agriculture and social chaos". See Weiss (n245 *supra*) 153 relying on reports from Passarge *Adamaua: Bericht über die Expedition des Deutschen Kamerun-Komitees in den Jahren 1893/94* (1895) 526.

²⁴⁸ See Weiss (n245 *supra*) 152-153.

(or third parties on their behalf) were allowed to purchase their freedom by paying an agreed-upon price to the masters.²⁴⁹ As a direct consequence of German colonial policies which intended to establish an African wage-earning class, more than 250,000 slaves managed to emancipate themselves in spite of the fact that abolition was never introduced.

Germany is mostly associated with Nazi practices of slavery during World War II. The Third Reich made use of state-imposed forced labour (*Zwangsarbeit*) of men and women from across occupied Europe to support the regime's war effort.²⁵⁰ More than seven million foreign workers were recruited under duress in the occupied countries and forced into slavery in German industries.²⁵¹ Women were furthermore prostituted by force in state-controlled brothels in military brothels or concentration camps (*Lagerbordell*) and brothels for foreign and forced labourers.²⁵² The SS would also persuade women into becoming sex workers with false promises of release or better treatment. The brothels were created as an incentive or bonus system (*Prämienverordnung*) for prisoners or *Kapos* (*Funktionshäftling*) - prisoners who supervised forced labour or performed administrative tasks in the concentration camps and who collaborated with the SS to increase production.²⁵³

²⁴⁹ *Ibid.* Masters of domestic slaves had duties toward their domestic slaves; if they neglected their duties they could lose their rights (*Herrenrecht*) to these slaves. See Weiss (n245 *supra*) 153. A discussion on German law concerning slavery in the German African colonies is found in Wege "Die Rechtlichen Bestimmungen über die Sklaverei in den Deutschen Afrikanischen Schutzgebieten" 1915 *Mitteilungen des Seminars für Orientalische Sprachen* 3 18.

²⁵⁰ These forced labourers of National Socialist slavery were finally recognized with the proclamation of the German Act on the Creation of a Foundation "Remembrance, Responsibility and Future" (EVZ) of 2000 (although most have of them had already died). This was Germany's first acknowledgement of the grave injustices suffered by the victims and an attempt to pay compensation to them. See Follmar-Otto & Rabe *Human Trafficking in Germany* (2009) 5.

²⁵¹ Herbert *Geschichte der Ausländerbeschäftigung in Deutschland 1880 bis 1980: Saisonarbeiter - Zwangsarbeiter - Gastarbeiter* (1986) 120-178.

²⁵² The women came mainly from the Ravensbrück concentration camp, but there were other camps (such as Auschwitz) which employed its own prisoners. It is estimated that at least 34,140 female inmates were forced to serve as prostitutes during the Nazi period. See Herbermann, Baer & Roberts-Baer *The Blessed Abyss: Inmate #6582 in Ravensbrück Concentration Camp for Women* (2000) 33-34; Drinck & Gross *Forced Prostitution in Times of War and Peace* (2007) 11.

²⁵³ See Sommer *Das KZ-Bordell - Die Rolle von Sex-Zwangsarbeit in den Nationalsozialistischen Konzentrationslagern* (Unpublished DPhil thesis Berlin Humboldt University 2009) 67-70. Other reasons for the establishment of the brothels include fears that sexually-transmitted diseases could become epidemics, and that a general ban on sexual contact could lead to offences against decency (such as homosexual acts) which would undermine military morale.

Aside from the Nazi era, Germany has had an enlightened policy on trafficking since the nineteenth century.²⁵⁴ The country incorporated a comprehensive approach to combat trafficking in recognition of the fact that trafficking requires national and international cooperation.²⁵⁵ In this regard, the country has signed and ratified most international human rights as well as core UN²⁵⁶ and regional anti-trafficking treaties. Historically, Germany has actively participated in the earliest anti-slavery and anti-human trafficking conventions.²⁵⁷ The country ratified the White Slave Traffic Agreement in 1904, the White Slave Traffic Convention in 1910 and the Suppression of the Traffic in Women and Children Convention in 1924.²⁵⁸ The Slavery Convention of 1926 was ratified by Germany 12 March 1929, while the Protocol Amending the Slavery Convention of 1953 was only signed by the country on 29 May 1973. Germany has further chosen to participate in the latest treaties aimed at prohibiting human trafficking. Germany became a signatory to the Palermo Protocol on 12 December 2000, but only became an official party to the instrument on 14 June 2006.²⁵⁹

²⁵⁴ See *infra* 6.3.1.

²⁵⁵ Askola (n1 *supra*) 5; Österdahl “International Countermeasures against Human Trafficking” in Jonsson (ed) *Human Trafficking and Human Security* (2009) 87.

²⁵⁶ Germany became a member of the UN in 1973. See *Gesetz* 6 Jun 1973, *Bundesgesetzblatt* II (BGBl) 430. The BGBl is the official law gazette of Germany. Starck remarks that Germany is not in the habit of adopting UN Declarations and Resolutions, because it is assumed that these are binding on the basis of art 25 of the UN Charter. See Starck “Artikel 1” in Van Mangoldt, Klein & Starck *Das Bonner Grundgesetz. Kommentar. Band 1: Präambel, Art 1 bis 19 4th* ed (1999) 24-149.

²⁵⁷ The German *Reichstag* already approved in 1891 the General Act of the Brussels Anti-Slavery Conference 173 CTS 293 2 Jul 1890. See Weiss (n245 *supra*) 145.

²⁵⁸ Germany only signed the Convention for the Suppression of the Traffic in Women of Full Age in 1933, and accepted the Protocol amending the International Agreement for the Suppression of the White Slave Traffic of 1949 on 29 May 1973. Germany did not sign the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1950) as it regarded the Convention as obsolete and ineffective with a very weak and ineffective implementation and monitoring system. See Galiana *Trafficking in Women* (2000) 32. The decision is based on the consideration that it is not the phenomenon of prostitution as such that should be fought under the criminal law, but only those activities that lead women into prostitution or which severely restrict the personal self-determination and economic independence of prostitutes. Another problem is that victims of trafficking can be repatriated if their “expulsion is ordered in conformity with law”. Additionally, victims do not have a procedural right to participate in proceedings against traffickers, unless national law accords them that right.

²⁵⁹ The CTOC and Migrant Smuggling Protocol were also signed on the same date. Germany has also signed the ICESCR on 9 Oct 1968 and ratified it on 17 Dec 1973, the CERD was signed in 1966 and ratified on 10 Feb 1967, and the ICCPR was signed 9 Oct 1968 and ratified on 17 Dec 1973. The ICCPR became effective for Germany on 23 Mar 1976. For this Convention, the country made a few reservations on matters relating to criminal law and procedure and declared it would handle according to the guarantees of the ECHR. Generally however, the Convention is applicable statutory law in Germany. See *Hamburgisches Obergericht* 17 Jun 2004, Bf 198/00. The Convention against Torture was signed on 13 Oct 1986 and ratified 1 Oct 1990, while its Optional Protocol (2002) was signed on 20 Sep 2006 and ratified on 4 Dec 2008. The country signed the CEDAW on 17 Jul 1980 and ratified the instrument on 10 Jul 1985 with reservations in respect of the wording in the preamble “[people living] under alien and colonial domination and foreign occupation” as it applies to people’s right to self-determination. Germany believes that all people have the inalienable right to freely determine their political status and to freely pursue their economic, social and cultural development. As such, it is “unable to recognize as legally valid an

The country took some time to ratify the Protocol as the trafficking elements required to criminalise the offences had to be included in Germany's existing legislation on sexual and labour exploitation.

In protecting children from any harm, the country has also signed and ratified the CRC,²⁶⁰ its Optional Protocol on the Involvement of Children in Armed Conflict,²⁶¹ and its Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.²⁶² The government made a declaration on the CRC's interpretation in relation to asylum law, which in effect impacts on the rights of non-German or non-EU children.²⁶³ Similarly, several reservations or interpretative statements

interpretation of the right to self-determination which contradicts the unequivocal wording of the Charter of the United Nations and of the two International Covenants of 16 December 1966". See Baer "The Basic Law at 60 – Equality and Difference: A Proposal for the Guest List to the Birthday Party" 2010 11(1) *German Law Journal* 67 71. The Optional Protocol to CEDAW was signed on 10 Dec 1999 and ratified on 15 Jan 2002. Baer (*ibid*) comments that in the reporting of implementation of the CEDAW, Germany has received positive comments only regarding political representation, and fares rather badly regarding equal pay, segregation of the work force, etc.

²⁶⁰ Germany signed the CRC on 26 Jan 1990 and ratified on 6 Mar 1992. It also made interpretative statements and reservations, and declared that the Convention was not considered as being self-executing: "The Federal Republic of Germany also declares that domestically the Convention does not apply directly. It establishes state obligations under international law that the Federal Republic of Germany fulfills in accordance with its national laws, which conform to the Convention".

²⁶¹ The Optional Protocol was signed on 6 Sept 2000, and was ratified on 13 Dec 2004, without any reservations. The German government declared under the terms of art 3 para 2 of the Optional Protocol that it considers a minimum age of 17 yrs to be binding for the voluntary recruitment of soldiers into its armed forces, and that persons under the age of 18 yrs shall be voluntarily recruited into the armed forces solely for the purpose of commencing military training. Except for this type of reservation that the country will not be bound by certain provisions in conflict with their constitution or federal laws, Germany's reservations revolve mainly around the application of international instruments to West Berlin before reunification in 1990. It would state that the relevant instrument would also apply to "*Land Berlin*" or "Berlin (West)" with effect from the date on which it entered into force for Germany. This is done eg for the CERD, ICESCR, ICCPR, CEDAW, OPCAT, Convention for the Suppression of the Traffic in Women of Full Age, the White Slave Traffic Convention, Slavery Convention, Supplementary Slavery Convention, and Vienna Convention. Eastern-European countries and the Soviet Union objected to these reservations in that West Berlin was not a "*Land*" of or part of the territory of Germany and could not be governed by it. Also, the Quadripartite Agreement confirmed that West Berlin was not a "*Land*" or constituent part of the Federal Republic of Germany and could not be governed by it, and that treaties affecting matters of security and status could not be extended to West Berlin by the German government. For the text of the reservations and declarations, see UN *Treaty Series* vol 999 294.

²⁶² This Protocol was signed on 6 Sept 2000 and only ratified on 15 Jul 2009 with reservations with regard to Qatar's commitment to fulfil its obligations under the Optional Protocol after the country raised a reservation with regard to the compatibility of the rules of the Optional Protocol with the precepts of Islamic Shariah law. Germany considers this reservation to be incompatible with the object and purpose of the Optional Protocol.

²⁶³ Germany declared that "[n]othing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens". This reservation is in favour of its immigration law, and shows the German government's intent to deny any domestic effects to the CRC. The German courts have upheld

were made to specific provisions in the Convention.²⁶⁴ Despite strong criticism from various NGOs and children's rights organizations, the declaration has not yet been withdrawn.²⁶⁵ Germany is a member of the Hague Convention on the Protection of Minors (Convention of 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors),²⁶⁶ and also ratified the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption.²⁶⁷

Germany has ratified all of the most important international labour treaties pertaining to aspect of labour trafficking.²⁶⁸ Germany is however not a signatory of, nor has ratified the Migrant Workers Convention.²⁶⁹ The ratification of the Convention is important as it controls the employment of migrant workers and illegal immigration. Its framework on especially

this view in several immigration cases. Eg, in the decision of the *Berlin Verwaltungsgericht* [Administrative Court], 11 Dec 1996, *BVerwG* 36 X 643.95, it was underlined that the same level of children's rights in the CRC is guaranteed by art 6 of the German Constitution. See Renner *Ausländerrecht* 8th ed (2005) 494. However, Germany is still bound by the CRC and has to apply it domestically. See Renner *Ausländerrecht in Deutschland* (1998) 165.

²⁶⁴ Germany prefers to interpret the CRC according to the precepts of EU agreements, in particular the EHRC, and also in accordance with German Constitutional guarantees. The government declared that when dealing with the common responsibility of the parents to raise the child (art 18(1)), parental custody has to be awarded on a case-by-case basis, taking into consideration the situation of the parents. It further declared that art 18(1) does not derogate German law concerning legal representation of minors, custody for children born in wedlock, and family and inheritance law for children born out of wedlock. Moreover, Germany made exceptions to the Convention's guarantees of legal representation and appellate proceedings by stating that these guarantees might not be provided in some cases for minor infringements. See Palmer "Germany: Children's Rights - International and National Laws and Practice" 2007 *The Law Library of Congress* 86 87.

²⁶⁵ The First Chamber of Parliament (*Bundestag*) has also requested the current and previous governments repeatedly to withdraw the declaration. Thus far, the government declined to do so. The Second Chamber of Parliament (*Bundesrat*) re-confirmed its agreement not to withdraw the declaration on 13 Jun 2008. See [http://www.bundesrat.de/cln_050/nn_8336/SharedDocs/Drucksachen/2008/0401-500/405-08_28B_29.templateId=raw.property=publicationFile.pdf/405-08\(B\).pdf](http://www.bundesrat.de/cln_050/nn_8336/SharedDocs/Drucksachen/2008/0401-500/405-08_28B_29.templateId=raw.property=publicationFile.pdf/405-08(B).pdf) (accessed 2013-01-10). Public interest groups, particularly those advocating a higher level of rights for child immigrants, want Germany to withdraw the reservations. See National Coalition für die Umsetzung der Kinderrechtskonvention in Deutschland *Themennetzwerk Kinder ohne Deutschen Pass* <http://www.national-coalition.de> (accessed 2013-01-10). In a recent hearing in the *Bundesrat*, the *Länder* confirmed their agreement not to withdraw the said declaration. See Cremer *Der Anspruch des Unbegleiteten Kindes auf Betreuung und Unterbringung nach Art 20 des Übereinkommens über die Rechte des Kindes: Seine Geltung und Anwendbarkeit in der Rechtsordnung der Bundesrepublik Deutschland* (Unpublished LLD-thesis University of Baden-Baden 2006) 180-201.

²⁶⁶ Drafted on 5 Oct 1961, 658 UNTS 143, and ratified by Germany on 30 Apr 1971. This Convention has been of great importance in the German legal practice in the past; however, its influence is waning as it is replaced by EU community legislation. See Council Regulation (EC) 2201/2003, OJ of the EU (L338) 1.

²⁶⁷ The Convention was concluded on 29 May 1993 32 (ILM 1134 [1993]) and entered into force on 1 May 1995. Germany ratified the instrument on 10 Oct 2001.

²⁶⁸ The country has ratified the ILO's Forced Labour Conventions C29 (Forced Labour) on 13 Jun 1956; C138 (Minimum Age Convention) on 8 Apr 1976. Germany has ratified the 1957 C105 (Abolition of Forced Labour) on 22 Jun 1959, and the C182 (Worst Forms of Child Labour) on 18 Apr 2002.

²⁶⁹ Not one European country has ratified the Migrant Convention. See Prasad & Rohner "Human Trafficking in Germany" in Drink & Gross *Forced Prostitution in Times of War and Peace* (2007) 51.

forced labour addresses human trafficking more concretely than even the Palermo Protocol, and it highlights several very useful anti-trafficking measures. This is the only treaty which grants undocumented migrant workers - even when they are not citizens and are of illegal status – access to basic human rights. By not ratifying the instrument, certain migrants are denied access to fundamental human rights because they lack a residence title or have a very insecure one. By allowing these migrant workers to be treated differently than its national workers, Germany is evading its responsibility to uphold human rights, which is a disparate position to that propagated by the country.

The government has signed the Convention for the Protection of Human Rights and Fundamental Freedoms on 4 November 1950 in Rome. The Rome Statute was signed on 10 December 1998 and ratified on 11 December 2000. It recognizes the jurisdiction of the International Criminal Court. Germany has signed and ratified the Vienna Convention on the Law of Treaties on 24 April 1970, and ratified it on 21 July 1987. It is also a signatory to the Geneva Convention, and acceded to the instrument on 3 September 1954 with reservation. The two Additional Protocols to the Geneva Conventions of 1977 and 2005 were both ratified respectively on 14 February 1991 and 17 June 2009.

Regionally, the country's implementation of the CoE Convention on Action against Trafficking in Human Beings and the EU Council Framework Decision on Combating Trafficking in Human Beings in Germany appears efficient.²⁷⁰ The country is a member state of both institutions which have separate legal frameworks addressing the issue of human trafficking. Still Germany seems accustomed to cooperating closely with these organizations in harmonising its legislation, more so than other regions.²⁷¹ As a founding member of the EU, Germany implements all the EU Decisions and Directives.²⁷² Germany

²⁷⁰ Österdahl (n255 *supra*) 76. Germany has signed the CoE Convention on 17 Nov 2005, but not yet ratified it. This Convention rectifies the Palermo Protocol's weakness as it makes victims' rights binding. Ratification was promised for the 16th legislative term; however, a bill to that effect had not been submitted to the *Bundestag*. See Follmar-Otto & Rabe (n250 *supra*) 38. Ratification of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007) is also still pending.

²⁷¹ Österdahl (n255 *supra*) 71.

²⁷² Some of the most important documents are: Council Decision to Combat Child Pornography on the Internet (2000); Council Framework Decision on Combating Trafficking in Human Beings (2002); Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography (2003); Council Directive on Residence Permit issued to Non-EU Member Country Nationals who are Victims of Trafficking in Human Beings or Subjects of an Action to Facilitate Illegal Immigration (2004); Council Decisions on the Conclusion of the Protocol to Prevent, Suppress and Punish Trafficking in Persons,

has ratified the ECHR which allows citizens to appeal to the European Court of Human Rights.²⁷³ Germany ratified the CoE's European Social Charter which guarantees social and economic human rights in 1965; signed its Additional Protocol of 1988 in the same year, but did not sign the last ESC Additional Protocol of 1995. However, a revised edition of the European Social Charter was signed in 2007. Germany ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1990. Regional conventions protecting the rights of children were also considered as Germany ratified the European Convention on the Adoption of Children²⁷⁴ that harmonizes substantive adoption law among the treaty members. In addition, Germany ratified the European Convention on the Exercise of Children's Rights in 2001, together with a statement specifying the matters of family law for which the Convention would be applied.²⁷⁵ The country enforces these conventions by means of stringent domestic laws, especially against child labour as well as the sexual exploitation of children and human trafficking.

Surrounded by eight bordering countries, Germany is a source, transit, and destination country for women, children, and men subjected to trafficking in persons, specifically forced commercial sexual exploitation and forced labour.²⁷⁶ Sex-trafficking victims are mainly exploited in bars, brothels, peep shows and private apartments, while forced labour mainly involves work in restaurants, hotels, construction sites, meat-processing plants,

Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (2006); Council Decision on the Conclusion of the Protocol Against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime (2006); Commission Decision Setting up the Group of Experts on Trafficking in Human Beings (2007); European Action Plan: The Fight Against Organised Crime (2008), and the Proposal for a Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings, and Protecting Victims, repealing Framework Decision 2002/629/JHA (2010).

²⁷³ This instrument was ratified in 1952. This Convention is fully applicable in Germany and theoretically it ranks at the level of statutory German law. See *Verwaltungsgericht Hamburg*, decision of 27 Feb 2006, docket no 15 E 340/06. However, due to the possibility of every individual petitioning the Court in case of alleged violations of human rights, the human rights guarantees of this Convention are taken very seriously in Germany. Its application causes few problems because many of its principles are mirrored in the German Constitution. See Renner 1998 (n263 *supra*) 165. This was followed by the following ratifications: ECHR Protocol 1 (on education) in 1957, ECHR Protocol 4 (on free movement) in 1968, and ECHR Protocol 7 (on crime and family) in 1985. The ECHR Protocol 12 (on discrimination) was only signed in 2000.

²⁷⁴ Concluded on 24 Apr 1967 (635 UNTS 255), ratified by Germany on 25 Aug 1980.

²⁷⁵ Drafted on 25 Jan 1996 (35 ILM 651 (1996)). Germany's level of compliance extends to the mandatory portion of the Convention.

²⁷⁶ US Dept of State *Trafficking in Persons Report 2009* (n80 *supra*) 141. Germany was originally listed as a transit and destination country only; however in 2003 Germany's statistics included 127 German trafficked nationals for the first time.

domestic service and work in the agricultural sector.²⁷⁷ Members of ethnic minorities, such as the Roma gypsies, as well as foreign unaccompanied minors who arrive in Germany, are particularly vulnerable to human trafficking.²⁷⁸ The flow of trafficking to the country tends to be directed from poorer or conflict-ridden countries from other parts of Europe (such as Romania, Bulgaria, Belarus, Lithuania, Ukraine, and Poland), Africa (primarily Nigeria), and Asia.²⁷⁹ However, the information from the German Federal Office of Criminal Investigation (BKA or *Bundeskriminalamt*) also suggests that approximately a quarter of the sex-trafficking victims are German nationals trafficked within the country, of which roughly ten percent are children.²⁸⁰ The most recent BKA data (2010) pertaining to criminal prosecutions of human trafficking for sexual exploitation shows that 470 investigations

²⁷⁷ US Dept of State *Trafficking in Persons Report 2011*(n22 *supra*) 169. Police estimate that gangs brought around 1000 Chinese people to Germany over the past decade and forced them to work in restaurants under exploitative conditions. Unlike other countries, the majority of offenders are not German-born nationals - a study showed that 52% of German national traffickers had a different nationality at birth. See UNODC *Trafficking in Persons: Global Patterns* (2006) 72. Kavemann & Rabe *The Act Regulating the Legal Situation of Prostitutes – Implementation, Impact, Current Developments* (2007) 8 state that in Germany there are a number of different kinds of brothels, including “sex malls”, massage salons, nudist clubs and sauna clubs, dominatrix studios, night clubs or “houses of boys”. Brothels often have a pick-up area, where the client can choose a prostitute and then go to a room with her or him for the sexual services. Variations on this are *Laufhäuser* (where clients can wander at leisure past the prostitutes” rooms throughout the building before making their choice) or streets, where prostitutes sit outside their rooms or in ground-floor windows respectively and solicit potential clients.

²⁷⁸ Aranowitz “Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organisations that promote it” 2001 9 *European Journal on Criminal Policy and Research* 163 173. Research conducted in Germany also shows that many servants escape their employee-owner and drift into prostitution.

²⁷⁹ The last 2 decades has shown a dramatic increase in the number of persons trafficked into Germany. This is partly due to the fall of the former Soviet Union and to the conflicts in the former Yugoslavia: “Sub-standard living conditions in the poor, war-torn and politically unstable countries of Eastern, South-Eastern and Central Europe have generated a pool of susceptible trafficking victims in search of the proverbial „better life” in neighbouring Western countries, in particular those of the European Union.” See Amiel “Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation” 2006 12 *Buffalo Human Rights Law Review* 5 6. Human trafficking was facilitated by the opening of the EU borders in the late 1980s and early 1990s which allowed almost unlimited freedom of movement, and according to some researchers, the legalization of prostitution in Germany in 2002. See Holman (n40 *supra*) 115-116. Eg, German crime statistics of 2003 show that there were more female victims of trafficking into Germany from the former Soviet Union countries (nearly 80% of the 1 235 identified victims) than from anywhere else, Poland coming in 2nd and Thailand dropping to 7th place. See Stoecker & Shelley (eds) *Human Traffic and Transnational Crime: Eurasian and American Perspectives* (2005) 15. Prior to 2000, most persons trafficked into Germany were from Africa. See Laczko & Gramegna “Developing Better Indicators of Human Trafficking” 2003 *Brown Journal of World Affairs* x(1) 178 183. In 2008 the number of Czech, Romanian, and Polish victims declined but those of Bulgaria, Hungary, and Nigeria increased. In 2010, these figures were as follows: 90% from Europe, including 28% from Germany, 20% from Romania, and 18% from Bulgaria. The numbers declined slightly in 2011 as 85% sex trafficking victims originated in Europe, including 25% from within Germany, 20% from Romania, and 19% from Bulgaria. See US Dept of State *Trafficking in Persons Report 2007* (2007) 12-17.

²⁸⁰ The BKA has published comprehensive yearly reports (*Lagebild Menschenhandel*) on crimes such as human trafficking since 1994: “The main aims of these investigations are the establishment of the profile and structures of the offenders, the detection of connections between criminal actors in different regions of Germany, the initiation of investigation procedures and the recognition of focal points and new *modi operandi*”. See UNiCRi *Trafficking in Women from Romania into Germany* (2005) 93.

(368 foreign and German victims; 102 German victims only) were concluded, i.e. about twelve percent less than during 2009.²⁸¹ Germany especially considers the trafficking of children as very serious. Child trafficking victims (younger than eighteen years of age) have remained constant at twenty-four percent from 2008.²⁸² It is estimated that there are about 20,000 street children in the country, who are often subjected to violence and abuse, and may turn to prostitution for income.²⁸³ However, Germany is not regarded as a destination for child sex tourism.²⁸⁴

As a region, Germany has addressed human trafficking using various means, most prominently through European treaties and framework decisions. Following a similar system to that of the UN and the EU, Germany's legislation and policies are extensively influenced by human-rights conventions and legislation. The country has an aggressive approach to combating trafficking by focusing mainly on criminal prosecutions.²⁸⁵ It attempts to extinguish the demand for trafficked persons (and prostitutes) in the supply chain by arresting traffickers.²⁸⁶ Human traffickers are recognised as being part of

²⁸¹ The figures for the previous years are as follows: In 2009 – 534 investigations (396 foreign and German victims; 138 German victims only); 2008 - 482 investigations (321 foreign and German victims; 161 German victims only); 2007 – 454 investigations (318 foreign and German victims; 136 German victims only); 2006 - 356 investigations (259 foreign and German victims; 97 German victims only); 2005 - 317 investigations (230 foreign and German victims; 87 German victims only); 2004 - 370 investigations (277 foreign and German victims; 93 German victims only); 2003 - 404 investigations (346 foreign and German victims; 58 German victims only); 2002 – 289 investigations; 2001 – 273 investigations; 2000 – 321 investigations; 1999 – 257 investigations; 1998 – 318 investigations; 1997 – 396 investigations; 1996 – 382 investigations; 1995 – 522 investigations. The earlier reports did not differentiate between foreign and German nationals. See *BKA Human Trafficking National Situation Report 2002* (2002) 3; *BKA Organised Crime - National Situation Report 2010* (2010) 4.

²⁸² According to the FCO, in 2008 there were 12,052 reported incidents of sexual abuse of children up to 14 yrs of age compared with 15 935 incidents in 2007. Between 2007 and 2008 the number of cases involving the distribution of child pornography (photographs and videos) increased by 14.5% to 18,264 cases. However, the number of reported cases of ownership and procurement of child pornography dropped by 40.9% from 11,357 cases in 2007 to 6,707 in 2008. A case that made the headlines was the sentencing by the Karlsruhe district court of the former Social Democratic parliamentarian for Baden-Wuerttemberg, Jörg Taus. He was handed a 15-month suspended sentence in May 2010 for the possession of 260 photos and 40 video clips of child pornography.

²⁸³ Terre des Hommes "Growing Number of Street Children in Germany, Report Says" www.expatica.com/de/news/local_news/Growing-number-of-street-children-in-Germany_report-says--_3618.html (accessed 2013-01-10).

²⁸⁴ Brown "Women and Children Last: The Prosecution of Sex Traffickers as Sex Offenders and the Need for a Sex Trafficker Registry" 2011 31(1) *Boston College Third World Law Journal* 1 20.

²⁸⁵ Brown (n284 *supra*) 20. See Bureau of Democracy, Human Rights and Labour *2008 Human Rights Report: Germany* (US Dept of State 2009) <http://www.state.gov/g/drl/ris/hrrpt/2008/eur/119081.htm> (accessed 2013-01-10).

²⁸⁶ This is in contrast to many other countries, eg, Sweden which attempts to stop demand at the point of consumption. Eg, in the German region of Nordrhein-Westfalen, human trafficking as a branch of severe sexual crimes ranked 2nd in the hierarchy of violent crimes committed in 2001. See Stoecker & Shelley (n279 *supra*) 15.

organised enterprises. Germany also views human trafficking crimes as a major branch of organized crime, and also addresses it from this perspective.²⁸⁷ Consequently, those involved in trafficking groups are heavily penalized. Traffickers face as many as ten years imprisonment and German courts have imprisoned nearly one third of those convicted of trafficking.²⁸⁸

Germany is a Tier 1 country as it fully complies with the minimum standards for the elimination of trafficking.²⁸⁹ The German government is unique in its human-trafficking efforts in that it has meticulously compiled data-bases located in the BKA containing the number of human-trafficking victims in their country as well as their gender, age, and nationality.²⁹⁰ There are very few countries that provide official national statistics on cases involving human trafficking.²⁹¹ However, the data provided has limitations as it refers primarily to cases of trafficking in women for the purpose of sexual exploitation. Men and children are excluded. The statistics also do not include trafficking in relation to other activities, such as labour. The yearly data fluctuations are further questioned as it is

²⁸⁷ Keidel "Menschenhandel als Phänomen Organisierter Kriminalität" 1998 5 *Kriminalistik* 321 322. Bravo "Follow the Money? Does the International Fight against Money Laundering Provide a Model for International Anti-Human Trafficking Efforts?" 2008 6(1) *University of St Thomas Law Journal* 138 160 adds that organized crime is also combated in Germany through the Group of Seven (G-7) of which the country forms part of. This is an international economic organisation consisting of 7 large industrialized countries (Canada, France, Germany, Great Britain, Italy, Japan, and the US) with the aim of countering drug and other trafficking which are seen as key sources of money laundering.

²⁸⁸ See US Dept of State *Trafficking in Persons Report 2007* (n279 *supra*) 106. The German law enforcement system is effective as it uses an integrated approach that leads to a numerous investigations and convictions. Eg, in 2006, 150 persons were convicted of trafficking. Some critics argue that convicted traffickers often only get suspended sentences or probation. See Brown (n284 *supra*) 20.

²⁸⁹ The country has been listed as a Tier 1 country since the inception of the US Trafficking Reports in 2001.

²⁹⁰ Laczko "Data and Research on Human Trafficking" 2005 43 *International Migration* 5 12. This information is provided by the BKA through its information and communications platform Extrapol. Other institutions also provide useful facts such as the criminal prosecution statistics of the *Statistisches Bundesamt* (German Federal Statistical Office), the *Bundesamt für Migration und Flüchtlinge* (Federal Agency for Migration and Refugees) which provides general statistics on asylum applications, and the *Weisser Ring*, an organisation which supplies data regarding the general implementation of the Law on the Compensation of Victims of Crime. However, these various statistics do not always tally as they are not harmonised with regard to either the underlying data collection methods or the form of presentation. Furthermore, some of the statistics comprise of limited information. Eg, the *Statistisches Bundesamt* does not deal with child trafficking as a separate offence. As such, it does not identify the age of the trafficking victims. Also, conviction numbers relating to the criminal offence of StGB s 236 mainly covers illegal adoptions. See Lawson & Koffeman *Child Trafficking in the European Union - Challenges, Perspectives and Good Practices* (2009) 66.

²⁹¹ However, German court decisions on human trafficking are published rather selectively which makes it difficult to obtain a comprehensive overview of relevant human trafficking case law. There is no central registration system for case files. Some cases appear to involve human trafficking aspects, but are often not prosecuted for that offence but for other offences committed in the context of trafficking, such as physical injury, pimping (*Zuhälterei*), smuggling of persons or duress. See Herz *Trafficking in Human Beings. An Empirical Study in Criminal Prosecution in Germany* (2006) 7; Galiana (n258 *supra*) 41.

unclear whether there are actually more trafficking cases or whether the police enforcement efforts were simply more improved for that period.²⁹²

The controversy regarding the legalization of prostitution also affects human trafficking in Germany. Although there was no specific legislation on prostitution before 2002,²⁹³ prostitution has principally always been a legal activity in Germany,²⁹⁴ but it was restricted by a host of different legal regulations. Many researchers are of the opinion that the demand for sexual services in countries with legalized prostitution is greater than in those criminalizing prostitution,²⁹⁵ and that trafficked persons can be more easily absorbed in the presence of an extensive and tolerated sex industry.²⁹⁶ It is argued, however, that it “places its policy on prostitution in the context of stepping up efforts to prosecute trafficking in

²⁹² According to the BKA, the areas of crime and their dimension in terms of numbers are essentially in keeping with the conclusions from previous years. The figures have remained nearly constant since the inception of the report in 1994. The reasons for the fluctuations vary. In 2005, eg, the BKA changed the basis of their statistics from initiated investigations to completed investigations, which amounted to a drop. Information may also overlap and trafficked persons may be recounted where investigations last several years. Another reason may be that the police perhaps changed the classification of their investigations to offences which are easier to prove (eg smuggling). Also, the BKA reports that the number of cases of human trafficking reported in Germany actually decreased from 1235 cases in 2003 to 710 in 2009. More and better assistance from NGOs may also contribute to this situation. See Laczko and Gramegna (n279 *supra*) 183. Andrees & Van der Linden “Designing Trafficking Research from a Labour Market Perspective: The ILO Experience” 2005 43(1/2) *International Migration* 55 68 argue that “when relying on official sources, such as police reports or court proceedings, the findings are limited due to narrow legal and institutional frameworks”.

²⁹³ The Act Regulating the Legal Situation of Prostitutes (Prostitution Act) came into force on 1 Jan 2002.

²⁹⁴ Von Galen “Prostitution and the Law in Germany” 1996 3 *Cardozo Women’s Law Journal* 349 349: “Over a million men a day in the Federal Republic [of Germany] seek out prostitutes. They buy 250 million sexual services of all types per year and spend at least 12.5 billion DM. Two-thirds of all men have contact with prostitutes-are patrons.” These figures are from a Bill introduced by the Green Party on 16 May 1990 “to eliminate legal discrimination against prostitutes” and are based on estimates by prostitute self-help groups for West Germany as it existed until 3 Oct 1990. See *Bundestagsdrucksache* (Bundestag Publication) *BT-Drs* 11/7140 16 May 1990.

²⁹⁵ Some researchers accentuate the fact that the legalization of prostitution does not hold any positive outcomes whatsoever. See Hughes “Don’t Legalize: The Czech Republic Proposes a Dutch Solution to Sex Trafficking” 2004 *The National Review Online* 1 2 who argues that the legalization of prostitution did not benefit the government as the lawmakers expected hundreds of millions of Euros in tax revenue with legalization, which did not appear as many registered brothels refused to pay taxes, and numerous criminally-run brothels remained unregistered. This resulted in a budget deficit for Germany, with the government estimating €2 billion in unpaid tax revenue annually from the sex industry. Research done by Farley, Cotton, Lynne, Zumbek, Spiwak, Reyes, Alvarez & Sezgin “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder” in Farley (ed) *Prostitution, Trafficking, and Traumatic Stress* (2003) 33 49 show that 59% of respondents said they did not feel that legalization made them any safer from rape and physical assault.

²⁹⁶ See Holman (n40 *supra*) 115-117 who suggests that the legalization of prostitution in the country created an even greater influx of trafficked, foreign sex workers. According to Ekberg “The Swedish Law That Prohibits the Purchase of Sexual Services” 2004 10 *Violence against Women* 1187 1201, victims have testified to the fact that pimps and traffickers prefer to market their women in countries such as Germany “where the operating conditions are more attractive, where the buyers are not criminalized and where certain prostitution activities are either tolerated or legalized”.

human beings and correspondingly its conclusions prioritise better protection of victims of trafficking in human beings and protection of minors”.²⁹⁷ Many sex-trafficking victims are professionally recruited and actually agree to work as prostitutes in Germany, but are afterwards deceived about the nature of exploitative conditions of their work and forced to permanently work as prostitutes.²⁹⁸ Some experts believe that the German process of “facilitated migration” abets traffickers in their trafficking objectives, as most impoverished persons find it virtually impossible to “facilitate their migration, underwrite the costs of travel and travel documents, and set themselves up in „business” without intervention”.²⁹⁹

All aspects considered, Germany, as a destination country, is undeniably affected by human trafficking, perhaps more than other regions. This is because of its allure as an advanced industrialised country and a strong welfare state with a comparably better economy and standard of living.³⁰⁰

6.3.1 The legal framework to combat human trafficking in Germany

Although the focus on human-trafficking crimes in Germany coincides with the rest of the international community, anti-trafficking legislation has a long history in Germany. Early Germanic law already had provisions that prohibited slavery and sexual exploitation. The “Constitutio Criminalis Bambergensis” (Bamberg Rules of the Court of Capital Offenses) of 1507 established the substance of German criminal law reform. This criminal codification formed the basis of the first German “criminal code” (the criminal laws of Emperor Charles V of 1532) and the “Constitutio Criminalis Carolina” which punished qualified procuring

²⁹⁷ Kavemann & Rabe (n277 *supra*) 3.

²⁹⁸ Victims of sex-trafficking in Germany increased from 2010 when a third of identified victims reported that they had agreed initially to engage in prostitution, versus 45% in 2011. 17% were professionally recruited (eg, via newspaper advertisements or talent agencies), 22% were deceived about the true purpose of their entry into the country, and 14% reported that traffickers used violence to coerce them into prostitution. See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 156; US Dept of State *Trafficking in Persons Report 2011* (n22 *supra*) 169.

²⁹⁹ Raymond “Ten Reasons for *Not* Legalizing Prostitution and a Legal Response to the Demand for Prostitution” in Farley (ed) *Prostitution, Trafficking, and Traumatic Stress* (2003) 315 318.

³⁰⁰ See Cyrus *Trafficking for Labour and Sexual Exploitation in Germany* (2005) 7. Constant & Tien *Germany’s Immigration Policy and Labour Shortages* (2011) 6 add: “In spite of the global recession, Germany remains Europe’s largest economy that displays dynamism and a secure future”. Also see Di Pascale “The New Regulations on Immigration and the Status of Foreigners in Italy” 2002 4 *European Journal of Migration and Law* 71 73.

(procuring of married women and children).³⁰¹ The German law (*Reichsgesetz*) of 1895 and the Chancellor's Decree of 1902 clearly condemned slave trading.³⁰² Reunified Germany's efforts to counter trafficking are based mainly on its Constitution, its Criminal Code and other related legislation.³⁰³ The German Constitution or Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*)³⁰⁴ is a resilient and liberal constitution and has served as a model for many other democratic constitutions.³⁰⁵ It guarantees all rights from the UDHR, with the exception of an unlimited right for asylum.³⁰⁶ The GG establishes a hierarchy of basic rights which are enforceable,³⁰⁷ commencing with three core protections - human dignity,³⁰⁸ personal freedoms³⁰⁹ and equality.³¹⁰ Article 1 of the GG establishes the mandate to respect human dignity and states that "human dignity is inviolable"³¹¹ and that human rights are directly applicable law. This paragraph is protected by an "eternity clause"³¹² and cannot be changed or abolished.

³⁰¹ Von Galen (n 294 *supra*) 354.

³⁰² Weiss (n245 *supra*) 150.

³⁰³ This is unlike the US approach which created new legislation. Germany's Constitution is flexible enough to respond to social change and integration. In contrast, the US Constitution is very difficult to modify and thus has seen very few amendments over the last 223 years. The German Constitution has been amended 55 times in the 60 yrs since its enactment. See Grimm "The Basic Law at 60 – Identity and Change" 2010 11(1) *German Law Journal* 33 33. Only half of the articles of the Constitution look exactly as they were drafted and enacted in 1949. See Gunlicks *The Länder and German Federalism* (2003) 146.

³⁰⁴ *Grundgesetz für die Bundesrepublik Deutschland* (GG) 23 May 1949 BGBl 1. The GG has been substituted and modified several times since its establishment in 1871 by Bismarck. The Constitution of the German Empire (*Verfassung des Deutschen Reiches*) was the Basic Law of the German Empire of 1871-1919, enacted 16 Apr 1871. This Constitution was replaced by the 1919 Constitution of the German Empire (*Die Verfassung des Deutschen Reichs*) or Weimar Constitution (*Weimarer Verfassung*), the 1st democratic constitution of Germany. The Weimar Constitution was very liberal, but allowed unlimited changes which made it possible for Hitler to manipulate certain critical provisions for a political government change. The GG for the Republic of Germany was signed and promulgated by the Parliamentary Council on 23 May 1949 at Bonn. After the fall of the Berlin wall in Nov 1989, the reunified Germany adopted the GG as its Constitution. This was accomplished by making use of art 23 of the GG, which stipulates that any new territory can adhere to the GG by a simple majority vote. Some changes were made to the law in 1990, mostly pertaining to reunification, such as to the preamble.

³⁰⁵ Herzog "Foreword by the Federal President" GG (1994) i.

³⁰⁶ Wyler *et al* (n174 *supra*) 17, 30. This instrument is highly respected in Germany and frequently relied upon for the interpretation of the fundamental rights guaranteed by the German Constitution. See Schreuer *Decisions of International Institutions before Domestic Courts* (1981) 144.

³⁰⁷ GG (n304 *supra*) arts 1-19; art 38.

³⁰⁸ This concept is not explicitly present in the US Constitution.

³⁰⁹ GG (n304 *supra*) art 2.

³¹⁰ GG (n304 *supra*) art 3 - Equality before the law and equal rights of men and women.

³¹¹ See GG (n304 *supra*) art 1(1) (FRG): "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority." The prohibition against the violation of human dignity is upheld without exception. Eg, in *Gäfgen v Germany* (ECHR 30 Jun 2008, Appl no 22978/05, ss 96-97), the human dignity of a kidnapper was violated during police interrogation. In this case, a police officer threatened a kidnapper with torture to disclose the location of the kidnapped child who at that time was, in fact, already dead. This resulted in criminal charges because of the violation of human dignity through a threat of torture.

³¹² The eternity clause is contained in GG (n304 *supra*) art 79 III. This protection is not afforded to every single right in the Bill of Rights, but it does guarantee a system with fundamental rights.

Other rights applicable to the combating of human trafficking concern the protection of marriage and family (article 6), school education (article 7), freedom of association (article 9), freedom of movement (article 11), occupational freedom and the prohibition of forced labour (article 12) and the inviolability of the home (article 13).

The state has a duty to respect and protect all people's fundamental rights irrespective of their sex - such as the right to life and freedom from physical or mental harm - rights which are central in combating human trafficking. These rights protect the individual against the state but also against fellow citizens who may exploit them. This was decided in *Lüth* by the German Federal Constitutional Court (*Bundesverfassungsgericht* or BVerfGE).³¹³ The Court ruled that although fundamental rights are primarily subjective rights of the individual against the state; they also have horizontal application. This was confirmed in the *Apotheken*-case.³¹⁴ The state's duty to protect rights is fulfilled through obligating the legislature to legislate if a fundamental right is threatened. If a law does too little to protect a right, it violates the Constitution. The German government must create new or revise existing trafficking laws in its Criminal Code to continually protect all threatened rights. The impact of the GG is however increasingly limited by external influences from the EU. Although all EU member states are affected, "it may be more noticeable in Germany than elsewhere since no other member state has attributed a similar level of importance to its constitution."³¹⁵

The first two fundamental rights together with article 6 which guarantees the welfare of children have been utilized frequently in cases concerning child trafficking or the exploitation of children. In 1968 already the BVerfGE held that "the child is a human being with his or her own human dignity and the right to development of his or her personality in the sense of article 1(1) and article 2(1) of the Constitution".³¹⁶ Since then, this phrase has been frequently used by the BVerfGE as the basis for the principle of the best interest of

³¹³ BVerfGE 7 198 (15 Jan 1958).

³¹⁴ BVerfGE 7 377 (11 Jun 1958).

³¹⁵ Grimm (n303 *supra*) 43-44. The author states that although "constitutional patriotism" is a German phenomenon, the ECJ ruled in *Costa v ENEL* (1964) that community law enjoys primacy over national law (including their constitutions) and that the citizens can invoke the primacy vis-à-vis their national government.

³¹⁶ BVerfGE 24 119, 144 <http://www.servat.unibe.ch/dfr/bv024119.html> (accessed 2013-01-10).

the child or *Kindeswohl*.³¹⁷ The BVerfGE held in a landmark decision that article 6(2) of the Constitution, which stipulates a constitutional right and obligation of the parents to care for and to educate their children, also contains a corresponding constitutional right of the child.³¹⁸

Persons who are persecuted in their country of origin have the right to apply for asylum in Germany based on article 16a GG. Germany grants refugee status to persons that are facing prosecution because of their race, religion, nationality or belonging to a special group. The scope of this right was limited and reformulated in 1992, under pressure of numerous asylum applications, with 400,000 submissions in 1992 alone.³¹⁹ Stricter regulations, such as the asylum refusal for nationals of so-called safe countries, led to fewer numbers of asylum seekers.³²⁰ German law prohibits the expulsion of rejected asylum applicants who have a founded fear of persecution in the home countries. As such, these persons do not necessarily need to leave the country.

Except for the Constitution, other mechanisms are available under separate provisions of the criminal law to combat exploitative structures. Amongst these are, for example, the Robbing of Persons,³²¹ Stealing of Minors and Children,³²² the Transplantation Law,³²³ Illegal Employment Law,³²⁴ and the Narcotics Law.³²⁵ As alternative charges, these

³¹⁷ Eg, the phrase is used in BVerfGE 79, 51, 63; E 83, 130, 140. The word "*Kindeswohl*" (child welfare) does not literally translate as "best interests of the child", but is the standard German term used in this regard. See Fodor & Peter *Aufenthaltsrechtliche Illegalität und Soziale Mindeststandards - Das Recht des Statuslosen Kindes auf Bildung* (Rechtsgutachten im Auftrag der Max-Traeger-Stiftung der Gewerkschaft Erziehung und Wissen 2005) 21.

³¹⁸ See BVerfGE 1 BvR 1620/04 (1 Apr 2008)

http://www.bverfg.de/entscheidungen/rs20080401_1bvr162004.html (accessed 2013-01-10).

³¹⁹ This change was later challenged and confirmed in a judgment by the Constitutional Court.

³²⁰ The hearings for asylum are however only opened after illegal entry. Also, the legislation for asylum is very strict, as such the asylum applications are reviewed thoroughly and only about 3% are accepted. See Cyrus (n300 *supra*) 8.

³²¹ See German Penal Code or *Strafgesetzbuch für das Deutsche Reich* (StGB) s 234. Seizure of a person by certain means (force, threat of appreciable harm or trickery) in order to abandon the victim in a helpless situation or force the victim into military service abroad.

³²² S 235 StGB "Removal or Withholding Children or Minors from their Parents or Legal Guardians". In this regard, StGB s 234 (kidnapping) and StGB s 234a (abduction) can also be used in cases of deprivation of personal freedom.

³²³ The illegal removal of organs is punishable in accordance with art 18 of the Transplantation Act (*Transplantationsgesetz*) of 1997. This crime is listed as one of the offences to which the StGB applies regardless of whether the crime is committed within or outside the country.

³²⁴ The Law to Intensify Measures against Illegal Employment and Tax Evasion connected with Illegal Employment (*Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung - SchwarzArbG*). Illegal employment is provided by employers who do not fulfil their social insurance obligations, who

violations are easier to prove. Aiding certain categories of migrants to obtain permanent residency easier by reducing bureaucracy, is the new Immigration Law or *Zuwanderungsgesetz* of 2005 (ZuWG).³²⁶ The act proclaims Germany's immigration policy as well as its social integration of migrants, and finally recognizes that Germany is an immigration country.³²⁷ The ZuWG replaces the *Ausländergesetz* or Aliens Law (AuslG) that facilitated the prosecution of traffickers in section 92a (transnational people-smuggling or facilitating illegal entry) or AuslG section 92b (commercial and organised transnational smuggling of aliens), and incorporates the Residence Law or *Aufenthaltsgesetz* (AufenthG) which contains relevant criminal provisions regarding the smuggling of persons (AufenthG articles 96, 97).

The provisions of the AuslG were also utilised to prosecute or deport migrants for illegal residence (AuslG section 92) or illegal entry (AuslG section 58). This Act also granted the trafficked person a toleration or *Duldung* status (AuslG section 53) of at least four weeks until the decision was made to give evidence as a witness. If no cooperation was forthcoming, the victim was obliged to leave the country after the expiry of the toleration

receive social benefits and do not fulfil their reporting obligations or who employ foreigners without work permits. Penalties are custodial sentences or fines for the violation of these obligations. Also see s 233 StGB (previously s 406 & 407 SGB III).

³²⁵ Abusing persons, and especially children for the purpose of illicit activities such as drug dealing, is criminalized in accordance with the provisions of the Narcotics Law (*Betäubungsmittelgesetz*) in conjunction with the relevant principles of the general part of the StGB as outlined in arts 25–27.

³²⁶ Immigration is strictly regulated in Germany, which is also linked to its policy reaction to trafficking. Whereas the early Schengen initiatives of the mid-1980s suggested a commercially-oriented scheme to end border controls, this was quickly replaced after the fall of the Berlin Wall in 1989 with a system of immigration control and monitoring. See Apap, Cullen & Medved *Counteracting Human Trafficking: Protecting the Victims of Trafficking* (2002) 6-7; Hailbronner, Martin & Motomura (eds) *Immigration Controls: The Search for Workable Policies in Germany and the United States* (1998) 1, 4. Rather than reducing opportunities for traffickers, restrictive immigration policies have created a market for irregular migration, often as organised serious crime, through trafficking and smuggling of people. See Prasad & Rohner (n269 *supra*) 50. The latest ZuWG was introduced to attract valuable professionals for the German labour market as new immigration categories for highly skilled professionals, academics and scientists were introduced. The recent *Gesetz zur Neuaustrichtung der Arbeitsmarktpolitischen Instrumente* (Act on the Reorganization of Labour Market Policy Instruments) of 2009 even prioritizes job placement within the framework of the German labour market policy. See Constant & Tien (n300 *supra*) 9. But the labour market remains closed for unskilled workers. Prasad & Rohner (n269 *supra*) 50 object to this: "In our opinion, the possibility of legal employment should also include work in prostitution, because there is apparently a need for workers in prostitution just as in some other sectors of industry."

³²⁷ The Act states as its purpose in s 1(1): "This Act serves to control and restrict the influx of foreigners into the Federal Republic of Germany. It enables and organises immigration with due regard to the capacities for admission and integration and the interests of the Federal Republic of Germany in terms of its economy and labour market." See Constant & Tien (n300 *supra*) 8. As an immigration country, Germany has a total population of 81.8 million of which 9.8 million people were born outside the country. The largest numbers of foreign citizens in the EU reside in Germany (6.4 million), according to Piirto (ed) *Europe in Figures – Eurostat Yearbook 2010* (2010) 192, 194-196.

period. Further toleration or a residence permit (AuslG section 55) may be granted if it could be proved that the trafficked person's life was in danger should she be returned to her country of origin. This right is seldom granted as the specifications of proof are very exacting.³²⁸ The ZuWG replaces the toleration status with a temporary residence permit (*Aufenthaltserlaubnis*), and awards the temporary residence permit without the required furnishing of evidence against traffickers.³²⁹ Section 25(4) AufenthG provides that a temporary residence permit is granted for urgent humanitarian or personal reasons or because of substantial public interests. It is usually granted until the end of the legal proceedings. The temporary residence permit is initially issued for a six-month period; after eighteen months, the permit is issued for a year at a time (AufenthG section 26(3)). After seven years, a permit to settle (*Niederlassungserlaubnis*) can be granted.

Article 50(2)(a) AufenthG stipulates that if the residence authority has concrete information that the person is a trafficking victim, a "period for departure" (*Ausreisefrist*) of at least one month must be granted, and a general prohibition of deportation (*Abschiebeverbot*) applies. Counselling services as well as police authorities point out that the identification and stabilization of victims of human trafficking often takes longer than the four weeks granted. If the trafficked person is not willing to testify in criminal proceedings, deportation follows. The AufenthG however does not regulate the situation of the exploited person after the completion of the criminal proceedings. Courts may still bar deportation proceedings on the basis of the so-called "*kleines Asyl*" (small asylum) if the trafficked person risks becoming a victim of trafficking again upon return to the country of origin.

³²⁸ The danger must be of a long-term nature and nationwide. The grant is only for 2 yrs, and must be reapplied for. If granted for 8 yrs consecutively, an unlimited residence permit may be awarded. However, a trafficking victim may be entitled to residence for other reasons, such as marriage, asylum or humanitarian reasons.

³²⁹ The German government introduced this regulation through the *Richtlinienumsetzungsgesetz* (Law on the Transposition of EU Directives) of 2007 and as such complies with the international requirement to grant a temporary stay to trafficking victims willing to cooperate with the relevant law enforcement authorities. Trafficking victims' prospects to stay in Germany were also enhanced by Criminal Procedure (*Strafprozeßordnung* or StPO) s 154 providing for more effective administrative regulations in the application of the ZuWG, in order to further encourage trafficking victims to testify against traffickers. S 154a grants the public prosecutor the authority to refrain from prosecuting victims (against incriminating themselves) for violation of the AufenthG, ZuWG or the Tax Law, since these are slight offences compared to human trafficking.

However, the visa system in the AufenthG has become stricter. Before 2002, a tourist visa was required by means of the “Vollmer edict”³³⁰ and a *Reiseschutzpass*, a certificate proving financial means in case of deportation. However, many of these documents were sold by smugglers. With the implementation of the ZuWG, new regulations concerning the granting of the visa have come into force. For example, an *Einlader-Datei* (database on persons inviting third country nationals to Germany) checks whether certain firms or individual persons invite foreign nationals frequently, as this is regarded as suspicious and an indicator for smuggling or trafficking in persons.³³¹

Prostitution is believed by some to be a contributing factor to human trafficking. Germany promulgated its first specific legislation on prostitution - the Act Regulating the Legal Situation of Prostitutes (*Prostitutionsgesetz*) - on 1 January 2002. Based on the concept of voluntary and self-determined prostitution, its intention is to counter all criminal activities accompanying prostitution such as human trafficking.³³² This act affords the profession legal protection³³³ against coercion and exploitation (section 180), living off immoral earnings and trafficking in human beings (sections 180b and 181). Sexual exploitation and incitement of a person less than eighteen years of age is punishable by up to three years imprisonment or a fine.³³⁴ Yet, trafficked persons are not entitled to such legal protection and benefits as they usually reside and work illegally in Germany. These victims are liable

³³⁰ This regulation was named after the former State Secretary, Ludger Vollmer, and instructed German consulates to provide persons with a visa even if doubts existed about their intention to return to their country of origin. See Galiana (n258 *supra*) 42. This led to a large-scale abuse of the visa system with faked invitations and guarantees sold on the black market, as in the judgment of *LG Köln* 9 Feb 2004, B 109-32/02. See Ziegler “Criminal Victims/Witnesses of Crimes: The Criminal Offences of Smuggling and Trafficking of Human Beings in Germany, Discretionary Residence Rights, and Other Ways of Protecting Victims” 2005 6(3) *German Law Journal* 605 611.

³³¹ Galiana (n258 *supra*) 22, 42. It has been argued that visas should be standardized by means of legislation. The lack of harmonisation means that many victims are brought into Germany from neighbouring countries because visas are not required. Eg, before the introduction of free visas for Romanian citizens in 2002, Romanian trafficking victims had not featured much in trafficking patterns into Germany. However after the change in the visa system, there was 1000% increase in Romanian trafficking victims. In 2003, Romanian victims constituted the 2nd largest national group of trafficking victims in Germany behind Russian victims. See UNiCRI (n280 *supra*) 19; Follmar-Otto & Rabe (n250 *supra*) 24.

³³² Kavemann & Rabe (n277 *supra*) 8: “One of the intentions is that, by improving the legal status of prostitutes, the criminal activities that often surround prostitution and often have to be classified as organised crime, will have the ground cut from under them”.

³³³ Prostitutes can sue their clients for payment of the sum agreed upon. As a result, trafficking victims of sexual exploitation and prostitutes exploited by their pimps may sue the offenders for damages. Kavemann & Rabe (n277 *supra*) 11-12.

³³⁴ Tucker, Martyn, Bejenaru, Brotherton, Gahleitner, Gunderson & Rusu *Violence, Exploitation and Trafficking: Service User Perspectives* (2011) 70.

to prosecution and deportation under the ZuWG, unless they act as witnesses in trafficking trials.

Further auxiliary legislation protecting trafficking victims are, amongst others, the Protection from Violence Act (2000),³³⁵ the First Right to Marriage Reform Act (1976),³³⁶ the Victim Protection Act (*Zeugenschutzharmonisierungsgesetz* 2001),³³⁷ the Improvement of the Rights of Victims Act,³³⁸ and the Protection of Crime Victims Law (2004).³³⁹ Child victims are additionally protected by the Youth Employment Law (*Jugendarbeitsschutzgesetz* 1976, as amended 2011) and the Children's Health and Safety Regulation (*Kinderarbeitsschutzverordnung* 1998, as amended 2011).³⁴⁰ Unaccompanied minor refugees are protected by article 42 of the *Sozialgesetzbuch* (SGB) VIII which obliges youth welfare authorities to take custody over all these juveniles until they are eighteen years of age.³⁴¹

Trafficked persons often have a claim to compensation against the state and against perpetrators for damages under civil law. The victims can pursue claims directly against the perpetrator(s) in accordance with the provisions of the *Bürgerliches Gesetzbuch* (BGB) section 823. This claim can be asserted as part of criminal proceedings using the “adhesion procedure” (*Adhäsionsverfahren*) to institute an ancillary civil action under

³³⁵ This civil law protects victims of violence, persecution, and other unreasonable acts (such as stalking) and criminalizes rape, including spousal rape. Penalties of up to 15 yrs in prison are provided for.

³³⁶ This law allows a wife the right to decide freely on legal, employment, and social areas, which may assist in cases of forced marriage, and other forms of trafficking.

³³⁷ This act introduces statutory protection of victims of serious crime, such as trafficking victims, vulnerable persons, and witnesses under the age of 16 in criminal proceedings; which include taped, video and video conference evidence by such victims/witnesses. Witnesses may be accompanied by a person of trust (*Vertrauensperson*).

³³⁸ The Act states that, inter alia, victims of crime have a statutory right to legal aid and the assistance of an advocate; victims also have a right to victim protection schemes, victim support in court proceedings and subsequent compensation.

³³⁹ This law concerns measures to ensure protection to victims of crime.

³⁴⁰ Minors below the age of 18 may be employed, albeit under numerous prohibitions that apply in principle also to vocational training. Some exceptions are made for properly supervised training. Minors may not be employed in dangerous occupations.

³⁴¹ This regulation conflicts with that of the *AufenthG* which regarding the capacity to act in proceedings (*Verfahrensfähigkeit*) of persons above 15 yrs. The *AufenthG* considers unaccompanied minors capable to act (*Handlungsfähig*) upon turning 16 yrs of age and are *de facto* treated as adults in accordance with *AufenthG* art 80 and art 12 of the Law on the Asylum Procedure (*Asylverfahrensgesetz* - *AsylVfG*). The principle of the best interests of the child (see n 319 *supra*) is also stressed in the STG as a primary concern, eg, STG III art 8(a) requires youth welfare authorities to act in case the *Kindeswohl* is imperilled; STG art 42 VIII obliges youth welfare authorities to assume responsibility of the child in case of a serious threat to the *Kindeswohl*. However, the principle of best interest of the child does not appear to be so well-established in the context of proceedings under the *AufenthG* and the Law on the Asylum Procedure.

sections 403 *et seq* of the German Code of Criminal Procedure (StPO). Victims of human trafficking can pursue claims for compensation as injured persons against the state in accordance with the Crime Victims' Compensation Law (*Opferentschädigungsgesetz* 1976, as amended 1985).³⁴² In case the claim is rejected the victim can challenge the decision of the maintenance office (*Versorgungsamt*) in court. The victim can also apply for legal aid for those proceedings. Trafficked persons can also assert their claims to payment of wages before the Labour Courts (*Arbeitsgericht*) if the injury is related to an employment relationship. Human-trafficking victims can only claim subsidies in accordance with the Asylum Seekers' Benefits Law (*Asylbewerberleistungsgesetz* 1993). Again, only trafficked persons who are willing to testify are entitled to these state payments. The subsidies received are minimal and, in accordance with the rates of the act, about thirty percent lower than that received by German social-benefit recipients. This guarantees only emergency support, and not any physical or health treatment.

6.3.1.1 Anti-trafficking provisions in the *Strafgesetzbuch* (German Penal Code)

As a civil-law state, Germany has codified most of its regulations in a well-organised legal civil code (*Bürgerliches Gesetzbuch* or BGB).³⁴³ The modern penal code for the Federal Republic of Germany (*Strafgesetzbuch für das Deutsche Reich* or StGB) originates from the Penal Code of 31 May 1870, and was promulgated on 26 February 1876 in the *Reichsgesetzblatt* (Law Gazette of the German Empire) stated in Section Thirteen "Crimes and Offences against Morality":

Artikel 180. Wer gewohnheitsmäßig oder aus Eigennutz durch seine Vermittelung oder durch Gewährung oder Verschaffung von Gelegenheit zur Unzucht Vorschub leistet, wird wegen Kuppelei mit Gefängniß bestraft; auch kann auf Verlust der

³⁴² In contrast to other grants, this claim does not include either damages for pain and suffering or compensation for damage to property or financial losses, but aims to restore the physical and mental health of trafficked persons to every extent possible, thereby allowing participation in society and work. Follmar-Otto & Rabe (n250 *supra*) 66.

³⁴³ Literally translated as the Book of Civil Law, the BGB has been shaped by Roman law (such as the *Corpus Juris Civilis*), Justinian law, and Napoleonic law (such as the Napoleonic Code). The German code derives from a modification of the French Code (after Napoleon conquered the region), but the legal standardization of the German criminal and procedural law began with the inception of the German Empire (*Deutsches Reich*) in 1871.

bürgerlichen Ehrenrechte, sowie auf Zulässigkeit von Polizei-Aufsicht erkannt werden.

(Whoever performs or encourages habitually or from self-interest by his intervention or by the granting or procuring of an opportunity to the sexual lewdness (fornication), shall be punished with imprisonment for pimping; also with the loss of civil rights, as well as be subjected to police supervision).

Artikel 181. Die Kuppelei ist, selbst wenn sie weder gewohnheitsmäßig noch aus Eigennutz betrieben wird, mit Zuchthaus bis zu fünf Jahren zu bestrafen, wenn

- 1. um der Unzucht Vorschub zu leisten, hinterlistige Kunstgriffe angewendet worden sind, oder*
- 2. der Schuldige zu den Personen, mit welchen die Unzucht getrieben worden ist, in dem Verhältniß von Eltern zu Kindern, von Vormündern zu Pflegebefohlenen, von Geistlichen, Lehrern oder Erziehern zu den von ihnen zu unterrichtenden oder zu erziehenden Personen steht.*

(The procuring is, even if it is pursued neither habitually nor from self-interest punishable with imprisonment of up to five years, if:

1. to abet or encourage the sexual lewdness, calculating deceit is used, or if
2. the offender stands to the persons with whom the sexual lewdness has been done in the relationship of parents to children, or of guardians to care-ordered, from clergy, teachers or educators to the persons to be taught or to be educated by them.)

These criminal regulations forbidding “encouragement of prostitution” protect not only minors or women, but all persons of all ages. All successive intermediaries that operate to implement the plan to bring persons to the brothel owner are equally criminal. Read together with article 48,³⁴⁴ these provisions combat trafficking for sexual exploitation as it explicitly states the elements of the crime; i.e. seducing a woman to go abroad with the purpose of surrendering her to a life of prostitution, and deliberately concealing (*Arglistige*

³⁴⁴ Art 48 reads: “*Als Anstifter wird bestraft, wer einen Anderen zu der von demselben begangenen strafbaren Handlung durch Geschenke oder Versprechen, durch Drohung, durch Missbrauch des Ansehens oder der Gewalt, durch absichtliche Herbeiführung oder Beförderung eines Irrthums oder durch andere Mittel vorsätzlich bestimmt hat.*” (Whoever intentionally determines another to commit a punishable action by giving a gift or promise, by threat, by abuse of reputation or force, by purposefully bringing about or fostering a mistake, or by other means, is to be punished as an instigator.)

Verschweigung) this objective. As such, the German government had recognised human trafficking as a serious crime in the nineteenth century already:

*'t Kan niet ontkend worden, dat de Duitse wetgever bij uitstek geslaagd is in de opsomming van de elementen, die eigen zijn aan de handelingen der meisjeshandelaars. We telden dan ook reeds 1897 bij de totstandkoming van dit artikel; vele jaren lang waren Regeering en overheid reeds van particuliere zijde in kennis gesteld met den waren aard van deze wandaden en met de omstandigheden, waaronder ze gepleegd worden.*³⁴⁵

(It cannot be denied that the German legislator was successful par excellence in the listing of the elements inherent in the act of the female-slave trading. We therefore already acknowledge the year 1897 as the origin of this article, the Government and authorities were already informed many years in advance of the true nature of these crimes and the circumstances under which they are committed.)

Germany's firm stance against human trafficking within its borders is confirmed by its legal evolutionary history, a position which has continued into the twentieth century. The StGB prohibits trafficking in persons for all purposes. In the German penal code there are currently two articles relating directly to trade in human beings. These legal provisions have been contained in sections 180 and 181 StGB, but since the 37th *Strafrechtsänderungsgesetz* (Criminal Law Reform Act) which came into force on 19 February 2005, the provisions have been expanded and relocated. These sections have now (as sections 232 and 233) been merged with parts of the former section 234 StGB on kidnapping in Chapter Eighteen "Crimes Against Personal Freedom".

Since their inception, sections 180 and 181 have punished any person who entices another to engage in illicit sexual practices.³⁴⁶ Although these provisions have changed

³⁴⁵ Collard *De "Handel in Blanke Slavinnen"* (Academisch Proefschrift Ter verkrijging van den Graad van Doctor in de Rechtswetenschap Universiteit van Amsterdam 1900) 162.

³⁴⁶ The provisions of StGB s 181(a) of 1900 stipulated the specific type of offender, who is described as follows: "As a rule, the pimp uses the prostitute, with whom he is linked by her need for protection or affection, as a source of income. He knowingly partakes of the income she earns through prostitution, in order to lead a life devoted to idleness and pleasure". See Von Galen (n294 *supra*) 359-360.

over the years, the focus has always been exclusively on sexual exploitation.³⁴⁷ The crime of trafficking in human beings was officially introduced into the German Penal Code in 1973 (as an amended section 181) as a “necessary element in combating international crime”.³⁴⁸ In 1992, modification took place again when the definition of the penal element of trafficking in human beings was renewed in sections 180(b) and 181 StGB,³⁴⁹ and human trafficking was classified as an organised crime offence,³⁵⁰ which allowed the police (especially the *Landeskriminalamt* (LKA) or State Office for Criminal Investigation) and the Public Prosecutor’s Department to become involved in the criminal investigations.³⁵¹

StGB section 180(b) contains the non-indictable offence of simple trafficking in persons, while aggravated trafficking in persons (as covered in StGB section 181) is an indictable offence and involves so-called “qualitative measures of constraint” (StGB section 240), such as force, threat of grievous harm or deceit.³⁵² Simple trafficking in persons involves pecuniary exploitation and strong exertion of influence (for example, by manipulating the individual’s helplessness resulting from their residence in a foreign country) while aggravated trafficking requires force, deceit, threat of harm, or kidnapping in addition.³⁵³

³⁴⁷ Other forms of exploitation linked to trafficking in persons, such as forced labour, are not considered in these articles and are penalised under other provisions (most notably through labour regulations). See Ziegler (n330 *supra*) 625.

³⁴⁸ Horstkotte “Kuppelei, Verführung und Exhibitionismus nach dem Vierten Gesetz zur Reform des Strafrechts” 1974 *Juristenzeitung* 84 88. The offence of trafficking in persons was introduced with the Fourth Act to reform the Penal Code in 1973 to accommodate the Germany’s legal obligations under international conventions against trafficking in women, girls and children.

³⁴⁹ Under the 26th Law to Change the Criminal Law (BGBl I 1992 1255). See Von Galen (n294 *supra*) 363.

³⁵⁰ There is no legal definition for organised crime in Germany, though the BKA has structured a definition for internal use: “Organised crime is the planned commission of criminal offences determined by the pursuit of profit and power which, individually or as a whole, are of considerable importance and involve more than two persons, each with his/her own assigned tasks, who collaborate for a prolonged or indefinite period of time (a) by using commercial or business-like structures, (b) by using force or other means of intimidation or (c) by exerting influence on politics, the media, public administration, judicial authorities or the business sector”. See BKA (n281 *supra*) 9.

³⁵¹ Generally, the Public Prosecutor’s Departments conduct the investigations (StPO s160 & s161); however the 15 LKA’s are responsible for investigating and controlling legal prostitution in Germany. The LKA investigates organised crime regionally. Investigators are assisted by various investigative methods provided by the StPO which ranges from search, police-monitoring notices, interception, phone tapping to deployment of undercover investigators and long-term-observation. These measures can however only be applied on the basis of a first suspicion.

³⁵² The differentiation between “normal” or simple, aggravated and less severe offences of the same basic crime is a systematic feature of German criminal law. This is done by adding additional criminal elements to it when formulating the statute. It is in sentencing when aggravating and mitigating “circumstances” will be assessed. See Ziegler (n330 *supra*) 315.

³⁵³ The 2 types of offences carry varying degrees of penalties. Simple trafficking in persons carries a sentence of up to 5 yrs or a fine while a sentence between 6 months and 10 yrs can be handed down for cases relating to victims aged between 18 and 21. Aggravated trafficking in persons carries a sentence ranging between 1 and 10 yrs and is imposed if the victim is a child; if severe abuse has taken place or the victim’s

StGB section 180(a) relates to the promotion of prostitution. This provision states that whoever exploits another person who engages in prostitution; or for a material benefit supervises another person's engagement in prostitution, determines the place, time, extent or other circumstances of the engagement in prostitution, or takes measures to prevent the person from giving up prostitution, and in that regard maintains a relationship with the person which goes beyond a particular case is guilty of an offence. The perpetrator(s) shall be punished with imprisonment from six months to five years, or a fine. If existing sex workers are prevented from leaving prostitution by force or threats of grievous harm, or are forced to continue prostitution against their will, they are also victims of this offence.³⁵⁴ However, the penalty for trafficking is reduced when a woman knows she is going to be a prostitute or is deemed "not far from being a prostitute". This provision has been subjected to constitutional review after the Münster Trial Court found section 180(a)(1)(2) prohibiting the encouragement of prostitution and employment of prostitutes unconstitutional.³⁵⁵ This provision defines encouragement of prostitution as running a business in which prostitution takes place and "prostitution is encouraged through means going beyond simple assurance of apartments, accommodations or a stay, and the usual secondary benefits accompanying this" and illegal pimping is defined as "overseeing one's property advantages in someone else's practice of prostitution, determining the place, time, extent or other circumstances of the practice of prostitution, or taking measures meant to keep the other from giving up prostitution". The court stated that these provisions were contrary to article 12 of the GG and violated the basic right to choose one's career as a club operator or prostitute. However, the BVerfGE rejected the Münster trial court's referral as inadmissible and did not consider the issues of unconstitutionality it contained.³⁵⁶

life was endangered; if the victim was forced to enter or continue illicit prostitution or forced to perform sexual acts using violence, threats of violence, or through deception; or if the perpetrator committed the crime for pecuniary advantage or as a member of an organized criminal enterprise. For the perpetrator of human trafficking crimes to be held liable, the trafficker must be subjectively culpable (acted purposively) and all elements need to be present to prove the existence of an "objective culpability". The promotion of human trafficking by means of recruiting, transporting, transferring, housing, or taking in another person will be punished with prison sentences ranging from 3 months to 5 yrs. The attempt to commit any of the above acts is also punishable. See Köhler "Fighting Human Trafficking in Bavaria" 2005 *The Quarterly Journal* 73 73; UNiCRI (n280 *supra*) 79-80.

³⁵⁴ As determined by the Federal Supreme Court regarding the application of s 181(a)(1)(1) StGB (exploitative pimping), "[t]he fact that, in regard to her profession, a prostitute subjected herself of her own free will to the influence and decisions of another does not necessarily stand in the way of conviction under this regulation". See BGH 21 Jul 1998, STV 482 (1994). Also see Von Galen (n294 *supra*) 365.

³⁵⁵ Unpublished decision of the LG Münster, 30 Jun 1992 KIs 39/91. See Von Galen (n294 *supra*) 366.

³⁵⁶ BVerfGE 7 Mar 1994, 2 BvL 69/92.

In 2005, trafficking legislation was changed again as per EU Framework Directive instruction to revise its domestic laws according to the Palermo Protocol's guidelines. An expanded definition of human trafficking similar to that of the Palermo Protocol was introduced which included not only women forced into prostitution, but all persons exploited whether in informal working conditions or as wives sold into marriage. Trafficking in human beings is now reclassified in Chapter Eighteen StGB as both a criminal offence against personal freedom and against sexual self-determination.³⁵⁷ The legal clauses for human trafficking were repositioned to StGB sections 232 (sexual exploitation), 233 (forced labour), and 233 (accessory actions, perpetrator supervision and extended forfeiture).

Trafficking for commercial sexual exploitation is criminalized in section 232 of the StGB "*Menschenhandel zum Zweck der Sexuellen Ausbeutung*".³⁵⁸ One of the important elements in this provision is contained in the first sentence which is the "abuse of a predicament or helplessness connected with the person's stay in a foreign country" (*ausnutzung einer Zwangslage oder der Hilflosigkeit, die mit ihrem Aufenthalt in einem fremden Land verbunden ist*). In addition, the stipulation requires that the person is "brought to engage in prostitution" (*zur Aufnahme oder Fortsetzung der Prostitution...bringt*). According to the second segment, the element of force as predetermined in the first part of the provision is not required if the exploited person is below the age of 21 years. Similar punishment as provided for in the first sentence applies. Promotion activities, or aiding (for example, harbouring or transporting the victim), have now been recorded in a separate regulation. The offence of "*forcing* someone to a sexual activity or prostitution" was changed to the activity of "*leading*" as it is easier to prove, for trafficking victims are mostly recruited by deception and not by force. For example, some women know that they will work in prostitution, but are not informed about the working conditions, earnings, etc. Perpetrators of human trafficking take advantage of the "helplessness" of foreigners; however if the offenders could demonstrate that the persons had been in the country for a specific time period, the "helplessness" element was reduced or refuted. "Knowledge" about the "exigency or helplessness caused by being in a foreign

³⁵⁷ Chap 18 StGB is entitled *Straftaten gegen die Persönliche Freiheit* (Criminal Offences against Personal Liberty) and consists of arts 232 – 241. See Prasad & Rohner (n269 *supra*) 43.

³⁵⁸ Despite its label as "human trafficking", art 232 criminalizes all acts of organised crime. See Tröndle & Fischer *Strafgesetzbuch* 54th ed (2007) 1496.

country” as an element of the crime was consequently replaced by “exploitation”, which is also easier to prove and requires less information from the offender about the victim’s situation.

Article 232(3) covers grave cases of human trafficking and renders the act a criminal offence,³⁵⁹ punishable with imprisonment of minimum one year up to ten years if the exploited person is a child. However, reference is made to StGB article 176(1) (“sexual abuse of children”) where a child is defined as a person below the age of fourteen. Accordingly, the aggravation cited in this provision does not apply where the exploited person is a child above the age of fourteen.³⁶⁰ Another predicament is that article 232(1) does not seem to cover the act of using the sexual services of a (minor) person who was forced into prostitution. This has led to much public debate on the possible criminalization of persons using the sexual services of trafficked persons, and whether a separate criminal offence (*Freierstrafbarkeit*) should be introduced.³⁶¹

Section 233 StGB concerns trafficking for the purpose of economic exploitation (*Ausbeutung der Arbeitskraft*). It is now also a punishable offence to recruit, promote and encourage human trafficking (section 233a StGB “*Förderung des Menschenhandels*”). As such, anyone who has provided support for the complete offence through for example the transport or conveyance of human trafficking can be legally prosecuted. Article 233a(2) contains the same aggravation in relation to victims below the age of fourteen years as articles 232 and 233. Section 233b StGB provides the possibility for a court to order that the future conduct of a trafficking perpetrator may be supervised (*Führungsaufsicht*), and that proceeds from the crime can be confiscated and fall to the state treasury (*Erweiterter Verfall*). These provisions (except for 233b StGB) are enumerated among the offences that fall under the principle of universal jurisdiction as stipulated in article 6 StGB and may be

³⁵⁹ Art 12 of the StGB distinguishes between a crime “*Verbrechen*” and a criminal offence “*Vergehen*”. A crime is defined in para 1(a) as an illicit act punishable with a minimum sentence of 1 year or above, while a criminal offence is defined in para 2 as an illicit act punishable with a lower imprisonment sentence or with a fine. Consequently, in accordance with StGB art 30, aiding and abetting is also punishable in the context of human trafficking.

³⁶⁰ The StGB’s definition of a child differs here from that of the CRC and CoE 2005 Trafficking Convention art 4(d).

³⁶¹ See eg BT-Drs 16/4146 <http://dip21.bundestag.de/dip21/btd/16/041/1604146.pdf> (accessed 2013-01-10); Lauth *Thematic Study on Child Trafficking, Report on Germany* (2008) 7.

prosecuted regardless of where they were committed and which nationality the perpetrator had.³⁶²

Section 233(1) StGB determines that the degree of exploitation and coercion necessary to qualify as trafficking is, in addition to the terms slavery, servitude, and debt bondage, the constituent element of “working conditions which are in striking disproportion to the working conditions of other workers who do the same or a similar job”.³⁶³ Although the phrase initially appears to be broadly formulated, the interpretations so far have been rather restrictive, which is presumably also due to the fact that few cases of human trafficking into labour exploitation have been identified. This situation may be ascribed to the fact that employment agreements may initially be amicable, but turn into situations of duress and coercion, making a clear distinction difficult.³⁶⁴

A third area of the StGB's focus against trafficking is forced marriage, which is criminalized in StGB article 240(4). This offence is punishable with imprisonment between six months and five years in accordance with the general distinction as stipulated in StGB article 12. Outlined in article 240(1) is the criminal offence of duress (*Nötigung*) in particular grave cases of forced marriage. Forced marriages reportedly often lead to violence. Victims include women and, in some cases, young men living in the country for whom the family brought a spouse from abroad. In addition, some women are sent by their families to other countries to marry against their will. The phenomenon of forced marriage may also give rise to “honour killings”.³⁶⁵ While there are no reliable statistics on the number of forced marriages in the jurisdiction, evidence indicate that the problem occur more often in the immigrant Muslim community than in the general population. The issue of forced marriage is also included in Germany under domestic violence, which is not a statutory offence.

³⁶² Prasad & Rohner (n269 *supra*) 43.

³⁶³ Follmar-Otto & Rabe (n250 *supra*) 18. Tröndle & Fischer (n358 *supra*) s 233 para 2 are critical of the wording of this element (“linguistically unfortunate” and “systematically inappropriate”). They maintain that according to case law on the criminal offence of usury under s 291(1)3 StGB, which contains the same phrase, there is a striking disproportion when remuneration is less than two-thirds of the usual pay.

³⁶⁴ See Cyrus (n300 *supra*) 74 *et seq.* A total of 92 cases under s 233 with 101 victims were recorded in police criminal statistics in 2006. See BKA (n281 *supra*) 11. Since 2006, the numbers dropped significantly to rise again in 2010 to 24 investigations (37 suspects, 41 victims). This was attributed to 1 large case involving Chinese nationals (12 suspects, 30 victims). See BKA (n281 *supra*) 11-13.

³⁶⁵ This is done where the female refuses to marry a chosen partner, or shame the family's name in any conceivable way. The possibility of an honour killing being perpetrated on them is also held as a manipulation constraint against women forced into prostitution from Islamic countries. See Cyrus (n300 *supra*) 21.

However, the offence is covered by the general provisions of criminal law. As such, a number of possible criminal offences could be used to prosecute perpetrators - murder, rape, sexual assault, causing a person to engage in sexual activity without consent, etc.

Aside from the cultural practice of forced marriage, many women become trapped in forced matrimony. The process is initially voluntary, as women employ various means to enter Germany for employment. Those who cannot afford a visa to enter the country, enter by means of “loan” or illegally. Many, who can afford a visa, enter the country by means of a three-month tourist visa, as the regulations for a work visa are quite demanding.³⁶⁶ The right to remain in the country is linked to the lawful existence of the marriage. Accordingly, these women are encouraged to marry a German national or their trafficker (which is against the German Aliens Act and opens them up to extortion). Dubious marriage-brokering agencies arrange German spouses for foreign women, who may find themselves exploited or prostituted upon arrival, either by their husbands or by traffickers.³⁶⁷ German men may marry a foreigner for a substantial fee, which covers the cost of travel, a visa, and services.³⁶⁸ The women who enter such a marriage are also generally not aware that the marriage must last two years and that even after two years their residence permit will become invalid if it comes to light that it was based on a marriage of convenience or sham marriage. The basis for this is section 31 of the Residence Act. This section is especially abused in cases of trafficking in the sex industry as a means of exerting pressure. Marriage contractors also make reference to the possibility of the wife’s speedy deportation – free of charge to the husband – if a separation occurs within two years of the wedding. The only existing exception here is if the wife can prove that a continuance of the marriage would be a hardship for her. In practice though, this is very difficult.³⁶⁹

³⁶⁶ The employment of persons who have only a tourist visa is illegal in Germany, however many women do not know of these regulations. This opens them up to exploitation and extortion. See Prasad & Rohner (n269 *supra*) 44. Galiana (n258 *supra*) 42 alleges that most trafficked women enter Germany with a 3-month tourist visa. German law stipulates that migrants who enter the country or stay illegally may be punished with fines and/or imprisonment of 1 year.

³⁶⁷ Galiana (n258 *supra*) 104. Galiana (n258 *supra*) 9 states that Germany has some 60 matrimonial agencies specialising in women from Asia, Latin America, eastern Europe, and the New Independent States.

³⁶⁸ Although the broker’s licence does not allow for the collection of fees from women, this regulation is commonly ignored. Women may be required to pay approximately DM 1000-2000 (US\$ 600-1200) for a legal work permit and DM 6000-8000 (US\$ 3600-4800) for the marriage arrangement.

³⁶⁹ Prasad & Rohner (n269 *supra*) 45.

If the elements of offences relating to simple or aggravated trafficking in persons cannot be proved, charges of so-called related offences (*Ausweichtatbestände*) or alternative charges (*Auffangtatbestände*) in the StGB are used to prosecute traffickers. These legal provisions involve specific forms of trafficking in persons such as the child trade (StGB section 236) and divestment of minors (StGB section 235). Trafficking of children for the purposes of illegal adoption is criminalized in article 236 StGB, which also serves as the criminal offence of “*Kinderhandel*” (trafficking in children).³⁷⁰ Paragraph 1 criminalizes natural or adoptive parents, who, in return for payment, leave or commit their (adoptive) child below the age of eighteen to another person. The perpetrator(s) is punished with imprisonment from six months to ten years, or a fine. According to article 236(2), any person who facilitates the adoption of a person under the age of eighteen with the purpose of achieving a financial gain is punishable with imprisonment of up to three years. The act is punishable with a sentence of up to five years if the child is brought to Germany from abroad or vice versa. Article 236 of the StGB is supplemented by article 14 of the Law on the Facilitation of Adoptions 1989 (*Adoptionsvermittlungsgesetz*) which contains a number of *Ordnungswidrigkeiten* (misdemeanours), such as the illegal facilitation of adoptions, the search for and offer of children or surrogate mothers as well as assisting a pregnant woman in arranging the giving away of her (future) child.

Germany prosecutes sex tourism under sections 176 through to 176b and 182. German citizens may be punished for sex-tourism offences committed anywhere in the world,³⁷¹ as the principle of extraterritoriality (StGB section 5) applies. There are however a few challenges in its application. Except for double jeopardy, another concern is double criminality. In order to be convicted, the actions of the accused must be recognised as criminal in both the country where the act was committed as well as in the country of residency. Germany will not prosecute a citizen for the crime of sex tourism committed in another country, unless his actions violated both countries’ laws.³⁷²

³⁷⁰ Art 236 was incorporated into the StGB in order to transpose the relevant provisions of the 2nd Optional Protocol to the CRC, which Germany has not yet ratified. See Lauth (n361 *supra*) 9. This section is an addition to the Law on the Facilitation of Adoptions.

³⁷¹ Fraley “Child Sex Tourism Legislation under the PROTECT Act: Does It Really Protect?” 2005 79(2) *St John’s Law Review* 445 469. The law is successful - in 1998 a UNICEF report praised Germany for its number of sex-tourism prosecutions.

³⁷² See Mattar (n242 *supra*) 417. This is unlike the US as seen in *US v Pendleton* No 08-111-GMS 2009 WL 330965 (D Del 11 Feb 2009). In this case, a US citizen was arrested, convicted, and sentenced under German law for having sexual contact with a teenage boy. He was deported back to the US, whereupon he

The StGB contains stringent provisions against the sexual exploitation of children for all purposes. Its section 174 penalizes those who have custody or authority over a person below the age of eighteen for the commission of sexual acts upon these minors. The penalty is up to five years of imprisonment. Section 176 makes the commission of sexual acts on persons below the age of fourteen punishable with imprisonment of up to ten years, and the same punishment applies to inducing a child to commit sexual acts with a third person. Punishable with up to five years imprisonment is the commission of sexual acts in front of a child or the inducing of a child to commit sexual act on his or her own body, as well as the showing of material with a pornographic content to a child. Section 176a provides a minimum sentence of one year in prison for certain aggravated forms of sexual abuse of children, including acts of penetration, acts committed by more than one person, and acts committed by repeat offenders. Those who engage in sexual abuse of children with the intent of producing pornography are punished with up to two years in prison, while those who seriously harm a child through sexual exploitation are punishable with imprisonment of no less than five years. If death results, the penalty is imprisonment for life or for at least ten years. Section 182 of the Criminal Code penalizes the sexual abuse of minors between the ages of fourteen and sixteen, if sexual conduct is forced upon them through the exploitation of a coercive situation.

Human trafficking also takes place to sustain the pornography industry, especially in child pornography.³⁷³ Pornography involving children is illegal in Germany under two subsections - child pornography (children under the age of fourteen – section 184b StGB) and youth pornography (children from fourteen to eighteen – section 184c StGB). The

was charged with violating 18 USC s 2423(c),(f)(1) (travelling in foreign commerce to engage in illicit sexual activity with a minor). His double jeopardy claim was rejected by the Delaware District Court: “The defendant’s argument that this prosecution is unreasonable as a matter of international law because he was previously prosecuted in Germany is ... unpersuasive. The fact that Germany has an interest in regulating, and does regulate the behaviour of adults toward children within its territorial limits, in no way diminishes the interest the US has in regulating that same behaviour when it involves one of its citizens. In this case the [defendant]’s previous prosecution, conviction, and term of imprisonment in Germany for a German sexual offense does not, in any way, diminish or bar prosecution or enforcement of US law under the Protect Act. Germany and the US are separate sovereigns.” *US v Pendleton* (2009) 6.

³⁷³ The BKA is attempting to eradicate the demand for child pornography by deleting child porn sites, which according to them, works better than simply blocking them. However, in this endeavour, the BKA is dependent on international support and cooperation in order to fight child pornography globally. In their Jan-Jul 2010 report, 40% of these websites (on average, 140 each month and mostly based in the US) remained online a week after they had alerted local authorities. See Levitz “Germany faces Obstacles in its Bid to lead the Global Fight against Internet Child Pornography” <http://www.dw.de/dw/article/0,,5920995,00.html> (accessed 2013-01-10).

definition of child pornography is very broad and includes images of all real or fictional people who either are under the age of eighteen or who appear to be below eighteen to an “average viewer”. The provisions penalize the production, distribution, marketing, and display of child pornographic material with between three months and five years imprisonment, but twice the punishment is applied to commercial endeavours. Distribution of such material is prohibited, although possession is a criminal offence only if the material shows a real person below eighteen. The mere possession of, or attempt to acquire, any material reflecting a true or realistic incident of child pornography is punished with a prison sentence from three months up to five years.³⁷⁴ The country's legal system also applies extraterritorial jurisdiction, so that any act of child pornography is prosecuted in the country according to German law, even if the act was not committed on German territory.³⁷⁵

(i) Prevention

Prevention in the area of human trafficking is seen to be reflective of a wider German commitment to the promotion of human rights. This is evident in the country's legalisation of prostitution, which grants sex workers legal rights and additional protection. In the area of forced labour, Germany's latest immigration policy (ZuWG) provides for the creation of job opportunities for certain categories of workers to encourage more lawful entries into the country.

Competent coordination amongst its various national, regional and local bodies seems to be the key to Germany's respectable record in the prevention of trafficking. The sixteen *Länder* have formed cooperation agreements with the police, state welfare agencies, and NGOs with the goal to coordinate discussion among state and non-state organisations regarding victim prevention and protection measures.³⁷⁶ By way of these agreements,

³⁷⁴ Interestingly, pornography involving violence or bestiality may not be produced or distributed, but is legal to possess.

³⁷⁵ Vrancken “Child Trafficking and Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms” 2007 (32) *South African Yearbook of International Law* 485 488.

³⁷⁶ Eg, Berlin has the Berlin Alliance against Human Trafficking for the Purpose of Labour Exploitation of which the members include the International Organisation for Migration (IOM), the German Trade Union of Berlin-Brandenburg, International Labour Organisation (ILO) and Ministry for Labour and Social Affairs. For the Alliance against Human Trafficking for the Purpose of Sexual Exploitation and Forced Prostitution, the Berlin Advisory Commission for Human Trafficking of Women was established. This group consists of representatives from the Interior Ministry, Ministry of Justice, Ministry of Labour and Social Affairs, criminal police, Integration Commissioner, counselling and refuge centres, anti-violence projects, and attorneys. The goals of these Alliances are to start and implement initiatives to combat human trafficking, to assure

police notify counselling centres of trafficking victims whom they identified and inform victims of their rights and options for seeking assistance.

Germany employs measures supplementary to its legislation to prevent the exploitation of human beings, such as action plans, special projects and funding, training and awareness-raising campaigns.³⁷⁷ Although Germany does not have a specific action plan for human trafficking, anti-trafficking actions are incorporated and coordinated through the Second Action Plan to Combat Violence against Women (2007).³⁷⁸ Similarly, measures to combat child trafficking appear within two national action plans namely A Germany Fit for Children 2005–2010, and Plan of Action 2011 of the Federal Government of Germany for the Protection of Children and Teenagers from Sexual Violence and Exploitation. The plans place particular emphasis on the need for multi-professional and multi-agency responses. Whilst attempts are being made to coordinate work at the local level, the nature of the problem requires the development of community-based services that are proactively responsive. The responsibility for implementing anti-trafficking policies are shared among the relevant ministries, mainly the Federal Ministry of Interior, FM of Justice, FM for Family Affairs, Senior Citizens, Women and Youth, FM of Labour and Social Affairs, the equivalent *Länder* Ministries as well as the regional and federal police. Germany still does not have an independent national rapporteur or other monitoring mechanism at this stage.³⁷⁹

that the organisations in Berlin are equipped with staff and equipment, and lobby for the rights of victims. See Tucker *et al* (n334 *supra*) 71.

³⁷⁷ Obokata „Trafficking“ and „Smuggling“ of Human Beings in Europe: Protection of Individual Rights or States“ Interests?“ 2001 5 *Journal of Current Legal Issues* 1 11. Also, the German Federal Ministry for Economic Cooperation and Development (BMZ) established the supra-regional “Sector Project against Trafficking in Women” in 2003 to assist victims of trafficking and the *Gesellschaft für Technische Zusammenarbeit* (GTZ) (German Association for Technical Cooperation) to combat trafficking in the countries of origin of trafficking victims found in Germany. See Kavemann & Rabe (n277 *supra*) 8.

³⁷⁸ It is the responsibility of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth to implement the national Action Plan. The Second Action Plan expanded on the Action Plan of the Federal Government to Combat Violence against Women (1999), which was produced by the Federal-State-Working Group to Combat Human Trafficking for Sexual Exploitation and Forced Prostitution (founded in 1997). Members include Federal Ministries, the BKA, representatives from the 16 *Länder* and NGO’s. The committee has been able to improve services for victims of human trafficking through increasing cooperation between police and counselling centres. See Tucker *et al* (n334 *supra*) 71.

³⁷⁹ A centralised anti-trafficking mechanism responsible for coordinating, monitoring and assessing all trafficking investigations and proceedings would allow better recognition of existing links and overlaps between different trafficking cases, and as such give a better overview of the existence and spread of the crime in Germany.

The German government funds all state-initiated national projects as well as dozens of NGOs that produce public awareness campaigns in Germany and abroad through websites, postcards, telephone hotlines, pamphlets, and speaking engagements.³⁸⁰ The government provides funding for NGOs that provide shelter, counselling, and assistance and facilitate protection for victims of trafficking. Germany also assists other countries financially in their efforts against human trafficking.³⁸¹ The BKA publishes an annual report containing statistics about its anti-trafficking activities. Research and studies regarding all aspects of human trafficking are frequently undertaken by the government, for example, the Ministry for Labour and Social Affairs assessed the extent of and government response to labour trafficking in 2009. Research - which influences governmental policies - emphasizes the importance of developing and sustaining responsive community-based services, specialised counselling centres and consultation.

The government, in partnership with NGOs, provide a range of specialized anti-trafficking training for the various service providers, such as judges, prosecutors, and police. The federal criminal police counter-trafficking office coordinates international trafficking cases and promotes partnership with other countries by offering training programs for foreign law enforcement. The government has provided trafficking awareness training to commanders of German military units prior to their deployment abroad on international peacekeeping missions; the training focused on how the commanders could sensitize subordinates to human trafficking. Awareness programs were also provided in partnership with ECPAT to promote awareness of the child sex tourism problem. This seems to be effective as no prosecutions for child sex tourism by German citizens abroad have been reported.

Law enforcement, NGOs and local women's shelters are also given training especially on the ability to identify and assist victims of sex and labour trafficking. In cases of domestic servitude, irregular migrant-based seasonal work, and forced marriage, victims are not easily detected. Actual victims may also not be properly identified if the authority's focus is on illegal residency status or illegal work practices. Most trafficked persons identified in

³⁸⁰ US Dept of State *Trafficking in Persons Report 2011* (n22 *supra*) 169-171. The Federal Ministry for Family, Senior Citizens, Women, and Youth fully funded the umbrella organization KOK representing 36 NGOs and counselling centres that assisted trafficking victims.

³⁸¹ The IOM regularly receives generous funding from the Federal Ministry for Labour and Social Affairs. The Ministry of Foreign Affairs contributed approximately US\$297,000 toward anti-trafficking projects in Ukraine, Moldova, and the Mekong region.

Germany were rescued during police raids, which show that police intervention at an early stage could save lives.³⁸² Police and NGOs jointly organize specialized seminars and conferences for investigating officers, victim protection officials, and prosecutors as well as workshops in source and transit countries. Unions, churches, government agencies, and NGOs operated a variety of support programs for women who experienced sexual harassment and sponsored seminars and training to prevent it. The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth supports awareness-raising campaigns and publishes material regarding domestic violence. Their web site contains an archive of data to assist those requesting information, services, etc. There is also an association of women's counselling centres and emergency hotlines supplying information about the location of services throughout Germany.

Some organisations consider the German government's measures in reducing the demand for commercial sex acts as too limited. It is argued here that there should be more public awareness focused on the beneficiaries of forced labour, as well as on potential clients who frequent sex workers in well-known red-light areas.³⁸³

(ii) Protection

A commitment to the protection of victims defines the German strategy.³⁸⁴ Improved cooperation between police and counselling centres to protect victims has been a primary focus in all the German states. Formal national victim referral mechanisms exist in twelve out of sixteen German states. However, the legal reform of 2005 did not include the introduction of a national referral mechanism for trafficked victims. Despite government encouragement of victims to cooperate in anti-trafficking investigations, victims are often

³⁸² Tucker *et al* (n334 *supra*) 139. According to the BKA *Human Trafficking National Situation Report 2008* (2008) 4-8, authorities proactively identified 38% of all victims registered by the government in 2008. Authorities registered 676 sex trafficking victims and 96 forced labour victims in 2008, down from 689 sex trafficking victims and 101 forced labour victims identified in 2007.

³⁸³ Eg, a Berlin NGO, funded largely by the Berlin Senate, operates a trafficking awareness website directed at clients of the sex trade. See US Dept of State *Trafficking in Persons Report 2010* (n24 *supra*) 157. Some critics want johns who exploit the situation of women and girls forced into prostitution to be liable to criminal prosecution. See Köhler (n353 *supra*) 79.

³⁸⁴ Before any US anti-trafficking efforts, Germany's Federal Ministry for Family Affairs, Senior Citizens, Women and Youth coordinated in 1997 already a national committee to address human trafficking of women for sexual exploitation. This committee has been able to improve community-based services for victims of human trafficking. See Tucker *et al* (n334 *supra*) 79. Services for victims of human trafficking are generally located within local community settings. These services are accessible, sensitive, tailored to meet individual need and relevant to victim's particular circumstances. It includes interpreting and translation services. Tucker *et al* (n334 *supra*) 87.

reluctant to assist law enforcement officials due to fear of retribution from traffickers, and that the police may be complicit with traffickers and may protect offenders.³⁸⁵

German legislation applicable to human trafficking also gives attention to the need to provide effective support to victims.³⁸⁶ Previously, when trafficked persons decided to testify against the perpetrators, they had to prove that they were victims of human trafficking and that they were sexually and financially exploited. This process involved proving that the perpetrator retained more than forty percent of the victim's income for himself.³⁸⁷ Many (if not all) trafficked women had no insight into the financial side of the trafficking business; as such, it becomes difficult to prove that they were financially exploited. The new offence places more emphasis on the exploitation of personal rights, which protects the victim more. As such, an economic advantage by the perpetrator need no longer be proven. If it can be concluded that the woman was financially exploited, it is sufficient.

Other improvements introduced by the AufenthG include the granting of a four-week recovery and reflection period after the victim has been identified, before they are subjected to repatriation or deportation. Victims will also be afforded additional protection in

³⁸⁵ There are few cases recorded in Germany of police involvement in trafficking. In one case, in May 1996, Mr Sigfried S, the Chief of the Special Commission on Organised Crime in Frankfurt an der Oder on the German-Polish border, was arrested for working with a local German pimp, Peter R, to control a ring of eastern European prostitutes. The pimp supplied the police chief with information on local brothels and other organised criminal activities in the region. In exchange, the police chief informed Peter R of planned raids on his own brothels, for which he received money from Peter R and sexual favours from the prostitutes. See Galiana (n258 *supra*) 12.

³⁸⁶ The current policy in Germany fails to recognise that uniform financial arrangements should exist for all trafficking victims, other than that provided through the asylum seeker benefit law. Victim protection however should be significantly high enough so that victims will be more willing to use services and become involved in legal processes. Tucker *et al* (n334 *supra*) 86. However, victim assistance measures must also be more standardized across the 16 federal states to ensure that forced labour and child victims too have equivalent access to appropriate assistance and protection.

³⁸⁷ This distribution regarding income differs amongst the *Länder*. In Berlin, eg, if more than 50% of the proceeds of prostitution must be submitted to the pimp, it could be an indicator of trafficking. The various Supreme Court rulings confirm this: in BGH 2 StR 608/98 a 50% withholding of income constitutes exploitation, the court in BGH 4 StR 67/04 held that a 50% payment of the revenue received as a prostitute as well as further payment from income earned from beverage sales amount to exploitative pimping, and in BGH 2 StR 131/05 a prostitute was left with less than 20% of her proceeds (60% was paid to the brothel owner, and the remaining 40% was halved again by the pimp) – this is another form of an exploitation within the meaning of StGB s 181a 1(1). In BGH 3 StR 184/00, the accused trafficked 8 Eastern European young women to Germany, where they worked in a bar cum brothel. They were forced to hand over 50% of their revenue to the brothel owner; and 25% to the defendant. From the remaining 25%, their initially-incurred costs (travel, entry, accommodation) and other expenses (such as fines for breach of rules of conduct) were deducted. The balance was then paid to the women.

criminal proceedings,³⁸⁸ and have the right to bring legal action against the perpetrators in the country.³⁸⁹ Victims who agree to act as witnesses are provided temporary residence permits or exceptional leave to remain in the country for the duration of trial proceedings.³⁹⁰ Legal alternatives, such as long-term residence permits, are further granted to foreign victims where they may face severe threats, hardship or retribution in the country of origin.³⁹¹ Trafficking victims have certain rights during a criminal trial which include the right to a lawyer (StPO section 397) and the right to obtain help for the testimony (StPO section 68b). In court, victims can participate through counsel in the main proceedings on nearly equal footing with the public prosecutor and the defence by means of an accessory prosecution procedure, called the *Nebenklage*.³⁹² The witness may also have an assistant (*Zeugenbeistand*) as an additional safeguard.³⁹³ Victims are also not penalized for any unlawful acts committed as a direct result of being trafficked.

All human trafficking victims have a right to state social welfare assistance, which includes housing, funds, work permits, legal advisors and medical assistance. They are assisted and supervised by the professional counselling centres during their stay in Germany, and are supported in making any necessary preparations for their return trip. This includes their travel costs, and, in some cases, a small grant to enable the victims to establish a new life

³⁸⁸ The German Constitutional Court has sanctioned that the victim may not be made a mere object of the process (BVerfGE 27 S 1, 6). In addition, the courts must be committed to the welfare and protection of the witness who may be in danger of limb or life, and protect them in their participation in the criminal proceedings (BVerfGE 57 S 250, 284).

³⁸⁹ Hennig, Craggs, Laczko & Larsson *Trafficking in Human Beings and the 2006 World Cup in Germany* (2007) 9. It is argued though that more regulations governing principal witnesses testifying for the state must be established, and that those willing to testify must be given more incentives to cooperate with police and turn state's evidence.

³⁹⁰ The granting of other residence permits for the duration of the criminal proceedings in the German *Länder* have long been governed by soft law through decrees, instructions, and administrative regulations. See Mentz *Frauenhandel als Migrationsrechtliches Problem* (2001) 252 *et seq.*

³⁹¹ It has been proven that the countries of origin for most German trafficking victims have a high level of official corruption, where corruption is defined as "...the misuse of entrusted power for private gain". See Demir *Trafficking of Women for Sexual Exploitation: A Gender-Based Well-Founded Fear?* (Unpublished MA dissertation University of Pavia 2003) 22. This corruption leads to a genuine fear, for some trafficked women, regarding the ability or willingness of the state to provide for their protection upon repatriation. These victims may apply to become part of a special witness protection program (with a new identity, no contact with their family in their home country, etc) according to the Act to Harmonise Witness Protection 2001 (*Zeugenschutzharmonisierungsgesetz*). See Köhler (n353 *supra*) 76-77.

³⁹² This so-called accessory charge (StPO s 395f) grants the victim the right to participate as a joint plaintiff in most criminal proceedings. This section strengthens her rights in that she may represent herself, view her case file, participation in all sessions of the main trial and make use of the right to refuse to give evidence according to StPO s 52 & s 55.

³⁹³ See Follmar-Otto & Rabe (n250 *supra*) 26; Post *Kampf gegen den Menschenhandel im Kontext des Europäischen Menschenrechtsschutzes. Eine Rechtsvergleichende Untersuchung zwischen Deutschland und Russland* (2008) 214 *et seq.*

for themselves upon their return.³⁹⁴ As part of this process, the counselling centres try to contact the relevant government agencies in the victims' home countries to aid in reintroducing them back into society.

The reinforcement and improvement of the victim's human rights are high on the government's political agenda; however, trafficking victims are still severely marginalised within German society. As a consequence, they do not know of, or are reluctant to assert their rights, either individually or collectively.³⁹⁵ To assist these trafficking victims in claiming compensation in German courts, the government has initiated the German Institute for Human Rights in 2009. Still, confiscating profits from human traffickers is difficult,³⁹⁶ because victims generally only provide scant information on the extent of their earnings. When victims are released, most of them normally request to return to their home countries, and thus are no longer available for investigators to obtain further information.³⁹⁷ Also, initially-obtained witness statements are often withdrawn, and the judicial authorities cannot process the human-trafficking offences any further.³⁹⁸ As a

³⁹⁴ See Köhler (n353 *supra*) 77; Prasad & Rohner (n269 *supra*) 46-47.

³⁹⁵ Tucker *et al* (n334 *supra*) 86.

³⁹⁶ Assets used in trafficking may be confiscated by the respective federal state where the crime occurred, according to StGB s 74, as well as money earned through the exploitation of a trafficking victim (StGB s 73(1)). Confiscated sums usually go directly to the treasury of these states. Trafficked victims may assert claims for damages from the state, usually through the criminal prosecution authorities. However, this requires concrete evidence proving the connection between the crime and any economic gain. Still, in the case of extended forfeiture (StGB s 73d), it is sufficient if circumstances justify the assumption that these assets were obtained from illegal acts. In this case, the trafficker (or smuggler) to AuslG s 92a, s 92b) must function either as a member of an organised criminal gang or on a commercial basis. See UNiCRI (n280 *supra*) 83.

³⁹⁷ The witness must be personally present in court to give oral evidence. Eg, in BGH 1 StR 493/06, the accused was acquitted on a charge of rape and trafficking with exploitive pimping because the victim, a Polish national, returned to her home country immediately after the last hearing and failed to appear for trial and could not be contacted. Similarly in BGH 4 StR 190/10 – in this case, the defendant together with her son recruited a woman by means of deception in Romania for the purpose of commercial sexual exploitation in Germany. They told the woman that she would work in their cleaning company and earn €150 per week. After crossing the Romanian-Hungarian border, her passport was confiscated. The victim was kept in the defendant's flat, but before she could be sexually exploited, the defendant was arrested. On a charge of human trafficking for the purpose of sexual exploitation, the defendant received a 2 yrs suspended prison sentence. This was mainly because the victim could not be found since her domicile was unknown.

³⁹⁸ BKA (n281 *supra*) 9. The victims are also rarely willing to press charges because of threat to self or family from traffickers, no identification documents, poor language skills, little or no trust in police authorities, etc. Victims often refuse to make statements as they are afraid to be deported for illegal prostitution. See Herz (n291 *supra*) 18-19. As a consequence: the "public prosecutor regularly stopped trafficking proceedings on the grounds that the victim was not ready to testify, the testimony was not credible, or the victim's testimony was insufficient evidence". See Herz (n291 *supra*) 17-18. In particular, victims from Romania and Bulgaria are characterized by a lack of willingness to cooperate with the police and counselling services.

result, a corresponding adjustment of claims to facilitate the recovery of profits is seldom possible.³⁹⁹

(iii) Prosecution

It has been argued that countries which have the most comprehensive measures for assisting victims also fare better in prosecuting and convicting traffickers of various crimes.⁴⁰⁰ As one of these countries, Germany's frequency of convictions for charges of trafficking proves to be higher than other EU countries. Germany follows a law-enforcement approach which entails crime reduction by means of prevention and prosecution.⁴⁰¹ Specific and related legislation are used to provide an appropriate framework for the prosecution of human trafficking offenders. The StGB does not provide for one single criminal offence covering all possible human trafficking transgressions, but cover these crimes under different provisions. Germany has classified human trafficking as a so-called "control crime" (*Kontrolldelikte*), i.e. a criminal offence which is only detected by means of the monitoring by law enforcement officers of other practices and information supplied by informants. This classification may obscure the identification of the crime, for many cases that involve human trafficking are initially often investigated and prosecuted for other offences committed in the context of trafficking.⁴⁰²

³⁹⁹ Köhler (n353 *supra*) 75 argue that the percentage of investigations involving measures taken to secure assets is strikingly low. In 2009, only in 12 investigations (approximately 3%) were measures to secure assets carried out. The amount of assets provisionally confiscated within the framework of investigations into human trafficking amounted to approximately €410,000. Yet the BKA estimates that traffickers earn \$21,000 for each trafficked woman within 3 months of her arrival. See BKA (n382 *supra*) 6. Also see Caldwell, Galster & Steinzor "Crime and Servitude: An Expose of the Traffic in Women for Prostitution from the Newly Independent States" 1998 3(4) *Trends in Organized Crime* 10 10.

⁴⁰⁰ Herz (n291 *supra*) 21.

⁴⁰¹ Preventative methods investigates recruitment methods in countries of origin, transport routes in transit countries, exploitative industries in the destination countries as well as the various determining intersections with other forms of crime such as drug and arms trafficking. Prosecution consists of instigating legal proceedings against exposed perpetrators (particularly in organised crime) by means of effective and appropriate sanctions, and punishments for persons found guilty of trafficking. While prevention is proactive, criminal prosecution is seen as reactive with a limited capacity. As a result, emphasis is frequently placed on prosecution of perpetrators, rather than the protection and promotion of the rights of victims. See Follmar-Otto & Rabe (n250 *supra*) 20; Kalbhenn *Strategies against Trafficking in Human Beings* (2004) 2.

⁴⁰² Tucker *et al* (n334 *supra*) 86. Human trafficking is largely seen as a "spot check" or "inspection" offence, or one that frequently surfaces following raids or "dragnet controls". Although police presence has a preventive effect, it is argued that there are too few police officers trained to identify human trafficking victims.

There are many decisions regarding the criminal prosecution for violation of StGB article 232. But several of these cases deal purely with the elements of the offence, such as taking advantage of the helplessness connected with a trafficked person's stay in a foreign country,⁴⁰³ or the element of making or inducing someone (*Dazu Bringen*) to engage in prostitution.⁴⁰⁴ From the available case law it appears that these elements are difficult to prove.⁴⁰⁵ For instance, in accordance with German case law, a situation of helplessness in the sense of article 232 (1) is considered to be a serious economic or personal distress which results in a significant limitation of the capacity to freely judge and act.⁴⁰⁶ This predicament must reduce the victim's resistance to assaults on her sexual self-determination because of the difficulties connected with being in a foreign country.⁴⁰⁷ In situations where the commission of the trafficking crime are simply enabled or favoured, the offence is not committed.⁴⁰⁸ It is immaterial whether the offender actively created a trafficking situation or whether he only used an already existing situation to his end.⁴⁰⁹ Whether the trafficked person has contributed to the trafficking situation, be it because of

⁴⁰³ This is an objective criterion which replaced the previous subjective requirement of "knowledge of a coercive situation or helplessness associated with the person's stay in a foreign country".

⁴⁰⁴ See eg, BGH 3 StR 87/09. In this case, the 2 defendants decided to start a brothel in a house, but their adverts for prostitutes led to nothing. They then planned to lure women into their house under the false pretext of conducting job interviews, overpower them, hold them captive and force them into prostitution. Their 1st victim was lured into their house and held captive for 3 months. The owner of the house repeatedly raped her, but did not force her into prostitution as he wanted a relationship with her. She was instead coerced to establish contact with other possible victims. The defendants approached another female, lured her into the house and captured her. She was raped and put to work as a prostitute. A 3rd victim was also lured into their house, however she managed to escape and call the police. Both defendants then fled with the victims before the police arrived. One defendant handed himself and one victim over while the other defendant took the 1st victim hostage for several days, during which he raped her repeatedly. Both were apprehended by the police, but the victim was erroneously imprisoned for 3 weeks. The court convicted the defendants of hostage taking, sexual assault and rape concurrently with trafficking for the purpose of sexual exploitation. Both received sentences of 12 yrs and had to pay €305,000 to the victims.

⁴⁰⁵ This is especially problematic where there are merely 2 opposing statements without any further evidence. It is further exacerbated when witnesses' statements contain inconsistencies, cf BGH 4 StR 24/00 (where the plaintiff's trafficking injury was questioned because of inconsistent statements). Criminal charges for human trafficking as such are often dropped in the course of the proceedings.

⁴⁰⁶ A state of "predicament can be assumed even when the victim's perception of her situation is erroneous." See Ziegler (n330 *supra*) 627.

⁴⁰⁷ A foreign country is described as one where the legal systems and the general living conditions differ completely from the victim's country of origin (BGH 52 NJW 3276; BGH 19 NStZ 349). Here several factors may play a part; such as lack of language – which can, but need not be a deciding factor (BGH 9 NStZ-RR 233); dependency on the perpetrator for financial support, accommodation and subsistence will normally qualify, as will a lack of travel documents or passport (BGH 19 NStZ 349).

⁴⁰⁸ In BGH 3 StR 266/76 it was decided that where there is a mere cunning creation of an incentive to engage in prostitution, and it is an adult person who freely decides to take up such activity, it does not meet the crime of human trafficking for the purposes of StGB s 181. In this case, a couple both decided the woman should take up prostitution so as to earn money for them to buy a pub or hotel; however, he deceived her and used the money exclusively for himself.

⁴⁰⁹ Tröndle & Fischer (n358 *supra*) s 180b para 5.

economic need (to sustain a drug addiction)⁴¹⁰ or because of personal states of emergency such as a lack of lodgings, ill health, unemployment or divorce makes no difference.⁴¹¹ Hence, persons who actually caused the situation through his or her irrational or unreasonable behaviour are also protected.⁴¹² The dire social or economic circumstances in the victims' home country may also amount to a situation of helplessness.⁴¹³ Also, the fear of illegal migrants of being expelled and deported as well as their anxiety of being shunned or ostracized in their country of origin on return fall in this category.⁴¹⁴

The helplessness which results from being in a foreign country is interpreted narrowly by the courts according to the victim's actual situation and personal abilities.⁴¹⁵ Nevertheless, it has been held that foreign-specific helplessness cannot be assumed when the woman previously worked as a prostitute outside Germany and continued her trade in Germany, even though she was in dire straits financially.⁴¹⁶ It often cannot be proven with sufficient probability that the victim did not voluntarily pursue sex work, especially when the woman was already a prostitute.⁴¹⁷ Similarly, it is also difficult to verify that coercion was used to

⁴¹⁰ In BGH 2 StR 571/06, the defendant and plaintiff had an intimate relationship and lived together in a rented apartment for a long time. Both were addicted to heroin and were in a methadone program, but still consumed cocaine. Their livelihood as well as the use of cocaine was partly funded by the plaintiff's prostitution. The accused assisted the plaintiff eg by taking down the registration numbers of clients' vehicles for safety reasons. Even though the plaintiff wanted to leave the accused, their drug habit kept them together. After her parents persuaded her to enter a rehabilitation clinic, the accused was charged and acquitted of pimping, human trafficking for sexual exploitation, and aiding and abetting illegal prostitution. This was confirmed on appeal as there was no realization of the objective facts as the prostitution was of their own accord unaffected by threats or other conduct of the defendant. The defendant did not exploit her in terms of StGB s 181a. Secondly the defendant did not bring the plaintiff into prostitution according to StGB s 232 para 1(2).

⁴¹¹ See Ziegler (n330 *supra*) 627.

⁴¹² Tröndle & Fischer (n358 *supra*) 1499.

⁴¹³ *Ibid.* This is only considered with additional distressing elements.

⁴¹⁴ Tröndle & Fischer (n358 *supra*) s 180b para 5.

⁴¹⁵ At the time when the perpetrator influences the victim in her home country, this element need not be present; however, the potential for such a situation to arise in the country of destination is sufficient. See BGH 3 StR 247/01. In BGH 2 StR 131/05 the elements required for foreign-specific helplessness was also explicated – these include a language, life skills and legal knowledge deficiency; insufficient financial funds, accommodation or food, amongst others.

⁴¹⁶ In BGH 9 NStZ-RR 233 (2004), a 20-year-old female prostitute was recruited in Lithuania to work in a German brothel. Although this situation resulted in trafficking-like conditions, the female was allowed to return to Lithuania on expiry of her tourist visa; whereupon she again boarded a bus back to Germany, without any specific undue influence from the perpetrator. In BGH 2 StR 571/06 it was considered that for a woman who previously had been investigated in voluntarily prostitution, it is a prerequisite for the crime of trafficking that the woman had the will to give up prostitution permanently or even temporarily. Similarly in BGHSt 45, 158, 161; BGH 3 StR 206/99, it was stated that the offender has to force the victim to continue to prostitute herself, because he assumes that she will be able to stop the practice.

⁴¹⁷ In cases such as these, the courts have to carefully assess the credibility of all testimonies and evidentiary facts as well as the relevant circumstances. In BGH 3 StR 135/01, eg, a prostitute was violently forced under threat of her and her family's life, to perform repeated sexual acts with the accused as well as

continue the prostitution, as the evidence is basically dependent upon the mindset of the prostitute. It would have to be proven that the prostitute was planning to abandon or even to reduce her activities.⁴¹⁸ Cases such as these may still be covered by laws against pimping, exploitation of prostitutes, or smuggling, which are commonly committed in conjunction with trafficking or semi-trafficking situations.

In addition, the victim has to be influenced by the trafficker to commence or to continue to engage in prostitution for the trafficker's financial benefit.⁴¹⁹ The perpetrator may induce the victim to take up a more intensive form of prostitution,⁴²⁰ or perform exploitative sexual acts,⁴²¹ or force victims who wanted to give up prostitution (even potentially) to continue.⁴²² The influence must be of certain intensity; mere advice, offers or questions would not be sufficient.⁴²³ However, an indirect influence by creating certain living conditions that make the victim susceptible to the influence may be sufficient.⁴²⁴ The victim's resistance against

several Turks. She was paid at the end of the evening. On appeal, the human trafficking conviction was set aside, as the charge should have been one of rape and kidnapping.

⁴¹⁸ In BGH 3 StR 367/00, the accused exploited 7 women for prostitution and 5 of them with violence and threats of substantial harm to continue prostitution. The accused violently raped the plaintiff in front of the other girls after she wanted to give up prostitution, in order to threaten them all of the imminent danger to life or limb if they should leave. Also see cases in n416 *supra*.

⁴¹⁹ The present s 232 StGB lowers the limit with regard to the intensity of the trafficker's influence (from "Bestimmen" in the old s 180b to "Dazu Bringen").

⁴²⁰ What exactly constitutes more intensive forms of prostitution is not clear. It could perhaps be sex with heavily obese clients, or unprotected sex with clients who have sexually transmitted diseases (as in BGH 3 StR 500/03). This offence is also difficult to prove, as the boundaries between the different forms of prostitution are not clear-cut. See BGH 3 StR 500/02; BGH 3StR 135/01.

⁴²¹ This section is primarily intended to cover economic exploitation, such as in the production of pornography, peepshows and the so-called marriage trade.

⁴²² In BGH 9 NStZ-RR 233, Eastern-European women who were interested in working as prostitutes in Germany and hoped to earn enough money to be able to rebuild a secure existence through prostitution, were upon arrival disillusioned with the living and working conditions. They were thus forced to continue.

⁴²³ In BGH 2 StR 524/04, the Court affirmed that not every form of influence meet the criterion for the action of "bringing in" to prostitution. In this case a young woman (under 21) had not conclusively decided to pursue prostitution; but merely toyed with the idea at a club whereupon the perpetrator mediated the job for her. "*Vielmehr ist unter "Einwirken" eine intensive Einflussnahme zu verstehen, die über eine bloße entsprechende unmittelbare psychische Beeinflussung hinausgeht, also mit einer gewissen Hartnäckigkeit geschieht*" - The influence has to be done so with a certain tenacity that goes beyond an immediate psychological impact; eg, repeated insistence, persuasion, or promises, the arousal of curiosity, use of authority, fraud, intimidation, threat or use of force.

⁴²⁴ Tröndle & Fischer (n358 *supra*) s 180b para 6. However, in BGH 3 StR 56/10, the court considered a threat as influence. In this case, the Bulgarian plaintiff already worked as a prostitute on her own before working for the defendant in different brothels. She lived with him and he kept her passport. She requested the defendant to allow her to quit working as a prostitute so that they may become a couple. The defendant rejected her offer and demanded she either leave the apartment at once (without her passport) or continue working as a prostitute, which the victim eventually did. The defendant was convicted of trafficking for the purpose of sexual exploitation as this act constituted a threat with serious harm to continue to engage into prostitution. On appeal, the BGH found that the act did not constitute a threat with serious harm as required by s 232(4)(2). This would only be if the threat would be able to influence the threatened person in the

influence is not necessary.⁴²⁵ The influence need not result in the actual taking up or continuing of prostitution. As regards the subjective elements of the crime, the offender must have the necessary criminal intent, and his *mens rea* must encompass all objective elements of the crime.⁴²⁶ However, the scope of the trafficking provision has been broadened to include all situations where the trafficker objectively exploits a state of helplessness.⁴²⁷ This means that the offender does not need to be fully aware of the circumstances that lead to the victim's helplessness, but intends to take advantage of the woman.

By including continuing prostitution, the law aims to protect both women who have decided to quit prostitution, and those who are induced to engage in a more intensive form of prostitution.⁴²⁸ In this regard, a sexual act need not actually take place to qualify as the completed act.⁴²⁹ Once the victim performs the first step aimed directly at any such non-gratuitous sexual act, prostitution has occurred.⁴³⁰ Where payment for the performance of

direction of the will of the perpetrator and if the threatened person in the actual situation could not reasonably be expected to withstand this threat. Even if the victim would have had reason to fear to be without money and shelter, her decision to continue to engage in prostitution rather stemmed from her lack of the German language and her illiteracy. The fact that the victim worked as a prostitute on her own before meeting the defendant was also a factor against the victim's predicament.

⁴²⁵ This was reaffirmed in BGH 3 StR 206/99, a case where the accused claimed that the women did not indicate that they wanted to discontinue the practice. The court held that the act to continue the exercise of prostitution does not require that the person who is influenced has the will to discontinue the exercise of prostitution. Rather, it is enough that the perpetrator intimidates the person, because he assumes that she may want to stop prostitution.

⁴²⁶ The offender must intend to bring another person to continue prostitution or to do more exploitative sexual acts. In BGH 3 StR 135/01, the perpetrator had the victim return his apartment keys to him whereupon he abducted her – he had already planned the sexual exploitation of the victim beforehand, and forced her to have sex with himself and multiple partners.

⁴²⁷ In this area there is still a *lacuna* in situations where a perpetrator merely recruits women for commission, but are indifferent to their future occupation. The perpetrator in this regard lacks the necessary intent "to induce or bring" the women to commit exploitative sexual acts required for the offence, as negligence does not form part of the elements. Such cases may be covered by StGB s 233a which covers the promotion of and assistance to trafficking as well as attempted trafficking.

⁴²⁸ See BGHSt 33, 353; BGH 52 JZ 153, 155; BGHSt 42, 179 ff; BGH 3 StR 135/01 which all contain violent acts of rapes to induce the victims to either continue with prostitution, or to give in to more aggressive sexual acts with clients. According to the findings of the BGH 3 StR 519/09, the accused assaulted the 20-year-old plaintiff with blows and threats that she would be handed over to the Hells Angels, if she did not continue with prostitution. In one incident, he had forced anal intercourse with the victim, on another occasion, he punched and kicked the plaintiff and choked her until she was unconscious.

⁴²⁹ The defendant in BGH 2 StR 90/08 attempted to induce the victim to engaging in prostitution, which was not successful. He was found guilty of attempted aggravated trafficking for sexual exploitation. On appeal, the court ruled that the fact that the victim did not engage in prostitution is irrelevant as the crime is completed with gaining physical control over the victim with the purpose of inducing her to engage in or continue with prostitution. The verdict was changed to the completed crime.

⁴³⁰ Due to conflicting jurisprudence, the requirements for the temporal and geographical correlation between the first preparatory act and subsequent sexual acts remain unclear. As such, it was ruled in BVerfG NJW 1985 1767 that the moment the victim offers her services in return for payment, eg, at a bar or on the

sexual acts cannot be proven, the definition of prostitution is not satisfied.⁴³¹ This is often the case when traffickers or their accomplices rape their victims, which might have been punished only as rape and not also trafficking.⁴³² In this respect, StGB section 232 is now broader, as it is not limited to sexual acts with third persons only but includes sexual acts with the trafficker himself. In certain cases, circumstances may indicate less severe factors which would lead to the law being more lenient on the perpetrator. These are, amongst others, the short-term employment of the victim, the victim's own substantial complicity in the act or acts, if the victim's age is just below the protective limit, in the absence of any harmful or exploitative practices, or at the instigation of voluntary prostitution activity.⁴³³

Trafficking in human beings often takes place in the context of organised crime.⁴³⁴ Section 232 (3)(2) of the StGB punishes anyone who "commits the offence professionally or as a member of a gang that has banded together to continually commit such acts". A perpetrator acts professionally if he has the intention to create a permanent and substantial revenue opportunity through the regular commission of certain acts.⁴³⁵ The crime is committed even if only one such professional act is carried out with the necessary intent, and no further acts follow.⁴³⁶ According to case law, a gang is an association of at least three persons⁴³⁷ who have grouped together in order to commit several autonomous offences based on an explicit or tacit agreement. It is not necessary that such gang members act jointly together in the commission of trafficking crimes in order for this provision to apply.⁴³⁸ An individual gang member may act alone, or together with other non-gang members, provided that the specific individual member is acting within the scope of

streets, the act was initiated. Similarly, a telephonic agreement to service a client at his house also constituted prostitution (BayOLG JZ 1989 51), while negotiations with the brothel owner were held to be insufficient, as these acts do not aim at engaging in prostitution immediately (BGH NStZ-RR 1997 294).

⁴³¹ Prostitution is defined in the Prostitution Act as a situation where someone repeatedly performs sexual acts with varying partners in return for remuneration over a certain length of time, which need not necessarily be a long period of time. See BGH 3 StR 135/01 for another definition. It does not matter where and how the partners are recruited and who collects the money.

⁴³² See *supra* n428; BGH 3StR 135/01.

⁴³³ Tröndle & Fischer (n358 *supra*) s 232 para 34.

⁴³⁴ The case of BGH 2 StR 320/04 confirmed the close alliance between organised crime and human trafficking. Here a pimp ring under the financial control of a foreign organised criminal group from Russia operated at different brothels, sauna and sex clubs or escort services companies.

⁴³⁵ BGH 1 StR 522/94. In BGH 7 B 265/00, the accused persons' communications were monitored and recorded, which led to the finding that it was a criminal organization profiting from narcotics, human trafficking, the smuggling of cigarettes and other criminal activities.

⁴³⁶ BGH 1 StR 154/98.

⁴³⁷ BGHSt 46, 321.

⁴³⁸ Tröndle & Fischer (n358 *supra*) s 260 para 3.

the gang agreement, or with the presumed agreement of the others in the gang to further the aims of the gang.⁴³⁹ German case law shows that most of the investigations are not directed against larger criminal organisations as less than two suspects per investigation are identified on average.⁴⁴⁰

Young persons are especially vulnerable to any type of exploitation. In this regard, StGB section 232 (1)(2) protects persons under the age of 21 years⁴⁴¹ from being subjected to prostitution or other sexual acts. In contrast to the stipulation for adults, this alternative does not require that the persons under the age of 21 be exploited.⁴⁴² In terms of preconditions concerning criminal intent, the offender must merely know that his victim is under the age of 21. Official statistics on criminal proceedings involving child trafficking in accordance with article 236 of the Criminal Code (i.e. adoption cases) display a number of cases over the years.⁴⁴³ Most of these cases do not involve the trade in children (buying, selling or swapping children), but concern illegal adoptions in the sense of procedural irregularities.⁴⁴⁴ As the criminal liability hinges on the receiver's knowledge that the parent or other custodian acted in order to receive remuneration or for enrichment, he may easily evade punishment by claiming that he did not know of this motive. He will go free of

⁴³⁹ In BGH 3 StR 502/09, an Austrian accused was sentenced as a member of a gang for drug-trafficking in significant quantities as well as aggravated trafficking for sexual exploitation for 7 yrs and 8 months.

⁴⁴⁰ See BKA (n382 *supra*) 10-11.

⁴⁴¹ This age limit was retained from the previous provision as it protects especially young adolescent females, the group most targeted by traffickers. This age limit does not actually accord with the rest of the German criminal law system and exceeds the obligations laid out under public international law. Eg, the age of sexual majority under German law is 14 yrs. StGB s 232 (3)(1) protects these children.

⁴⁴² But in almost all cases, this is the situation. Eg, in 1 KLS 211 Js 3771/11, the defendant established contact with the victim when she was 14 and started a relationship with her. He promised her that they would have a future together and that they would buy a horse farm (her dream) if they had more money. She became extremely dependent on him and lost contact with her family and friends. Shortly before she turned 18 she started working as a prostitute for the defendant for around 11 yrs. All income was given to the defendant, which he used for himself or his family. The victim was kept in isolation and through repeated rape and violence became submissively dependant. After a particularly violent rape, she contacted the police. The court convicted the defendant of trafficking for the purpose of sexual exploitation and other related charges and sentenced him to 9 months imprisonment, and compensation of €1 million, which the victim received. This estimation was based on the victim's precise written records of her earnings.

⁴⁴³ It is unclear as to how many child trafficking cases exist, as the content of many are not available on publicly accessible data bases. Relevant decisions are further issued through administrative courts in the context of adoption proceedings only.

⁴⁴⁴ Eg, in OVG 3 B 8 07 a German divorced mother of 2 grown-up children attempted to adopt a Moroccan minor from an orphanage. He had been living with her sister in Casablanca for 2 yrs already. The applicant had already been granted guardianship and permission to adopt the child from a Casablanca family judge. She applied for a family reunification visa which was rejected as the goal was adoption and a residence permit could not be granted, as it was contrary to the Adoption Placement Act and against the right of domicile of the minor child.

punishment if he claims that he merely wanted to help the parents in their plight or get the child out of its desperate situation.

When StGB section 233 (human trafficking for the purpose of economic exploitation) was initially introduced, very few cases were recorded. These have however increased substantially.⁴⁴⁵ However, it is still mostly labour courts that deal with the bulk of cases concerning economic exploitation in work relationships.⁴⁴⁶ In most labour trafficking cases, the victims were forced to accept inhumane working conditions by the trafficker who takes advantage of their helplessness related to being in a foreign country, by threatening or deceiving the persons.⁴⁴⁷ Similar to the elements of sex trafficking, the perpetrator must induce the victim to enter into employment or discourage the victim from her decision to give up the employment.⁴⁴⁸ If the victim deliberately and knowingly accepts an exploitative working situation, for example to obtain a permanent residence permit, labour trafficking

⁴⁴⁵ In 2010, 24 investigations into human trafficking for the purpose of the exploitation of workers were completed, which corresponds to a significant increase of 140% in comparison to the previous year (10 victims). See BKA (n382 *supra*) 11. The increased number of victims can be explained by 1 investigation which involved 30 Chinese nationals. There are rising indications that the low case numbers can also be explained by the fact that it is difficult to put StGB s 233 into practice and that more easily proved regulations are applied when possible. In these cases, the resulting proceedings do not contain a labour trafficking charge. See BKA (n382 *supra*) 13.

⁴⁴⁶ See, eg, 5 Ca 5152 5198/00 where a wage agreement for an assistant with no professional qualification was declared immoral and null and void as there was a striking disparity between performance and reward. Immorality of remuneration also formed the basis for the decision in 28 Ca 6934/07 where interns took a €200 per month job with the undertaking that they would be permanently employed. The court decided that these persons should earn a minimum wage of €1286 per month – the employer had to pay reparations of €10, 317. Also, in S 1 AL 77/03 a woman's unemployment benefits was stopped after she refused to accept a job as a domestic help which paid only €900 per month gross. As her unemployment benefits came to €780, her wages should have been at least over €1000 to qualify as a reasonable salary.

⁴⁴⁷ An Ethiopian victim's helplessness arising from being in a foreign country was exploited in 3 St Js 723/05. The victim was employed as cook by the Ethiopian defendant and his wife in their Ethiopian restaurant. She was forced to work 85.5 hrs a week in the restaurant and also full-time as a domestic in their house. Her passport was confiscated, and she was threatened that the German authorities were racist and that she would be deported and tortured or killed if found by them. She was completely helpless as she also could not understand German or the German system of law. She continued working for 1½ year and then fled. She was never paid her promised wage except for a single payment of €100. The perpetrator was convicted of labour trafficking as well as usury and fraud.

⁴⁴⁸ Eg, in 940 Ls 6500 Js 38/09 the defendant induced a woman from the defendant's country of origin in Africa to work in a hair salon in Hamburg. The defendant took the victim's passport and forced her to work 13 hrs a day, 6 days a week, in the hair salon which was located in the cellar. The victim also had to cook and do domestic work. The defendant also unsuccessfully attempted to force the victim into prostitution. The victim did not receive any pay during the first 6 months as she had to pay off visa and travel costs incurred. The defendant was found guilty of human trafficking for labour exploitation, trafficking for the purpose of sexual exploitation, personal injury, indirect false authentication and larceny. Similarly, the defendant in the case of 523 Ds 451/07 lured a Brazilian victim into Germany with the promise of a well-paid household job. She instead had to work 7 days a week for up to 15 hrs a day for 1 year without any pay. The defendant was convicted of labour trafficking and of alien smuggling.

has not transpired.⁴⁴⁹ The perpetrator can treat the victim as an object that he may arbitrarily dispose of as he wishes.⁴⁵⁰ In order to be penalized of trafficking for labour exploitation, a factual situation of slavery or serfdom must be proved.⁴⁵¹

There is currently no information on relevant criminal proceedings for violations related to forced marriage (StGB article 240(4)) reflected in official statistics.⁴⁵² The relevant official statistics rather relate to offences inherent or subsequent to forced marriages, such as

⁴⁴⁹ In the decision of BGH 3 StR 507/09, the defendant recruited at least 25 Moroccans on renewable one-year contracts as folklore artists and offered to pay them wages comparable to those of similar artists for productions, circuses and events. Although they stayed in inadequate shelters with inadequate sanitary installations, the defendant paid most of the victims but withheld the pay for 8 persons. They all renewed their contracts with the perpetrator with the hope that after 5 yrs in Germany, they could apply for permanent residency. The BGH remanded the case for procedural issues as it was unclear whether all the requirements of labour trafficking were met. The court was unconvinced that their exploitative situation was only due to the influence of the defendant, or whether their decision was based on them working towards obtaining a permanent residence permit.

⁴⁵⁰ In BGH 1 StR 896/92, a case from the District Court of Freiburg who convicted the accused of kidnapping, aggravated assault, title abuse and theft was considered. The accused, pretending to be the Commissioner of Police, took the victim (a homeless man) to his property to dig a well. He kept the man captured for several months in his tool shed where he kept him virtually as a slave. The victim endured severe physical, psychological and sexual maltreatment as the accused threatened, kicked and punched him almost daily, and made the man believe that escape was totally impossible. The victim was made to eat from a dog bowl with the accused's German shepherds and got bitten by them. He had to perform gymnastic acrobatics on a balance beam for the accused and fell and injured himself. The victim was repeatedly forced to have anal and oral sex with the accused, and were even forced to perform oral sex on certain of the accused's male guests. The victim's treatment constituted involuntarily bondage and subjugation, but it did not satisfy all the elements for the crime of slavery. Also, in case 106 Ls-50 Js 208/07-58/07 the court found that the defendants lured deaf-mute Polish victims into Germany by promising them jobs and then exploited them on a commercial basis. The victims were in a position of helplessness and dependency as they could not communicate or ask for help in their situation. They also had to live in inadequate housing and were beaten frequently if they would not cooperate. They were afraid for their lives. The money the defendants gained was used for financial benefits for themselves. The court convicted the defendants of trafficking for the purpose of labour exploitation with aggravating circumstances.

⁴⁵¹ An example of slave-like relationships concerning employment and unfavourable terms of labour is found in 8045 Js 9059/10.5 KLs. In this case, 124 Czech truck drivers were recruited to work in Germany on payment of the German minimum wages. They however did not know what the minimum wage was and as they did not know German, they were entirely depended on interpreters. They were forced to live off their own savings as they did not receive their wages at all or only with vast deductions. These deductions were for mistakes made by the drivers such as non-compliance with instructions, not reporting in at a certain time, delays, or for not informing the defendant of traffic jams. If they objected, the defendant threatened them with dismissal. They continued to work out of desperation and hope that they will receive their outstanding money. The defendant abused their economically vulnerable situation by withholding wages and was charged with and convicted of labour trafficking and fraud.

⁴⁵² This does not appear to match the number of increased calls for assistance against forced marriages lodged by victims with various NGOs. Eg, the *Hatun und Can Frauennothilfe*, a Berlin NGO assisting women threatened by forced marriage, reported that ± 2,000 women approached them anonymously to seek help in life-threatening situations. In a study done by the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth *Zwangsverheiratung in Deutschland - Anzahl und Analyse von Beratungsfällen* (2011) 7, it was reported that 3,443 people sought counselling for forced marriage in 2008. Most were female Muslim immigrants but 6% were young men. A third was girls under the age of 17 yrs.

duress, physical injury, harassment or “honour killings”.⁴⁵³ There are administrative courts cases involving forced marriage performed in another country. Most of these cases concern deportation proceedings, where the fact that a person was either already forced into a marriage prior to coming to Germany or would face the risk of being forced into a marriage upon return to the home country have often been considered as a bar to deportation (*Abschiebungshindernis*).⁴⁵⁴

It has been argued that many German *Länder* are hesitant to consider trafficking in persons a serious crime. Prescribed punishments in these statutes range from six months” to ten years” imprisonment and are sufficiently stringent and proportionate to penalties prescribed for other serious crimes.⁴⁵⁵ However, it is common practice for judges in Germany to suspend prison sentences of two years or less for all crimes, including trafficking. Available statistics indicate that the majority of convicted labour and sex trafficking offenders were not required to serve any time in prison.⁴⁵⁶ This raises concerns that punishments imposed are inadequate to deter traffickers or do not reflect the heinous nature of the offence.⁴⁵⁷

⁴⁵³ Eg, the accused, a Turkish imam from Anatolia, decided that one of his daughters, a 21-year-old, was to marry one of his nephews in Turkey. After the traditional wedding was completed, she refused a civil marriage. She annulled the cultural bond with the consent of her fiancé, and returned to Germany. The accused could not accept his daughter’s refusal to marry, and he tried to persuade his 2nd oldest son (who was still underage) to kill his sister for her violation of the family honour. The son, who loved his sister dearly, confided in his teacher, who alerted the police. The accused was sentenced for attempted murder and incitement to a honour killing to 5 yrs and 6 months imprisonment.

⁴⁵⁴ See eg, case A 11 K 13008/04 (application for asylum from an Iranian national to escape a force marriage).

⁴⁵⁵ This is in line with the punishment for pimping.

⁴⁵⁶ Research has shown that less than 10% of the perpetrators (traffickers, pimps) are accused of the crime, and even fewer are ever convicted. This is due to the frequent lack of evidence and witness testimony, and the difficulty of proving trafficking. There is a high standard of proof required set by previous judgments for a conviction of the crime of human trafficking. However, it is argued that by adopting or following the EU Framework Decision of 2011, the problem of proof could be facilitated. It is also claimed that despite the large number of trafficked migrant women entering, residing and/or working illegally in Germany, they are rarely arrested. Also, with the exception of North Rhine-Westphalia (which offers counselling and a 4-week period of grace before deportation), most of the German *Länder* simply deport the women upon discovery. See Galiana (n258 *supra*) 43.

⁴⁵⁷ On the one hand, the basic offence is still less severe than other offences against personal liberty, for example, robbing persons, or kidnapping or hostage taking entailing an element of extortion, which carries a minimum sentence of 5 yrs imprisonment. On the other hand, the abduction of minors or trafficking children is subject to lesser maximum sanctions. However there have been efforts by courts and public prosecutors to impose higher penalties, especially in cases of aggravated trafficking in human beings.

6.3.2 Criminal-justice responses from Germany

Trafficking cannot be countered without extensive multi-agency partnerships and inter-institutional cooperation. Reports on Germany's efforts state that there is a high and effective level of coordination between law enforcement, state welfare agencies, NGOs⁴⁵⁸ and government agencies in Germany. As indicated, specific cooperation agreements exist between the local level (towns and cities), the state and federal levels. The federal ministries coordinate anti-trafficking initiatives on the local, national, and international levels.⁴⁵⁹ The German government promotes a nationwide networking of services through the umbrella non-profit organisation KOK,⁴⁶⁰ a central organising group combating human trafficking and violence against women in the process of migration. Along with these services, there are other resources which include SOLWODI Deutschland (Solidarity with Women in Distress),⁴⁶¹ KOBRA (*Zentrale Koordinations- und Beratungsstelle für Opfer von Menschenhandel*),⁴⁶² *Verein für Innere Mission in Bremen: Beratungsstelle für Opfer von Menschenhandel und Zwangsprostitution* (BBMeZ),⁴⁶³ *Terre Des Femmes*,⁴⁶⁴ Ban Ying

⁴⁵⁸ The majority of these NGOs focus on adult, female victims; however, a number of NGOs, in cooperation with local governmental youth welfare services, also attend to child victims. Some of these NGOs also make their services available to male victims.

⁴⁵⁹ Brown (n284 *supra*) 20; Popova (ed) *Expertise zu den Rahmenbedingungen von Opfern von Menschenhandel und deren Praktischer Umsetzung in Deutschland für das Nationale Thematische Netzwerk Asyl in der Europäischen Gemeinschaftsinitiative* (2008)16.

⁴⁶⁰ KOK, Berlin: *Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess* (Federal Coordination Group against Female Human Trafficking and Violence against Women in Migration Process). This organisation represents over 39 NGOs and counselling institutions to help lobby for policy and services nationally and internationally, and provides referrals to those in need throughout Germany. The organisation offers professional and public awareness campaigns and training, lobbies for legislation to enhance the human rights of victims, coordinates protection and psychosocial services for victims across all *Länder*, and cooperates at international levels. See Tucker *et al* (n334 *supra*) 79.

⁴⁶¹ This organisation has 13 counselling centres in Germany and works with other organisations in Africa, Asia, Latin America and East Europe to combat abuse and exploitation of women. As women's initiative in assisting women in distress, they raise professional and public awareness and attempt to meet the needs of victims of human trafficking through activities and publications worldwide.

⁴⁶² KOBRA has been working with victims of human trafficking since 1997, aided by funding and support from the State of Lower Saxony. They specialise in trauma counselling in clients' home languages and offer specialised trauma-training to professionals. The organisation also works with victims of forced labour and women threatened by forced marriage. There is a telephone crisis line and referrals are made to protection agencies and organisations.

⁴⁶³ Commencing in the 1990s, the *Innere Mission* initiated programmes to address human trafficking, and provides advocacy and ongoing engagement to provide a low threshold approach to help especially women who have been trafficked.

⁴⁶⁴ The active non-profit human rights organisation based in Germany supports girls and women who have experienced violence such as forced marriage, domestic violence, human trafficking, and genital mutilation. Services include nationwide individual personal assistance, telephone and e-mail counselling, advocacy with community agencies, public awareness-raising, international networking, campaigning, promotion of self-help projects and support to find safe shelter.

Coordination Centre,⁴⁶⁵ Caritas,⁴⁶⁶ the Women's Shelters Coordination Association,⁴⁶⁷ the Women's Counselling Agencies and Hotlines, and various religious-based organisations⁴⁶⁸ who all offer counselling and shelter victims.⁴⁶⁹ Unlike the political decisions made in the US, German NGOs in the field contribute practically by progressively influencing policy development and practice both nationally and locally. Although some of these NGOs prioritize their specific focus areas,⁴⁷⁰ these organisations change officials' viewpoints so that trafficked persons are not seen as criminal perpetrators or illegal migrants, but as victims.

Except for national crime-fighting organisations, Germany cooperates with other regional and international law enforcement and judicial institutions as well. Germany shares intelligence information with Interpol and Europol (the EU's criminal intelligence agency). Additionally, Eurojust (an EU agency dealing with judicial co-operation in criminal matters) is also empowered to combat human trafficking. Europol has the authority to prevent and combat all types of trade in human beings (under the mandate of the Europol Drug Unit). Europol's information system on crime-related data is very useful as Germany can automatically upload data on any offence, suspect, criminal, means used in committing crimes, membership of a criminal organisation, and other information needed for a trafficking investigation. A further advantage is that the information is accessed in the language of the specific country. Information is crucial, especially with the dismantling of Europe's internal borders.⁴⁷¹

⁴⁶⁵ This centre offers social and legal counselling and advocacy for trafficked victims and for domestic servants in diplomats' homes. Trafficked persons working for diplomats are highly unprotected as German courts have no jurisdiction over diplomats. In this regard, Ban Ying was able to establish minimum standards for domestic personnel working for diplomats in Ban Ying *Informationen für Hausangestellte, die für Diplomaten Innen arbeiten* (2003).

⁴⁶⁶ As Germany's largest welfare association, this organisation has been involved in fighting human trafficking and supporting trafficking victims since the mid 1990s.

⁴⁶⁷ There are more than 400 women's shelters in the country, and, according to the Federal Ministry for Family, Senior Citizens, Women, and Youth, approximately 45,000 women per year seek shelter.

⁴⁶⁸ Eg, the Federal *Diakonisches Werk* of the Protestant Church that assists women to leave prostitution and offers general counsel at 13 special consultancies for trafficking victims throughout Germany; the *Asyl in der Kirche* or the *Malteser Migranten Medizin* are involved in protective and advocacy deeds for victims.

⁴⁶⁹ Jantsch *Law Enforcement: Germany's Perspective* (Report delivered at the *US-EU Trafficking in Women Seminar* held at L'viv, Ukraine, 9–10 Jul 1998) 51-54.

⁴⁷⁰ In this regard, certain policies were questioned that placed of all human trafficking victims regardless of gender in women's shelters. This is seen as inappropriate and insensitive. See Tucker *et al* (n334 *supra*) 86-87.

⁴⁷¹ Bertozzi *Europe's Fight against Human Trafficking* (2009) 131-134.

Germany is also part of another innovative policy measure which the EU has adopted - an electronic migration database which monitors movement both into and within EU borders.⁴⁷² Though this digital border monitoring system regulates entry at designated border crossings; other areas of the border are not protected. The EU has improved on this monitoring system by adding surveillance through satellite monitoring. This European Border Surveillance System (EUROSUR) combines the latest intelligence and surveillance tools for cross-border observation and apprehension. Germany, as a member state, is connected to a computerized communication network to provide real-time information regarding incidents occurring at its borders.⁴⁷³ Combined with the information available on extensive databases, these monitoring tools support Germany's efforts to combat human trafficking effectively.

6.3.3 Summary

Germany has a long tradition of coordinating anti-trafficking efforts, dating from the 1890s and reviving again in the 1970s and late 1990s. Germany has signed numerous bilateral treaties in the area of organized crime with countries of origin, transit and destination of trafficking in persons, which as a rule include joint measures to combat trafficking in human beings. The country also has a high level of compliance with national and international human trafficking and human rights instruments. The main focus of Germany's anti-trafficking policies has traditionally been trafficking in women for the purpose of sexual exploitation. However, in 2005 the legal framework was brought into line with international standards and all forms of trafficking are currently acknowledged as criminal offences. The institutional and policy framework currently includes trafficking for sexual exploitation, labour purposes and forced marriage. Germany strives to base its anti-trafficking efforts on the provisions enshrined in the Palermo Protocol and EU anti-trafficking Conventions in order to avoid duplication of measures and definitions. The government's multifaceted approach addresses prosecution, protection, and prevention, as well as the rescue, rehabilitation, and reintegration of victims. An annual trafficking-in-human-beings-report has also been published by the BKA since 1994. The data is based

⁴⁷² Wooditch, DuPont-Morales & Hummer "Traffick Jam: A Policy Review of the United States' Trafficking Victims Protection Act of 2000" 2009 12 *Trends in Organised Crime* 235 241.

⁴⁷³ Broeders "The New Digital Borders of Europe: EU Databases and the Surveillance of Irregular Migrants" 2007 22(1) *International Sociology* 71 72-73.

on information obtained from police investigations conducted into suspected trafficking in human beings as specified in StGB sections 180(b) (trafficking in human beings) and 181 (aggravated trafficking in human beings). The jurisdiction further recognises that human trafficking is a growing phenomenon with changing dynamics, and adapts its policy proactively to prevent trafficking, to protect and support victims more comprehensively and to combat the crime by means of stricter regulations and the use of innovative technology and productive research.

6.4 Nigeria

The territory currently known as Nigeria has its earliest origins in the ancient Kingdom of Nok of 500 BC, a peaceful, organised civilization.⁴⁷⁴ Africa's first contact with the West took place in this region when the Portuguese discovered the mouth of the Niger in the 1470s. News of the splendour of African artefacts soon led to trade between the two states, which soon progressed to trade in human beings as the Portuguese commenced the slave-trade in Africa, mainly through Nigeria.⁴⁷⁵ However, slavery has always been a legitimate custom in Africa.⁴⁷⁶ This mainly took the form of domestic servitude, which transpired on many different grounds. For example, children born from the Niger Delta tribe who cut their upper teeth first were handed to the Nohi, a priestly caste, as religious slaves. Also, every tenth child born of the same Igbo mother was sold as a slave.⁴⁷⁷ There was also the hereditary slave, known as the half-free or home-born slave, from houses such as Efiks or the Yorubas.⁴⁷⁸ Slaves were also captured in wars amongst the tribes. Accordingly, slaves in the traditional, cultural sense were "people suffering from the effect of their sins or those

⁴⁷⁴ Atwood *The Nok of Nigeria* www.archaeology.org/1107/.../nok_nigeria_africa_terracotta.html (accessed 2013-01-10).

⁴⁷⁵ Gibson "Slavery in Western Africa" 1903 3(9) *Journal of the Royal African Society* 17 24.

⁴⁷⁶ See Mockler-Ferryman *British Nigeria: A Geographical and Historical Description of the British Possessions Adjacent to the Niger River, West Africa* (1902) 239: "From time immemorial the native of West Africa has been a slave ... the institution of domestic social slavery is part and parcel of the black man's life." He continues: "The African negro sees nothing outrageous nor even extraordinary in the mere fact of being held in bondage. The Koran expressly permits the Faithful to possess domestic slaves, and though to our notions the mere institution of slavery is abhorrent, yet, in reality, it compares very favourably (certainly among the African Muhammadans) with the slavery of Ancient Rome or with the serfdom existing in our own country but a few centuries ago." Folami "Trafficking Children for Child Labour and Prostitution in Nigeria" in Ebbe & Das *Global Trafficking in Women and Children* (2008) 79 confirms this: "Domestic slavery predominated traditional society, and children were sometimes sold to honour social economic and religious obligations or pledged for money to pay for a dowry of an elder brother's would-be bride". He adds that "[t]his traditional form of slavery still exists in sub-Saharan Africa".

⁴⁷⁷ Gibson (n475 *supra*) 20.

⁴⁷⁸ Gibson (n475 *supra*) 20.

of their ancestors".⁴⁷⁹ However, the only slaves traded were those regarded as criminals who would otherwise have been slain if not sold. Still, this institute was based on a principle of law founded on justice and equity,⁴⁸⁰ and arose from express or tacit consent.⁴⁸¹ Western-type slave-trading brought forth slave-raiding, where people were hunted down for capture and trade.

In the Colonial age, British rule was established in the jurisdiction from 1900-1960, enforcing the British policy to reform slavery. Ironically, this policy only extended to male slaves in Nigeria, which further reinforced the patriarchal structure of Nigerian society and incorporated "the subordination of women ... into the colonial system".⁴⁸² The British also adopted the name Nigeria in 1898 to designate the British Protectorates on the River Niger, arbitrarily merging agglomerations of diverse ethnic peoples.⁴⁸³ This indiscriminate colonial amalgamation had direct consequences for the modern state, as it is still constantly plagued by internal regional and ethnic hostilities. The relations amongst the West African member states are also influenced by the ideological divisions, which affected cooperation.⁴⁸⁴

Modern Nigeria continues the slave-trade in the form of human trafficking. Several factors have been identified which make the jurisdiction vulnerable to trafficking in persons. Since its independence in 1960, Nigeria has been subjected to constant military regimes under

⁴⁷⁹ Gibson (n475 *supra*) 46.

⁴⁸⁰ Gibson (n475 *supra*) 42 quotes the editor of *West Africa* (25 Dec 1900) as stating: "The position of the slave so-called in Muhammadan and even in many Pagan communities is a position of ease and comfort compared with the poverty of the masses in European cities as with the hard-working, cheerless lives of our manufacturing and mill hands. If people would take the trouble to make themselves acquainted with the ethics of domestic slavery or, more properly, servitude in West Africa, there would be less interference with it, and a truer appreciation of the facts would do much to curtail the unfortunate results which accrue from its attempted abolition."

⁴⁸¹ Gibson (n475 *supra*) 39.

⁴⁸² Lovejoy "Concubinage and the Status of Women Slaves in Early Colonial Northern Nigeria" 1988 29(2) *The Journal of African History* 245 246. In order to obtain the collaboration of the Sokoto Caliphate aristocracy, the British High Commissioner, Sir Frederick Lugard, had to compromise on the position of female slaves, especially concubines, and allowed this tradition to continue.

⁴⁸³ The colonial map of the region traversed ethnic lines and separated kinsmen such as the Yoruba in Nigeria and Benin and the Hausa-Fulani in Niger and Nigeria, and many more. See Sesay & Olayode *Regionalisation and the War on Human Trafficking In West Africa* (Paper presented at the GARNET Conference on *Mapping Integration and Regionalism in a Global World: The EU and Regional Governance outside the EU*, Bordeaux, 17-19 Sept 2008) 9.

⁴⁸⁴ Sesay & Olayode (n483 *supra*) 6. Eg, 4 of the 15 states in ECOWAS were British colonies; 8 were Francophone while 2 were Portuguese colonies. After independence, the region remained largely divided into Francophone and Anglophone zones, with clear affiliations to their particular former colonial power. Cooperation existed only amongst the various French-speaking or English speaking zones themselves.

relentless dictators (such as Sani Abacha), coups, assassinations, civil wars,⁴⁸⁵ rebel groups,⁴⁸⁶ corruption, unemployment and poverty.⁴⁸⁷ Nigeria is also a country of vast potential with huge and enviable natural and human resources. It is Africa's most populated country with an estimated population of 162.5 million and an annual population growth rate of 2.5 percent.⁴⁸⁸ In the 1970s, the country experienced a huge oil boom⁴⁸⁹ and became one of the wealthiest countries in Africa. The oil boom led to expansion of road and building construction, infrastructure, education and allied sectors. This again attracted a huge influx of skilled and unskilled immigrants entering the country regularly or irregularly from especially Ghana, Togo, Benin, Cameroon, Niger and Chad.⁴⁹⁰ The subsequent plummet of oil prices in the 1980s sent Nigeria's economy into a crisis (despite continued expansion in oil production) from which it has never recovered completely.⁴⁹¹ The negative economic growth, amongst other factors, led to high rates of poverty. This again resulted in "hunger, ignorance, malnutrition, disease, unemployment, poor access to

⁴⁸⁵ The Nigerian Civil War (1967-1970) played a significant role in the upsurge of women and children being trafficked in Nigeria. See Folami (n476 *supra*) 81.

⁴⁸⁶ Nigeria also has rebel groups, eg, Niger Delta People's Volunteer Force and Ahlul Sunnah Jamaa (the last-mentioned insurgent group was largely disbanded in 2004, yet remnant factions within the group remain sporadically active). See Beber & Blattman *The Industrial Organization of Rebellion: The Logic of Forced Labor and Child Soldiering* (2010) 57-60. The *Boko Haram* (lit "Western education is sinful") group was responsible for Nigeria's most devastating suicide bombings (including bombing the UN Secretariat in Abuja on 26 Aug 2011, the Nigerian Police Force Headquarters on 16 Jun 2011, the St. Theresa Catholic Church on 25 Dec 2011 and the multiple attacks on security outfits in Kano in 2012). See Ndifon, Apori & Ndifon "Human Trafficking in Nigeria: A Metaphor for Human Rights, Crime and Security Violations" 2012 2(3) *American Journal of Social Issues & Humanities* 84 89.

⁴⁸⁷ Dave-Odigie "Human Trafficking Trends in Nigeria and Strategies for Combating the Crime" 2008 1(1) *Peace Studies Journal* 63 67. Nigeria has been rated one of the poorest countries in the world where widespread poverty abounds even in the midst of abundant resources. See Oshewolo "Galloping Poverty in Nigeria: An Appraisal of the Government's Interventionist Policies" 2010 12(6) *Journal of Sustainable Development in Africa* 264 266. As reported by the UNDP (2010), between 1980 and 1996, the percentage of the core poor rose from 6.2% to 29.3%, and declined to 22.0% in 2004. About 70% of the population lives in abject poverty.

⁴⁸⁸ See World Bank *Nigeria Data 2011* <http://data.worldbank.org/country/nigeria> (accessed 2013-01-10).

⁴⁸⁹ In the mid-1970s the output is more than 2 million barrels a day, the value of which is boosted by the high prices achieved during the oil crisis of 1973-4. Nigeria is still the world's 5th largest oil producer, and the biggest oil exporter in Africa. It also has the largest natural gas reserves in the continent. Adepoju *Migration in Sub-Saharan Africa* (Nordic Africa Institute for the Swedish Government White Paper on Africa Lagos 2007) 15.

⁴⁹⁰ By 1982 they numbered about 2.5 million. See Adepoju "Regional Organizations and Intra-Regional Migration in Sub-Saharan Africa: Challenges and Prospects" 2001 39(6) *International Migration* 43 48. In 1990, during the Gulf War, Nigeria again fuelled a large-scale emigration of workers to the Gulf and the Maghreb states Adepoju *Migration and Social Policy in Sub-Saharan Africa* (UNRISD-IOM-IFS project on Social Policy and Migration in Developing Countries Geneva 2008) 5.

⁴⁹¹ During the Gulf War of the 90's, Nigeria had the opportunity to revive its economy. However, the huge oil revenue accrued (\$12.4b) through oil sales was siphoned and misappropriated by the military dictatorship of Babangida from 1985-1993. See Nwolisia *Social and Cultural Changes in Nigerian Society: the Role of Household in Women/Young Girls Trafficking as 'Ebony/Exotic Bodies' in the European Sex Industry* (2008) 5; Fagbadebo "Corruption, Governance and Political Instability in Nigeria" 2007 1(2) *African Journal of Political Science and International Relations* 28 31-32.

credit facilities, and low life expectancy as well as a general level of human hopelessness".⁴⁹² The fast growth of the population, the uncontrolled urbanisation in the region, poor security and economic hardship associated to wide inequalities in the distribution of wealth contribute to an increased salience of trafficking in human beings as an available option to break out of poverty.⁴⁹³

The jurisdiction has taken the lead on the African continent in its efforts to combat trafficking. Nigeria became a signatory to the Palermo Protocol on 13 December 2000, and became an official party to the instrument on 28 June 2001.⁴⁹⁴ It was also the first country in Africa to domesticate the Palermo Protocol. After gaining independence in 1960, the country signed the amended Slavery Convention on 26 June 1961.⁴⁹⁵ Other international treaties endorsed in this time period include the International Convention on the Elimination of All Forms of Racial Discrimination, the Geneva Convention and the Vienna Convention on the Law of Treaties.⁴⁹⁶ By accepting the authority of especially the last two treaties, Nigeria as a signatory has confirmed that it is bound by customary international law not to defeat any treaty's object and purpose. International labour treaties signed in the post-independence period include the ratification of the ILO's Forced Labour Conventions C29 (Forced Labour) and the C105 (Abolition of Forced Labour) on 17 October 1960.

⁴⁹² Oshewolo (n487 *supra*) 264. According to the UNDP Human Development Index 2010, Nigeria positions 142 out of 179 ranked countries as a country with low human development. The population living below the national income poverty line of PPP US\$1.25 a day is 64.4%. Life expectancy at birth is 48.4 yrs; while 42.4% of the population is aged 0-14 years. The mean years of schooling is 5 yrs while the expected years of schooling 8.9 yrs. See UNDP "Nigeria" <http://hdrstats.undp.org/en/countries/profiles/NGA.html> (accessed 2013-01-10).

⁴⁹³ See Sawadogo "The Challenges of Transnational Human Trafficking in West Africa" 2012 13(1/2) *African Studies Quarterly* 95-96. The introduction of the Structural Adjustment Program (SAP) in Nigeria by the World Bank and the IMF in 1986 has been linked to the rapid increase in trafficking in human beings. The effect of this program was a great shrinking of the economy, which resulted in massive retrenchment of workers from the formal sector and increase in the informal economy sector (such as trafficking). See Agbu "Corruption and Human Trafficking: The Nigerian Case" 2003 4(1) *West Africa Review* 1-2; Asiwaju "The Challenges of Combating Trafficking in Women and Children in Nigeria" in Ebbe & Das *Global Trafficking in Women and Children* (2008) 181.

⁴⁹⁴ See UNTS "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en (accessed on 2013-01-10). The CTOC was signed and ratified on the same dates; however the Migrant Smuggling Protocol was ratified only on 27 Sep 2001.

⁴⁹⁵ Britain signed the convention on behalf of its protectorate on 25 Sept 1926 where after Nigeria succeeded to the instrument.

⁴⁹⁶ Respectively signed in 1966 and acceded on 16 Oct 1967; signed 20 Jun 1961 and ratified in 1977; signed on 23 May 1969, ratified on 31 Jul 1969.

Political instability due to civil war and swift successive governments led to a general disregard for international conventions. Yet in the 1980s, the government still managed to sign and ratify both the Torture Convention as well as CEDAW, and acceded to the Additional Protocols to the Geneva Conventions.⁴⁹⁷ In the following decade Nigeria only acceded to the ICESCR and ICCPR on 29 July 1993, but signed and ratified the CRC.⁴⁹⁸ With the dawning of the millennium and more socio-political stability in the jurisdiction, more international commitments were made. These included the Rome Statute, the Optional Protocol to CEDAW, the Torture Convention Optional Protocol, both CRC Optional Protocols, the Migrant Workers Convention; the ILO's C138 (Minimum Age Convention) and C182 (Worst Forms of Child Labour).⁴⁹⁹

Regionally, Nigeria has signed the OAU Charter,⁵⁰⁰ and its successor, the Constitutive Act of the AU. The government is one of the few African nations that have ratified all AU standards and treaties. These include, amongst others, the African Charter on Human and People's Rights, the African Charter on the Rights and Welfare of the Child, the Convention on Preventing and Combating Corruption, the African Youth Charter and the Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa.⁵⁰¹ It has also committed itself to the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children. The African Union dedicated 16 June 2007 as the Day of the African Child to trafficking in children.

Nigeria has also committed itself to bilateral or multilateral agreements between the jurisdiction and its neighbouring and other countries to address trafficking in persons. These regional anti-trafficking initiatives are, amongst others, the Libreville Common

⁴⁹⁷ Nigeria signed the Torture Convention on 28 July 1988, and ratified it on 28 Jun 2001; signed the CEDAW on 23 Apr 1984 and ratified it on 13 Jun 1985. It acceded to the Geneva Additional Protocol on 10 Oct 1988.

⁴⁹⁸ Nigeria signed the CRC on 26 Jan 1990 and ratified it on 19 Apr 1991.

⁴⁹⁹ Nigeria signed the Rome Statute on 1 Jun 2000, and ratified it on 27 Sept 2001. The government signed the CEDAW's Optional Protocol on 8 Sept 2000, ratified it on 22 Nov 2004; only acceded to the Optional Protocol to Torture Convention on 27 Jul 2009; only signed the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict on 8 Sep 2000. However, it both signed the Optional Protocol to the CRC's Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on 8 Sep 2000, and ratified it on 27 Sep 2010. The Migrant Convention was only acceded to on 27 Jul 2009. Nigeria has ratified the C138 and C182 on 02 Oct 2002.

⁵⁰⁰ Nigeria has signed the OAU Charter on 25 May 1963 and the AU Act on 9 Jul 2002.

⁵⁰¹ These instruments were respectively ratified on 22 Jun 1983; 23 Jul 2001; signed on 16 Dec 2003 and ratified on 26 Sept 2006; ratified on 21 Apr 2009; signed on 11 Jul 2003 and ratified on 16 Jul 2004.

Platform for Action of February 2000,⁵⁰² the ECOWAS Declaration on the Fight against Trafficking in Persons (2001), the ECOWAS Initial Plan of Action against Trafficking in Persons (2002-2003), the ECOWAS Plan of Action against Trafficking in Persons (2008-2011),⁵⁰³ and a bi-regional Plan of Action to Combat Trafficking in Persons, especially Women and Children (2006) between the member States of the ECOWAS and the Economic Community of Central African States (ECCAS). These agreements enhance their efforts in combating trafficking. The Multilateral Cooperation Agreement to Combat Child Trafficking in West Africa⁵⁰⁴ (2005) specifically targets child trafficking, but affords victims more protection than the ECOWAS Declaration. The need for further adoption of multilateral legal instruments in the region is urged.⁵⁰⁵

In February 2002, Nigeria signed an agreement known as Measures to Combat Trafficking in Human Beings in Benin, Nigeria and Togo, with the UNODC.⁵⁰⁶ A further bilateral agreement called the Agreement between the Republic of Benin and the Federal Republic of Nigeria on the Prevention, Repression and Abolition of Human Trafficking, especially Women and Children followed in June 2005 reaffirming the countries' commitment to fight human trafficking, to develop common strategies to combat the crime and to promote closer inter-country cooperation. The Nigerian Ministry of Justice signed the Nigerian Programme Against Trafficking in Minors and Young Women from Nigeria to Italy for the Purpose of Sexual Exploitation on 22 September 2002. The project focused on eliminating organised criminal groups that promote trafficking in minors and to lend support to the victims of such trafficking. Beyond the bilateral agreements, there are multilateral accords on judicial cooperation, such as the ECOWAS Convention on Mutual Assistance in

⁵⁰² Libreville Plan of Action on the Development of Strategies to Fight Child Trafficking for Exploitative Labour Purposes in West and Central Africa. Moreover, in 2000, the Libreville Platform of Action offered guidelines to combat child trafficking for labour exploitation in West and Central Africa, and emphasised the need for joint action with international organisations. Some of the initiatives derived from the platform of action included that formulation and enforcement of a legal framework aimed at protecting women and children, training and retraining stakeholders and providing a public enlightenment program, and educating members of the public.

⁵⁰³ Asiwaju (n493 *supra*)175,189. These various action plans positively affected the training program organised for the Nigeria Police Force (NPF) and the Nigeria Immigration Service (NIS).

⁵⁰⁴ Signed by Benin, Burkina Faso, Cote d'Ivoire, Guinea, Liberia, Mali, Niger, Nigeria & Togo.

⁵⁰⁵ Cumulative reading of paras 2, 5, 7, 8, 11 &13 of the Preamble. See also arts 2 & 3.

⁵⁰⁶ UNODC *Measures to Combat Trafficking in Human Beings in Benin, Nigeria and Togo* (2006) 17. The purpose of this agreement is to strengthen the cooperation between the 3 countries in combating trafficking by jointly collecting and analysing data, and training law enforcement and criminal justice officials in this regard.

Criminal Matters which aims to strengthen the criminal response to trafficking.⁵⁰⁷ Yet, the protection and repatriation of victims of trafficking and extradition of traffickers was still a matter of concern which led to the ECOWAS Convention on Extradition and the Extradition Treaty in 1996.⁵⁰⁸ These instruments are important tools in combating trafficking and the activities of criminal groups.

It seems however that though Nigeria has gained a reputation for signing several international and regional agreements, it does not implement some of the treaties or keep faith with the provisions of the agreements. It has been argued that the practices in Nigeria differ widely from the commitments under the ratified AU instruments and framework.⁵⁰⁹ For example, despite the ratification of the continental instruments and a commitment to the AU Convention on Preventing and Combating Corruption, the crime has rather become more institutionalised especially among public officials. The jurisdiction also does not fully commit itself to the problem by adopting fundamental treaties on labour and immigration laws. Ratification of these treaties will bring Nigeria into agreement with internationally accepted standards. However, the situation on the ground remains

⁵⁰⁷ Also called the ECOWAS Convention on Mutual Assistance in Criminal Matters (A/PI/92), it was adopted on 29 Jul 1992 in Dakar, Senegal. See UNODC (n506 *supra*) 73.

⁵⁰⁸ This agreement is a quadripartite between Nigeria, Benin, Ghana and Togo. The agreement complements the Convention on Extradition (A/PI/94) adopted on 6 Aug 1994 in Abuja, Nigeria, which gave national criminal courts jurisdiction over crimes committed in another country or against that country's citizens. See UNODC (n506 *supra*) 73.

⁵⁰⁹ Nigeria has however shown a blatant disregard for the recommendations of the African Commission. Eg, the interim measure the Commission passed to postpone the set execution time of playwright and activist Ken Saro Wiwa and 8 other people was disregarded by the Nigerian Government when it went ahead and executed the persons on 10 Nov 1985; see generally *International Pen et al v Nigeria*, Communications 137/94, 154/96, 161/97. Another case against Nigeria for contempt is *The Constitutional Rights Project v Nigeria*, Communication 87/93, AHG/Res/240(XXXI) (1997) in which the African Commission found that the Civil Disturbances Act under which the tribunal tried the applicants to be in violation of the Banjul Charter. The Nigerian government ignored the recommendation. This Civil Disturbance Act was used to sentence Ken Saro Wiwa. In giving its recommendations, the African Commission, "[r]eiterates its decision on recommendation 87/93 that there has been a violation of article 7.1(d) with regard to the establishment of the Civil Disturbance Tribunal." When the decision was ignored, the Commission declared that Nigeria had violated art 1 of the Charter. See Kidanemariam *Enforcement of Human Rights under Regional Mechanisms: A Comparative Analysis* (Unpublished LLM thesis University of Georgia 2006) 53. Another case, *Rights International v Nigeria*, Communication 215/98 AHG/222 (2000), the victim had been horsewhipped and tortured while in detention from which he escaped to the US where he was granted refugee status. There are many more cases illustrating Nigeria's non-cooperation eg, *Civil Liberties Organisation v Nigeria*, Communication 101/93 (1995); *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, Communication 102/93 AHG/215 (1999); *Media Rights Agenda, Constitutional Rights Project v Nigeria*, Communications 105/93, 130/94, 152/96 AHG/215 (1999); *Huri-Laws v Nigeria*, Communication 225/98, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*, Communication 218/98. Up to date, of the entire continent, Nigeria has had the most (27) AU Commission complaints of serious AU violations against it.

unchanged.⁵¹⁰ Although Nigeria has ratified the African Charter on Human and People's Rights - and enshrined similar contents in the nation's Constitution - as well as the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; the country still ranks high on human-rights violations such as arbitrary arrests without prosecution. A litany of other barriers also impedes intra-African freedom of movement with regard to goods and services.

Nigeria is a source, transit, and destination country for trafficked persons, specifically for the purpose of forced labour and forced prostitution. Nigeria is recognised as the single largest African nation trafficking women to countries in Africa,⁵¹¹ the EU countries, the US and the Middle East.⁵¹² These persons are primarily recruited from rural areas within the country.⁵¹³ Women, girls and boys are mainly trafficked for the purpose of involuntary domestic servitude and forced commercial sexual exploitation, while children are exploited for forced labour such as street vending, hawking,⁵¹⁴ aggressive hawking (hawking and running after moving vehicles), begging,⁵¹⁵ shoe shining, car washing and feet washing.⁵¹⁶ In the semi-formal sector, children are employed in agriculture, construction, quarries,

⁵¹⁰ UNICEF estimates that more than 200,000 children are enslaved by cross-border smuggling and trafficking in Western and Central Africa. See UNODC (n506 *supra*) 34. See also US Dept of State *Trafficking in Persons Report 2009* (n80 *supra*) 6.

⁵¹¹ Nigerian women and children are taken from the country to other West and Central African countries, such as Gabon, Cameroon, Ghana, Chad, Benin, Togo, Niger, Burkina Faso, and Gambia for the labour and sexual exploitation. See US Dept of State *Trafficking in Person Report 2012* (n22 *supra*) 270. They are also trafficked to other African states such as Libya, Morocco and South Africa. Children from ECOWAS states like Benin, Togo, and Ghana (which allows for easy access) are also forced to work in Nigeria. Trafficking in girls is reportedly rampant on the Niger/Chad/Nigeria border – the so-called “triangle of shame”. Adepoju (n489 *supra*) 38 state that many girls from Edo State end up in the sex industry in Italy.

⁵¹² Nigerian females are taken to the Middle East (Saudi Arabia) and Europe, especially to Italy (where Nigerians constitute 80% of the foreign prostitutes), France, Belgium, Netherlands, Germany, Spain, Greece, Austria, Sweden, Switzerland, Norway, Denmark, Finland, Scotland, Ireland, Turkey, Slovakia, the Czech Republic and Russia for forced prostitution and domestic servitude. See Nwolisa (n491 *supra*) 6.

⁵¹³ Further, despite escalating urbanisation in Nigeria, 9 out of every 10 working children recruited are also still employed in rural areas. Of all of Nigeria's 36 states, Edo state (Benin City) has produced approximately 95% of women trafficked to Europe. This is, interestingly enough, not the most poverty-stricken region in Nigeria. See Aranowitz (n278 *supra*) 183. Other states such as Delta, Rivers, Imo, Abia, Benue, Anambra, Cross River, Ikwa-Ibom and many others have increased the number of their women trafficked.

⁵¹⁴ 40% of Nigeria's street children and hawkers are trafficked persons. See Dave-Odigie (n487 *supra*) 67.

⁵¹⁵ Children are also used as organised begging “guides” to lead around physically challenged or disabled persons, such as the blind and crippled, who are contracted on a daily basis with a token fee of often no more than N500 (US\$ 3,8). In 1995, the Saudi Arabian authorities deported 18 Nigerian men for running a ring that trafficked in beggars. See Olateru-Olagbegi *Human Trafficking in Nigeria: Root Causes and Recommendations* (Policy Paper No 14 UNESCO Inter-sectoral Programme Poverty Eradication 2006) 31.

⁵¹⁶ It is estimated that 8 million Nigerian children are enduring the worst forms of child labour. See Fitzgibbon “Modern-day Slavery? The Scope of Trafficking in Persons in Africa” 2003 12(1) *African Security Review* 81 82. Folami (n476 *supra*) 80 asserts that child labour is the most prevalent form of human trafficking in Nigeria. Child labour in Nigeria ranges between 20% and 30% of the population under 18 yrs of age, which makes up a part of the 41% of African children between 5 and 6 yrs old who are labourers.

brick-making factories, brass melts, granite mines, vulcanizing, iron and metal works, carpet and textile trade industries, hair dressing, and tailoring.⁵¹⁷ Trafficked persons are moved via airlines, ships, boats, and overland by buses, caravans or on foot.⁵¹⁸ Traffickers consist of small criminal groups involving three or more persons. It is argued that Nigerian traffickers or recruiters “are persons with whom the victims have had one form of contact or the other, such as their uncles, aunties, neighbours, and so on”.⁵¹⁹ Yet their global reach, flexibility and amorphous structure of organised crime groups in Nigeria cannot be underestimated, as Nigerian criminal groups still dominate the organised human trafficking networks.⁵²⁰

Nigerian cultural patterns fertilize the expansion of human trafficking. For example, the large family size,⁵²¹ tribal affiliation,⁵²² traditional beliefs,⁵²³ patriarchal discrimination,⁵²⁴

⁵¹⁷ Folami (n476 *supra*) 81. A curious form of Nigerian child trafficking involves the luring of young Nigerian children to Saudi Arabia, where the trafficker (often female) takes the child to go shopping. Upon spotting an affluent Arab’s car, she pushes the child in the path of the car to get run over and possibly killed. In order to avoid the death penalty for killing another human being, the driver offers compensation (“diya”) to the relatives of the dead child. Usually an equivalent of about N3, 500 000 (US\$27, 000) is obtained. When the trafficker returns to Nigeria, she informs the trafficked child’s parents that the child died of natural causes, and pays them about N100, 000 (US\$775) as the child’s wages. Parents often accept the child’s death as the will of Allah and do not probe the trafficker’s story. See Bhagat *Human Trafficking: Biggest Social Crime* (2009)117-118; Olateru-Olagbegi (n515 *supra*) 30.

⁵¹⁸ Nwolisa (n491 *supra*) 6.

⁵¹⁹ Asiwaju (n493 *supra*) 182. As such, most victims being recruited are aware that the people recruiting them and the “Madams” (female Nigerian pimps) or sponsors (persons loaning the money) are working together.

⁵²⁰ These traffickers have a network of relationships on an international level, but attempt to keep a low profile. Close contacts established with South American drug trafficking syndicates have led to Nigerian victims also being trafficked to Venezuela, and other South American countries. Ngor Ngor *Effective Methods to Combat Transnational Organised Crime in Criminal Justice Processes: The Nigerian Perspective* (Resource Material Series No 58 116th International Training Course 2002) 172-175; Fitzgibbon (n516 *supra*) 85; Prina (n7 *supra*) 24.

⁵²¹ Within the traditional social structure, children are seen as a sign of prosperity for the family and thus economic tools for further production of wealth in the farms of their parents. See Folami (n476 *supra*) 79; Ebbe “The Nature and Scope of Trafficking in Women and Children” in Ebbe & Das *Global Trafficking in Women and Children* (2008) 26. According to a Nigerian human rights group and the Constitutional Rights Project Report, middlemen go out scouting for families with more children than they can care for, convincing them of the juicy employment opportunities waiting for their wards in the cities inside and outside of Nigeria. See ILO *Combating Trafficking in Children for Labour Exploitation in West and Central Africa* (2001) 43.

⁵²² Ethnic conflicts (in Plateau and Kano states in 2004 and in Benue state in 2001 respectively) as well as conflicts over crude oil mining and refining in the Delta area has led to Nigeria having the highest number of internally displaced persons in West Africa - estimated to be as high as 1.2 million at the end of the 1990s. See De Haas *International Migration and National Development: Viewpoints and Policy Initiatives in Countries of Origin - The Case of Nigeria* (2006) 7.

⁵²³ The slavery known as *trokosi* which is based on religious traditions and patriarchal superstitions continues in south-western Nigeria. See Aird “Ghana’s Slaves to the Gods” 1999 7(1) *Human Rights Brief* 6 6. Religious beliefs are also used as strategy to influence and control Nigerian trafficked persons. Prior to departure, girls have to undergo voodoo or “*woodoo*” ritual practices (“*juju*” or ritual contracts/oaths) performed by the *baba-loa* (voodoo priest) to ensure the women’s job success, to prevent them from

forced marriage,⁵²⁵ and the culture of traditional fostering,⁵²⁶ all further vulnerability. In some instances, parents were found to be direct or indirect accomplices in the exploitation of their own children, selling them for financial gain, many not aware of the dangers of the practice.⁵²⁷ Such parents lose contact with their children. Traffickers capitalized upon these cultural and religious beliefs and practices to suit their illicit business.⁵²⁸

Institutional inadequacies further exacerbate the problem. Corruption is rife in Nigeria, especially in the public service. Nigeria is “widely regarded as one of the world's most corrupt countries”.⁵²⁹ Corruption within law enforcement and/or judicial systems has hindered effective combating of trafficking. Local officials may be corrupt or linked to the trafficking network. People are in general either mistrustful or unaware of the judicial system. Corrupt custom officials contribute to facilitating the spread of trafficking. Nigeria has vast and porous borders, virtually uncontrolled by the government due to a lack of

speaking out or misbehaving and to protect the traffickers. See Prina (n7 *supra*) 35 who asserts that the magic-religious tie is a fundamental aspect of the traffic of Nigerian girls and women – “it is the element which on a symbolic and psychological level strongly subdues the women and ties their destiny to the pledge undertaken, the debt incurred and therefore to the wishes of the madam or „maman””. See also Aranowitz (n278 *supra*) 183; Kelly & Regan *Rhetorics and Realities: Sexual Exploitation of Children in Europe* (2000). Folami (n476 *supra*) 83 states that trafficked children may “in extreme cases, become targets of ritualists, who ... kill the child for her or his body parts for the practice of voodoo or other ritual sacrifices”.

⁵²⁴ In most African communities, women are subordinated to the men, making them vulnerable to exploitation. A very low value is placed on the girl-child, and low status is allocated to women in society. Some girls are still forced to undergo female genital mutilation. Most women cannot own land or inherit. They also have very limited access to credit or training.

⁵²⁵ The custom of underage marriage is linked with trafficking as many of these girls run away from abusive marriages and often end up in another exploitative situation. Due to poor economic conditions, it is a survival strategy for a family is to sell their young daughters into matrimony. It is estimated that in Western Africa, 49% of girls are married under 19 yrs. The average age at first marriage in Nigeria is 17 yrs. See Fong *Literature Review on Trafficking in West and East Africa* (2004) 3; UNICEF *Trafficking in Human Beings, Especially Women and Children in Africa* (2003) 6.

⁵²⁶ Children are placed with extended family members with the objective of securing better education and working opportunities for them. See UNODC (n506 *supra*) 27. See also Truong *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management* (2006) 71. See UNICEF *Problématique du Travail et du Trafic des Enfants Domestiques en Afrique de l'Ouest et du Centre* (1998) vii.

⁵²⁷ Pharoah *Getting to Grips with Trafficking: Reflections of Human Trafficking Research in South Africa* (2006) 30. See also UNODC (n506 *supra*) 27; Fong (n525 *supra*) 2; Sesay & Olayode (n483 *supra*) 3. Folami (n476 *supra*) 83: “Because of the economy, a child will be sold to meet the needs of the family or to pay the school fees of the other children in the family. More often than not, however, the father spends the money on beer or takes another wife”.

⁵²⁸ Sawadogo *Transnational Crimes in West-Africa: New Challenges for Good Governance in a Globalising World* (Unpublished Master's thesis School of International Affairs Ming Chuan University 2008) 32.

⁵²⁹ Pearson *Human Traffic, Human Rights: Redefining Victim Protection Human Traffic* (2002) 33. Agbu (n493 *supra*) 3: “To say that corruption is rampant in Nigeria is to restate the obvious. Corruption in Nigeria, as it presently manifests, should more appropriately be termed endemic or systemic.” Eg, Nigeria is ranked number 90 out of 91 most corrupt countries. See Transparency International's Corruption Perceptions Index 2001 “Nigeria” <http://www.transparency.org/cpi/2001/cpi2001.html> (accessed 2013-01-10).

both manpower and material resources.⁵³⁰ This opens the door to trafficking in persons. Connected to the issue of corruption are complaints regarding Nigeria's long suffering under undemocratic government and poor leadership.⁵³¹

The lack of official birth registration in some areas, low literacy levels and high school-dropout rates contribute to many Nigerian children being vulnerable to trafficking. There are close linkages between poverty and widespread illiteracy as well as unsafe and uninformed migration.⁵³² The HIV/AIDS pandemic has made thousands of children in Nigeria (more than 995 000 children, the highest in West Africa) orphans.⁵³³ Nigeria has a huge problem of children deprived of their family environment but still imposes a blanket ban on inter-country adoption. This is done under the guise of caring for these children in institutions, even though the institutions cannot finance or cope with the extremely high number of these children.⁵³⁴

Nigeria is ranked as a Tier 2 country, as the government does not fully comply with the minimum standards for the elimination of trafficking.⁵³⁵ Nigeria provides data on trafficking

⁵³⁰ Nwolisa (n491 *supra*) 5. Nigeria has a land area of 923,768 sq km. Nigeria must struggle with other problems as the country is constantly plagued by electricity outages and the immigration outposts often do not even have telephones, let alone computers. Aranowitz (n278 *supra*) 185. The government, as other African states, does not appear to be much concerned with irregular, non-political border movements.

⁵³¹ After independence, 8 military regimes succeeded, beginning in 1966, interspersed between the 4th and 5th military regime by a return to civilian rule with the Second Republic between Oct 1979 and Dec 1983. The final military regime left power on 29 May when the Fourth Republic was installed and the president, Chief Obasanjo, democratically elected. See Sawadogo (n528 *supra*) 2. Obasanjo had an 8-year rule, after which Alhaji Umaru Musa Yar'Adua was elected. This marked the first time Nigeria would transit successfully from one civilian administration to the other since the country's independence in 1960. Still, Yar'Adua's election was highly controversial and strongly criticized by observers. The current president is Goodluck Jonathan, who was sworn into office in May 2010.

⁵³² See Fong (n525 *supra*) 6.

⁵³³ OHCHR *Study on Trafficking in Persons in West Africa: An Analysis of the Legal and Political Framework for the Protection of Victims* (2010) 5; UK Home Office *Country of Origin Information Report: Nigeria* (2007) 13.

⁵³⁴ Mezmur *Children at Both Ends of the Gun: Towards a Comprehensive Legal Approach to the Problem of Child Soldiers in Africa* (Unpublished LLM dissertation University of Pretoria) 153.

⁵³⁵ See US Dept of State *Trafficking in Persons Report 2012* (n22 *supra*) 270. Nigeria was first ranked in 2001 as a Tier 2 country, which it continued until 2003. In 2004, the jurisdiction was placed on a Tier 2 Watch List "... because of the continued significant complicity of Nigerian security personnel in trafficking and the lack of evidence of increasing efforts to address this complicity. Unlike other governments in the region, the Nigerian Government does not face severe resource constraints, yet it commits inadequate funding and personnel to the fight against Nigeria's serious trafficking problem". See US Dept of State *Trafficking in Persons Report 2004* (2004) 71. In 2005, Nigeria was ranked as a Tier 2 country until 2009, when the country was upgraded to a Tier 1 country. In 2012, it was downgraded again to a Tier 2 country as "a third of convicted traffickers received fines in lieu of prison time, and despite identifying 386 labour trafficking victims the government prosecuted only two forced labour cases". See US Dept of State *Trafficking in Persons Report 2012* (n22 *supra*) 270.

prosecutions, victims and trafficking routes through and from Africa. However, the depth and quality of available information is relatively poor.⁵³⁶ A likely reason for the paucity of data is that although efforts are made in this regard, it cannot be given a higher priority than other pressing problems. Lack of capacity and resources also affect the reliability of statistics or data reporting methods. Police agencies seldom record crime statistics and when they do, they fail to distinguish between conventional and organised criminal activity.⁵³⁷ Although activist civil society organisations and NGOs recognise the links between organised crime and corruption, they find it difficult to gain access to information on these sensitive matters. Official data on trafficking within Africa is, accordingly, almost non-existent and the non-governmental sector has with a few exceptions, been unable to fill the gap. However, the reporting on trafficking flows out of Nigeria is better, as the receiving (non-African) states report on these trafficked victims. It has been remarked that “non-African states and the organizations they sponsor are only interested in trafficking activity in Africa to the extent that its impacts are felt outside the region”.⁵³⁸ There is, for example, detailed information available on the movement of Nigerian women and girls into the European sex industry.⁵³⁹

6.4.1 The legal framework to combat human trafficking in Nigeria

Nigeria is governed by the Constitution of the Federal Republic of Nigeria,⁵⁴⁰ the supreme law of the state.⁵⁴¹ The Constitution guarantees the protection of basic civil and political rights and freedoms of the all people. These rights are mainly located in the fundamental rights chapter and can be utilized to protect trafficked persons and prosecute human

⁵³⁶ Gallagher & Karlebach *Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-based Approach in the Administration of Criminal Justice* (2011) 2. For a useful recent overview of trafficking in Africa within the context of broader migration trends on the continent, see Adepoju “Issues and Recent Trends in International Migration in Sub-Saharan Africa” 2000 165 *International Social Science Journal* 383 384.

⁵³⁷ Wannenburg “Organised Crime in West Africa” 2005 14(4) *African Security Review* 5 5-16.

⁵³⁸ See Gallagher *Consideration of the Issue of Trafficking* (2002) 15.

⁵³⁹ See Nigeria Federal Office of Statistics (NFOS) *National Modular Child Labour Survey* (2000/01) 26-27.

⁵⁴⁰ The current constitution was enacted on 29 May 1999. Previous constitutions of Nigeria as an independent state were the First Republic’s Constitution (1963), the Second Republic (1979) and the Third Republic (1993). The 1999 Constitution consists of 8 chaps, Fundamental Rights are found in Chap IV.

⁵⁴¹ Chap 1(1) of the Nigerian Constitution (n540 *supra*) states: “This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria”. Any law enacted in the country that conflicts with the Constitution is void to the extent of its inconsistency. All forms of discrimination against women are prohibited by the Nigerian Constitution and equal rights are granted to men and women. However, customary and religious law limit these rights.

trafficking violations. The right to life is guaranteed in section 33(1) which is important as many trafficked persons are often killed in the trafficking process, or where trafficked women are sentenced to death in countries such as Nigeria and the Middle East for prostitution or for engaging in adultery (a married client).⁵⁴² This provision is also applicable to situations where trafficking results in death through the transmission of life-threatening infections such as HIV or AIDS as the victim's right to life is contravened. Section 34 proclaims that "[e]very individual is entitled to respect for the dignity of his person, and accordingly . . . no person shall be subject to torture or to inhuman or degrading treatment." The right to human dignity is very relevant as it provides for respect for the dignity of the trafficked person. This right encompasses non-subjection to torture, inhuman or degrading treatment,⁵⁴³ slavery or servitude,⁵⁴⁴ and freedom from forced or compulsory labour.⁵⁴⁵ Section 35 provides for the right to personal liberty, another right that is encroached in a trafficking situation. This right is enhanced by Section 41 which guarantees the right to freedom of movement of all citizens in Nigeria.

Although there is no provision in the Constitution that directly prohibits the sexual exploitation of persons, section 17(2)(d) states that "exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented". In addition, section 17(3)(f) focuses specifically on protecting children, young person and the aged "against any exploitation whatsoever, and against moral and material neglect". Section 17(3)(c) provides that the state shall direct its policy towards ensuring that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused. Trafficking has severe direct and indirect effects on the physical and psychological health of victims, as such, this constitutional provision that provides for a right to health and safety of trafficked persons establishes the duty to prevent and

⁵⁴² See Wu "Global Burqas" 2005 14 *Texas Journal of Women and the Law* 179-199. Eg, in 2003, an unmarried Nigerian Moslem woman became pregnant and the Northern Nigerian Islamic State government wanted to execute her according to Sharia Code. International outcry and the Nigerian Supreme Court saved the woman, yet nothing was done to the Moslem man who impregnated her. See Ebbe (n521 *supra*) 29. Ironically, traffickers exploit the annual pilgrimage to Mecca to traffic women and children for different exploitative purposes like prostitution, begging and domestic work. See Akee, Basu, Chau & Khamis *Ethnic Fragmentation, Conflict, Displaced Persons and Human Trafficking: An Empirical Analysis* (Forschungsinstitut zur Zukunft der Arbeit (IZA) Discussion Paper No 5142 Bonn 2010) 5.

⁵⁴³ Nigerian Constitution (n540 *supra*) s 34(1)(a): "No person shall be subject to torture or to inhuman or degrading treatment".

⁵⁴⁴ Nigerian Constitution (n540 *supra*) s 34(1)(b): "No person shall be held in slavery or servitude".

⁵⁴⁵ Nigerian Constitution (n540 *supra*) s 34(1)(c): "No person shall be required to perform forced or compulsory labour". A long list of exclusions on forced or compulsory labour follows.

combat this crime. It is implicit from all these provisions that human trafficking is an infringement of the individual's fundamental right to security of the person. The state thus has the obligation to protect victims of trafficking. Any violation of the fundamental human rights provisions in the Constitution is remediable by the High Court in the state where the violation occurs.⁵⁴⁶ However, there has never been a human trafficking case concerning the violation of human rights heard before any Nigerian court.⁵⁴⁷

The Nigerian Constitution is common to all states, however the Nigerian legal system consists of two different laws which operate geographically, giving rise to different court systems.⁵⁴⁸ The Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria 1990 (Criminal Code) is drawn from British laws and operates in the southern parts of the country. The Penal Code (Northern States) Federal Provisions Act, 1960 (Penal Code) is influenced by Islamic Law that applies in the north.⁵⁴⁹ There is also customary law which applies in the south, but only in matters of marriage and family. The crime of human trafficking in Nigeria was initially addressed by means of this general criminal legislation.⁵⁵⁰ Relevant offences were kidnapping,⁵⁵¹ abduction,⁵⁵² unlawful deprivation of liberty of a

⁵⁴⁶ See Nigerian Constitution (n540 *supra*) s 46.

⁵⁴⁷ See Nwogu "Nigeria" in Sanghera (ed) *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 147.

⁵⁴⁸ See Nwogu (n547 *supra*) 145. As such, these 2 laws are applied federally depending on their jurisdiction. To adjudicate on these 2 laws, Nigeria only has 1 Federal High Court which has judicial divisions across the federation. However, special judicial tribunals may also be set up in any part of the country to look into any criminal matter.

⁵⁴⁹ In order to avoid duplication of information, the Criminal Code Act, Chap 77, Laws of the Federation of Nigeria 1990 (Criminal Code) will mainly be discussed, and the Penal Code (Northern States) Federal Provisions Act, 1960 (Penal Code) and other laws utilized for highlighting information of interest. Other laws include the full Islamic Shari'ah Penal Law (first adopted by Zamfara State in 2000) which is utilized in 11 states in the north as legal system; customary law in the south and federal state laws on trafficking, such as the Edo state law. As individual Nigerian states may amend the Criminal Code, Edo state added new provisions in 2000 criminalising trafficking and making prostitution itself a crime. See Criminal Code Amendment Law (2000) Amendments ss 222, 223, 225, 226 and 233 of the Criminal Code.

⁵⁵⁰ Eg, about 56 cases relating to elements of human trafficking were charged to the Edo state Magistrates' Court between Jan 2000 and Apr 2003. The majority of these cases were charged under ss 516 (conspiracy), 419 (obtaining anything capable of being stolen by false pretence and with intent to defraud) and 390 (stealing) of the Criminal Code. A few cases were charged under s 362 (abduction of a girl below 16), s 223A (procuration), s 225 (trading in prostitution or aiding and abetting trading in prostitution) and s 222A (causing or encouraging the seduction or prostitution of a female person). One person was charged with being in unlawful possession of human pubic hairs; finger nails and pants with menstrual stains belonging to another under s 430(1) of the Criminal Code (n549 *supra*) (ie, being in possession of anything reasonably suspected to have been stolen or unlawfully obtained without giving a proper account to the satisfaction of the court as to how such a thing was obtained). See Okojie (n7 *supra*) 96-97.

⁵⁵¹ Criminal Code (n549 *supra*) s 364. Kidnapping is punished with imprisonment for 10 yrs.

⁵⁵² Criminal Code (n549 *supra*) s 225 (girls under 18) with a sentence of 2 yrs imprisonment; Criminal Code (n549 *supra*) s 361 (females of any age) 7 yrs; Criminal Code (n549 *supra*) s 362 (girls under 16) 2 yrs imprisonment.

person by confinement or detention,⁵⁵³ conspiracy⁵⁵⁴ (where there was more than one offender), obtaining something capable of being stolen by false pretences,⁵⁵⁵ forgery,⁵⁵⁶ and intent to defraud.⁵⁵⁷

The Criminal Code does not specifically refer to or define human trafficking nor does it discuss the various forms of trafficking. However, it does consider related offences which may constitute cross-border trafficking for prostitution and slavery.⁵⁵⁸ Slave dealing (section 369)⁵⁵⁹ is considered a crime in both Codes,⁵⁶⁰ in accordance with international law. It is further an offence to procure women and girls under the age of eighteen (minors in Nigeria) to have sexual relations with other persons within or outside Nigeria (section 223(1)). Any person who procures any girl or woman of any age to either become a prostitute or with intent that she resides in a brothel for purposes of prostitution within or outside Nigeria is punished under section 223 (2), (3) and (4).⁵⁶¹ Section 224 punishes any person who by threats, intimidation or false pretence procures a woman or a girl or administers stupefying or overpowering drugs on her to facilitate unlawful sexual relations

⁵⁵³ Criminal Code (n549 *supra*) s 365. Deprivation of liberty carries the penalty of imprisonment for 2 yrs.

⁵⁵⁴ Criminal Code (n549 *supra*) s 227.

⁵⁵⁵ Criminal Code (n549 *supra*) s 382.

⁵⁵⁶ Criminal Code (n549 *supra*) s 465.

⁵⁵⁷ Criminal Code (n549 *supra*) s 418.

⁵⁵⁸ Nwogu (n547 *supra*) 147. In the Criminal Code, the following provisions specifically addressed the elements of trafficking: Chap 21 (Offences against Morality), Chap 28 (Offences Endangering Life or Health), Chap 29 (Assaults), Chap 30 (Assaults on Females: Abduction), Chap 31 (Offences against Liberty: Slave dealing), Chap 32 (Parental Rights and Duties). These chapters contain ss 222-225, 337, 365, 369. The Penal Code sections which have direct application to the elements of trafficking are ss 271-272, 277-281.

⁵⁵⁹ Criminal Code (n549 *supra*) s 369 punishes slave dealing with imprisonment for up to 14 yrs upon conviction of any offender. The section defines the offence to include: (a) dealing/trading in, purchasing, selling, transfer or taking of any slave, or for the purpose of holding or treating any such person as a slave; or (b) placing or receiving any person in servitude as a pledge or security for a current or future debt; or (c) conveying, sending or inducing any person to go outside Nigeria to enable the person to be possessed, dealt or traded in, purchased, sold or transferred as a slave or be placed in servitude as a pledge or security for debt; or (d) entering into any contract or agreement with or without consideration for doing any of the acts or accomplishing any of the purposes listed in (a)–(c). See Pearson (n529 *supra*) 159.

⁵⁶⁰ The Penal Code (n549 *supra*) s 279 states that “whoever imports, exports, removes, buys, sells, disposes, traffics, or deals in any person as a slave or accepts, receives or detains any person against his will any person as a slave shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to a fine”. This does not define the term “traffic” nor “slave”. The term “as a slave” has meant this provision is extremely restrictive, thus not useful to prosecute traffickers. The same problem is shown in the various other provisions relating to trafficking including abduction (inducing someone to move somewhere by force or deceit) (s 272) and kidnapping.

⁵⁶¹ See Pearson (n529 *supra*) 163. In Cross River state, 1 trafficker has been convicted under s 223 of the Criminal Code (for procurement for prostitution) and sentenced to 3 months in prison. In Edo state, the Solicitor General reported that in the past 5 yrs, 2 cases of trafficking had reached court; but neither has been concluded.

with a man either within or outside Nigeria.⁵⁶² This section is further enhanced by section 366 which encompasses most of the methods used by traffickers to place their victims under subjection such as threats, surveillance or other methods of intimidation.⁵⁶³ The exploitation of female prostitutes by pimps or madams is made illegal by section 225A. Punishment consists of imprisonment for two years for first offenders; subsequent offences by males may lead to imprisonment for any number of years in addition to caning.⁵⁶⁴

Sexual assault is penalized in both Codes, but no definition is given of the offence which makes its application unclear and impractical. Section 360 of the Criminal Code states that any person “who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanour, and is liable to imprisonment for two years” but provides no guidance on what constitutes unlawful and indecent assault. Other provisions which also apply to sexual assault add ambiguity to the standard, for example, the Criminal Code establishes in sections 218 and 221 the crimes of “Defilement of girls under thirteen” and “Defilement of girls under sixteen and above thirteen, and of idiots”. What exactly “defilement” entails, is never set out in the Code. Also, section 222 introduces the crime of “indecent treatment” as “any person who unlawfully and indecently *deals with* a girl under the age of sixteen years”⁵⁶⁵ (italics mine). Section 216 specifies that “the term „deal with” includes doing any act which, if done without consent, would constitute an assault as hereinafter defined.” The Code does not provide exactly what activity amounts to sexual assault. In order to explicate the crime of rape, the Codes make use of the terms “carnal knowledge”⁵⁶⁶ or

⁵⁶² Asiwaju (n493 *supra*) 184. Note that it is a defence to a charge of any of the offences defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of 18 yrs.

⁵⁶³ According to s 366, any person who compels another to do any act which he/she is lawfully entitled to abstain from doing by means of (a) threats of injury to the person, reputation or property of the victim or those of anyone in whom the victim is interested; (b) persistent surveillance of victim; and (c) other forms of intimidation such as name dropping, seizure of clothing, work tools or other items of property is guilty of an offence punishable with imprisonment for a year. If this involves assault, the penalty increases to 5 yrs (s 367). For a discussion on the Penal Code, see Okojie (n7 *supra*) 40.

⁵⁶⁴ Conspiracy to commit this crime is punished in s 227 with imprisonment for 3 yrs.

⁵⁶⁵ It would seem that this article provides for a statutory minimum age of 16 for consent to any sexual activity. However, under the Child Rights Act 2003 (see *infra* n572), the age of legal majority for all purposes irrespective of gender has been fixed at 18 yrs including the issue of consent to marriage or sexual activity.

⁵⁶⁶ As in Criminal Code (n549 *supra*) s 357: “Any person who has unlawful *carnal knowledge* of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape” (italics mine). Thus offence is punished in s 358 by imprisonment for life, with or without caning. The Penal Code provides for a much narrower description of “sexual intercourse”, however an explanatory note in the Penal Code and the Shari’ah Code states that “mere penetration is sufficient to

“carnal connection” which is clarified in section 6 as “...implied that the offence, so far as regards that element of it, is complete upon penetration”. However, the Codes do not provide a definition of “penetration” or “consent”.⁵⁶⁷ The phrase “unlawful carnal knowledge” means carnal connection which takes place otherwise than between husband and wife.⁵⁶⁸ As such, marriage can still be used as a defence in rape cases in Nigeria. On the charge of certain sexual offences such as those found in sections 218 or 221 of the Nigerian Criminal Code, a person cannot be convicted on the uncorroborated testimony of one witness. This makes the crime of rape very difficult to prove as these offences are typically committed in private where there are usually no witnesses to provide direct evidence to corroborate the victim’s allegations.⁵⁶⁹

As can be deduced from the provisions provided, trafficking in Nigeria is regarded in the Codes as being exclusively for prostitution or the procurement of women for sex. Human trafficking for the purpose of labour exploitation is not considered. The articles are also very gender-specific and regard only females as possible victims of trafficking, and mainly males as the perpetrators.⁵⁷⁰ Moreover, different prison terms are stipulated for the

constitute the sexual intercourse necessary to the offense of rape”. See Zamfara State of Nigeria Shari’ah Penal Code Law (2000) s 128.

⁵⁶⁷ The Shari’ah Law (s 38) does define “invalid consent” as consent given “(a) by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or (b) by a person who, from unsoundness of mind or involuntary intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or (c) by a person who is under 18 years of age or has not attained puberty”.

⁵⁶⁸ See Criminal Code (n549 *supra*) s 6. Unlawful carnal knowledge may consequently also encompass penetration by a foreign object.

⁵⁶⁹ See Barad *Gender-based Violence Laws in Sub-Saharan Africa* (2007) 40. Notwithstanding the problem of proof, the northern Shari’ah Law contains further onerous evidentiary requirements in respect of a claim of rape by a married person: “(a) Islam; (b) maturity; (c) sanity; (d) liberty; (e) valid marriage; (f) consummation of marriage; (g) *four witnesses*; or (h) confession” (italics mine). If any of the conditions have not been proved by the person alleging the offence, the person (victim) “shall be imprisoned for one year and shall also be liable for caning which may extend to one hundred lashes.” Her testimony will also be seen as unreliable, unless she “repents before the court” (s 140). This is because the Shari’ah Law recognizes the crime of *qadhif* - falsely accusing another of adultery or fornication (*zina*) – as set out in s 139. Women who have been raped or sexually assaulted may find it impossible to prove their claim, and may themselves be accused of having “by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations”, made a “false imputation of *zina* or sodomy concerning a chaste person (*muhsin*).” These victims may also be accused of extramarital sexual relations (eg, if the rape results in a pregnancy), which is punished with a sentence of death by stoning.

⁵⁷⁰ Even when offences concern children, only the girl-child is regarded, eg, Criminal Code (n549 *supra*) s 222 which punishes any person who, having lawful custody, charge or care of a girl under age 16 yrs, causes or encourages the seduction, unlawful carnal knowledge or prostitution of, or the commission of an indecent assault upon such a girl. Indecent assault is very vaguely defined as “sexual and other such immoral abuses”. The Penal Code (n549 *supra*) again recognizes the offence of sexual assault of children under the age of 16, which can only be perpetrated by men in positions of authority. S 285 labels this crime “gross

different genders. The unlawful and indecent assault of a male under fourteen years of age warrants seven years imprisonment (Criminal Code section 216), while same crime merits two years if the victim is female. Similarly, the unlawful and indecent assault of a female results in two years imprisonment (section 360), while a male victim's perpetrator will be sentenced to three years (section 353). Additionally, the Criminal Code provisions are difficult to prove especially when the exploitation occurs outside Nigeria. This is also ascribed to the poor information-sharing between the Nigerian authorities and those in the destination countries, as well as the general state of corruption in Nigeria.

Critics have remarked that the penalties in the Criminal Code for offences that constitute human trafficking are surprisingly lenient, and these crimes are sometimes regarded as mere misdemeanours. For example, section 223 offences are only made punishable with imprisonment for two years, a punishment which seem unlikely to deter traffickers. On the other hand, some of the penalties imposed violate human rights standards. Caning or "hadd" sentences are frequently prescribed as part of a sentence for a crime such as rape, for example. The UN regards caning as a form of cruel, inhuman or degrading punishment, and may even amount to torture. As these Codes were not intended to combat human trafficking directly, prosecutors could only apply specific sections with regard to the identifiable crime. Similarly, offenders made use of loopholes in the legislation to avoid any convictions.⁵⁷¹ The criminal codes only consider the offences and their punishments and do not pay any heed to the protection of victims.

Nigerian family law and labour law also contain provisions related to trafficking in persons. The Child's Rights Act 2003 (CRA)⁵⁷² is currently the most comprehensive law in Nigeria

indecentcy" provides for 7 yrs imprisonment and a fine. Shari'ah Law also recognizes the crime of "gross indecentcy" (s 138) which is punishable with caning of 40 lashes and imprisonment of 1 year and a fine. The same law also recognizes the crime of "assault or criminal force to women with intent to outrage modesty" (s 226): "whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may extend to one year and shall be liable to caning which may extend to forty lashes." These subjective provisions do not provide for the safety of trafficking victims as any activity which is contrary to morals of the community or tribunal will be viewed negatively or criminal.

⁵⁷¹ Asiwaju (n493 *supra*) 183.

⁵⁷² Enacted in Nov 2003, in accordance with its obligations in terms of the CRC, the ILO C182 and the OAU Charter. The Act is divided into 24 parts and 11 schedules and broadly addresses the rights and responsibilities of children and the government. The legislation is yet to be domesticated in many states of the country - child trafficking is criminalized in only 23 of the 36 states where the act is operative. See

providing for the total well-being, protection and welfare of children.⁵⁷³ In accordance with international norms, the child's best interests are always of primary consideration in all actions to be undertaken.⁵⁷⁴ For example, section 14 of the CRA states that a child must not be separated from the parents against the will of the child, unless it is in the child's best interest.⁵⁷⁵ Consequently, it is mainly the parents who determine what the best interests of the child are. Many Nigerian parents give consent to the trafficking of their child thinking that the action would be in the child's best interest. This is a clear violation of the child's right to parental care, protection and maintenance.⁵⁷⁶

Child labour is regarded as an immense problem in Nigeria. As such, trafficking for the purpose of all types of exploitative labour is covered under the CRA. Section 28 prohibits forced, exploitative and hazardous child labour. This includes the employment of children in any capacity⁵⁷⁷ except where the child is engaged by a member of the family on light work of an agricultural, horticultural or domestic nature.⁵⁷⁸ The CRA section 30 proscribes the buying, selling, hiring or otherwise dealing in children for the purpose of hawking or begging for alms or prostitution. These activities are punishable with ten years imprisonment. The Muslim system of *almajirai* (where Qur'anic pupils are forced to beg in order to support their Islamic teachers or *mallams*) may be covered by this section.⁵⁷⁹ The CRA sections 31, 32 and 33 respectively prohibit unlawful sexual intercourse with a child (punished with life imprisonment), other forms of sexual abuse and exploitation (punished with imprisonment of up to fourteen years), forms of exploitation prejudicial to the welfare of a child (which provides for a fine of N500,000 (US\$ 3794) or five years imprisonment or both). Section 34 prohibits recruitment into the armed forces but prescribes no

Lawrence & Andrew "A „Neo-Abolitionist Trend“ in Sub-Saharan Africa? Regional Anti-Trafficking Patterns and a Preliminary Legislative Taxonomy" 2011 9(2) *Seattle Journal for Social Justice* 599 632.

⁵⁷³ CRA (n572 *supra*) s 277 defines a child as a person below the age of 18 yrs.

⁵⁷⁴ CRA (n572 *supra*) ss 1 & 2.

⁵⁷⁵ This provision is reinforced by CRA (n572 *supra*) s 27 which punishes the abduction, removal and transfer of a child from lawful custody with imprisonment of between 10 and 20 yrs.

⁵⁷⁶ Nwogu (n547 *supra*) 150.

⁵⁷⁷ Eg, the use of children in any criminal activities (s 26); where offenders are liable to punishment of 14 yrs imprisonment.

⁵⁷⁸ The punishment for contravening this section is 5 yrs imprisonment or a fine of between N50, 000 (US\$ 380) and N250, 000 (US\$ 1,897). The CRA (n572 *supra*) s 28 duplicates s 59 of the Labour Act 1971. The subsequent s 29 is also an application of the provisions relating to young persons in ss 59-62 of the Labour Act.

⁵⁷⁹ Olateru-Olagbegi (n515 *supra*) 35.

punishment.⁵⁸⁰ Any further practices harmful to the child that causes physical, mental or emotional injury such as child marriage, child betrothal, infliction of tattoos and skin marks, female genital mutilation, maltreatment, torture, inhuman or degrading punishment are made illegal.⁵⁸¹

The Labour Act 1990⁵⁸² can also be applied to cases of labour trafficking. Forced or compulsory labour for all persons is prohibited in section 73. Forced child labour is also illegal, and the minimum age is set at twelve years (section 49, 59) in order to employ a child in a work or apprenticeship, except for communal obligations (light agricultural or domestic work performed for the family). Children under twelve years of age are not allowed to lift or carry any load likely to inhibit a child's physical development. Section 61 further establishes a minimum age of fifteen years for industrial work and maritime employment. Lastly, children younger than eighteen years are not allowed to engage in any employment that is dangerous or immoral, but this does not apply to domestic service.⁵⁸³ Neither Nigeria's Labour Act nor its Child Rights Act lays out a comprehensive list of hazardous activities prohibited for children nor do they establish a clear minimum age for hazardous work. Trafficked persons are, as in other countries, also regulated by the Immigration Act 1990.⁵⁸⁴ The Nigerian government, and the whole West African region, has a *laissez-faire* attitude towards migration.⁵⁸⁵ Yet travel requirements for women have discriminatory overtones, aimed at keeping them at home. For example, for a married Nigerian woman to obtain a passport, her husband's permission (in the form of a written declaration) must be presented. A single woman travelling without a male companion experience many obstacles when crossing the borders, however, male traffickers manipulate this stance and pose as husbands to get trafficked women across international

⁵⁸⁰ In 2005 NIS officials arrested a security man at the Banki border who was trying to traffic young secondary school boys into Chad to join an armed rebel group. See Nwogu (n547 *supra*) 151.

⁵⁸¹ The non-existence or flawed birth registration in the jurisdiction is not touched on, which make these children more vulnerable to trafficking. Olateru-Olagbegi (n515 *supra*) 50.

⁵⁸² The Labour Act, Chapter 198, Laws of the Federation of Nigeria, 1990 (Labour Act).

⁵⁸³ See further Nwogu (n547 *supra*) 153.

⁵⁸⁴ The Immigration Act, Chap 171, Laws of the Federation of Nigeria 1990. Deportation is discussed under ss 18-23.

⁵⁸⁵ West Africa has the highest number of migrants (4.7% of the population) in the world. UN-HABITAT *State of the World's Cities: Trends in Sub-Saharan Africa, Urbanisation and Metropolitanisation* (2004) 1. A third of the rural population have moved from their rural homes, urbanisation has escalated from 14% of the population in 1960 to 40% in 1990; 12% of non-Nigerians do not live in their country of birth. See Olukoshi *West Africa's Political Economy in the Next Millennium: Retrospect and Prospect* (2001) 5.

borders.⁵⁸⁶ The lack of adequate provisions regarding trafficking in Nigeria's general and criminal laws required new trafficking-specific legislation. This legislation was introduced in 2003 and considered below.

6.4.1.1 Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003

The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 (NAPTIP Act 2003)⁵⁸⁷ adopted the Palermo Protocol's definition of trafficking as including

... all acts and attempted acts involved in the recruitment, transportation within or across Nigeria borders, purchases, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion or debt bondage for the purpose of placing or holding the person whether for or not involuntary servitude (domestic, sexual or reproductive) in force or bonded labour, or in slavery-like conditions.⁵⁸⁸

Despite the distinct definition, the NAPTIP Act does not specifically punish human trafficking in one single offence.⁵⁸⁹ The Act amalgamates all the existing Nigerian laws on slavery, sexual crimes dealing with women and girls, labour exploitation, and child trafficking in the offences section.⁵⁹⁰

Within the ambit of the trafficking definition is internal trafficking of children by their parents or guardians.⁵⁹¹ Activities previously regarded as indigenous cultural practices (such as

⁵⁸⁶ Asiwaju (n493 *supra*) 179.

⁵⁸⁷ Passed on 14 Jul 2003; amended in 2005 as the Trafficking in Persons (Prohibition Law Enforcement and Administration (Amendment) Act 2005 to give enforcement powers to NAPTIP Agency. The original full title of the Bill was A Bill for an Act to Establish the National Agency for Trafficking in Persons Law Enforcement and Administration to Enforce Laws against Traffic in Persons, to Investigate and Prosecute Persons Suspected to be Engaged in Trafficking in Persons, and to take Charge and Co-ordinate the Rehabilitation and Counselling of Trafficked Persons and for Other Matters Connected Therewith. The law has 51 sections, of which 26 ss define offences related to human trafficking. See Asiwaju (n493 *supra*) 177.

⁵⁸⁸ NAPTIP Act (n587 *supra*) s 50.

⁵⁸⁹ Nwogu (n547 *supra*) 144, 145. Upon its enactment, the NAPTIP Act restated some of the offences in the Criminal and Penal Codes and prescribed stiffer penalties for them, but all 3 laws exist alongside and are equally applicable.

⁵⁹⁰ NAPTIP Act (n587 *supra*) ss 11-28.

⁵⁹¹ Nwogu (n547 *supra*) 143. This is made clear in *Attorney-General of the Federation and Chioma Ogbonna*, Suit No HU/41C/2005 (22 Feb 2006), where the accused allegedly kidnapped the young daughter of the man she was living with and attempted to sell her to someone for a sum of money. Although there was no proof that this deal was concluded, she was found guilty on all charges and sentenced to 2 yrs imprisonment.

child fostering) are now prohibited. Attempts to traffic a person is also made a criminal offence which enables law enforcement agents to institute criminal proceedings when they suspect that an offence related to human trafficking is about to be committed, even where the act is yet incomplete.⁵⁹² However, in applying this clause, law enforcement agents have to prove that actual exploitation of the intercepted persons will take place upon arrival at their destination, and that the activity is not merely migration.⁵⁹³ This is extremely difficult to prove. The Nigerian definition also ignores the problem of trafficking for the removal of organs.⁵⁹⁴ There have been cases in Nigeria where organs were trafficked for the purpose of unlawful organ transplants; however, more often organs are unlawfully removed for the purpose of rituals associated with traditional religious beliefs. It is believed that, as Nigeria has ratified the Palermo Protocol, this supplementary instrument could act as aid to the NAPTIP Act where the Act does not specifically provide for the criminalization of certain crimes.

Sections 11–28 lists and define the specific trafficking offences such as exporting and importing minors for prostitution purposes (section 11); the procurement of minors (with or without their consent) for forced seduction/prostitution (section 12); procuring minors or causing or encouraging the seduction or prostitution of minors within or outside Nigeria (sections 13, 14); procuring any person for prostitution/pornography, drug trafficking or armed conflict; organizing foreign travel for prostitution (section 15); unlawful detention of any person with intent to defile (section 17); procuring/defiling of minors by means of threats, fraud or administering of hard drugs (section 18); kidnapping of minors from guardianship (section 19); kidnapping/abduction of persons for culpable homicide (section 20); buying and selling of persons for any purpose (section 21); unlawful forced labour

⁵⁹² Nwogu (n547 *supra*) 143. Here the definition draws significantly on art 5(2)(a) of the Palermo Protocol.

⁵⁹³ Eg, on 14 Mar 2004 the police intercepted a bus-load of children on their way to Cameroon. The children, ranging in age from 14 to 16 yrs (8 girls and 7 boys), were told by the adults arranging their journey that some were going to work while others would go to school. Both the suspected traffickers and the children were interrogated, after which the children were sent home to their parents and guardians. See Nwogu (n547 *supra*) 143. In case law, the prosecution in *Attorney-General of the Federation v MA*, Suit No B/13c/2004 (16 Dec 2005) could not prove that accused procured the 3 girls to travel for the purpose of prostitution. In *Attorney-General of the Federation v Samson Ovensari*, Suit No B/15c/06 (1 Apr 2008) however, the accused was found guilty of the offence of attempt to procure the victim for prostitution in Spain. He was sentenced to 12 months' imprisonment or a fine of N50, 000 (US\$308).

⁵⁹⁴ The removal of body organs is not covered adequately in other laws, and when referred to, a skew impression of the crime is given. Other laws refer to the use of human remains in *juju* worship, suggesting that the crime involves the use of body parts of corpses rather than procuring living people especially so that parts of the body can be used. See Nwogu (n547 *supra*) 149.

(section 22); trafficking in slaves (section 23) and slave-dealing (section 24). Even when the offences are committed abroad by Nigerians, the offenders are liable to punishment and forfeiture of assets in Nigeria upon their repatriation or return for “bringing the image of Nigeria to disrepute” in spite of having served an earlier punishment for the original offence abroad (section 25). Alien offenders resident in Nigeria are punishable under the Act by imprisonment and subsequent deportation (section 26). Attempts to commit any of the substantive offences are punishable under the Act (section 27), and corporate bodies and their management staffs are also punishable under the Act for attempts or commission of any of the offences created by the Act (section 28). The Act criminalises commercial carriers with knowledge of the trafficking transaction (section 29). However, the element of guilt due to knowledge (“who knowingly carries”) may be difficult to prove in order to secure the conviction of a commercial carrier and no prosecutions have yet occurred.⁵⁹⁵ The Act shows a strong focus on prostitution rather than trafficking for all forms of exploitation. This is evident in the many provisions on sexual exploitation in the Act, which results in human trafficking being equated with sex work in Nigeria, especially trafficking of Nigerian females to other countries. Generally, women are regarded to be victims. This focus has affected the perception of the authorities (especially law-enforcement officials) about which acts constitute trafficking in persons. The trafficking of men and children for sex and labour exploitation, internal trafficking and trafficking of persons into Nigeria have not so far received commensurate attention.⁵⁹⁶ The Protocol could potentially be cited as backing by prosecutors to cover the other forms of exploitation. Again, the words “carnal knowledge” or “carnal connection” (instead of sexual exploitation) are widely used within the NAPTIP Act, but is not defined anywhere.⁵⁹⁷ This could lead to a legal misinterpretation where acts constituting voluntary sex work by adult women abroad are interpreted as sexual exploitation.

The NAPTIP Act provides stiffer penalties for related offences in the Codes.⁵⁹⁸ Traffickers are punished with sanctions ranging from heavy monetary fines, imprisonment with or without option of fines, forfeiture of assets, forfeiture of passport by convicted offenders

⁵⁹⁵ Nwogu (n547 *supra*) 143.

⁵⁹⁶ Pearson (n529 *supra*) 160.

⁵⁹⁷ Lawrence & Andrew (n572 *supra*) 655 state that prosecutors complain that poorly written definitions (or no definition) do not provide the leverage to guarantee convictions.

⁵⁹⁸ The Federal High Court, the High Court of a State and the High Court of the Federal Capital all have concurrent jurisdiction to try any human trafficking related offences. Further see Brown (n284 *supra*) 48.

(section 34), deportation or repatriation and liability for compensation to victims in civil proceedings. Jail terms range from 12 months (for attempts) to two years to life imprisonment depending on the degree of seriousness of the offence, while fines range from N50,000 (US\$ 379) and N200,000 (US\$1,517) for individual traffickers or managerial staff of corporate bodies. Penalties for trafficking offences related to sexual purposes and involving minors under the age of 18 are much more severe than other penalties. The slave dealing provision of section 369 of the Criminal Code is restated in the NAPTIP Act and its sentence increased to life imprisonment (s 25). The NAPTIP Act also has similar provisions to the Labour Act with much higher penalties - while the penalty in the Labour Act is two years' imprisonment or N1000 (US\$7, 70) fine for private individuals and six months' imprisonment or N200 (US\$1, 55) fine for public officers, the NAPTIP Act provides a penalty of five years' imprisonment or a fine of N100, 000 (US\$770) or both. This conflict between the two laws with regard to their penalties could create difficulties in prosecution and sentencing.

The Act further provides for the protection of trafficked persons, informants, and information gathered in the course of investigation in respect to an offence committed or one that is likely to be committed.⁵⁹⁹ The Act makes provision for the humane treatment, protection from intimidation, threats of reprisals from traffickers, their associates and persons in positions of authority, and non-discriminatory practices towards victims of trafficking. These include access to social services and rehabilitation facilities, the guaranteed protection of the identity of the trafficked person, medical attention and temporary stay without valid documents (sections 36, 37).⁶⁰⁰ However, Nigerian victims and witnesses do not have any right to be legally represented in criminal proceedings.⁶⁰¹ Trafficked victims have the right to institute civil actions against their traffickers irrespective

⁵⁹⁹ Asiwaju (n493 *supra*) 185. NAPTIP Act (n587 *supra*) ss 36-38.

⁶⁰⁰ The Act stipulates that a trafficked person should not be denied temporary residence visas during criminal, civil or other legal actions and adequate health and social services should be provided to the person during this period (s 36(e)). This inclusion of civil action is broader than that available in other countries. Again, a clause in the NAPTIP Act (n587 *supra*) s 37 provides a loophole for the violation of the provision. It states: "*Where the circumstances so justify*, trafficked persons shall not be detained, imprisoned or prosecuted for offences related to being a victim of trafficking, including non-possession of a valid travel or stay permit or use of false travel or other documents" (*italics mine*). The italicized words suggest to law enforcement officials that the norm is to detain trafficked persons.

⁶⁰¹ Pearson (n529 *supra*) 168.

of their immigration status (section 38).⁶⁰² These three provisions regarding victims' rights and assistance do not provide sufficient protection to victims of human trafficking.⁶⁰³ It is argued that the Palermo Protocol could cover the gaps in the NAPTIP Act in this regard.⁶⁰⁴ The possibility of compensation to victims is made possible in section 25 of the NAPTIP Act, but only in situations where Nigerian traffickers were convicted overseas and subsequently returned to their country of origin. The NAPTIP Amendment Act established the Victims of Trafficking Trust Fund into which confiscated assets of traffickers should be paid (with no explicit provisions as to the uses of the trust fund). Not much has been paid to victims from this Fund - in reality, Nigerian trafficking victims have very little monetary assistance with regard to rehabilitation.⁶⁰⁵

Additionally, the Act creates an agency charged with the responsibility for the investigation and prosecution of offenders⁶⁰⁶ and the counselling and rehabilitation of trafficked persons. The National Agency for the Prohibition of Traffic in Persons and other related matters (NAPTIP Agency) is in charge of the enforcement and administration of the provisions of the human trafficking law (section 4(a)); the coordination and enforcement of all existing laws on trafficking in persons and other related offences (section 4(b)); the adoption of measures to increase the effectiveness of eradication of trafficking in persons (section 4(c)); the facilitation or encouragement of the presence or availability of persons in custody who consent to assist in investigations or participate in proceedings relating to trafficking in

⁶⁰² Nwogu (n547 *supra*) 161: "Under the Nigerian legal system, damages are awarded when a victim brings a civil action after the criminal action has been discharged and the guilt of the accused person determined. This is certainly unrealistic in Nigeria, just as it is in many other countries where trafficked persons are poor and intimidated by legal procedures".

⁶⁰³ NAPTIP Act (n587 *supra*) s 45 provides that: "Where a person volunteers to the Agency or an official of the Agency any information, which may be useful in the investigation of an offence under this Act, the Agency shall take all reasonable measures to protect the identity of that person and the information so volunteered shall be treated as confidential." Despite this provision, the general requirement is that trials be conducted in public (except where children are involved). This poses a threat to victims and witnesses, creating the need for their protection.

⁶⁰⁴ In practice though, the Protocol is not being applied alongside the NAPTIP Act. Asiwaju (n493 *supra*) 185.

⁶⁰⁵ See US Dept of State *Trafficking Persons Report 2012* (n22 *supra*) 272. Agbu (n493 *supra*) 4-5 comments: "Rehabilitation is an expensive project as victims have to be sheltered, fed, receive Medicare and re-skilled". Still, NAPTIP claims to have successfully rehabilitated 1,138 victims of human trafficking between 2003 and 2007. Pearson (n529 *supra*) 168 states that no trafficked persons have yet received legal redress or compensation in Nigeria. See also Nwogu (n547 *supra*) 161: "Payment of compensation to victims of crime is not a very prominent feature in the administration of criminal justice in Nigeria".

⁶⁰⁶ The first conviction secured by the NAPTIP Agency under the new trafficking legislation was *Attorney-General of the Federation v Sarah Okoya*, Suit No B/15c/2004 (19 Nov 2004). In this case, the female accused procured 6 young women with the promise of assisting them with jobs in Spain, however, she smuggled them into Benin for prostitution. She was sentenced to a prison term of 3 yrs with hard labour.

persons and other related offences (section 4(d)); enhancing the effectiveness of law enforcement agents to suppress trafficking in persons (section 4(e)); establishing, maintaining and securing communication to facilitate the rapid exchange of information concerning offences; conduct research and improving international cooperation in the suppression of trafficking in persons by road, sea and air (section 4(f)); reinforcing and supplementing measures in such bilateral and multilateral treaties and conventions on trafficking in persons as may properly be adopted by Nigeria to counter the magnitude and extent of trafficking in persons and its grave consequences (section 4(g)).

The Agency also has to take such measures in collaboration with other bodies such as the police, immigration service, customs service, and other relevant security agencies that may ensure the elimination and prevention of the root causes of the problem of trafficking in any person (section 4(h)); it has to strengthen and enhance the effective legal means for international cooperation in criminal matters for suppressing the international activities of trafficking in persons (section 4(i)); strengthen the cooperation between the office of the Attorney-General of the Federation and all law enforcement agencies involved in the eradication of trafficking in persons (section 4(j)); take charge, supervise, control and coordinate the rehabilitation of trafficking victims and participate in proceedings relating to trafficking in persons (section 4(k)).⁶⁰⁷ The NAPTIP Agency has the power to institute investigations into suspected cases of trafficking as well as into the activities of suspected traffickers or persons engaged in activities related to trafficking (section 5). To assist the Agency in the exercise of its powers and functions, the Act also establishes in sections 8 and 9 respectively, an investigation unit, a legal unit, a public enlightenment unit, a counselling and rehabilitation unit, and other relevant units, technical committees and task forces, each with their specific duties.⁶⁰⁸ Finally, the Agency is empowered to initiate, develop or improve specific training programmes for the relevant law enforcement agents and other personnel of the Agency (section 10). Such programmes include methods of crime detection, countermeasures against techniques employed by traffickers and the

⁶⁰⁷ The Agency has established 8 operational shelters across the country where the victims of human trafficking are provided with temporary accommodation, welfare packages, medical and counselling services. The victims are also trained in life and economic skills and thereafter they are provided with micro- finance to start business or to go back to school. See Asiwaju (n493 *supra*) 186.

⁶⁰⁸ In this regard, the Agency has established 6 operational zonal anti-human trafficking units (ATUs) in Lagos, Uyo, Kano, Enugu, Benin and Sokoto - which are among the worst offenders - in a bid to effectively policing those zones. See Agbu (n493 *supra*) 4.

routes they use, monitoring of the movement of traffickers and victims and dissemination of information on laws relating to trafficking. Under the Act, the Investigation and Monitoring Unit has the responsibility of liaising with the NPF for the prevention and detection of offences in violation of the provision of the Act, and to work in collaboration with the NIS, the Custom Service and other security agencies to fight human traffickers. Public enlightenment and awareness creation is one of the core mandates of the Agency.⁶⁰⁹ The agency is however handicapped in that it gets its funding directly from the government's constrained budgetary allocations. As such, funding is never enough to cover all its activities or released as and when needed.⁶¹⁰ The Agency has to rely on donations from development partners.

Despite being the first in Africa to give effect to its obligations under the Palermo Protocol, the NAPTIP Act has some shortcomings. Some critics claim that the verbatim reproduction of the Palermo Protocol results in inherent difficulties.⁶¹¹ While the Protocol is mainly preoccupied with the state parties' relationship in dealing with human trafficking cases; national legislation should provide for anti-trafficking provisions specifically addressing the particular trafficking situations in that country. This is not done in the Nigerian law, resulting in some of the provisions being inappropriate in the socio-political context of the country. Furthermore, the Protocol assumes the commission of crimes by organised crime syndicates, while in Nigeria most crimes relating to human trafficking are committed by individuals who are sometimes close relatives or neighbours of those being trafficked and who are not concealed in sophisticated networks. Another drawback of the NAPTIP Act is that all forms of trafficking are grouped together (the so-called blanket approach).⁶¹² This approach may be beneficial for the purposes of prosecutorial attention and it also streamlines funding as there is no unnecessary deviation from the collective focus.⁶¹³ But the approach allows law enforcement to give significant attention to selective aspects of trafficking, such as prostitution, while other trafficking forms such as child trafficking is

⁶⁰⁹ Sesay & Olayode (n483 *supra*) 18.

⁶¹⁰ A direct result of the disadvantage is the appalling rate of prosecution directly after the enactment of the NAPTIP Act. Between 2003 and 2007, NAPTIP filed 58 cases in various high courts across the country, out of which 12 cases were successfully prosecuted resulting in 10 convictions and 2 acquittals. See Asiwaju (n493 *supra*) 186.

⁶¹¹ Nwogu (n547 *supra*) 146.

⁶¹² Lawrence & Andrew (n572 *supra*) 638.

⁶¹³ Funding is developed in compliance with foreign governmental initiatives to repatriate smuggled "illegal" migrants from, eg, the EU and US.

neglected. Examining the NAPTIP Act as a whole, one finds that the legislation is oriented more towards the prosecution of traffickers than towards the prevention of trafficking or the protection of trafficked persons. The deficiencies in the NAPTIP Act regarding the victim and witness protection make it difficult to secure the testimonies of these persons for use in prosecutions, as they fear reprisals from traffickers.⁶¹⁴ The lack of effective victim or witness protection shows non-compliance with international human rights treaties.⁶¹⁵

(i) Prevention

The NAPTIP Agency has put several preventative measures with varying degrees of success in place to tackle the phenomenon of human trafficking. The NAPTIP Agency's Public Enlightenment Unit is tasked with carrying out extensive and regular sensitisation and advocacy campaigns among various groups in Nigeria. These programs raise awareness and educate the public and government agencies⁶¹⁶ on a national and local level on problem of trafficking in persons. The population is made aware of the issue of human trafficking through workshops, conferences, media (such as television,⁶¹⁷ radio, newspapers, magazines,⁶¹⁸ online journals), arts and theatre, sport events ("race against human trafficking"), essay competitions for secondary-level students, and state tours. The NAPTIP Agency also works at grassroots level, and frequently has "town hall" meetings with communities and traditional leaders in order to raise awareness of the dangers of trafficking and the available legal protections and resources.⁶¹⁹ In these efforts, NAPTIP works closely with other government agencies and NGOs,⁶²⁰ such as Nigerian Immigration Services (NIS),⁶²¹ the Nigerian Police Force (NPF), faith and community based organisations, educational institutions, especially primary and secondary schools.

⁶¹⁴ Nwogu (n547 *supra*) 149: In its first 2 yrs of existence, only 2 cases were successfully prosecuted to conviction under the law, despite the thousands of trafficking transactions taking place in Nigeria.

⁶¹⁵ Eg, the UNCHR's *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) Guidelines 6 & 9.

⁶¹⁶ Eg, Nigerian troops undergo mandatory human rights and human trafficking training in preparation for peacekeeping duties abroad. The police, customs, immigration, and NAPTIP officials are trained to employ procedures to identify victims among high-risk persons, such as young women or girls travelling with non-family members.

⁶¹⁷ A television drama entitled "Izozo" runs on national television under the sponsorship of 2 NGOs and deals with human trafficking. See Olateru-Olagbegi (n515 *supra*) 54.

⁶¹⁸ Nigerian airline companies are obliged by law (NAPTIP Act (n587 *supra*) s 31) to promote human trafficking through every possible means through in-flight magazines, ticket jackets, Internet units and video on long plane flights.

⁶¹⁹ Brown (n284 *supra*) 50.

⁶²⁰ As regard to preventative actions, NGOS aid with data collection, analysis and research.

⁶²¹ NIS assists in monitoring emigration and immigration patterns for evidence of trafficking.

Furthermore, close collaboration with development partners and other countries for all types of assistance is central to NAPTIP's campaign against trafficking. Thus the NAPTIP Agency has signed a Memorandum of Understanding (MOU) on behalf of Nigeria with Italy,⁶²² Britain, Spain, Saudi Arabia,⁶²³ Belgium, the Netherlands, France, Norway, Germany,⁶²⁴ the USA and Benin Republic. Most of these countries have given funds and grants for awareness-raising campaigns. Other international and bilateral donors who provide resources for activities to address human trafficking in Nigeria is UNICEF, UNIFEM, UNODC, UNICRI, ECOWAS, the World Bank, USAID, American Bar Association - Africa (ABA-Africa), ILO, IOM, the Canadian International Development Agency (CIDA), the Italian NGO TAMPEP Onlus, the international NGO Terre des Hommes, EU and EC.⁶²⁵ Aside from granting funds, the development partners provide technical cooperation, give workshops, disseminate information, and give advice on policy, capacity building and project implementation. NAPTIP's activities are also funded by federal government funding, yet payment delays hamper their activities severely.⁶²⁶

The jurisdiction is endeavouring to solve its trafficking dilemma through the creation of national programmes.⁶²⁷ Nigeria produced a National Plan of Action on Trafficking in Persons in 2008. The Action Plan provides government bodies and NGOs with a coordination framework for research, protection, prevention, and prosecution. In an attempt to address poverty, the country has introduced the National Poverty Eradication

⁶²² Italy has received the bulk of Nigerian trafficked persons, and has as a result assisted Nigeria with funding and expertise since 1999. The country has assisted Nigeria on attaining NAPTIP, its Plan of Action, and also facilitates repatriation and prosecution of traffickers, rescue, rehabilitation, and reintegration of victims. Asiwaju (n493 *supra*) 189.

⁶²³ Dave-Odigie (n487 *supra*) 67: From Mar 2002 to Apr 2004, the Saudi Arabia authorities deported 9,950 women and 1, 230 underage and unaccompanied children.

⁶²⁴ Germany's interest in assisting the jurisdiction resulted after a substantial increase in cases with Nigerian victims. In Germany, Nigerians represented the largest number of traffickers (37 persons, 5.1%) up from 2009 (29, 3.7%). Nigerians represented the largest number of victims from Africa (46 persons, 7.5%) up from 2009 (34, 4.8%).

⁶²⁵ The EU and EC have funded African regional collaboration to combat trafficking in exchange for the pledge to expand their preventative capacity and harmonize their legislation on trafficking. The EU has allocated a budget of €25 million to an intra-ACP migration facility for 2009-2013. See Klavert *African Union Frameworks for Migration: Current Issues and Questions for the Future* (2011) 18.

⁶²⁶ This is not unusual for the Nigerian government as all government programs receive partial payment pending budget approval by legislative and executive branches, which can be protracted.

⁶²⁷ Sub-regional programs also exist. The West Africa Early Warning and Early Response Network (WARN), which forms part of the West Africa Preventive Peacebuilding Program, co-coordinated by the West Africa Network for Peacebuilding (WANEP) is a civil society-based early warning and response network in Africa with emphasis on human security. WARN covers the entire ECOWAS sub-region.

Programme (NAPEP),⁶²⁸ the National Economic Empowerment Development Strategy (NEEDS), and the States' Economic Development Strategies (SEEDS). A National Gender Policy has been formulated to empower women, especially in important decision and law-making positions in Nigeria.⁶²⁹ It is suitably argued that when women are better educated, have control over resources and have a voice in decision-making, food security is also strengthened. Official corruption is also being reduced with the help of the Independent Corrupt Practices and Related Offences Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC), dreaded by criminals and politicians alike.⁶³⁰ There are no programme or action plans to reduce the demand for commercial sex acts in Nigeria. The government also operate hotlines for assistance to victims in each of NAPTIP's zonal areas; however, no information was available on these hotlines. Nigeria does not have a national database or rapporteur on human trafficking.⁶³¹

(ii) Protection

NAPTIP Agency's Counselling & Rehabilitation Unit is charged with the responsibility of care giving, counselling, and rehabilitating and reintegrating victims of trafficking. Victim assistance is coordinated with the state-level Ministries of Women Affairs, NGOs, IOM, ILO, UNODC, UNICEF and other partners through the NAPTIP Agency's six zonal offices. Various government agencies refer trafficking victims to the NAPTIP Agency for sheltering and other protective services.⁶³² However, the bulk of Nigerian trafficking victims are deported from other countries.⁶³³ On arrival, these persons are detained and interviewed

⁶²⁸ The aim of the programme is to empower unemployed youth and rural communities mainly by means of training and loans through micro-credit schemes. Concerns of corruption led to marring its target to completely wipe out poverty from Nigeria by the year 2010.

⁶²⁹ Although the aim is that women must constitute 35% of all bodies, available statistics show a gross under-representation (5%) of women in these positions. Eg, out of the 109 Senators in the National Assembly, only 9 are women, and out of the 360 members of the House of Representatives only 27 are women, while out of the 990 members of the State Houses of Assembly, only 54 are women. See UNDP *African Development Report 2012* (2012)126.

⁶³⁰ See Agbu (n493 *supra*) 1.

⁶³¹ The current UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, incidentally hails from Nigeria.

⁶³² NIS referred 465; NPF referred 277; Social Services referred 192; and the State Security Service referred 9. The NAPTIP Agency reflected a total of 949 victims identified within the country in 2011, including 386 victims of forced labour, 563 victims of sex trafficking, and 467 children. The Agency estimated the government's 2011 spending on its shelter facilities to be \$671,000. Yet, less than half the victims assisted in 2010 were helped in 2011. See US Dept of State *Trafficking in Persons Report 2012* (n22 *supra*) 271.

⁶³³ Eg, Italy has a readmission agreement with Nigeria which allows the Italian authorities to deport women to Nigeria within 48 hrs on the mere presumption that they are Nigerian nationals. See Agreement with the Republic of Nigeria on Identification and Readmission 2000, art IV. These agreements do not take the distress of the trafficked person into consideration. See Pearson (n529 *supra*) 147.

by NIS officials, the NPF or both. They are forced to undergo compulsory medical examination including HIV/AIDS tests.⁶³⁴ No such tests appear to be obligatory for Nigerian men. Their personal details are also recorded to prevent them from legally travelling abroad again.⁶³⁵ This re-victimisation endured by returning trafficked persons was to some extent alleviated by reintegration programmes offered by the IOM, but the procedures still continue.

Trafficked persons are relocated to one of NAPTIP's eight shelters throughout the country.⁶³⁶ Shelter staffs assess the needs of victims upon arrival and provide food, clothing, shelter, recreational activities, and various skills acquisition, including vocational training; psychological counselling is provided to only the most severe cases. The NAPTIP Agency attempts to assist with family tracing, the provision of scholarships, health care, legal aid, and financial assistance but faces severe financial constraints. The IOM ameliorated this position by creating micro-credit opportunities and sustainable employment opportunities. However, this only assisted a tiny number of trafficked persons returning to Nigeria. Because of insufficient funding, there is a lack of adequate facilities for the victims.⁶³⁷ Victims are allowed to stay in government shelters for six weeks. If a longer time period is needed, civil society partner agencies are contacted to take in the victim. Foreign victims facing hardship or retribution in their countries of origin have a limited legal alternative – short-term residency that cannot be extended. Victims are encouraged to assist with the investigation and prosecution of traffickers.⁶³⁸ Victims can theoretically seek redress through civil suits against traffickers, or claim funds from a

⁶³⁴ This violates the UN HIV/AIDS standards s 128(b), which clearly states that HIV testing should be done only with the specific informed consent of the individual (UNHCHR HR/PUB/98/1 Guideline 3 Geneva 1996). This stigmatises and discriminates against deported women, making the process of reintegration much more difficult for returning women.

⁶³⁵ See Pearson (n529 *supra*) 60-61.

⁶³⁶ The NAPTIP Agency did not have any transport to convey the victims of trafficking from the airport to the ATU office in Lagos, so Italian government donated buses for this purpose. Also, 8 shelters seem insufficient for such a huge trafficked population and geographical area. Most NGOs do not have any shelter, or one maximum. Asiwaju (n493 *supra*) 192.

⁶³⁷ Asiwaju (n493 *supra*) 192: Eg, "... there is no standard reception centre. Instead, there are two cells, formerly used for detainees, with about 40 mattresses on the floor. There are also no adequate sanitary facilities. The IOM personnel in Lagos are always privy to the arrival of victims in the country, so they make themselves available at the airports. They provide sanitary towels, basic toiletries, and pure water. The officers in the unit usually complain that they have to buy the bread for the victims from their personal resources with no hope of being reimbursed."

⁶³⁸ Cases can only be conducted with at least one witness, which usually is the victim. All the cases considered had the victims as witnesses. However, very few cases were prosecuted and still fewer successful. Many victims do not want a trial or give testimony in court as more than half of all victims are recruited by their family.

Victims" Trust Fund set up in 2009 through which assets confiscated from traffickers are transferred to victims.⁶³⁹ The government also has a National Policy on Protection and Assistance to Trafficked Persons in Nigeria (2009), which provides for services to trafficking victims, such as protection and rehabilitation. The NAPTIP Agency used to interrogate trafficking suspects at the same facility that housed its shelter for trafficking victims, however this practice has been ceased and the victims" quarters relocated a considerable distance from detention areas for trafficking offenders.

(iii) Prosecution

The NAPTIP Act provides for the prosecution of human trafficking perpetrators, and the NAPTIP Agency to enforce this law. The NAPTIP Agency instituted a National Investigation Task Force, consisting of the NPF, NIS and the Directorate of State Services to effectively monitor, investigate and respond to human trafficking offences. However, it is argued that the approach followed by the NPF, NIS and NAPTIP in detecting, investigating and gathering evidence against traffickers is inconsistent. There is little cooperation on these procedures and on the methods used by criminal organisations in human trafficking.⁶⁴⁰

Nigeria has a functioning justice system, yet relatively few human trafficking cases have been concluded in the courts.⁶⁴¹ The reasons for this predicament vary. It is manifest that trafficking needs to be supported by clear evidence in order to lead to imprisonment of the accused. As previously mentioned, witnesses are crucial in this respect. Another explanation why NAPTIP is unable to successfully prosecute traffickers is because the NPF is involved in the investigation and the police are still susceptible to bribes.⁶⁴² Save for

⁶³⁹ The Trust Fund committee is chaired by the Minister of Justice and meets 4 times per year.

⁶⁴⁰ Sesay & Olayode (n483 *supra*) 14.

⁶⁴¹ Pearson (n529 *supra*) 162-163: "There is no clear indication of exactly how many cases related to trafficking have been prosecuted in Nigeria, but very rarely indeed do cases ever reach a courtroom. Many cases are filed but never tried, and cases are often suspended. The court process is very slow." Only 9 traffickers have been convicted so far.

⁶⁴² Police corruption in Nigeria is high because of non-payment and delayed payment of police wages. Pearson (n529 *supra*) 164 quotes an official: "It is very difficult for us as prosecutors, because on the one hand, our police have not been paid for months, they are not properly paid and the sponsors (traffickers) in Benin City are very powerful. Even if we [prosecutors] did have the power to direct police to investigate a case, they probably would not do it... traffickers offer money to police officers".

corruption,⁶⁴³ other key obstacles to prosecuting traffickers were identified as “lack of clarity in the law, lack of resources and lack of understanding by law enforcement officials and ineffectiveness of the judiciary in applying the law”.⁶⁴⁴ The lack of prosecutions and convicted traffickers in Nigeria is widely blamed on poor investigations by law enforcement officials, and the unwillingness of victims to testify.⁶⁴⁵ Also, to ensure effective prosecution the judiciary’s cooperation in the process is necessary.

Limited intelligence-sharing between law-enforcement agencies within Nigeria and between the government and countries of destination are also obstacles to effective prosecution. There is no effective and practical framework for exchanging of information between law enforcement and criminal justice agencies of member countries.⁶⁴⁶ In addition, the lack of adequate data hampers the police in their research of the crime trends in the whole country as well as in different parts of the country. The lack of data also affects criminological assessment in the units. Therefore, policies being implemented might not really affect the problems and situations found on the ground.

Penalties for trafficking include fines, imprisonment and deportation, forfeiture of assets and passport, and liability for compensation to victims in civil proceedings. It is argued that the sentences prescribed by law are sufficiently stringent and commensurate with penalties prescribed for other serious crimes, such as rape.⁶⁴⁷ However, of the few cases that have been conducted in court; some have been dismissed and lighter penalties than recommended have been prescribed. Trafficking cases mainly concern NAPTIP Act section 19(1)(b) “Deceitful inducement of any person to go from any place”, section 23 “Sale or trafficking of any person as slave”, section 24(a) “Transfer of any person so that person can be held as slave” and section 24(b) “Placement of any person in servitude as security for debt owed”. In the case of *Attorney-General of the Federation v EO*, Charge No B/17c/2005 (19 April 2007), the accused was found not guilty on all the above charges

⁶⁴³ Eg, NAPTIP Agency dismissed 2 staff members who were found to have diverted victims’ funds; they were made to refund the money. See US Dept of State *Trafficking in Persons Report 2010* (n24 supra) 256.

⁶⁴⁴ Pearson (n529 supra) 37.

⁶⁴⁵ Pearson (n529 supra) 164. Sawadogo (n528 supra) 32 remarks: “For many African people, the need to feed their family and send siblings to school may be stronger than their desire to see their trafficker brought to justice.”

⁶⁴⁶ See Sesay & Olayode (n483 supra) 14.

⁶⁴⁷ US Dept of State *Trafficking in Persons Report 2012* (n22 supra) 271. But a fine in lieu of prison time is often given.

and released.⁶⁴⁸ The accused was convicted in *Attorney-General of the Federation and Samuel Emwirovbankhoe*, Suit No B/20C/2005 (22 April 2008) on a charge of procurement of persons for prostitution (section 15(a)) and of organising foreign travel, which promotes prostitution (section 16), but not of sections 23 and 24(b)⁶⁴⁹ and sentenced respectively to imprisonment for five years and three years, to be served concurrently. In a similar case, a two-year sentence or a fine of N 50,000 (US\$ 310) was found appropriate. In *Attorney-General of the Federation v Toyin Ogbemor*, Suit No NCT/140/06 (7 April 2008), the accused promised the four victims good jobs abroad. After the administering a pledge of loyalty to the trafficker, they departed but was apprehended and arrested at the border. The accused was convicted and sentenced to pay a fine. A young female accused was found guilty on all counts in *Federal Republic of Nigeria v Favour Anware Okwuede*, Charge No FHC/ASB/24C/09 (28 September 2009) and sentenced to five years imprisonment.⁶⁵⁰ There has also been a case of child trafficking considered by the Nigerian court. In *Attorney-General of the Federation v Joseph Sunday Effiong*, Charge No FHC/UY/70C/07 (15 January 2008), the accused had custody of an eleven-year-old girl whom he employed as a domestic helper. It was alleged that the accused had engaged in unlawful sexual relations with her, causing her to fall pregnant. He also detained her

⁶⁴⁸ In this case, EO, the neighbour of the victim, invited her to Lagos where after they would travel to Europe. He would sponsor her. She was however trafficked to Algeria where she was sold to a man named Chidi. The victim contacted her sister via telephone, and informed her about the situation. The victim's father spoke to Chidi, who demanded the money he had paid refunded before he would return her. The father could not pay the sum, but kept promising to pay. The victim suffered severe beatings and torture during this period. Chidi took the victim to Morocco, where the NAPTIP Agency, acting on a tip, found her. EO denied selling the victim and had a supporting witness. The court held that there was not enough evidence to support the elements necessary for the accused to be found guilty.

⁶⁴⁹ The accused asked the 4 victims to go with him abroad to work as prostitutes. They had to pay him €35,000 to cover the costs of transportation, food and accommodation. All 4 girls took a *juju* oath that they would pay him back. However, before exiting Nigeria, they were stopped by the immigration officials and arrested. The accused was held to have procured, ie "bring about", "effect" or "cause" the girls to travel for the purpose of prostitution. It was not in dispute that the accused person organized foreign travel to Italy for the victims. However, the accused claimed it was for a tailoring and hairdressing business, while the victims said the purpose of the journey was for prostitution.

⁶⁵⁰ The charges were based on NAPTIP Act (n587 *supra*) ss 15(a), 16 and 19. In this case, the victim's brother knew the brother of the accused who told him that his sister is looking for some girls to take back to Italy to work in a fashion-designing store and in a hair dressing saloon. The victim was introduced to the accused who demanded N60, 000 (US\$ 370) for transportation. When told she did not have the money, the accused said she will sponsor her. Again, she was taken to a voodoo priest who performed rituals on her to ensure her loyalty to the accused. The accused then took her to Niger Republic, where she forced her into prostitution in a hotel room that she had rented. On seeing that the victim was not cooperative, the accused made plans to sell her there in Niger to a person named Edith, whose sister, Queen, ultimately reported the accused to the Nigerian Union in Niger whereupon she was arrested. The court sentenced the accused to 8 yrs imprisonment on all charges, however because she had already been detained in jail for 3 yrs, the sentence was only 5 yrs. The court stated: "I shall give the accused a second chance in life to look for more worthy things to do than getting involved in activities which demeans human beings and turn them to slaves all because of the greed to make money."

against her will and overpowered her by threatening her with a cutlass, a gun, and by gagging her mouth. He was found guilty of NAPTIP Act section 13(1) "Having the custody, charge or care of any person under the age of eighteen and causing or encouraging the seduction, unlawful carnal knowledge or prostitution of, or the commission of an indecent assault upon any person" and detaining such a person. He was sentenced to 10 years imprisonment. In very few cases with a conviction, offenders' assets were forfeited. A reason for this situation may be that the proceeds of the offence could not be tracked for confiscation. A specialized institution, such as the EFCC, can assist the NPF in investigating, tracing and seizing the crime proceeds and assets of traffickers.

Curiously, the information regarding human trafficking prosecutions in Nigeria differs from other countries' data. For example, the majority both of prosecutions of traffickers and convictions were women. All the female accused were convicted and only females received additional hard labour. Almost all the cases prosecuted contained elements of *juju* rituals.⁶⁵¹ Also, though neighbouring countries produce episodic and inconsistent trajectories of anti-trafficking enforcement, Nigeria's rates of identification and prosecution of traffickers increase year after year.⁶⁵²

6.4.2 Criminal-justice responses from Nigeria

Regarding the institutional framework to address the crime of trafficking in Nigeria, the office of the President of Nigeria coordinates and monitors all issues and activities addressing trafficking. This is overseen by the Office of a Special Adviser and Special Presidential Committee on Human Trafficking, Child Labour and Slavery. For this purpose, the Nigerian Expert Group (Task Force) was set up. The organisations which make up the Task Force are those whose statutory functions are incidental to the problem of trafficking in persons. These organisations are the Federal Ministry of Justice, the Federal Ministry of Women Affairs and Youth Development, the Federal Ministry of Labour and Productivity,

⁶⁵¹ One of the accused in *Attorney-General of the Federation v Constance Omoruyi*, Charge No B/31C/2004 (22 Sept 2006) was a voodoo priest who administered an oath to 2 girls not to run away from their madam in Italy and to pay her the money. He collected the girls' pubic hairs, fingernails and pants to keep with him as tools of psychological manipulation.

⁶⁵² Eg, in 2005, of 340 identified victims of trafficking, 51% were women, 31% were girls, 8% were boys, and 10% men. By 2007 identification rates had more than doubled, and adults comprised 72% of victims. See UNODC (n6 *supra*) 104-105.

the Federal Ministry of Information and National Orientation, the Office of the Special Assistant to the President on Human Trafficking and Child Labour, NAPTIP Agency, NIS, NPF, the State Security Service (SSS), Nigeria Customs Service, National Boundary Commission and the Nigerian Police Commission. Another entity formed for combating trafficking is the NPF's Anti-Trafficking Units (ATUs). At this stage it is not known whether these offices harmonize their budgets and resources so that they do not duplicate efforts and thus can achieve better results. The ATUs has to investigate and ensure the effective prosecution of human trafficking cases however, they lack the equipment and facilities to perform their functions effectively.⁶⁵³ As a result, the units only carry out reactive and not proactive investigation.

At the community level, NGOs assist NAPTIP greatly in the fight against trafficking in Nigeria. Specifically, the NGO-NAPTIP Cooperation against Human Trafficking collaborates on the prevention and return of human trafficking victims. This partnership is made up of five NGO's (Bonded Labour in Nederland, Girls' Power Initiative (GPI),⁶⁵⁴ Lift Above Poverty Organization (LAPO), the International Reproductive Rights Research Action Group (IRRRAG)⁶⁵⁵ and NAPTIP. Nigerian NGOs such as the National Council of Women Societies (NCWS), Women's Health and Action Research Centre (WHARC),⁶⁵⁶ Women Trafficking and Child Labour Eradication Foundation (WOTCLEF),⁶⁵⁷ Women's Consortium of Nigeria (WOCON), IDIA Renaissance,⁶⁵⁸ Committee for the Support of the Dignity of Women (COSUDOW),⁶⁵⁹ African Network for the Prevention and Protection

⁶⁵³ Eg, the ATUs do not have standard communication equipment (telephone lines, computers, printers, fax machines, etc.) with which to liaise with. Computers and fax machines found in some units were donated by the Italian government. In addition, it is difficult for the ATUs to purchase simple items, such as stationary, which in turn affects the investigation processes. See Asiwaju (n493 *supra*) 190. The units also grapple with bureaucracy (the central authority, the Inspector General of Police) as permission has to be sought and received before any actions are taken, including going on raids. See Okojie (n7 *supra*) 95.

⁶⁵⁴ GPI examined sex trafficking in 4 Nigerian states in 2002.

⁶⁵⁵ IRRRAG promotes women's sexual/reproductive rights.

⁶⁵⁶ WHARC conducted the first major survey of human trafficking in 2002.

⁶⁵⁷ WOTCLEF was involved in submitting a Private Bill to the National Assembly for approval, which led to the enactment of the NAPTIP Act and Agency. The organisation operates a shelter for victims and provides skills training and microcredit/loan opportunities.

⁶⁵⁸ The IDIA Renaissance focuses attention on campaigning against the illicit involvement of Edo State girls in prostitution in Italy. The group also investigates the incidence of drug abuse, drug trafficking, and cultism on campuses and provides trafficking victims with a youth resource centre, job skills training and counselling.

⁶⁵⁹ COSUDOW was formed in 1999 by nuns in order to find concrete ways of addressing the issue of sexual abuse and human trafficking of Nigerian girls in Italy. They set up a home for rescued victims of human trafficking in Benin City, which according to them is the worst-hit area of human trafficking in Nigeria. See Pearson (n529 *supra*) 162.

Against Child Abuse and Neglect (ANPPCAN),⁶⁶⁰ the African Women Empowerment Group (AWEG), Heart Land Child Care Foundation,⁶⁶¹ Halt Violence Against Girls,⁶⁶² Society for the Empowerment of Young Persons,⁶⁶³ the Children's Rights Advocacy Group of Nigeria (CRAGON), the Galilee Foundation, the Committee for the Support of the Dignity of Women,⁶⁶⁴ the National Council of Child Rights Advocates of Nigeria (NACCRAN), Global Rights Partners for Justice (GRPJ), Adolescent Health and Information Project (AHIP), Royal Pearl's Foundation International, Gender and Development Action (GADA), Legal Resources Consortium, Centre for Training and Development Activities (CETDA) are also involved in efforts to combat human trafficking. Faith Based Organizations such as Global Spiritual Information (Promotion of Spiritual awareness for Africa's Redemption Network), Sisters of Mercy, Catholic Secretariat of Nigeria/Caritas Nigeria, are also involved. Additionally, a Network of Non-Governmental Organisations against Child Trafficking, Abuse and Labour (NACTAL) that comprises 32 civil society groups, including WOTCLEF. Working together with these organizations at an international level the following are involved with anti-trafficking efforts in Nigeria: UNESCO, UNIFEM, ECOWAS, World Bank, UNODC, IOM, UNICEF, ILO-IPEC, FIDA, USAID, Save the Children, The International Association of Criminal Justice Practitioners (IACJP), CARE, Terre des Hommes, Anti-Slavery International, Plan International and International Programme on the Elimination of Child Labour of the International Labour Organization (ILO/IPEC).

Except for the NAPTIP Agency, law enforcement agencies, ministries and NGOs involved with human trafficking, Nigeria does not have any specific criminal justice response. Nigeria does not have the technical capacity for surveillance and tracking down of traffickers. Interpol has assisted the Nigerian anti-trafficking agency by attempting to create a victims' data-base through documentation. This effort was not completed.⁶⁶⁵ The SSS, as a member of the Anti-Trafficking Central Working Committee, has sporadically assisted in tracking down traffickers through their underground surveillance activities. The

⁶⁶⁰ ANPPCAN conducts research on behalf of ILO on child trafficking and sexual exploitation in Nigeria.

⁶⁶¹ The Foundation uses advocacy strategies to fight the spread of trafficking and dissuade parents from collaborating with agents to traffic their children.

⁶⁶² Halt Violence against Girls empower women, especially girls, youth for better life.

⁶⁶³ The organisation provides vocational training and business support to trafficking victims.

⁶⁶⁴ This NGO has a shelter for trafficking victims in Benin City, with funding from the Italian Catholic Church.

⁶⁶⁵ Okojie (n7 *supra*) 94.

complaint is that after handing the traffickers over to the NPF, the cases tend to fizzle out because of poor investigation or connivance with traffickers.

6.4.3 Summary

Although slavery has always been an indigenous custom in Nigeria, the modern state attempts to combat modern forms of slavery. However, despite these efforts, the jurisdiction is recognised as the single largest African nation trafficking women to other countries. This situation is the result of many factors such as Nigeria's colonial past and the suffering independent Nigeria has endured under various military regimes and civil wars, with resultant abject poverty. Nigeria has furthermore been stigmatised as a corrupt country. Engrained cultural and religious attitudes which tend to favour child labour and the exploitation of women also constitute obstacles in the attempt to eradicate human trafficking in Nigeria.

Nigeria has signed various international and regional treaties related to trafficking and elements of trafficking as well as bilateral or multilateral agreements, yet it has a reputation for not always implementing or keeping faith with the provisions of the agreements. The basic protection of trafficked persons' fundamental rights is provided for in the Constitution of the Federal Republic of Nigeria, which is the supreme law of the country. Specific offences found mainly in legislation are further employed to combat elements of human trafficking. The laws are the Criminal Code, the Penal Code, Shari'ah Penal Law and customary law. The Nigerian Child Rights Act and Labour Act also contain provisions related to trafficking in persons. Yet some of these instruments' provisions are incompatible and consequently not very valuable in prosecuting trafficking in persons. The NAPTIP Act 2003 amalgamates all existing Nigerian laws on slavery, sexual crimes, labour exploitation, and child trafficking. Although revolutionary in the area, the Act has many flaws mainly as a consequence of its hasty promulgation. Many of its terms are not defined, or are unclear. The NAPTIP Act also focuses mainly on human trafficking for the purpose of female sexual exploitation, and do not provide extensively for the protection of victims and the prevention of trafficking. The NAPTIP Act created the NAPTIP Agency which is specifically tasked with combating trafficking. Although Nigeria's national anti-trafficking strategy is expansive and well-financed by development partners, the NAPTIP

Agency is crippled by the minimal funds available to function effectively. In order to fully enforce the national law, the Nigerian government must show political will and commitment, proper management of resources (financial and personnel), and expertise to address the complex phenomenon of trafficking in persons.

The situation in Nigeria has shown that the promulgation of anti-trafficking legislation does not necessarily guarantee the eradication of the crime. The NAPTIP Act has not had much impact on trafficking flows. This is mainly because the legislation seems to be too narrowly focused on achieving a particular aim, such as preventing trafficking exclusively via securing convictions of traffickers or public information programmes. Perhaps the answer lies in the approach - in order to combat the crime more effectively, the general public and victims must cooperate with authorities. As such, communal networks at grassroots level may shed light on the way towards an effective legal response to human trafficking in Nigeria.

6.5 Conclusion

This chapter provided an overview of the historical developments in anti-trafficking efforts, the political contexts, the constitutional frameworks and trafficking legislation of the US, Germany and Nigeria. All three countries share a history of slavery, albeit in different contexts. Germany has the oldest slavery record and also a long tradition of coordinating anti-trafficking efforts, dating from the 1890s and re-emerging again in the 1970s and late 1990s. Nigeria practised customary slavery, and became involved in the trans-Atlantic slave trade. The US was the main recipient of the trans-Atlantic slaves, yet it was one of the first countries to promulgate anti-trafficking legislation in the form of the White Slave Traffic Act of 1910.

Human trafficking is high on the agenda of the US, Germany and Nigeria. All three countries provide for the basic protection of trafficked persons' fundamental rights in their Constitution. While trafficking of humans has been challenged on constitutional grounds in the US and in Germany, this has not yet occurred in Nigeria. Before enacting anti-trafficking laws or provisions, all three jurisdictions employed traditional offences and other

legislative measures to combat human trafficking. In the case of all three countries, these laws were not sufficient to effectively address the phenomenon of trafficking in persons.

All three jurisdictions have signed numerous bilateral and multilateral treaties in the area of organized crime and trafficking with countries of origin, transit and destination. As part of the EU, Germany has committed itself to almost all national and international human trafficking- and human-rights instruments, and has shown a high level of compliance. Nigeria, as a latecomer to the international scene, has signed most of the applicable treaties and conventions. The Nigerian government limits its obligations in terms of bilateral and multilateral treaties to the ECOWAS region, as well as to destination countries of trafficked Nigerians. Due to various reasons relating to resources and lack of commitment, Nigeria does not always implement or adhere to the provisions of these agreements. The US is more selective with the signing of treaties. Resembling the jurisdiction's approach to human trafficking, the treaties that the country has chosen to endorse also address human trafficking from a narrow, law-enforcement perspective. In this regard, the US have been criticised for not adopting more fundamental treaties especially on labour and immigration matters.

All three countries tackle the crime of trafficking on a federal as well as state level. This is done in the US and Germany in a multi-disciplinary manner and with a coordinated, integrated and sustained approach. Nigeria, through inherent national, institutional and financial problems, is less successful in its approach. The three jurisdictions all utilise the criminal model in combating human trafficking. This approach is supplemented by prevention and victim protection strategies, but the main focus is on prosecution, which on its own is not enough to eradicate human trafficking.

The US is seen as revolutionary in combating trafficking in persons as it was one of the first jurisdictions in the world to adopt the provisions of the Palermo Protocol in its domestic legislation, for instance, the TVPA and its reauthorizations of 2003, 2005 and 2008. However, the government adopted selected aspects of the Protocol, and neglected other aspects. Not only did this approach create inherent problems but the common international response to trafficking was not conformed to. Be that as it may, the TVPA has contributed immensely to fight sex- and labour trafficking in the US and abroad. The Act

has progressed through its reauthorizations to adopt a more comprehensive victim-centred approach. In order to increase victim protection, it is argued that the requirement of coercion in its definition needs to be removed. This requirement is also not in accordance with the provisions of the Palermo Protocol. Furthermore, the legislation needs to incorporate the standards for trafficking provided by the Palermo Protocol, as the “severe forms of trafficking”-criterion is overly narrow. The Act also needs to integrate a more complete human-rights approach and include the relevant human-rights provisions of the Palermo Protocol against gender discrimination. Under the TVPA and its reauthorizations, many traffickers have been successfully prosecuted. Persons convicted of human trafficking in the US are punished quite harshly. A defendant can be sentenced up to 20 years in prison. If death resulted from any act of human trafficking, or if the contravention included kidnapping and/or aggravated sexual abuse, the defendant can be imprisoned for any term of years up to life.

Germany did not create a separate law to combat trafficking, but adjusted available anti-trafficking provisions in its StGB. Similar to the US and Nigeria, the main focus of Germany’s anti-trafficking policies has traditionally been trafficking in women for the purpose of sexual exploitation. In 2005 the legal framework was brought into line with the Palermo Protocol and all forms of trafficking (trafficking for sexual exploitation, labour purposes and forced marriage) are currently criminalised. Germany strives to base its anti-trafficking efforts on the Palermo Protocol provisions and EU Conventions in order to avoid duplication of measures and definitions. The government's multifaceted approach addresses prosecution, protection, and prevention, as well as the rescue, rehabilitation, and reintegration of victims. Germany’s frequency of convictions for charges of trafficking under the StGB is higher than any other EU country. Prescribed punishments range from six months” to ten years” imprisonment and are sufficiently stringent and proportionate to penalties prescribed for other serious crimes. However, it is common practice for German judges to suspend prison sentences of two years or less for all crimes, including trafficking. Available statistics indicate the majority of convicted labour- and sex-trafficking offenders were not required to serve any time in prison.

Nigeria enacted separate legislation to combat trafficking. The NAPTIP Act 2003 amalgamated all existing Nigerian laws on slavery, sexual crimes, labour exploitation, and

child trafficking but prescribes stiffer penalties than previously. Nigeria was the first country in Africa to domesticate the provisions in the Palermo Protocol. Though ground-breaking, the Act has many flaws mainly as a consequence of its hasty promulgation. The verbatim reproduction of the Palermo Protocol in certain provisions is inappropriate in the country's socio-political context, and does not address the particular trafficking situations of the country. Following the Protocol, the Act describes the crime of human trafficking as being commissioned by clandestine organised crime syndicates, while evidence reveals that in Nigeria, most crimes relating to human trafficking are committed by known individuals such as relatives or neighbours. Many of its terms, such as "carnal knowledge" or "carnal connection" (instead of sexual exploitation), are not defined or are unclear. The NAPTIP Act also focuses mainly on human trafficking for the purpose of female sexual exploitation, and do not provide extensively enough for the protection of victims and the prevention of trafficking. The NAPTIP Act provides for the prosecution of human trafficking perpetrators, and the NAPTIP Agency to enforce this law. Relatively few human trafficking cases have been concluded in the courts, and even fewer convicted. Reasons for this anomaly varies from corruption, lack of resources, ambiguous legislation, poor investigation and the unwillingness of witnesses to testify.

In the United States, the annual global anti-trafficking review *Trafficking in Persons Report* (as created in terms of the TVPA) in which the government provides information on the state of trafficking legislation and compliance around the world. Germany also has an annual trafficking in human beings report which has been published by the BKA since 1994. But the data is based only on German trafficking investigations conducted into suspected trafficking in human beings as specified in StGB sections 180(b) (trafficking in human beings) and 181 (aggravated trafficking in human beings). Nigeria has no trafficking database, review procedure or similar publication.

The *Trafficking in Persons Report* rates the US as a Tier 1 country which fully complies with the minimum standards for the elimination of trafficking. Germany has also been rated as a Tier 1 country since the inception of the report. Nigeria was rated as a Tier 2 country from 2001 to 2003. In 2004, the country was relegated to a Tier 2 Watch List because of lack of evidence of efforts in addressing the crime of trafficking. Ironically, this occurred after the promulgation of the NAPTIP Act 2003. In 2005, Nigeria was again ranked as a

Tier 2 country until 2009, when the country was upgraded to a Tier 1 country. In 2012 the country was again downgraded to a Tier 2 country as it does not fully comply with the minimum standards for the elimination of trafficking, but is recognised as making significant efforts to do so.

The three governments all work extensively with various NGOs to combat the crime. The US government has since the passage of the TVPA 2000 invested hundreds of millions of dollars in various law enforcement and social programs aimed at countering the problem at home and abroad. In its efforts, the government is assisted by many different agencies, such as the FBI, the CIA and Interpol. Germany also has extensive multi-agency partnerships and a high level of inter-institutional cooperation amongst its agencies. Germany shares intelligence information with Interpol, Europol and Eurojust, and employ sophisticated technology such as digital and satellite border monitoring systems to combat the crime. Nigeria had assistance from Interpol at a certain stage, but mainly relies on the NAPTIP Agency tasked with combating trafficking. Although Nigeria's national anti-trafficking strategy is expansive and well-financed by its development partners, the funds available have been a stumbling block to function optimally.

All three jurisdictions recognise that human trafficking is a growing phenomenon with changing dynamics. This can be seen by all three governments having adapting their trafficking policies to prevent trafficking, to protect and support victims more comprehensively and to combat the crime by means of stricter regulations. Yet, in all three jurisdictions this does not seem to be enough to eradicate the crime domestically as well as internationally.

CHAPTER 7

COMBATING HUMAN TRAFFICKING IN SOUTH AFRICA

7.1 Introduction

Having compared and contrasted the trafficking legislation of the USA, Germany and Nigeria in the previous chapter, and having set the various legislative measures against the background of the international Human Trafficking Conventions, the South African national legal framework regarding human trafficking will now be examined. In this chapter both the theoretical and practical aspects of the combating of human trafficking in South Africa and the punishment thereof will be explained. In order to contextualise the crime of trafficking, the history of slavery and its modern counterpart - human trafficking - will first be traced.

The dynamics of trafficking in South Africa and its root causes will be examined briefly. The new South African dispensation is unique in many ways with effective government still challenged by many historical factors, for example, the structural imbalances in education caused by apartheid; the extremely uneven distribution of wealth, and the unequal provision of services. South Africa is in many ways a developing country, but the developmental process is being hampered by crime, which includes human trafficking. Crime destroys human and social capital and damages the moral fibre of society, especially through corruption. Crime also results in low investment levels, which contributes to the further impoverishment of the general population. These are but some of the principal factors which must be addressed as a matter of urgency in order to combat trafficking in persons. The government has responded to the crime of trafficking in various ways in order not only to secure domestic stability, but also to demonstrate to potential investors that South Africa is an attractive market for investment – a vital ingredient for economic growth.

The influence of the most important international and regional treaties, conventions and agreements on South African domestic policy and norms regarding trafficking in persons will be investigated. The new South Africa has signed and ratified many regional and international policies, but also needs to give effect to the obligations imposed by these instruments and implement them domestically. Although the previous regime was an isolated one, the new government is a leader on the African continent and a prominent international player in areas such as reform in the UN and the WTO. The jurisdiction should therefore set the example by bringing its domestic laws and policies in line with the minimum standards laid down in these international and regional instruments.

There are major stumbling blocks to eradicate human trafficking. Literature on counter-trafficking measures available from the Southern African region remains fragmentary and incomplete.¹ Much information is based on mere speculation. For instance, in the run-up to the 2010 FIFA World Cup anecdotal references suggested that the number of cases of human trafficking would dramatically increase, though there was no research data that sustained such concerns.² This did not realize as only five human trafficking cases could be directly connected to the World-Cup event itself.

It should be noted that certain trafficking schemes such as *ukuthwala*, *lobola* and organ harvesting for *muthi*, are unique to the country. Additionally, in spite of a gender-even population,³ South African society struggles with gender-based violence, which renders women and girls vulnerable to trafficking particularly for purposes of sexual exploitation as they seek means to escape the violence.⁴ South Africa also has a growing sex tourism industry where travellers to the country seek and engage in commercial sex as part of a travel experience.⁵ With a viable and developing economy, South Africa attracts migrant workers from especially the African continent which may lead to possible labour exploitation. Traffickers are said to service the demand of this lucrative and expanding

¹ Delpont, Koen & MacKay *Human Trafficking in South Africa: Root Causes and Recommendations* (2007) 32.

² IOM –Human Trafficking and the 2010 Soccer World Cup” 2009 21 *Eye on Human Trafficking* 1 1, 4.

³ South Africa has a population of 50 460, 00 with males representing 25 002, 37 and females 25 457, 61 of the total (2011 census). See World Bank —Country Development Indicators 2011” <http://data.worldbank.org/country/south-africa> (accessed 2013-01-16).

⁴ Kreston —Trafficking in Children in South Africa: An Analysis of Pending Legislation” 2007 (8)1 *Child Abuse Research in South Africa* 35 38.

⁵ Bermudez “No Experience Necessary”: *The Internal Trafficking of Persons in South Africa* (2008) 17.

industry. Still, the 2010 World Cup has shown that when the South African law enforcement agencies focus attention and resources on trafficking issues, people were protected. They were also informed of the dangers through information campaigns. Moreover, criminals were deterred and prevented from crime due to strong police presence both before and during the events and criminals caught were swiftly and successfully prosecuted.

This discussion will be followed by an explanation of the ways in which previous governments dealt with the crime. Under common law, depending on the circumstances of each case, suspects of human trafficking may be charged with a variety of crimes such as kidnapping, rape and other appropriate crimes. Currently, the use of the criminal sanction to combat human trafficking in South Africa is divided into fragmented auxiliary laws which can be utilised against this practice, specific legislation against trafficking in persons, and constitutional provisions, which will be discussed in the following chapter.

Various statutory crimes can be employed to prosecute manifestations of human trafficking, for example, the Immigration Act 13 of 2002 and the Prevention of Organised Crime Act 121 of 1998 (POCA). The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act 2007) and the Children's Act 38 of 2005 (Children's Act) contain transitional provisions dealing with certain aspects of trafficking in persons pending the promulgation of the draft Prevention and Combating of Trafficking in Persons Bill (TIP Bill). The provisions on trafficking in the said Acts have limited scope since they do not target all forms of human trafficking. The efficacy of these laws to specifically combat aspects of trafficking will be examined in this research. The cases that have been prosecuted under legislation such as the Sexual Offences Act 2007 and the Children's Act will be examined to determine the ambit and interpretation of the provisions. The study also purports to investigate whether these recent legislative developments are an improvement on the common-law position and to make suggestions for further developments.

The new TIP Bill recently proposed by the South African government will be considered in detail, and proposals to improve the legislation from the perspective of crime prevention, offender prosecution and victim protection will be made. The knowledge gained in this

process may contribute towards the further development of South Africa's trafficking legislation, which has not yet come into operation. This study will also attempt to predict the way in which the proposed statutory crime of trafficking in persons as stipulated in this Act may be applied, and whether it will be effective to combat the practice.

7.2 Human trafficking in South Africa: history, causes and developments

Slavery was first introduced in South Africa in 1652 after the first Dutch colonizers settled in the Cape Colony in order to establish a fort and a refreshment station for their ships en route to the East Indies.⁶ Although the Dutch initially traded with the indigenous Khoi for cattle and labour, these negotiations were not very successful. The Khoi and San were also an unwilling and unreliable source of labour as they resisted any attempts to change their pastoralist way of life.⁷ It was apparent that the Dutch urgently needed further labour power to provide for their ships. Initial strategies to encourage immigration to the Cape included importing liberated slaves (*Maardijkers*) and free Chinese citizens from the East, as well as the persecuted French Huguenots from Europe, but this did not alleviate the labour dilemma.⁸

In another attempt to solve the labour shortage, a number of Company officials (who became known as the *Vryburgers* or Free Burghers) were released in 1657 from their contracts and were allocated land along the Liesbeeck River to farm on. These farmers were also in need of labourers to assist with the cultivation of wine, wheat and vegetables. As the Dutch were already involved in the Atlantic slave trade, the *Vereenigde Oost-Indische Compagnie* (Dutch East India Company or VOC) granted Van Riebeeck permission to import slaves.⁹ The first slaves arrived at the Cape on 28 March 1658 on board the slave ship *Amersfoort* which had been seized by the Dutch from a Portuguese

⁶ Mountain *An Unsung Heritage: Perspectives on Slavery* (2005) 18-20.

⁷ See Mountain (n6 *supra*) 20. Company edicts also protected the Khoisan (collective term for the Khoi and the indigenous hunter-gatherer San) from enslavement from the earliest days of VOC settlement. However, within 50 yrs of the establishment of the Dutch settlement, the indigenous Khoi communities near Table Bay had been displaced and dispossessed of their lands. Small communities of Khoisan still survived beyond the Table Valley Mountains until the end of the 18th century, but the arrival of the Dutch settlers proved to be a major turning point in the existence of the indigenous populations of the Cape.

⁸ Mountain (n6 *supra*) 20.

⁹ Mountain (n6 *supra*) 21; Worden *Slavery in Dutch South Africa* 2nd ed (2010) 6.

slaver en route to Brazil.¹⁰ On 6 May 1658, another 228 slaves reached the Cape on board the *Hassalt*, from Ghana.¹¹ A further source of slaves came from the VOC's fleets returning from the Dutch Colonies in the East Indies which sailed around the Cape on their way to Europe.¹² Foreign ships on their way to the Americas from Madagascar¹³ also sold slaves at the Cape. Slaves were also later imported from India¹⁴ and East Africa (for example, from Mozambique¹⁵). These slaves were initially all owned by the VOC, however at the time of Van Riebeeck's departure in 1662, there were already 23 privately-owned slaves.¹⁶

The Cape Colony became a fully-fledged slave society that could not function without the use of slave labour. Some slaves (especially females) were employed as domestic servants, while others who worked for business owners helped in trades such as shoe-making, clothing and furniture.¹⁷ Prostitution was also already practiced from the very early colonial days and the slave lodge became notorious as the town's leading brothel.¹⁸ Not all slaves were condemned to a lifetime of slavery. There were slaves who were manumitted

¹⁰ The 250 slaves on board were originally captured by the Portuguese in present-day Angola. Only 170 survived the journey to the Cape. See Mountain (n6 *supra*) 21; Böeseken *Slaves and Free Blacks at the Cape, 1658-1700* (1977) 23.

¹¹ *Ibid.*

¹² The VOC officials returning from the Indonesian Islands sold their slaves in the Cape as they received a better price there than in the East Indies. Slavery was also illegal in the Netherlands, so they could not take their slaves with them when they returned home. The Dutch outlawed the slave trade in 1814, and slavery was completely abolished by the Netherlands in 1818.

¹³ Between 1731 and 1765 increasingly more slaves were bought from Madagascar. From 1652-1808 most African slaves (53.04%) were from Madagascar. See Da Costa & Davids *Pages from Cape Muslim History* (1994) 2.

¹⁴ The Indian subcontinent was the main source of slaves during the early part of the 18th century, and approximately 80% of slaves came from India during this period. From 1658-1808, 63 000 slaves were imported into the Cape Colony of which 36.4% (the majority) came from India. This is a relatively small number compared to the 167 000 slaves in Jamaica in 1768, the 1.7 million slaves in Brazil in the 1850's, and the 4 million slaves in the US before the outbreak of the American Civil War in 1861. See Mountain (n6 *supra*) 21.

¹⁵ For this purpose, a slaving station was established in Delagoa Bay (present-day Maputo) in 1721, but was abandoned in 1731. During the first period of British rule (1795-1802), South-East Africa, and especially Mozambique became the main source of slaves. When the Cape Colony was returned to the Dutch in 1802, this trend continued.

¹⁶ See Worden (n9 *supra*) 6. These slaves were mainly owned by the Free Burghers.

¹⁷ Shell *Children of Bondage: A Social History of the Slave Society at the Cape of Good Hope, 1652-1838* (1994) 290-291.

¹⁸ See Van Heyningen "The Social Evil in the Cape Colony 1868 – 1902: Prostitution and Contagious Diseases Acts" 1984 10(2) *Journal of Southern African Studies* 170 170. In 1678 the VOC found it necessary to prohibit concubinage in the colony, but the first recorded mention of a brothel is found in 1681. See also Ross "Oppression, Sexuality and Slavery at the Cape of Good Hope" 1979 6(2) *Historical Reflections / Réflexions Historiques* 421 430 who claims the motto of these women was "Kammene Kas, Kammene Kunte" (No money, no sex).

by their owners, sometimes even before the owner's death.¹⁹ These free slaves (called *Vrijzwart* by the Dutch settlers) could do extra work in order to save money for when they were freed. They often earned a living by catching fish, selling vegetables and running small canteens. Some slaves achieved success stories such as Angela of Bengal. She became a prosperous businesswoman and landowner after her manumission by Abraham Gabbema. Her daughter, Anna de Koningh, became the owner of Simon van der Stel's Groot Constantia in 1724, after the death of her husband Oloff Bergh. She independently acquired further property such as two houses on the Heerengracht, a house in Table Valley and two farms in Piketberg.²⁰

Most of the European settlers in the Cape Colony owned fewer than ten slaves, but almost all of them owned at least some slaves.²¹ Between 1652 and the ending of the slave trade in 1807, about 60 000 slaves were imported into the Colony.²² At the time of the final ending of slavery in 1838, the registered slave population stood at around 36 169.²³ However, unlike the European population, which doubled in number with each generation through natural increase, the harsh living conditions of the Cape's slave population meant that their numbers could only be sustained through continued importation.²⁴

Slaves in the Cape were strictly controlled and also severely punished for any transgressions, in keeping with the Roman-Dutch legal system applied at the Cape which fully supported slavery.²⁵ Harsh punishment and strict laws²⁶ were necessary to keep the slaves subjugated, as Otto Mentzel, a German traveller, observed:

¹⁹ Manumission was quite widespread in the 17th century, and thereafter decreased with stricter slave rules: slaves did not have the right to marry, had no right of *potestas* over their children, and were unable to make legal contracts, acquire property or leave wills". See Marx *Making Race and Nation: A Comparison of South Africa, the United States, and Brazil* (1998) 47.

²⁰ Mountain (n6 *supra*) 34.

²¹ Shell (n17 *supra*) 407.

²² Shell (n17 *supra*) 46.

²³ Ironically, the slave population outnumbered the burgher populace up until 1825, when the burghers amounted to 50 427 (with children making up the majority 27 352 of the total), and the slaves 32 830 (with children forming the minority = 11822). See Marx (n19 *supra*) 47. Also see Lovejoy *Transformations in Slavery: A History of Slavery in Africa* (2012) 230-231; Worden *The Chains that Bind Us* (1996) 43.

²⁴ Between 1720 and 1790, slave numbers increased from 2 500 to 14 500. In 1726, male slaves amounted to 2992 and females 708, equalling 3700 registered slaves. See Mountain (n6 *supra*) 22.

²⁵ According to the Roman-Dutch law, slaves were defined, first and foremost, as property. This form of slavery (chattel slavery) meant that one human being was the legal belonging of another human being.

²⁶ See Mountain (n6 *supra*) 44. In 1754 the governor of the Cape Colony, Rijk Tulbagh, prepared a set of rules (the Tulbagh Code) to govern the control of slaves. Amongst some of the restrictions were the following: Slaves had a curfew and had to be indoors by 10 o'clock at night. If they were out later they were

It is not an easy matter to keep the slaves under proper order and control. The condition of slavery has soured their tempers. Most slaves are a sulky, savage and disagreeable crowd ... It would be dangerous to give them the slightest latitude; a tight hold must always be kept on the reins; the taskmaster's lash is the main stimulus for getting any work out of them.²⁷

Slave owners were allowed to mete out harsh punishment like whipping, withholding food, and longer working hours. However, the enforcement of law and order often fell to a group of slaves known as the "Caffers".²⁸ These slaves were mandated to inflict punishments on other slaves,²⁹ which were at times extremely brutal. For example, in 1724, a slave that was found guilty of both murder and arson was sentenced to first having his right hand cut off (being the hand in which he held the murder weapon), and then being half-strangled and left to die on a slow-burning fire so that his pain and suffering could be prolonged and serve as deterrent to other slaves.³⁰ The slave Franciscus Xaverus van Tranquebar received a particularly gruesome sentence in 1721 – he was crucified upside down, and his corpse was dragged backwards and forwards through the streets, and then taken to Gallows Hill (Greenpoint) to be hanged "until the birds of the heavens and the air itself consume the body".³¹ Other forms of punishment included dismemberment on the rack,

required to carry a pass and a lantern. Slaves could not ride through the streets of Cape Town on horseback or in a wagon, and were forbidden to sing, whistle, or make any kind of sound at night. Slaves could not enter public houses or bars (*taphuis*) and could not buy any alcohol. They could not congregate in groups on public holidays, and were not allowed to gather near a church entrance during service. Slaves could not stop to converse on the streets of Cape Town, at risk of being publicly caned. Slaves who made false claims or insulted Free Burghers were to be punished by public flogging and to be held in chains. Those who proffered violence to their masters were to be put to death. Slaves were also not permitted to carry, or own, firearms. See also Boddy-Evans *Slave Laws in South Africa* <http://africanhistory.about.com/od/slaveryinsouthafrica/p/SASlaveLaw.htm> (accessed 2013-01-16).

²⁷ Mentzel *A Geographical and Topographical Description of the Cape of Good Hope* (1921) 129.

²⁸ Derived from the Arab word *Caffre* originally meaning "ungrateful" and given to Africans by Muslim explorers who thought the heathen inhabitants to be ungrateful as they did not believe in or praise Allah for their blessings. The Dutch adopted the word from the Arab traders and first used it in Indonesia and later in the Cape Colony to signify the local constabularies. In the Cape Colony, the *Caffers* wore a special uniform (a special police outfit including a short gray coat with blue lapels, a waistcoat, and trousers), permitted to carry arms (armed with a sword with iron hilt [and] carry a *palang* or heavy club)". See Mountain (n6 *supra*) 50.

²⁹ The *Caffers* also had no curfews and were required to roam around Cape Town at all hours enforcing the curfew on other slaves and also on burghers. The *Caffers* were collectively hated and feared throughout the Cape Colony, and referred to as "the hangman's black assistants" by the people of Cape Town. See Mountain (n6 *supra*) 50; Elks "The Police and Crime in Cape Town 1825-1850" 1987 12 *Kronos* 43 45.

³⁰ Mountain (n6 *supra*) 51.

³¹ Boddy-Evans (n26 *supra*) 1; Shell (n17 *supra*) 360.

multiple re-hangings at different parts of the town, having eight pieces of flesh being ripped with red-hot pinchers from the body before impaling.³² From 1680 to 1795 an average of one slave was executed in Cape Town each month.

After the British Empire replaced the formal Dutch rule of the Cape in 1795, the slave trade was made illegal throughout the British Empire in 1807.³³ However, the practice of slavery persisted at the Cape. On 27 October 1808, the first slave rebellion occurred at the Cape led by the slave Louis of Mauritius.³⁴ The rebellion was quickly quelled in Cape Town and its leaders put to death. A second slave rebellion occurred in 1825 led by Galant of the Cape, but was suppressed.³⁵ In December 1833, slaves were set partially free under a law allowing a period of four feudal years' apprenticeship for domestic slaves and six years for plantation slaves. The Abolition of Slavery Act ended slavery in the Cape officially in 1834, but it was not until 1838 that the Cape's 38 427 slaves were finally freed.³⁶

It was during this period that South Africa's most notorious case of human trafficking occurred. Saartjie Baartman, a 21-year-old Griqua servant, accepted an offer to travel with Dr William Dunlop to London in 1810. But instead of fame and fortune, he exploited her:

Fascinated by her elongated labia and large buttocks, neither of which were uncommon physical features for the people of the Cape, Dunlop chose to exhibit her in the nude in front of large crowds of Londoners, who paid one shilling each to gawk at the Hottentot Venus from Africa.³⁷

As she received no recompense, she turned to prostitution in order to survive. She died, abandoned and alone in France, only six years after leaving Cape Town.

After their liberation, many slaves continued working for their masters as jobs were scarce, but others found other avenues to support themselves. Some females opted for

³² Mountain (n6 *supra*) 51.

³³ Marx (n19 *supra*) 36.

³⁴ Mountain (n6 *supra*) 59.

³⁵ Mountain (n6 *supra*) 62.

³⁶ Mountain (n6 *supra*) 75.

³⁷ See Martens, Pieczkowski & Van Vuuren-Smyth *Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa* 3^{ed} (2003) 11.

prostitution, which had become widespread and very visible by the nineteenth century. Authorities did little to interfere with the practice except for enforcing legislation to control disorderly conduct in public.³⁸ Significant changes were brought to the sex industry when the Cape experienced an influx of women from Europe in 1890. Trafficking for the purpose of commercial sexual exploitation and organized crime surfaced in the Cape for the first time:

The most notorious case was that of Julienne Jacqmin, an eighteen-year-old Belgian girl, the daughter of farm labourers, who was brought to South Africa by her sister Antoinette and Antoinette's "fiancé", Joseph Davis. Julienne had accompanied her sister and Davis on a brief visit to Paris but found herself abducted to Cape Town via London. Only when she was placed in a house in Vandeleur Street did she understand her position. Even then she refused to co-operate until Davis had raped her and promised to send money home to her mother.³⁹

Another recorded case of sex trafficking at that time concerned a twenty-year-old tailoress, Fanny Kohler of Odessa. Fanny was persuaded by a young girlfriend, Hannah, to accompany her to Warsaw where the employment job prospects were better. Hannah and her husband, Leon Alexander, consequently took her to London before transporting her to Cape Town. She could not speak the local language (only Russian and Yiddish dialects), and had no money to support herself or to pay a passage back to Odessa. She was forced into prostitution by the couple, but escaped after Salvation Army rescue workers made contact with her in the Lock Hospital in Roeland Street.⁴⁰ These trafficking for prostitution

³⁸ See Van Heyningen (n18 *supra*) 171. A register of prostitutes dated Oct 1868 indicates that there were 213 female prostitutes from varied backgrounds living and working in a variety of brothels and bars in Cape Town at that time. See Van Heyningen (n18 *supra*) 182. To explain the acceptance of prostitution during this period, Van Heyningen (n18 *supra*) 173-174 cites the Secretary of the Colonial Medical Committee to the Colonial Secretary as quoted in the *Cape Argus* of 11 Jun 1868: —"Hardly, as an institution, with all its fearful evils to mind and body, is of so ancient an origin, that we can hardly now hope to put it down entirely; and perhaps, too, it is not quite desirable, while society is constituted as it is, that it should be driven into secret places; for experience teaches us that even where it is not openly allowed by law, as in the Roman states, its evil effects are aggravated. In a measure it must, perhaps, be regarded almost as an institution necessarily attendant on the present state of society; as, in a degree, a safety-valve for public morality, and as some protection to the chastity and purity of our virgins and matrons, guarding them partially from temptations only too seductive!"

³⁹ Van Heyningen (n18 *supra*) 186. After Antoinette was discarded by Davis for another partner, she rescued Julienne and both were given refuge at the Salvation Army Rescue Home before authorities returned them to Belgium.

⁴⁰ Van Heyningen (n18 *supra*) 186-187.

cases attracted very little attention in South Africa and even less in their countries of origin. In the court case that followed the authorities portrayed Fanny as a fallen woman, and the Alexanders were acquitted.

Another corollary of the end of slavery was the bankruptcy of many slave owners as no compensation was paid to them for emancipated slaves. This was in fact one of the reasons for the Great Trek in 1836, when many white, Dutch-speaking farmers migrated eastwards away from the Cape. Although slavery in South Africa was officially abolished, it is argued by some historians that as they advanced into the South Africa interior, white settlers and black Dutch-speakers enslaved local Africans rather than import slave labourers. Boers conducted slave raids with armed African auxiliaries, and turned the captives (mostly children) into domestics, herders, hunters, agricultural labourers, porters, drivers, personal servants and artisans. Boer republics legalized slavery as ‘apprenticeship’ and labelled thousands of captive children (whose parents they had killed) as ‘orphans.’⁴¹ Remnants of slavery still existed in practices such as the *inboekstelsel*,⁴² indentured labourers,⁴³ and oppressive laws.⁴⁴ Some researchers suggest that slavery has shaped South Africa,⁴⁵ as the colonial–feudal “slave–master” relations between black and white have imprinted themselves on South Africa’s political, social and economic structures for years to come”.⁴⁶

The institution of slavery in colonial South Africa is perpetuated in the modern-day state in the form of human trafficking, sustained by the jurisdiction’s distinctive factors of demand and supply. South Africa is inimitable in that it is situated in the poorest part of the world, yet it is a regional powerhouse with a Gross Domestic Product (GDP) or Gross National

⁴¹ Eldredge & Morton *Slavery in South Africa: Captive Labour on the Dutch Frontier* (1994)

⁴² The *inboekstelsel* was a type of apprenticeship where war captives had to work for a certain period of time before being released. This system was transferred inland in the 19th century with the Great Trek. See Eldredge & Morton (n41 *supra*) 266.

⁴³ Indentured Indian labourers were introduced to South Africa to work on the sugar cane plantations in 1855. They were requested to swear an oath of allegiance to their unknown future employer, and were divided among sugar planters like slaves in an auction.

⁴⁴ Black people were enslaved by the oppressive laws of industrialisation, pass regulations, and labour ordinances such as the Masters and Servants Act of 1841, which made it a criminal offence for a worker to break a labour contract.

⁴⁵ Shell (n17 *supra*) 395; Eldredge & Morton (n41 *supra*) 2.

⁴⁶ Legassick M —“Slavery Came First” 1996 43 *Southern African Review of Books* http://web.uct.ac.za/depts/sarb/X0026_Legassick.htm (accessed 2013-01-16).

Income (GNI)⁴⁷ four times greater than some of its Southern African neighbours.⁴⁸ The jurisdiction is classified as a developing country with an abundant supply of natural resources, well-developed financial and legal communications, energy- and transport sectors, a stock exchange that ranks amongst the top twenty in the world and modern infrastructure supporting an efficient distribution of goods to major urban centres throughout the entire region. Yet, like many parts of sub-Saharan Africa, South Africa has experienced rapid and adverse social, economic and environmental changes with serious implications for the institutional and cultural structures that have shaped the security of people's livelihoods for centuries.⁴⁹ These are factors that enhance the likelihood for human trafficking in the region.

Widening economic disparities in countries of origin as well as in South Africa⁵⁰ lead to impoverished living conditions and people anxious to find employment.⁵¹ Further high unemployment levels,⁵² high-earning inequalities and low wages for a surplus of low-

⁴⁷ GNI measures the total domestic and foreign value added claimed by residents. GNI comprises GDP plus net receipts of primary income (compensation of employees and property income) from non-resident sources. The World Bank uses GNI per capita in \$US to classify countries for analytical purposes and to determine borrowing eligibility. See World Bank "World Development Indicators 2011" <http://data.worldbank.org/> (accessed 2013-01-16).

⁴⁸ The World Bank ranks South Africa as a middle-income economy with the largest economy in Africa, and the 26th largest in the world. In 2011 the country had \$24.83 per \$100 per person as GNI. See World Bank "Country Development Indicators 2011" (n3 *supra*) 1. In 2011, South Africa was ranked 123rd in the world in terms of GDP (PPP). See UN Development Programme "Human Development Reports" <http://hdrstats.undp.org/en/countries/profiles/ZAF.html> (accessed 2013-01-16). Still, South Africa has a human development index (HDI) that would normally be associated with an economically underdeveloped country. See Altman *Low Wage Work in South Africa* (Employment Growth & Development Initiative Paper HSRC Pretoria 2007) 6. In terms of 2011 HDI values South Africa is ranked regionally as having the 6th highest HDI in the sub-Saharan region of 45 countries (behind Seychelles, Mauritius, Gabon, Botswana and Namibia). Globally, South Africa is ranked 123rd in the world. Of the 187 countries with an HDI for 2011, the 15 lowest ranked are in sub-Saharan Africa. 35 of the 37 African nations identified as having "Low Human Development" on the UN's HDI were located in sub-Saharan Africa. See UN Development Programme "Regional and National Trends in the Human Development Index 1980-2011" <http://hdr.undp.org/en/data/trends/> (accessed 2013-01-16).

⁴⁹ Truong *Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management* (2006) 28.

⁵⁰ Although South Africa has one of the strongest economies in Africa, there is great economic disparity between many of the white minority and most of the black majority. See Bermudez (n5 *supra*) 11.

⁵¹ South Africa has a mixed economy with high rate of poverty and low GDP per capita. At least 50% live below the poverty level and about a quarter of the population is unemployed and live on less than US \$1.25 a day. See World Bank "Country Development Indicators 2011" (n3 *supra*) 1. See also Chichava & Kiremire *A Situational Analysis of the Abuse and Trafficking of Children in Southern Africa* (2007) 26.

⁵² According to statistics from 2011, 24.9% of the population is unemployed, while 48.2% of youths aged 15-24 are unemployed. More females (52.5%) than males (44.6%) are unemployed. See CIA "Country Report: South Africa" <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (accessed 2013-01-16).

skilled workers relative to high living costs⁵³ further enhance susceptibility to human trafficking. People attempt to improve their standard of living by seeking employment elsewhere and using any means to do so.⁵⁴ Reduced economic opportunities in rural areas, loss of traditional livelihoods, reduction of subsidies and other protective means and the introduction of Structural Adjustment Programmes (SAPs)⁵⁵ have all had a negative impact on the lives of the poor in Southern Africa.⁵⁶ It is especially women and children in South Africa who fall prey to exploitative working conditions, as their economic inequality in power; status and access to resources render them vulnerable to human trafficking.⁵⁷

Gender inequality⁵⁸ and cultural factors are key root causes of human trafficking in South Africa because of

... the deeply patriarchal ethos which pervades South African society. Rigid social constructions of masculinity and femininity and a profoundly conservative ethos relegates women and children to positions of being owned' (and therefore

⁵³ See Bermudez (n5 *supra*) 13. Altman (n48 *supra*) 6 avers: "Unlike many other emerging economies, South Africa's Apartheid legacy is such that income inequality is amongst the most severe in the world, and a very large proportion of the work-force earns extremely low wages relative to the cost of living".

⁵⁴ Bermudez (n5 *supra*) 18. There is evidence of an increase in migration by women of the traditionally male-dominated migratory streams in sub-Saharan Africa. These women migrate independently to fulfil their own economic needs rather than simply joining a husband or other family members. See Adepoju — "Issues and Recent Trends in International Migration in Sub-Saharan Africa" 2000 165 *International Social Science Journal* 383 385.

⁵⁵ SAPs imposed by international financial institutions have compelled states to reduce spending on social welfare, education and health care and consequent subsidies to impoverished citizens. The burden of providing these basic needs has fallen to the families and most often women who usually do not have the means. James & Atler — "Trafficking of Young Women" in *Highly Affected Rarely Considered: The International Youth Parliament Commission's Report on the Impacts of Globalisation on Young People* (2003) 74.

⁵⁶ Delpont *et al* (n1 *supra*) 34.

⁵⁷ James & Atler (n55 *supra*) 75-78; Truong (n49 *supra*) 42. Gettu *Towards a Food Secure Future* (Africa Human Development Report 2012) 126 further asserts that women have less control of land in sub-Saharan Africa than anywhere else: "Women in sub-Saharan Africa and elsewhere have less control over productive resources such as assets, land and credit; their time is often devoted to activities that are non-marketed and undervalued; and their access to key institutions such as courts and markets is curtailed".

⁵⁸ Eg, certain principles of indigenous law discriminate against women as determined in *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC). In these cases, the Constitutional Court ruled that the custom of male primogeniture as applied in the indigenous law of succession to be unconstitutional since it violates women's rights to equality and human dignity. Adepoju (n54 *supra*) 385 concurs that in most African societies, social and political structures define and limit especially — women's access to credit, land and modes of production thus impinging seriously on women's self-actualisation and autonomy". As example, he quotes at 385 a recent Supreme Court decision in Zimbabwe which noted that women — should never be considered as adults within the family, but only as junior males". In this regard, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (especially ss 8, 24-25) can be applied to ensure that no person be unfairly discriminate against on the ground of gender.

disposable at the whim of the owner’) and there is limited recognition of even women, and still less of children, as human beings with rights in their own right. There is a sense of entitlement around sex and sexual activity - almost as though that’s what women and children are there for, and they shouldn’t complain about it.⁵⁹

Girls may be denied the right to education,⁶⁰ especially in rural areas where culture demands them to be confined to the home setting, producing off-spring.⁶¹ This decreases their chances of employment in the formal sector, resigning them to employment in the informal sector where no skills are required and where chances of exploitation are high.⁶²

South Africa is a country that attracts people from the whole continent fleeing from armed conflict,⁶³ political and economic upheaval, food insecurity, the HIV/AIDS pandemic,⁶⁴ and

⁵⁹ Truong (n49 *supra*) 114. See also Delpont *et al* (n1 *supra*) 37. This patriarchal culture has led the country to have one of the highest rates of male sexual violence against women in the world, as evidenced by rates of rapes nationally. According to Interpol, South Africa is the “world’s rape capital” as it has the highest number of declared rapes in the world, with nearly half of the victims younger than 18. According to their estimations, a woman born in South Africa has a greater chance of being raped than learning how to read. A Gallup survey results add to these statistics estimating that a woman is raped every 17 seconds in South Africa and that 1 in every 2 women will be raped in their lives in the country. SAPS statistics show that 134 women per 100 000 of the population were raped in 1997. Statistics for 2012 however show that 94.9 women per 100 000 of the population were raped. Still, less than 1% of rape cases are reported to police. See SABC *South Africa, World’s Rape Capital* SABC News 19 Apr 2012 <http://www.sabc.co.za/news/a/a424c0804af19b5e9583fd7db529e2d0/SouthAfrica,-worlds-rape-capital:-Interpol-20121904> (accessed 2013-01-16).

⁶⁰ Girls are also forced to leave school prematurely and assume the role of caregiver to ailing AIDS parents and siblings. Such children lack education and skills and become easy prey for traffickers. See Delpont *et al* (n1 *supra*) 36. Lack in education also results in ignorance about trafficking. Only 33% of people living in South Africa regard trafficking as a serious problem, (see Adepoju —Review of Research and Data on Human Trafficking in sub-Saharan Africa” 2005 43 (1/2) *International Migration* 75 76); and 29% had no awareness of the crime (see Bermudez (n5 *supra*) 8).

⁶¹ This can be observed in that most children go to school only until they are 13 yrs old; while girls as young as 14 already have babies. Also, the maternal mortality rate in SA is 300 deaths/100,000 live births (2010). See CIA (n52 *supra*) —Country Report: South Africa”.

⁶² James & Atler (n55 *supra*) 75; Delpont *et al* (n1 *supra*) 36. See also Molo Songololo *Trafficking in Children for the Purposes of Sexual Exploitation* (2000) 26.

⁶³ Adepoju (n54 *supra*) 384 declares that: “Sub-Saharan Africa has been a theatre of internecine warfare” for the past 2 decades, creating major refugee populations. Eg, during 1969–1990, 17 of the world’s recorded 43 civil wars were in Africa, including “high intensity” civil conflict in Angola, Liberia and Mozambique. This has resulted in more than 6 million people as refugees and another 17 million displaced within their countries.

⁶⁴ The HIV/AIDS pandemic could be one of the reasons why South Africa is rated 1st in the world with 5.6 million people living with HIV/AIDS as well as the world’s most HIV/AIDS deaths with about 320,000 people. The HIV/AIDS adult prevalence rate in South Africa is 17.8%, which is the 4th highest in the world. HIV/AIDS related orphan-headed households are estimated to consist of 1.2 million children out of an under 18 population of 18,417,000; this represents 15%. See Chichava & Kiremire (n51 *supra*) 26. See also Kreston (n4 *supra*) 39; Bermudez (n5 *supra*) 14-15. Additionally the prevalence and fear of HIV/AIDS and ignorance of its transmission have led to an increased demand for underage children based on the perception that they are disease-free. This practice is what Lomé terms the so-called *marche du petit*

unemployment.⁶⁵ South Africa has the highest number of asylum seekers in the world.⁶⁶ Although South Africa supports large numbers of refugees and asylum seekers, the jurisdiction is also home to an estimated five million illegal immigrants, including some three million Zimbabweans.⁶⁷ In response to the dynamics of supply and demand, migration (which has always been endemic in Africa)⁶⁸ to South Africa is aided by the porous nature of the country's borders and coast lines,⁶⁹ as well as ineffective monitoring of land, rail and sea transportation modes. Trafficked people are indistinguishable amongst these flows.

South Africa's commitment to curb human trafficking in the region has primarily taken the form of adopting several international and regional human-rights instruments with provisions under which activities associated with trafficking may be prosecuted.⁷⁰ As a

vagin, literally, the market of the small vagina. See Allais *An Overview of Human Trafficking in Sub-Saharan Africa* (Paper presented at the Joint Area Centres Annual Symposium: *Criminal Trafficking and Slavery: The Dark Side of Global and Regional Migration*, Champaign, Illinois, 23-25 Feb 2006) 8, 10. There is also a belief that men with HIV/AIDS who have sex with a child (a virgin) will be cured or cleansed. Traffickers are therefore targeting increasingly younger girls. See Bermudez (n5 *supra*) 15; James & Adler (n55 *supra*) 76.

⁶⁵ Chichava & Kiremire (n51 *supra*) 40. Adepoju (n54 *supra*) 383 asserts: –At the current growth rate of 2.7% in the labour force, the region now requires 7.5 million new jobs merely to stabilise the employment situation. Beginning from the 1980s, Sub-Saharan Africa (SSA) countries experienced negative economic growth rates; GDP stagnated whilst population increased annually at 3% and average per capita income declined by one quarter. ... Today SSA is the world's poorest region, where people were poorer at the end of the eighties than they had been in the beginning of the decade.”

⁶⁶ See Apleni *Speaking Notes for Home Affairs Director-General Mkuseli Apleni Following Briefing to Media* (2012) 2. They are mainly from the DRC (33 000), Somalia (20 000), Burundi (6 500), Angola (6 000) and other states in Africa (26,000). See CIA (n52 *supra*) —Country Report: South Africa”. According to the most recent statistics available, this population numbered approximately 256,200 in 2008. See USCRI *World Refugee Survey 2009* (US Committee for Refugees and Immigrants Arlington 2008) 31.

⁶⁷ Crush & Williams *Making Up the Numbers: Measuring “Illegal Immigration” to South Africa* (2001) 12. Solomon –Turning Back the Tide: Illegal Immigration into South Africa” 2005 16(4) *Mediterranean Quarterly* 90 91 confirms these numbers, but cautions that accurate numbers are difficult to come by. No more recent, verifiable statistics are available.

⁶⁸ As per Adepoju (n54 *supra*) 383, who declares that: –Historical, economic, ethnic, and political links have fostered and reinforced intra-regional, inter-regional and international migration in Africa, as well as between it and the colonial metropolitan and other countries. By far the largest stream of migration in Africa consists of intra-regional migrant workers, undocumented migrants, nomads, frontier workers, refugees and, increasingly, highly skilled professionals”.

⁶⁹ Delport *et al* (n1 *supra*) 34. South Africa has a total perimeter of 4,862 km, with bordering countries consisting of Botswana (1 840 km), Lesotho (909 km), Mozambique (491 km), Namibia (967 km), Swaziland (430 km), and Zimbabwe (225 km). It also comprises of 2,798 km of unprotected coastline. See CIA (n52 *supra*) —Country Report: South Africa”. The land borders are particularly difficult to police due to their length and because local communities share cultural relations with people in adjacent countries.

⁷⁰ Ratification of these treaties is a formal expression by the South African government at the international plane of its commitment to be bound by the treaties' rights and obligations, as well as their domestic implementation. Compliance with the treaties' obligations is monitored primarily by means of state reporting. State reporting is thus at the core of the promotion of human rights. See Chenwi *South Africa: State of State Reporting under International Human Rights Law* (Paper presented at the Seminar on

colony of Great Britain, the previous Union of South Africa⁷¹ became a state party to many of the erstwhile anti-slavery and counter-trafficking conventions. A series of international agreements aimed at addressing the fraudulent recruitment of women for prostitution were adopted such as the International Agreement for the Suppression of the White Slave Traffic 1904, which entailed *ipso facto* accession to the Agreement of 18 May 1904 by virtue of article 8 of the Convention of 1910.⁷² The International Convention for the Suppression of the Traffic in Women and Children of 1921 was ratified by the Union of South Africa on 28 June 1922.⁷³ Furthermore, the International Convention for the Suppression of the Traffic in Women of Full Age 1933 was ratified by the Union of South Africa on 20 November 1935.⁷⁴ These instruments culminated in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1950.⁷⁵ As regards practices similar to slavery, the Union of South Africa ratified the Slavery Convention 1926 on 18 June 1927, and also signed its Amending Protocol of 1953 on 29 December 1953. Most importantly, South Africa has ratified the primary international instrument used in addressing human trafficking; the Palermo Protocol. The country signed the instrument on 14 December 2000, but only became an official party to it on 20 February 2004.⁷⁶ The jurisdiction has not committed itself to adopting any further anti-slavery and counter-trafficking conventions.

Promoting Constitutional Rights through International Human Rights Law: The State of South Africa's State Reporting Cape Town, 22 Sept 2010) 17: —“State reporting under international human rights treaties is based on the obligation of States to submit periodic reports on the measures they have undertaken and the progress they have made in implementing the specific treaty. The submission of State reports is important, because assessing compliance with any human rights obligation requires gathering and evaluating information.” In this manner, any deficiencies resulting from the laxity of States Parties to comply with their obligations can be avoided.

⁷¹ As a British Colony, the jurisdiction was named the Union of South Africa until 31 May 1961 where after it became an independent Republic.

⁷² The International Convention for the Suppression of the White Slave Traffic 1910 was declared applicable to the Union of South Africa. The Protocol amending both the Agreement and the Convention for the Suppression of the White Slave Traffic 1904 was signed by South Africa on 22 Aug 1950, and acceded to on 14 Aug 1951.

⁷³ The jurisdiction gave the Protocol to amend this convention a definitive signature on 12 Nov 1947.

⁷⁴ Its Protocol to amend the Convention was signed on 12 Nov 1947.

⁷⁵ This Convention was signed on 16 Oct 1950 and ratified on 10 Oct 1951.

⁷⁶ The CTOC and Migrant Smuggling Protocol were also signed and ratified on the same dates. The CTOC art 37(4) provides that any supplementary protocol to the Convention must be interpreted together with the Convention, taking into account the purpose of that protocol. It further requires states parties to legislate on various matters relevant to the issue of trafficking in persons and provides a framework for effective cooperation in bringing traffickers to justice, eg, mechanisms of extradition, mutual legal assistance, seizure of assets and confiscation of proceeds of crime.

In addition to the Palermo Protocol, there are other core international instruments which may be invoked in order to enforce anti-trafficking efforts in South Africa, such as human-rights instruments. The previous apartheid regime did not sign many of these human-rights treaties, for instance the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1966. After several years, the new democratic dispensation signed the document on 3 October 1994, and ratified it on 10 December 1998.⁷⁷ The government has been lax in submitting reports to the CERD Committee, and has missed several reporting deadlines.⁷⁸ Furthermore, the new South African government has only signed but not ratified the ICESCR.⁷⁹ The ICCPR was signed on 3 October 1994 and ratified on 10 December 1998, with a declaration that the Republic recognises for the purposes of Article 30 of the Convention, the competence of the International Court of Justice (ICJ) to settle a dispute between two or more State Parties regarding the interpretation or application of the Convention, respectively.⁸⁰ To date, South Africa has not yet submitted any reports to the Human Rights Committee, the supervisory body for the ICCPR. The initial report was due in 2000 and two periodic reports were due in March 2005 and March 2010 respectively.⁸¹ Similar to other international law agreements, this Convention obligates South Africa “to respect and to ensure to all individuals within its territory and subject to its jurisdiction” their guaranteed rights and “to take the necessary

⁷⁷ In a declaration, the new government proclaimed that although it recognises the competence of the CERD Committee to receive and consider communications from individuals or groups of individuals within the Republic's jurisdiction claiming to be victims of a violation in the Convention, it regards the South African Human Rights Commission as the appropriate body within the Republic's national legal order competent to receive and consider these petitions. The previous South African government as well as the new dispensation did not sign the amendment to art 8 of the Convention 1992, nor the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 Nov 1973.

⁷⁸ South Africa had to submit its initial report to the CERD Committee in Jan 2000 but it was not submitted. The subsequent 2nd and 3rd periodic reports, due in Jan 2002 and Jan 2004 respectively, were consolidated with the 1st and submitted in late Dec 2004. An additional report was requested for submission in Aug 2007; however, this was also not submitted. The consolidated 4th, 5th and 6th periodic reports were due in Jan 2010, yet also not submitted. The CERD Committee requested South Africa to respect the reporting deadlines, and made a number of recommendations in its concluding observations which primarily relate to obtaining detailed information on a number of issues such as “the ethnic composition of the population, the role of traditional leadership and the status of customary law, measures taken to address *de facto* segregation that persists in South Africa, the socio-economic situation and the situation of indigenous people”. See Chenwi (n70 *supra*) 8, 30-34.

⁷⁹ South Africa signed the ICESCR on 3 Oct 1994; but did not sign nor accede to it or its Optional Protocol of 10 Dec 2008. Even though South Africa has signed but not ratified this treaty, it is under a *bona fide* obligation to refrain from acts that would defeat the object and purpose of the treaty in the period between signature and ratification.

⁸⁰ South Africa has not as yet accepted the jurisdiction of the ICJ but does so by conjecture to s 36 of the Rome Statute. See *infra* n88. The Optional Protocol to the ICCPR of 16 Dec 1966 was acceded to by South Africa on 28 Aug 2002.

⁸¹ See Chenwi (n70 *supra*) 28-30.

steps, in accordance with its constitutional processes and with the provisions of the [treaty], to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the [treaty].⁸² The implementation of this treaty requires the jurisdiction to go beyond making a legal commitment of ratification to ensuring the actual realisation of the rights through adopting appropriate measures.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 was signed on 29 January 1993 and ratified on 10 December 1998. The South African government declared that it recognises, for the purposes of Article 21 of the Convention, the competence of the Committee Against Torture to receive and consider communications that a State Party claims that another State Party is not fulfilling its obligations under the Convention; and for the purposes of Article 22 of the Convention, the competence of the Committee Against Torture to receive and consider communications from, or on behalf of individuals who claim to be victims of torture by a State Party. However, regarding the country's reporting duties, the initial report to the Committee against Torture, due in January 2000, was submitted late June 2005. The CAT Committee noted the considerable delay in submission as well as the lack of analysis as to the implementation of statutory provisions. Further recommendations were made which included, amongst others, statistical data on complaints related to torture, cruel, inhuman or degrading treatment, information on compensation and rehabilitation for victims and more information regarding all cases of extradition. An additional report was requested for November 2007 but it was not submitted, and is still outstanding. The jurisdiction has now been reprimanded by the World Organisation against Torture (OMCT) for its disregard of its treaty obligations and human rights record regarding torture.⁸³ In *McCallum v South Africa*,⁸⁴ McCallum, an inmate of Port Elizabeth's St Albans Prison, was subjected to torture, ill-treatment and human rights violations by prison guards. The UNHRC found that South Africa had violated McCallum's rights regarding torture and ill-treatment, as well as his right to an effective remedy in terms of the ICCPR. South Africa was asked six times by the UNHRC to respond to McCallum's allegations. The requests were ignored.⁸⁵ The

⁸² ICCPR art 2.

⁸³ See Chenwi (n70 *supra*) 9-10; 38-42.

⁸⁴ *McCallum v South Africa* UN Doc CCPR/C/100/D/1818/2008 (2 Nov 2010).

⁸⁵ See Legalbrief —“Time for SA to Face Up to Allegations of Torture” *Legalbrief Today* Issue No 3116 7 Sept 2012 <http://www.legalbrief.co.za/article.php?story=2012090708225511> (accessed 2013-01-16).

jurisdiction has also ignored the Torture Convention's amendments to Articles 17(7) and 18(5) in 1992.⁸⁶ South Africa submitted to Parliament a Draft Prevention and Combating of Torture of Persons Bill in 2012 in compliance with its obligations under this Convention, but it has not yet been promulgated.

The jurisdiction has also adopted key international women's and children's rights instruments. In order to protect women from especially sex trafficking, the country signed the CEDAW on 29 January 1993 and ratified it on 15 December 1995. Bound by the obligations created by the CEDAW, South Africa had to submit reports on its progress in implementing the provisions of the convention. Its initial report to the CEDAW Committee, which was due in January 1997, was only submitted late February 1998. In its concluding observations on the report, the CEDAW Committee recommended that the jurisdiction not only rely on information from government sources, and that the data submitted be disaggregated by sex. Information on policies to eliminate gender-based violence, progress towards increasing girls' and women's access to health services, and the abolition of unequal inheritance rights were also requested. After failing to submit the second and third reports in January 2001 and January 2005 respectively, South Africa had to consolidate these reports in a fourth report. The consolidated report was due in January 2009 but was only submitted in July 2009.⁸⁷

A number of provisions in the CRC are relevant to child trafficking, an instrument the country signed on 29 January 1993, and ratified on 16 June 1995.⁸⁸ In terms of its reporting obligations, South Africa submitted its first report to the CRC - due in July 1997 - slightly late in 1997. The second and third periodic reports were due in July 2002 and July 2007 respectively, but to date these have not been submitted. The CRC Committee made the following recommendations to the jurisdiction: implement effective measures to strengthen law enforcement and intensify efforts to raise awareness in communities about the sale, trafficking and abduction of children. The Committee further advised that the data collection system be reviewed and effective measures be taken to prohibit by law the use of corporal punishment in the family. Also, the establishment of bilateral agreements with

⁸⁶ The Optional Protocol to Torture Convention 2002 was also signed only on 20 Sep 2006.

⁸⁷ See Chenwi (n70 *supra*) 9, 34-38. The amendment of the CEDAW's art 20, para1 of 1995 was not attended to by the jurisdiction, and the Optional Protocol to CEDAW was only acceded to on 18 Oct 2005.

⁸⁸ South Africa accepted the amendment to art 43 (2) of the CRC on 5 Aug 1997.

neighbouring countries to prevent the sale, trafficking and abduction of children and to facilitate their protection and safe return to their families was requested.⁸⁹ The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 was only acceded to on 30 June 2003. The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict 2000 was signed on 8 February 2002, and ratified 24 September 2009, with declarations stating that the South African National Defence Force (SANDF) is a voluntary force therefore there is no compulsory conscription into the SANDF and that the minimum age limit of eighteen years is stipulated by law as a requirement.⁹⁰ South Africa also has not submitted its initial report for this instrument which was due in October 2011, or the report for the Optional Protocol on Child Prostitution, which was due in July 2005. The Optional Protocol to the CRC on the Rights of the Child on a Communications Procedure of 19 December 2011 was not signed by South Africa.⁹¹

Most importantly, the government has neither signed nor ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990, nor any of its complementary instruments relating to migrant workers.⁹² As a result, the rights of migrant workers and their families are not fully safeguarded in the jurisdiction. Since corruption is of major concern in South Africa, the country has committed itself to the Convention against Corruption of 2003 by signing it on 9 December 2003 and ratifying it on 22 November 2004. Furthermore, the government has ratified twenty international labour treaties at present,⁹³ including those that prohibit slavery and the recruitment of women and children for prostitution. South Africa has addressed the ILO (International Labour Organisation) Conventions through various acts, for example, the Basic Conditions of Employment Act 1997, whereby children are not allowed to work under the age of fifteen and are not permitted to work until the end of the school year.

⁸⁹ See UN *Concluding Observations of the Committee on the Rights of the Child: South Africa* (UN Doc CRC/C/15/Add122, 28 Jan 2000); Chenwi (n70 *supra*) 10, 42-47.

⁹⁰ Verification of the correct age of the applicant is required, such as producing a national identity document which states their date of birth; and undergoing a rigorous medical examination in terms of which pre-pubesence would be noticed.

⁹¹ Only Germany signed this instrument on 28 Feb 2012.

⁹² These conventions are the Migration for Employment Convention 1949, the Migrant Workers (Supplementary Provisions) Convention 1975, and the Private Employment Agencies Convention No 181.

⁹³ Eg, the country has ratified the ILO's Forced Labour Conventions C29 (Forced Labour) on 5 Mar 1997; the 1957 C105 (Abolition of Forced Labour) on 5 Mar 1997, and the C82 (Worst Forms of Child Labour) on 7 Jun 2000. The Freedom of Associations treaties (C87 and C98) were both ratified on 19 Feb 1996. The ILO treaties on the abolition of discrimination were ratified on 30 Mar 2000 and 5 Mar 1997 respectively. South Africa ratified C138 (Minimum Age Convention) on 30 Mar 2000.

The concepts of enslavement and trafficking in persons are included as crimes against humanity in the Rome Statute. The South African government signed this instrument on 17 July 1998 and ratified it on 27 November 2000, but did not commit itself to the recent amendments to Article 8 of the Rome Statute concerning penal matters, or to the crime of aggression which was introduced in the Statute in 2010. Nevertheless, South Africa is a state party which has made declarations under Article 36, paragraph 2 of the Rome Statute. These declarations are deemed to be acceptances of the compulsory jurisdiction of the International Court of Justice (ICJ).⁹⁴ South Africa acceded to all four Geneva Conventions 1949 on 31 March 1952 and is a party to the Additional Protocol I and II of the Geneva Conventions 1977 as of 21 November 1995; but is neither a party nor a signatory of the Additional Protocol III 2005. South Africa has neither signed nor ratified the Vienna Convention on the Law of Treaties,⁹⁵ or any of its more recent extensions. According to the Vienna Convention on the Law of Treaties, while it is not legally bound to implement the specific provisions of those treaties, South Africa must not act to defeat their object and purpose. It is trite that the South African government has also accepted that it is bound by customary international law not to defeat a treaty's object and purpose.

In addition to these instruments at the international level, strong regional and sub-regional frameworks have been developed in the territory to further combat human trafficking. At the continental level, South Africa has signed and ratified the Constitutive Act of the AU⁹⁶ on 8 September 2000, ratified it on 3 March 2001 and deposited the instrument on 23 April 2001. Three instruments that reaffirm human rights and human security for trafficked persons are the African Charter on Human and People's Rights of 1981, which the new dispensation ratified on 9 July 1996; the African Charter on the Rights and the Welfare of the Child of 1997, which was acceded to on 7 January 2000,⁹⁷ and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003,

⁹⁴ The national executive accepted the UN Charter and Statute of the ICJ on 7 Nov 1945. However, in cases of disputes all available domestic remedies must be exhausted before resorting to international settlement procedures. Dugard *International Law – A South African Perspective* 3rd ed (2008) 464 questions the jurisdiction's reluctance to accept the ICJ's jurisdiction: "It is difficult to understand why post-apartheid South Africa has failed to accept the compulsory jurisdiction of the ICJ. Its failure to do so may be construed as a lack of commitment to the rule of law in international relations".

⁹⁵ Vienna Convention on the Law of Treaties 1155 UNTS 331 (adopted 22 May 1969, entered into force 27 Jan 1980) art 18.

⁹⁶ South Africa was also a signatory to the OAU Charter.

⁹⁷ South Africa has also signed the African Youth Charter on 7 May 2009 and ratified it on 28 May 2009.

which was ratified on 17 December 2004.⁹⁸ The initial report to the African Committee of Experts on the Rights and Welfare of the Child was due in January 2002 and has not yet been submitted. Also, South Africa's initial report for the African Charter was due in October 1998 and was submitted on time. Yet: -

In spite of submitting its initial report on time, the general pattern of late and delayed reporting has subsequently been established in respect of this treaty. The second, third and fourth reports were due in October 2000, October 2002 and October 2004, respectively. These were submitted late as a consolidated report in May 2005.⁹⁹

In its comments, the African Commission raised specific concern about the lack of detail about measures taken to eradicate xenophobia directed towards African migrants and the high incidence of sexual violence against women and children. The consolidated fifth and sixth periodic reports were due in October 2006 and October 2008 respectively, but have not yet been submitted.

The South African government also acceded to the multilateral OAU Convention governing the Specific Aspects of Refugee Problems in Africa of 9 October 1969 on 15 December 1995.¹⁰⁰ This accession is important as it is currently the only instrument which protects migrants' and refugees' rights in South Africa. The continental counterpart to the international convention on corruption, the African Convention on Preventing and Combating Corruption, was signed on 16 March 2004 and ratified on 11 November 2005. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, established on 9 June 1998, was ratified by South Africa on 3 July 2002, whilst the Protocol to the Treaty establishing the African Economic Community relating to the Pan African Parliament (AU) of 2 March 2001, was ratified by the country on 3 July 2002.¹⁰¹

⁹⁸ The supervisory body for these instruments is the African Commission on Human and People's Rights.

⁹⁹ See Chenwi (n70 *supra*) 11, 50-55.

¹⁰⁰ The instrument entered into force on 15 Jan 1996.

¹⁰¹ In this regard, NEPAD (New Partnership for Africa's Development) was developed by South Africa, Algeria, Egypt, Nigeria, and Senegal and formally adopted in Jul 2001. This partnership is designed to address the current challenges facing the African continent, namely, increasing poverty, underdevelopment, the continued marginalization of Africa and African countries, and the empowerment of women. See Gallinetti *Child Trafficking in SADC Countries - The Need for a Regional Response* (2008) 33.

The new South African government has illustrated the importance of having sub-regional bilateral and multilateral cooperation agreements with its nearest sub-Saharan neighbours, of which most do not have effective policies or legislation designed to combat trafficking. These countries also lack capacity to respond adequately to the crime.¹⁰² Although no sub-regional instrument contains specific reference to, or concrete directives for the combating of trafficking in persons, certain multilateral initiatives could be utilized to combat trafficking in persons. In this regard, the jurisdiction acceded to the Treaty of the Southern African Development Community (SADC)¹⁰³ on 29 August 1994. In combating human trafficking in South Africa, the SADC structure should be the first point of departure, given its sub-regional constituency and the recent launch of the Regional Indicative Strategic Development Plan (RISDP), its fifteen-year strategic plan. The formation of this sub-regional economic union is crucial as it establishes to some extent homogeneity amongst the Southern African neighbours. As this sub-regional economic union provides for the free flow of skilled labour and rights of establishment in member countries, intra-regional labour mobility could be facilitated and self-reliant development in the region promoted.¹⁰⁴ It is argued, however, that these economic unions are also dominated by the economy of a single country such as South Africa, and movements of persons have been directed to principally this country. Because trafficking is a multi-dimensional social phenomenon, cooperation agreements regarding refugees,¹⁰⁵ drugs,¹⁰⁶ health,¹⁰⁷ trade,¹⁰⁸ education,¹⁰⁹ corruption,¹¹⁰ gender,¹¹¹ extradition,¹¹² and legal assistance¹¹³ were also entered into.

¹⁰² Only Mozambique has specific anti-trafficking legislation.

¹⁰³ This structure replaced the Southern African Development Co-ordination Conference (SADCC) established in 1980 on 17 Aug 1992. See Adepoju (n54 *supra*) 389.

¹⁰⁴ Adepoju (n54 *supra*) 389.

¹⁰⁵ Eg, the Tripartite Agreement of 15 Oct 1993 between the government of South Africa, the government of Mozambique and the UNHCR for the voluntary repatriation of Mozambican refugees from the RSA. These types of agreements could significantly reduce the risk or push factors for trafficking.

¹⁰⁶ The Protocol on Combating Illicit Drug Trafficking in the SADC Region (24 Aug 1996) was ratified on 22 Jul 1998, and entered into force on 20 Mar 1999.

¹⁰⁷ The Protocol on Health in the SADC of 18 Aug 1999 was ratified by SA on 4 Jul 2000.

¹⁰⁸ The Protocol on Trade in the SADC Region (24 Aug 1996) was ratified by SA on 24 Dec 1999.

¹⁰⁹ The Protocol on Education and Training in the SADC of 8 Sept 1997 was ratified by SA on 14 May 1999.

¹¹⁰ The Protocol against Corruption (SADC) of 14 Aug 2001; ratified by SA on 15 May 2003. This instrument focuses on the promotion and strengthening of mechanisms to prevent, combat and eradicate corruption through cooperation and the development and harmonization of domestic legislation.

¹¹¹ The SADC Protocol on Gender and Development, signed and ratified by South Africa on 17 Aug 2008, aims to increase the accountability of member states in achieving gender equality and women's rights.

¹¹² The SADC Protocol on Extradition of 3 Oct 2002; ratified by SA on 16 Jun 2003.

¹¹³ The SADC Protocol on Mutual Legal Assistance in Criminal Matters of 3 Oct 2002; ratified on 16 Jun 2003 by South Africa. This Protocol promotes the development of legal capacity and expertise in a specific field amongst member states. It also concerns cooperation among member states in criminal matters relating to

These SADC protocols provide a legal and institutional framework for deepening regional integration in the social, economic and political sphere".¹¹⁴ South Africa can be held accountable for its SADC policy commitments if it fails to translate political will into systematic and sustainable implementation".¹¹⁵ However, it is argued that there is a widening gap between policy and action and that promises made by governments rarely match actual delivery. This is evident in that most of the Protocols mentioned above are still to be implemented.

Cooperation amongst the Southern African member states could strengthen law enforcement agencies' anti-trafficking endeavours and aid prosecutors in combating the crime. Standard procedures here should include victim assistance, the voluntary return and reintegration of victims of trafficking in their countries of origin, and the extradition of traffickers for prosecution. Coordinated efforts at law-enforcement and judicial levels, for example, joint investigations, information exchange, the identification of individual traffickers or trafficking syndicates, trafficking routes, potential victims and trafficked victims would also assist in this regard.¹¹⁶ This is essential as many of the SADC states have inadequate legislative frameworks, poor law enforcement and scant administrative capacities to address the problem. However, in order to develop effective strategies to deal with trafficking as well as solutions to its causes within the SADC region, specific counter-trafficking multilateral cooperation agreements should be initiated. This initiative should include guarantees on the domestication of national laws on trafficking.

From the treaties and conventions signed, it is apparent that whilst previous South African governments concluded many of the older international treaties, the post-apartheid national executive focused more on regional treaties. However, many of the earlier instruments not signed or ratified by the previous dispensation were also concluded by the new government. Even so, the true effectiveness of a treaty can only be assessed by the extent to which the state party applies its provisions at national level. For example, while almost all the governments of the SADC region have signed, ratified or acceded to the

offences involving transnational organised crime, which could assist states in their investigation of trafficking offences.

¹¹⁴ Mhlanga — "Success of SADC Gender Protocol lies in Evaluation" *Cape Times* (23 Jul 2007) 9.

¹¹⁵ *Ibid.*

¹¹⁶ See Delpont *et al* (n1 *supra*) 51.

Palermo Protocol, only one country has enacted anti-trafficking legislation. South Africa still does not have any legislation or policies on human trafficking. Essentially, lack of legislation in most SADC countries creates disparities in addressing trafficking at both the regional and national level, with disorganised and ineffective strategies to tackle trafficking. This is an advantage for traffickers as the risks to their business remain minimal. In this regard, South Africa lags behind especially concerning the application of the Palermo Protocol's provisions.

The jurisdiction also has not fully committed itself to the problem by adopting fundamental treaties on immigration laws. Ratification of these treaties will bring South Africa into agreement with internationally accepted standards. Also, the government's general non-compliance with its reporting obligation under core treaties is glaring. The impression is created that the government does not regard its reporting function as "a self-critical assessment of its efforts to realise the rights in the treaties it has ratified, but rather a mere formality".¹¹⁷ Reports have generally either not been submitted or are submitted after considerable delays. These delays raise the risk that the content of the reports will be outdated by the time they reach the various committees. Some of the reports fail to meet the reporting guidelines of the treaty bodies, especially in relation to the information contained in them; and have been based largely on government sources. More often than not, the reports do not include information on the implementation of recommendations made on previous reports. These findings must be mainstreamed into policy discussions and documents to ensure their effective implementation. The reporting backlog created by the government can only be alleviated with improved institutional capacity, and more and effective coordination between government departments in the preparation of reports. As a signatory to the relevant conventions and treaties, the jurisdiction needs to demonstrate more political will and positive action in order to prepare concrete, comprehensive and quality reports. This undertaking will represent a constructive step towards combating human trafficking in the jurisdiction.

But to return to the existing circumstances and conditions in South Africa. Trafficking in South Africa is complex and diverse as it consists of culturally-unique trafficking types and

¹¹⁷ Chenwi (n70 *supra*) 14.

also involves regional and international trafficking to, from and within South Africa. South Africa has been listed as a human-trafficking source, transit, and destination country for men, women, and children for mainly labour and sex trafficking.¹¹⁸ Sub-Saharan Africa is the only region in the world where child labour is increasing, according to a global ILO study completed in 2006.¹¹⁹ NGOs estimate that 60% of the trafficking victims in South Africa are children. It is further reported that between 28,000 and 38,000 children are prostituted in South Africa; in Cape Town, 25% of the prostitution services are offered by children.¹²⁰

Women and girls are mostly subjected to sex trafficking, domestic servitude and child-minding; while boys are forced to work in street vending, food service, begging, criminal activities, cattle herding, mining and farm work.¹²¹ In a study done on agricultural child labour in South Africa, it was found that the greater percentage of ten to fourteen year-old-workers were girls (55 percent); while in the fifteen- to seventeen-year age group, 40 percent were girls. The lower number of girls in the last group is ascribed to their withdrawal to attend to home responsibilities and to raise their children.¹²² Both males and females may be forced to become drug mules for their traffickers.¹²³ The tradition of forced marriage or *ukuthwala* is still practiced in some rural areas but abused in that non-consenting under-aged girls are married off to elderly men.¹²⁴ It has been argued that the practice of virginity testing may even put girls at risk, as traffickers are alleged to monitor these ceremonies to identify those who have been proved to be virgins.¹²⁵ Trafficking in

¹¹⁸ US Dept of State *Trafficking in Persons Report 2012* (2012) 315.

¹¹⁹ See Kreston (n4 *supra*) 37. A recent study by SANTAC estimates that “as many as 30,000 young people annually arrive in South Africa from SADC countries”. See Chichava & Kiremire (n51 *supra*) 26.

¹²⁰ See Molo Songololo (n62 *supra*) 26.

¹²¹ US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 315.

¹²² See Bosch & Gordon *Child Labour in Commercial Agriculture in South Africa* (ILO/IPEC Working Paper No 3 Dar-es-Salaam 1996) 7.

¹²³ Trafficking victims, particularly women who have been trafficked for sexual exploitation, are often involved in ancillary criminal activities including the use and distribution of narcotics to clients. See Allais (ed) *Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa* (2010) vii.

¹²⁴ The custom of *ukuthwala* (lit meaning “to carry”) originates from the Xhosa people. It is a culturally legitimated mock abduction of a girl by a young man whereby the girl’s family is forced to enter into negotiations for the conclusion of a customary marriage. See Mwambene & Sloth-Nielsen “Benign Accommodation? *Ukuthwala*, ‘Forced Marriage’ and the South African Children’s Act” 2011 2(1) *Journal of Family Law and Practice* 5 6. According to Brown *Human Slavery’s New Era in Sub-Saharan Africa* (2010) 4, early marriage “... often leads to limited education, abusive circumstances, and destitute poverty from divorce, separation or abandonment. Multiple marriages can leave the wives struggling to support the family unit and therefore vulnerable to trafficking for exploitative purposes”. This is fertile ground for human traffickers.

¹²⁵ See Allais (ed) (n123 *supra*) viii.

body parts¹²⁶ or organ harvesting for the purposes of traditional medicine, known as *muti*¹²⁷ is reported to be common in the region.¹²⁸ These cultural norms contribute to the spread of trafficking.¹²⁹ In urban areas, the renting out of babies and small children to beggars also occurs.¹³⁰ Children are trafficked for various activities such as for use in ritual sacrifice,¹³¹ or to paedophile rings for use in pornographic videos. Children also risk illegal adoption.

Trafficking in South Africa has elements of organised crime but is not exclusively linked to it. Nigerian syndicates are widely credited for operating and dominating the commercial

¹²⁶ South Africa also has a market for international organ trafficking. Eg, Brazilian kidney sellers are being transported to South Africa for transplantation and recipients are believed to be predominantly from Israel. See Scheper-Hughes "The Global Traffic in Human Organs" 2000 41(2) *Current Anthropology* 191 206.

¹²⁷ *Muti* or rather *umuthi* is the Nguni word for traditional medicine and refers to the use of potions made from indigenous herbs to cure illness. This principle has been expanded by exploiters to include the use of human body parts which are believed to cure ailments ranging from HIV to infertility as well as to increase wealth and influence. See Bermudez (n5 *supra*) 16. In 2005, the South African Police Services (SAPS) estimated that 150-300 *muti* murders occur per year (see Allais (ed) (n123 *supra*) 9). However, this estimate is likely to be conservative because the trafficking of body parts in South Africa remains poorly documented due to lack of evidence in prosecution and fear on behalf of witnesses. Eg, Bermudez (n5 *supra*) 60-62 describes a case in Polokwane of 21 girls from the same community who were missing since 2004. 7 of the girls' bodies were found in 2008 with their wombs removed. The removal of body parts from young or unborn children is seen as particularly powerful and can bring forth larger monetary sums for both the traditional healers and those who bring the parts to the healers. Eg, in Jun 1995 Moses Mokgethi was found guilty in the Rand Supreme Court of murdering 6 young children for their organs. Mokgethi sold these organs for *muti* purposes to a local township businessman for approximately ZAR2,500 to strengthen his business. Also in an ongoing murder case being heard in the Alberton Magistrate's Court, the accused, Bishop Monde Tokwe of the Eden Zionist Church and his wife consulted Mofokeng, an *inyanga* (traditional herbalist) when their congregation started dwindling. To bring back church-goers, it was advised that they make *muti* with human-body parts. They kidnapped a 9-yr-old girl, Yonela Skweyiya, for this purpose. While the girl was still alive, Tokwe's wife sat on top of her and removed her vagina using a razor blade. Then Tokwe used the blade to remove the child's eyes, ears and fingers. Mooki —Bishop, Wife Face Charges of Mutilating Young Girl" *The Star* 7 Aug 2012 <http://www.iol.co.za/the-star/bishop-wife-face-charges-of-mutilating-young-girl-1.1357710> (accessed 2013-01-16).

¹²⁸ Research conducted between May and Sept 2008 in Mozambique and South Africa reveals that the trafficking of body parts is a widespread and prevalent problem. See Fellows *Trafficking Body Parts in Mozambique and South Africa* (Human Rights League Maputo 2008) 7.

¹²⁹ One should also consider the traditional practices of child placements and child fostering as potential trafficking hubs. Many black children often reside with their extended family, especially with the grandmother who basically lives on a government social pension. This income is in many cases not sufficient for large families to survive, which forces the children to seek work. See Edmonds —Understanding Child Labour - Patterns, Types, and Causes" 2005 *Economic Perspectives* 21 23.

¹³⁰ There is a thriving business involving the sale and rental of babies to beggars by their mothers. Babies are rented out to beggars for as little as ZAR20 a day. Many of these children are intentionally drugged and harmed to garner increased sympathy from motorists. See Comrie & Wiener —Rent-a-Baby" *Carte Blanche* 23 May 2010 <http://beta.mnet.co.za/carteblanche/Article.aspx?Id=3964&ShowId=1> (accessed 2013-01-10). The renting of children is a practice which is not exclusively found in South Africa, as the American —Gö-case proves. In this case, an Asian couple travelling with a 2-yr-old toddler was stopped at the Los Angeles Airport. It was discovered that the man was a sex trafficker and the woman his trafficking victim. The child was rented to the man as decoy for about US\$250, drugged and then put on the plane. This was not the first time the child had been rented out for this purpose. See Joshi —The Face of Human Trafficking" 2002 13(1) *Hastings Women's Law Journal* 31 49.

¹³¹ Allais (n64 *supra*) 3.

sex trade within the country.¹³² These syndicates also traffic South African women to households of African migrant clients in the US and Europe. Other organised crime networks which conduct trafficking operations trans-nationally and internally in South Africa include trafficking rings run by Moroccan, Chinese, Thai and Eastern European syndicates.¹³³ It has been established that refugees residing in South Africa also traffic family and other asylum seekers to South Africa especially for sexual exploitation.¹³⁴ Also involved in trafficking activities, especially the trafficking of children, are Zimbabwean drivers who assist people in crossing the borders to South Africa illegally (*malaichas*) or gangs which prey on migrants trying to cross the border on foot (*gumagumas*).¹³⁵ Local criminal gangs and street gangs organize child prostitution in a number of South African cities, which are common destinations for child sex tourists.¹³⁶ Trafficking syndicates send recruiters to rural towns. These recruiters may be women or men and are often parents, trusted family members, acquaintances, or neighbours of the victims.¹³⁷ Posing as employment agencies, traffickers also use job advertisements in local newspapers to lure victims.

Children are trafficked mainly within the country and are often recruited from rural areas such as Beaufort West, Graaff-Reinet and Orange Farm and trafficked to places such as Cape Town, Johannesburg, Pretoria and Durban.¹³⁸ The most vulnerable South Africans are poor blacks from rural areas suffering high rates of unemployment. Cape Flats children are reportedly sold to ship's crews.¹³⁹ Traffickers recruit male and female street children,¹⁴⁰

¹³² US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 315.

¹³³ Bermudez (n5 *supra*) 36.

¹³⁴ Delport *et al* (n1 *supra*) 22.

¹³⁵ Allais (ed) (n123 *supra*) iv.

¹³⁶ According to Adepoju (n60 *supra*) 80: "Tourists from Germany, the Netherlands, and the UK use gifts and cash to lure young boys and girls under age 18 who reside at tourists' spots into pornographic sex acts. They later put the films on the Internet with the victims' names and addresses. The victims' parents are deceived with gifts under the pretence that their wards would be assisted with education and jobs abroad. The unsuspecting children who follow the tourists to Europe end up as sex slaves to the traffickers or are distributed into the paedophile network."

¹³⁷ Allais (ed) (n123 *supra*) vii: While globally, women are heavily involved in human trafficking; this study found that in South Africa the role of women is more commonly that of intermediaries rather than primary perpetrators.

¹³⁸ Bermudez (n5 *supra*) 31-32.

¹³⁹ Allais (n64 *supra*) 7.

¹⁴⁰ There are an estimated 10,000 – 12,000 homeless children in South Africa who are highly vulnerable to trafficking, according to Heiberg (ed) *Listen and Speak Out against Sexual Abuse of Girls and Boys* (2005) 43. Moser *Violence and Poverty in South Africa: The Impact on Household Relations and Social Capital* (International Save the Children Alliance Norway 1999) 14 concurs and quotes a 1995 study which estimated that 20% of South African children were not living with their parents.

AIDS orphans and children abused at home in the country as well as from neighbouring countries. The trafficking pattern observed in Southern Africa shows that almost all SADC countries are source countries, while transit countries include South Africa, Tanzania, Zambia and Zimbabwe with South Africa being the final destination. Children from Lesotho normally migrate from rural areas and border towns to Maseru from where they are trafficked for work on asparagus farms in the border region employment of the Eastern Free State and Bloemfontein.¹⁴¹ Long-distance truck drivers traffic women and girls by way of false promises of jobs, marriage or schooling, with the help of corrupt immigration officials at the border posts.¹⁴²

Women from Thailand, Cambodia, the Democratic Republic of the Congo, India, Russia, Ukraine, Bulgaria, China, Taiwan, Angola, Mozambique, Swaziland, and Zimbabwe are enticed with offers of legitimate work in South Africa, only to be forced into prostitution, domestic servitude, and forced labour.¹⁴³ The victims are gang-raped or killed en route if they resist.¹⁴⁴ Both sex- and non-sex workers from Mozambique are recruited by mainly female Mozambican traffickers and taken to Johannesburg and Durban where they are forced into prostitution or sold as wives to mine workers on the West Rand.¹⁴⁵ Similarly, young men and boys from Mozambique, Malawi, and Zimbabwe migrate to South Africa in search of farm work. At times these labourers may work for months with little or no pay and poor working conditions before employers have them arrested and deported as illegal immigrants.¹⁴⁶ Organized crime gangs force teenage boys from Zimbabwe and Mozambique to steal leftover bits of gold from abandoned mines.¹⁴⁷

As regards international trafficking, trafficked Chinese women are imported into South Africa via transit routes such as Lesotho, Botswana and Swaziland.¹⁴⁸ Women from Eastern Europe are also trafficked to work in the sex industry in private clubs and

¹⁴¹ See Adepoju (n60 *supra*) 79. Allais (n64 *supra*) 7 cites an IOM Report which found that Lesotho children are used in orgies by Free State Farmers and businessmen. See Martens *et al* (n37 *supra*) 36.

¹⁴² Adepoju (n60 *supra*) 79-80.

¹⁴³ Martens *et al* (n37 *supra*) 125; Chichava & Kiremire (n51 *supra*) 20. See also Adepoju (n60 *supra*) 79.

¹⁴⁴ Martens *et al* (n37 *supra*); Adepoju (n60 *supra*) 80.

¹⁴⁵ Delport *et al* (n1 *supra*) 21; Adepoju (n60 *supra*) 79.

¹⁴⁶ US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 315.

¹⁴⁷ *Ibid.*

¹⁴⁸ Delport *et al* (n1 *supra*) 21.

brothels.¹⁴⁹ Chinese and Taiwanese men are trafficked to South Africa for the purpose of labour exploitation, mainly as workers in mobile-sweatshop factories in Chinese communities in South Africa. Women from Asia and the Middle East are trafficked to the Western Cape into the commercial sex industry, or further transported to North America.¹⁵⁰

In addition to being a transit country for victims who will be transported to Europe, the Middle East or the United States and other destinations for forced prostitution and forced labour, South Africa is also a source country.¹⁵¹ For example, in 2011, South African trafficking victims were discovered in Bangladesh and Turkey.¹⁵² During 2010, South African trafficked persons were located in Macau.¹⁵³ South African men are also being recruited by local employment agencies to drive taxis in Abu Dhabi, but are subjected to forced labour subsequent to their arrival in the UAE.¹⁵⁴ South Africans who have immigrated abroad also exploit their ex-country men. For example in *US v Johannes du Preez et al*,¹⁵⁵ Du Preez, his wife and others were found guilty on charges they had smuggled in scores of South African workers and forced them to perform hard labour at his Atlanta granite and marble company.¹⁵⁶ A similar situation transpired in England, where South Africans were lured by a British employment agency to work for exceptionally good salaries at one of the largest fruit packers in the country. Once in England, the promised salaries turned out to be extraordinarily low, with added deductions not only of the interest for the loan towards their visas and flights, but also exaggerated rent for small and crowded rooms, and high administrative charges for each shift. Most workers were left with hardly anything to live on and were unable to pay back their debt.¹⁵⁷

¹⁴⁹ US Dept of State *Trafficking in Persons Report 2011* (2011) 327-328.

¹⁵⁰ Delpont *et al* (n1 *supra*) 22.

¹⁵¹ Delpont *et al* (n1 *supra*) 20.

¹⁵² US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 315.

¹⁵³ US Dept of State *Trafficking in Persons Report 2011* (n149 *supra*) 327.

¹⁵⁴ US Dept of State *Trafficking in Persons Report 2011* (n149 *supra*) 327.

¹⁵⁵ *US v Johannes du Preez et al* 04-CR-008 (2005) US District Court Northern District of Georgia, Newman Division.

¹⁵⁶ Du Preez lured these South Africans to supposedly work as executives at his firm. They entered illegally under a special US visa program reserved for foreign managers. Their wages were used to repay the cost of their visas and housing at an apartment complex, and they were threatened with being reported to US immigration officials if they complained. See DeStefano *The War on Human Trafficking - US Policy Assessed* (2007) 71-72.

¹⁵⁷ See Belser *Forced Labour and Human Trafficking: Estimating the Profits* (ILO Report 42 Geneva 2005) 1.

South Africa is rated as a Tier 2 level-country for a fourth consecutive year.¹⁵⁸ The jurisdiction was consigned to this position since it has not yet complied with international obligations to pass domestic legislation and to meet the minimum standards required in terms of the Palermo Protocol. Other systemic constrictions include inadequate allocation of resources to fight the crime, and minimal awareness or denial as to what trafficking constitutes and the extent thereof. This ignorance and denial are especially noticeable with regard to forced labour. South Africa has also been unable to provide data on investigated or prosecuted trafficking crimes, mainly because these types of trafficking have been prosecuted in terms of other offences. Reliable information on the scale, direction and nature of trafficking remains sparse. The South African Police Service (SAPS) collects statistics on the offence of trafficking for sexual purposes (contravention of section 71 of the Sexual Offences Act 2007) and other trafficking-related offences under this Act as part of the Crime Administration system (CAS).¹⁵⁹ But there is no data on related movements, such as irregular migration and migrant smuggling, which may include a trafficking element. This hampers the effective and proper situational analysis of the problem. Unlike Germany and the US, the country does not have a centralized data-base which provides official statistics on cases involving human trafficking. A handful of studies on the extent of trafficking in South Africa have been conducted by various bodies, such as the IOM,¹⁶⁰ UNICEF,¹⁶¹ Molo Songololo¹⁶² and the Human Sciences Research Council (HSRC).¹⁶³ It

¹⁵⁸ See US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 315. This position has been assigned to the country as it does not fully comply with the TVPA's minimum standards but is making significant efforts to bring themselves into compliance with those standards. South Africa was positioned in the Tier 2 –Watch List” since the inception of the Tier System in 2001. The jurisdiction was consigned to the Tier 2 Watch level as it failed to provide evidence of increasing efforts to combat severe forms of trafficking in persons. The South African government was furthermore criticized for providing inadequate data on trafficking crimes investigated or prosecuted, or on resulting convictions or sentences; it also did not provide information on its efforts to protect victims of trafficking. A further grievance was that the country continued to deport and/or prosecute suspected foreign victims without providing them with appropriate protective services. See US Dept of State *Trafficking in Persons Report 2007* (2007) 184-185.

¹⁵⁹ See Allais (ed) (n123 *supra*) 10. The study reports 19 cases of contravention of s 71 in 2010.

¹⁶⁰ See Martens *et al* (n37 *supra*) 6 for information on the IOM study. In this study, interviews were conducted with 232 people, of which only 25 were victims of trafficking.

¹⁶¹ See UNICEF *Trafficking in Human Beings, especially Women and Children, in Africa* 2nd ed (2005) 1-2. For this study, no victims were interviewed, and the findings were based exclusively on cases described by support organisations, NGOs or law enforcement.

¹⁶² Molo Songololo (n62 *supra*) 17 conducted interviews with 19 children working in prostitution, of which only 1 young woman had been trafficked into prostitution as a child. Researchers also spoke to 2 family members of trafficked children and 3 adult sex workers. Also, in Molo Songololo *The Trafficking of Woman into the South African Sex Industry* (2000) 7, 44 women working in the sex industry were interviewed, of whom only 4 had been trafficked. Thus for both reports, the researchers spoke to a total of 69 sex workers, children and parents, of whom less than 25 were victims of trafficking.

¹⁶³ See Allais (ed) (n123 *supra*) iv.

has been argued that in these studies, the [s]ample sizes are small and the findings are based primarily on interviews with governmental and non-governmental stakeholders, as well as a few conveniently chosen individuals with firsthand experience of trafficking".¹⁶⁴ Restricted geographical scope and a narrow range of topics are further limitations.¹⁶⁵ The most recent trafficking research conducted in South Africa is the HSRC's *Tsireledzani* (2010) report.¹⁶⁶ This report has been criticized as being neither informative nor comprehensive and that it ... also fails to adequately inform governmental decision-making by failing to provide evidence-based interpretations of key concepts."¹⁶⁷

Despite the paucity of data regarding the extent of trafficking in South Africa, the government has increased its efforts in addressing human trafficking. The numbers of new trafficking investigations and prosecutions under other legal provisions have increased.¹⁶⁸ Although not all prosecutions have resulted in convictions, two trafficking offenders were convicted and significantly longer prison terms were imposed than in previous years.¹⁶⁹ The government's comprehensive counter-trafficking bill which was originally drafted in 2003 has still not been passed or enacted and has been before parliament for a fourth year.¹⁷⁰ The government does have a national plan of action to deal with the trafficking problem, but this plan has not yet been implemented.¹⁷¹ In addition, the Children's Act 2005 which prohibits child trafficking was only fully implemented in 2010.¹⁷² Although South Africa is a major migrant destination country in Africa, the government has failed to

¹⁶⁴ Pharoah *Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa* (2006) 31.

¹⁶⁵ In Molo Songololo (n62 *supra*) 31-32, cases of girls having sex with their teachers in exchange for payment of school fees is construed as trafficking. In the IOM report, a situation where South African men kidnap, abuse and release Basotho street children is described as human trafficking. See Martens *et al* (n37 *supra*) 23-28. Research on trafficking for the purposes of body parts and organ harvesting could also share these flaws. See Pharoah (n144 *supra*) 32.

¹⁶⁶ See Allais (ed) (n123 *supra*) i.

¹⁶⁷ Gould, Richter & Palmery — "Nigerians, Albinos, Satanists and Anecdotes - A Critical Review of the HSRC Report on Human Trafficking" 2010 32 *SA Crime Quarterly* 37 37.

¹⁶⁸ See NPA *Human Trafficking Statistics and Case Analysis* (Presentation to the Justice and Constitutional Development Portfolio Committee Pretoria 2010) 3-8.

¹⁶⁹ In 2010, those convicted received suspended sentences or fines. Such types of penalties are inadequate to deter the commission of trafficking crimes. See US Dept of State *Trafficking in Persons Report 2011* (n149 *supra*) 328. Of the 2 offenders convicted, life imprisonment was given to one.

¹⁷⁰ The government had been promising to pass this legislation since 2008 so it could be fully implemented before the 2010 FIFA World Cup. The US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 316 reports though that the —Parliamentary Portfolio Committee on Justice and Constitutional Development continued revision of and stakeholder consultation on the draft comprehensive anti-trafficking bill, and several departments began to draft required implementing regulations".

¹⁷¹ See *infra* n538.

¹⁷² See *infra* para 7.3.2.4.

identify or adequately address forced labour among migrant workers, as well as amongst foreign and South African children. Law enforcement efforts remain focused on sex trafficking, despite increasing reports of labour trafficking in mines and on farms. There is also criticism that the South African government devotes little funding for anti-trafficking law enforcement or victim protection, despite the availability of financial and other resources. Substantial financial and personnel contributions are received from a large number of foreign donors and NGOs.

Notwithstanding a myriad of trafficking forms, a high crime rate, lack of adequate and available data regarding the extent, nature and magnitude of trafficking and many more quandaries, the government of South Africa has made some progress in addressing the phenomenon of trafficking in persons. This is especially evidenced in the draft legislation specifically created for this purpose.

7.3 The legal framework to combat human trafficking in South Africa

As evidenced from past colonial history,¹⁷³ South African law primarily has its roots in the Roman-Dutch and English legal systems.¹⁷⁴ This hybrid system contains aspects of both civil law- and common law-systems.¹⁷⁵ The jurisdiction's criminal law was reformed in 1806 and 1828 according to English law, but retained its Roman-Dutch legal foundations.¹⁷⁶ South African law is an uncodified legal system,¹⁷⁷ that is to say, the law originates from several sources such as legislation, common law, legal precedent, indigenous law, custom

¹⁷³ See *supra* para 7.2.

¹⁷⁴ See Burchell *Principles of Criminal Law* 3rd ed (2005) 137. According to Wessels *History of the Roman Dutch Law* (2005) 6: "Roman-Dutch law is a hybrid of medieval Dutch law - which is mainly Germanic in origin - and Roman law as defined by the *Corpus Juris Civilis* and its later reception." Roman-Dutch law was developed and adapted in South Africa. The English common law has its roots in Anglo-Saxon England and is very different from the Roman law of European countries.

¹⁷⁵ South African common law is based on Roman-Dutch law, and to a lesser extent on English law. See Zimmerman *Das Römisch-Holländische Recht in Südafrika - Einführung in die Grundlagen und Usus Hodiernus* (1983) 58ff.

¹⁷⁶ Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* 2nd ed (1960) 18-19. English civil law was also introduced in 1828, and English law of evidence in 1830. It is particularly in the field of the law of evidence where the Roman-Dutch law is intermixed with many elements of English law. See Zimmerman (n175 *supra*) 97-98. See also Kleyn & Viloen *Beginner's Guide for Law Students* 4th ed (2010) 33 who maintain that English law exerted its influence especially through legislation and precedent.

¹⁷⁷ Kleyn & Viljoen (n176 *supra*) 39. There have been calls for the creation of a completely new, codified South African law, which would, for many, simplify it and make it more easily accessible. However, the South African doctrine criticises mainly the rigidity of codification and the difficulty to codify precedents reaching back a couple of hundred years. See Hahlo & Kahn (n176 *supra*) 28ff; Zimmerman (n175 *supra*) 73.

and the Constitution.¹⁷⁸ Legislation is only created when required, for example, to address needs in society or gaps in the common law. Not all sources have the same authority.¹⁷⁹ The diversity of the South African legal system is not only an advantage¹⁸⁰ as some authors like to point out, but also has many disadvantages.¹⁸¹ The cultural diversity, the existence of features of the law based upon two different legal systems¹⁸² and the numerous statutes make the law difficult to understand.¹⁸³ The new dispensation brought about new challenges that relate more to different cultural values. For example, the philosophy of *ubuntu* is cited in many constitutional cases. This value and other constitutionally-entrenched rights will be focused on in more detail in the following chapter.

Added to these challenges, the contemporary phenomenon of human trafficking emerged as an international and national concern. Except for sections on trafficking for sexual exploitation in the Sexual Offences Act 2007 and on child trafficking in the Children's Act, comprehensive legislation that specifically prohibits human trafficking has not as yet been introduced in South Africa.¹⁸⁴ In order to prosecute human-trafficking offenders, the common law was utilised in the past. Trafficking situations were dealt with under a variety of other crimes such as kidnapping; rape; abduction; assault; and so forth. However, the problem with employing common-law crimes to act against trafficking transgressors is that some of these offences are of a less serious nature, and that only certain aspects of the trafficking phenomenon are dealt with. Also, the sentences that may be imposed do not always reflect the severity of the crime.

There are also statutory provisions which can be utilised to prosecute possible offenders. These include statutes on sexual offences, child care, corruption, organised crime, and

¹⁷⁸ The Constitution of South Africa 1996 will be discussed in Chap 8.

¹⁷⁹ Kleyn & Viloen (n176 *supra*) 40. Some have binding authority, while others have merely persuasive authority.

¹⁸⁰ Eg, Holmes J in *Ex Parte de Winnaar* 1959 (1) SA 837 (N) 839 describes the colourful legal history: "No doubt its roots are Roman-Dutch, and splendid roots they are". See also Zimmerman (n175 *supra*) 39.

¹⁸¹ See Zimmerman (n175 *supra*) 67, 69, 72.

¹⁸² Though there are fundamental differences between the two legal systems, Hahlo & Kahn (n176 *supra*) 47 point out that: "It would be entirely wrong to think of Roman-Dutch Law and English law as mutually incompatible systems which, like oil and water, do not mix".

¹⁸³ See Hahlo & Kahn (n176 *supra*) 49 who explicitly confirms this. See also Du Plessis & Du Plessis *An Introduction to Law* 3rd ed (1999) 60-61 who comment that the predominantly positivist interpretation of laws in South Africa also has the effect that they are applied very strictly on one hand and interpreted in conformity with common law on the other hand.

¹⁸⁴ See the Sexual Offences Act 2007 (n249 *infra*) Part 6 ss 70-71; and Children's Act 2005 (n296 *infra*) Chap 18, ss 281- 291.

many more. Again, none of these statutes are comprehensive or specific enough to effectively protect victims of trafficking or to provide proper sentences for such conduct. Legislation needs to be promulgated as a matter of urgency in order to protect specifically vulnerable persons from human trafficking and to provide appropriate sentencing strategies. The lack of legislation which addresses the criminalization of trafficking in persons also undermines ongoing efforts by other sub-Saharan governments, NGOs and international organizations to counter trafficking in persons in the region. Despite the best efforts of the prosecuting authorities in South Africa to prosecute practices related to human trafficking, they are limited to provisions of related legislation and the recognised offences in the common law. These provisions will now be examined.

7.3.1 The common law

There is no common-law provision dealing with trafficking *per se*. Under common law, depending on the circumstances of each case, there are a number of options available to the prosecution for charging a suspected trafficker. These crimes include, amongst others, slavery, sexual assault; rape, common assault, indecent assault, assault with the intent to do grievous bodily harm, murder; attempted murder, culpable homicide, kidnapping; abduction; extortion and conspiracy to commit any of these offences, as well as in the case of organ harvesting and the crime of tampering with a corpse.

Slavery can perhaps be the starting-point for an investigation into the prosecution and penalizing of criminal activities committed during the human trafficking process. As indicated at the beginning of this chapter, slavery was an institution that developed over many centuries, and was introduced in South Africa by means of the Dutch common law relating to slavery which was again based entirely on the well-developed principles of the Roman law of slavery.¹⁸⁵ With the abolition of slavery, the practice became a crime. It has been recognised as a crime under international customary law in South Africa since the signing of the Slavery Convention,¹⁸⁶ in terms of which South African courts could exercise

¹⁸⁵ See *supra* para 7.2.

¹⁸⁶ *Ibid.*

jurisdiction.¹⁸⁷ Also, as an international crime all nations are obligated to prosecute the perpetrators of slavery as *hostis humani generis* (enemies of mankind). Prohibitions against slavery and the slave trade are compelling law and thus included under *jus cogens* norms that command peremptory authority. As such, South Africa has to punish slavery offences not only in terms of international customary law obligations, but also because these laws are incorporated into the common law of South Africa.¹⁸⁸ Historically, slavery was regarded as a crime after the abolishment of the practice at the Cape.¹⁸⁹ Although older legal texts did refer to the crime of slavery,¹⁹⁰ current criminal-law textbooks make no mention of it. It is submitted that even though a crime is no longer referred to by criminal law authors, or that there are no known prosecutions for such a crime, does not mean that such a crime is no longer acknowledged or that the crime has fallen into desuetude altogether.¹⁹¹ The application of slavery as a common-law crime to contemporary human trafficking transgressions remains a possibility, but without any precedents as guidance to its ambit, it would be difficult to apply.¹⁹²

The trafficking of a minor for the purpose of forced marriage or sexual intercourse may be punished under the common-law crime of abduction.¹⁹³ The legal interest protected by this

¹⁸⁷ This is according to Lansdown & Campbell *Gardiner & Lansdown: South African Criminal Law and Procedure: Vol V, Criminal Procedure and Evidence* (1982) 19-20; Dugard (n94 *supra*) 141, 143.

¹⁸⁸ Dugard (n94 *supra*) 160.

¹⁸⁹ During the period of slave-trading at the Cape, the enslavement of a freed slave was also considered a crime. Eg, in the *Rex v Christian Philip Zinn*-case of 1823, which involved the illegal enslavement of a freed slave girl in the Cape Colony, it was commented that —. the free inhabitants of the Cape were becoming more and more convinced of the illegality of the existence of slavery in general, and of the injurious consequences attached to that state”. See Lloyd —Celebrated Cape Trials: *Rex v Christian Philip Zinn for Falsification and Plagium*” 1921 39 *South African Law Journal* 398 402. Slavery is described at 398: —the willful suppression of a free person as a slave was the crime known by this name [*plagium*] in Roman law. Van der Linden describing the Dutch equivalent, *Menschenroof*, declares it to be the suppression of a man with intent to deprive him of his liberty.” In *R v Motati* (1896) 13 SC 173 [224], slavery is again held by the court as a crime. In this case, an indigenous tribe practiced a custom which was held equivalent to slavery. Also see Burchell (n174 *supra*) 759.

¹⁹⁰ Eg, in Lansdown, Hoal & Lansdown *Gardiner and Lansdown: South African Criminal Law and Procedure Vol II - Specific Offences* 6th ed (1957) 1062-1063, the offence of slave-trading is described. Slave-trading is however regarded by the authors as a statutory crime as anti-slavery enactments dating from 1806 are utilized for its criminalization.

¹⁹¹ South African Law Reform Commission (SALRC) *Trafficking in Persons* (2008) 14. The South African legislature has also implemented the Rome Statute in 2002, whereby the Statute’s definition of enslavement is incorporated into domestic law. A South African court trying an accused for the crime of slavery would have to apply the international definition of this crime, but the general principles of South African criminal law to interpret the meaning of the definition. See Burchell *South African Criminal Law and Procedure Vol 1* 4th ed (2011) 7.

¹⁹² In this regard the international crime of slavery may be of assistance, as a definition already exists here.

¹⁹³ Abduction is the unlawful and intentional removal of an unmarried minor from the control of her/his parents or guardian without the consent of such parent or guardian with the intention of marrying the minor,

crime is the authority of the parents or guardian, as such; the consent of the minor to the abduction provides not defence to the perpetrator. If the minor did not consent to the act, a charge of kidnapping may also be instituted.¹⁹⁴ In this regard, abuse of the *ukuthwala* tradition where a young child is illegally removed from the parents' dwelling for the purpose of forced marriage or sexual intercourse, could qualify as criminal abduction.¹⁹⁵ It seems that courts acknowledge that certain forms of *ukuthwala* do constitute abduction.¹⁹⁶ As such, this common-law crime finds application in these types of trafficking cases.

Kidnapping¹⁹⁷ occurs quite frequently as trafficked persons are often deprived of their freedom by means of captivity,¹⁹⁸ or by enticing them away by means of deceit.¹⁹⁹ Kidnapping in the human trafficking process is often used as the means of capturing people,²⁰⁰ who are then transported to be used in the sex or other trades in foreign countries or milieus.²⁰¹ But the purpose of human trafficking is much broader than merely that of kidnapping. A person is trafficked for any type of exploitative purpose which may include the violation of several human rights, not only the deprivation of liberty.²⁰² A

marrying the minor off to someone else, or having sexual intercourse with the minor. See Snyman *Criminal Law* 5th ed (2008) 403; Burchell (n174 *supra*) 762. Statutory abduction, as created by s 13 of the Sexual Offences Act 23 of 1957 was repealed by the Sexual Offences Act 2007.

¹⁹⁴ Snyman (n193 *supra*) 404.

¹⁹⁵ Burchell (n174 *supra*) 764.

¹⁹⁶ See Burchell (n174 *supra*) 764. In a case heard in the Lusikisiki Regional court in Apr 2011, 3 men were sentenced to a total of 16 yrs imprisonment after being convicted of the abduction of a 15-yr-old girl. The main perpetrator, who was the suitor, was sentenced to 10 yrs imprisonment of which 5 yrs was suspended on condition that he does not commit the same offence. The remaining 2 accomplices were each sentenced to 3 yrs imprisonment. Their sentences were suspended for 5 years on condition that they do not commit the same offence. See also *Nienaber v Minister of Safety and Security* (A290/09) [2010] ZAFSHC 96 where the plaintiff was accused of abduction and rape by a 15-yr-old girl, but the charges against him were subsequently withdrawn as adequate evidence to prove the offence was lacking.

¹⁹⁷ Kidnapping is the unlawful and intentional deprivation of a person's freedom of movement or the parental control in the case of a child. See Burchell (n174 *supra*) 758; Snyman (n193 *supra*) 479. See the case of *S v Levy* 1967 (1) SA 353 (W) which makes it clear that the definition applies to men, women and children.

¹⁹⁸ Eg, see *S v Mellors* 1990 (1) SACR 347 (W) where the accused entered a building and kept the victim against her will. The accused was accordingly convicted of kidnapping.

¹⁹⁹ As in *R v Long* 1970 (2) SA 153 (RA) where the accused pretended to be a photographer's assistant who had to fetch a little girl from her school to photograph her, and in this way obtained possession of the girl.

²⁰⁰ Eg, see the Pretoria case of *S v Elizabeth Maswanganye* (2006) as reported by the NPA (n168 *supra*) 6. The accused was convicted of kidnapping, running a brothel and soliciting girls for carnal intercourse (ss 2 & 14 of Sexual Offences Act 2007 (n249 *infra*)). She lured victims with promises of employment and forced them into prostitution. She was sentenced to 5 yrs imprisonment in terms of CPA s 276(1)(i).

²⁰¹ South African courts have no jurisdiction to charge a perpetrator with kidnapping if the victim was kidnapped in another country before being brought to South Africa. See *S v Fraser* 2005 (1) SACR 455 (SCA) 458.

²⁰² Kruger & Oosthuizen –South Africa – Safe Haven for Human Traffickers? Employing the Arsenal of Existing Law to Combat Human Trafficking” 2012 15(1) *Potchefstroom Electronic Law Journal* 283 287. See eg, the case of *S v Nyabo* (327/07) [2008] ZASCA 150; [2009] 2 All SA 271 (SCA), where 2 men were convicted of the kidnapping and rape of a young woman. She was forcefully abducted by gunpoint in a public street in

conviction of kidnapping would not be warranted if an adult person consented or volunteered to accompany the alleged kidnappers.²⁰³ But a child cannot give consent to such a situation, as the custodians' interest would be violated if their legal consent was not obtained. Traffickers are thus not allowed to use the child's consent as a defence. In the absence of recognized trafficking legislation or in situations where not all the elements of the trafficking offence can be established, the crime of kidnapping remains an option to take legal action against perpetrators.

Some of the worst cases of trafficking involve rape,²⁰⁴ either as an induction method or to subjugate any adverse behaviour of victims. Rape charges can be laid against perpetrators – traffickers as well as clients - who force persons to have sexual intercourse against their will. Traffickers can also be charged as accomplices to rape, if they intentionally further the commission of the crime by providing clients with the opportunity to commit rape.²⁰⁵

In addition to rape, charges of common assault, assault with the intent to do grievous bodily harm, and indecent assault could be laid against perpetrators of a victim of trafficking.²⁰⁶ At the minimum, offenders can be charged with common assault if perpetrators intentionally applied force to a victim or threatened that force would be imminently applied to them.²⁰⁷ Although this form of assault usually occurs as the actual

Port Elizabeth and brought to a darkened shack, where she was raped by each in turn. She was able to leave after the incident, in contrast to human trafficking victims who are kept captive until they are either rescued, escape, or die.

²⁰³ See the decision in *Burger and Others v S* (236/09) [2010] ZASCA 12; 2010 (2) SACR 1 (SCA); [2010] 3 All SA 394 (SCA). Where consent is initially given but later withdrawn, this could however find liability.

²⁰⁴ The common-law crime of rape is defined as the unlawful and intentional sexual intercourse with a female per vagina without her consent. See Snyman (n193 *supra*) 355. The common-law crime of rape was applicable to cases prior to Sexual Offences Act 2007. The Constitutional Court in *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) 30-32 has interpreted the common-law crime in such a way so as to allow a broader definition of sexual intercourse which includes the anal penetration of a female.

²⁰⁵ As an accomplice's liability is accessory in nature, if a client who has raped a victim cannot be traced, the trafficker can probably not be charged. Due to the anonymity of the sex trade, it is practically very difficult to track down clients.

²⁰⁶ In *S v Amien Andrews* Case No 27/50/98 (Unreported), 2 Nov 2002, Cape Town Regional Court, Andrews targeted and lured young females to a brothel under false pretences. He kept the girls captive, and exploited them sexually for financial gain. The girls were tattooed as a means of branding them as belonging to him and kept compliant by imposed drug addiction. Andrews was found guilty of kidnapping, assault to do grievous bodily harm, indecent assault and rape and was sentenced to a total of 17 yrs imprisonment.

²⁰⁷ Common assault is committed if a person unlawfully and intentionally applies direct or indirect force to the person of another, or inspires a belief in another person that force is immediately to be applied to him. See

application of force such as punching a victim, it may also be applied indirectly by means of administering drugs or intoxicating substances to the victim.²⁰⁸ Trafficked persons may also be frightened by means of threats into believing that they will be physically assaulted if they for example would attempt to escape. Assault with intent to commit grievous bodily harm²⁰⁹ is particularly relevant to the crime of human trafficking, as victims are often subjected to intentional and harmful assault by their captors, to break their spirit and to force them to comply with demands.²¹⁰ An assault with the aim of committing an indecency is also applicable.²¹¹ An indecent assault charge can be laid if perpetrators intentionally assaulted, touched or handled a victim in an indecent way or with indecent intentions.²¹² The common-law crime of indecent assault was repealed by section 68(1)(b) of the Sexual Offences Act 2007, and substituted with the offence of sexual assault (section 5 of the Sexual Offences Act 2007).²¹³ Still, a sentence imposed for indecent assault may be more lenient than if the accused had been convicted of rape.²¹⁴ This would not have the necessary deterrent effect for traffickers.

Snyman (n193 *supra*) 455. It seems that the courts also consider the cultural background of an offender who assaults. In *S v Ngubeni* [2009] 1 All SA 185 (T), the accused had been convicted of assault and domestic violence, and sentenced to 12 months' imprisonment, conditionally suspended for 5 yrs. Not only did the court consider the fact that the complainant had not sustained any visible injuries, but also the accused person's culture with regards to domestic violence perpetrated by men who come from an African background. The sentence was subsequently reduced.

²⁰⁸ These situations are analogous to the case of *S v Marx* 1962 (1) SA 848 (N), who fed wine to his young children, causing them to become ill.

²⁰⁹ Assault with the intent to commit grievous bodily harm is the unlawful and intentional application of force to the person of another or a threat thereof. See Snyman (n193 *supra*) 461-462.

²¹⁰ In *S v Mthembu* (379/07) [2008] ZASCA 51; [2008] 3 All SA 159 (SCA); [2008] 4 All SA 517 (SCA); 2008 (2) SACR 407 (SCA), it was emphasized that the use of assault and torture as a means to obtain an intended outcome (in this particular case, it was the giving of evidence) is unlawful.

²¹¹ Indecent assault is the unlawful and intentional assault, handling or touching where either the act or the intent is indecent. See Snyman (n193 *supra*) 371.

²¹² In *S v Carolus* (32/07) [2008] ZASCA 14; [2008] 3 All SA 321 (SCA); 2008 (2) SACR 207 (SCA), the accused indecently assaulted an 8-year-old boy by penetrating the boy's anus with his penis, and was sentenced to 8 yrs imprisonment. Many indecent assaults in the trafficking underworld occur, eg, in pornographic videos and acts of bestiality.

²¹³ The relevant provisions in Sexual Offences Act 23 of 1957 and the Sexual Offences Act 2007 will be discussed *infra* respectively in para 7.3.2.1 and para 7.3.2.2.

²¹⁴ However, in *Direkteur van Openbare Vervolgings, Transvaal v Tshabalala* 2006 (2) SACR 381 (TPD) where the accused was found guilty of indecent assault by penetrating a 6-year-old boy anally, the court commented that when considering an appropriate punishment, it is obliged to consider the nature and the gravity of the offence and not merely look at the legal definition thereof. See also the *Masiya*-case *supra* n204.

Indecent assault and similar violations are usually supplemented by the crime of *crimen iniuria*.²¹⁵ Trafficking victims' dignity may be impaired in myriad manners during the trafficking process. Not only does the trafficker often use vulgar and injurious language, but also abusive behaviour such as forced participation in sexual acts and unsolicited sexual fondling or touching.²¹⁶ Although trafficked persons do not have any control over their privacy in a trafficking situation, a trafficker may also be convicted of *crimen iniuria* for violations of privacy.²¹⁷ Traffickers may also be charged with criminal defamation²¹⁸ if their damaging utterances or conduct come to the attention of someone other than the complainant. In this regard, the trafficker intends to harm the victim's reputation by exposing victims' activities as prostitutes or drug mules to their families and communities without divulging that they were coerced or tricked into the situation. Once freed or having escaped, victims are reluctant to return home because of the stigmatisation.

Traffickers are often guilty of murder²¹⁹ as prolonged torture of the victims may result in death. Charges of attempted murder can be laid if a trafficker performs any act with the intention to cause the death of a trafficking victim, whether directly, indirectly or by *dolus eventualis*, but fails to bring about the desired result. Where trafficked persons are raped by HIV-positive or AIDS-infected traffickers or clients, whilst knowing their status; a charge of attempted murder can also be instituted against the perpetrators.²²⁰ If the victim succumbs from the disease contracted as a direct result of being raped, a charge of murder could be laid against the perpetrator.²²¹ There may also be cases where the deaths of trafficking victims are caused by perpetrators' negligent conduct. In these instances, a

²¹⁵ *Crimen iniuria* consists in the unlawful and intentional serious violation of the dignity or privacy of another person. See Snyman (n193 *supra*) 467; Burchell (n174 *supra*) 746.

²¹⁶ These types of behaviour have been proven in the courts to be indecent and infringing on the dignity of the victims. Eg, see *Coetzee v S* (502/08) [2009] ZASCA 134; 2010 (1) SACR 176 (SCA); [2010] 2 All SA 1 (SCA) where a pastor at the Apostolic Faith Mission Church in Richards Bay was sentenced to an effective term of 4 yrs' imprisonment upon conviction on 4 counts of indecent assault and 2 counts of *crimen iniuria* for unwarranted sexual fondling of girls during so-called counselling sessions.

²¹⁷ Burchell (n174 *supra*) 753, and Snyman (n193 *supra*) 473, mention intrusions such as eavesdropping on victims and voyeuristic peeping.

²¹⁸ Criminal defamation is "the unlawful and intentional publication of matter concerning another which tends seriously to injure his reputation". See Snyman (n193 *supra*) 475.

²¹⁹ According to Snyman (n193 *supra*) 447, murder is the unlawful and intentional causing of the death of another human being.

²²⁰ This was confirmed in *S v Nyalungu* 2005 JOL 13254 T. In this case concerning non-consensual sexual intercourse, a HIV-positive accused was convicted of both rape and attempted murder for sexually penetrating the victim with the knowledge that he was HIV-positive and could infect sexual partners if no protective prophylactics were used. Such a conviction is possible even if the rape victim is already infected with the virus.

²²¹ See SALRC (n191 *supra*) 13.

charge of culpable homicide²²² may be instituted against the transgressors. For example, in one case, eighteen Zimbabweans who had attempted to cross the border into South Africa illegally were found suffocated in a truck near the Tlokweng border gate. The truck driver who had discarded the bodies, as well as the recruiting agent in Bulawayo were prosecuted for and found guilty of the crime of culpable homicide.²²³

Another common-law crime which may be used to combat trafficking is extortion.²²⁴ Victims of trafficking are often threatened or intimidated with harm against their own person or retaliation against their families as a way of forcing them to submit to the demands of perpetrators. Other role players in the trafficking scenario, such as border and police officers, may also demand patrimonial or non-patrimonial advantages for their cooperation. As held by the court in *S v Msane and Another*, extortion –especially when committed by law enforcement officers, is morally reprehensible”,²²⁵ and should be strictly punished.

The crime of fraud may be used to prosecute trafficking offenders for unlawful and intentional making of misrepresentations which causes actual prejudice or is potentially prejudicial to trafficked persons.²²⁶ Many victims are recruited by means of false promises of employment or educational opportunities. Although the prejudice in most cases is either real or potential, the prejudice need not necessarily be proprietary in character. One could consider here cases where, through fraudulent misrepresentation, agreements are entered into or privileges are obtained by a person who is not entitled to them. Also, the impairment of the victim’s dignity or reputation by making false allegations against her,

²²² Culpable homicide is the unlawful, negligent causing of the death of another human being. See Snyman (n193 *supra*) 453.

²²³ UNODC *A 2005 Situational Assessment of Human Trafficking in the SADC Region* (2007) 12.

²²⁴ Snyman (n193 *supra*) 426 defines the crime of extortion as the unlawful and intentional obtaining of some advantage, which may be of either a patrimonial or a non-patrimonial nature, from another by subjecting the latter to pressure, which induces such person to hand over the advantage.

²²⁵ See *S v Msane and Another* (96/2008) [2008] ZASCA 118; [2009] 1 All SA 454 (SCA) 10. In this case a sergeant and constable attached to the SAPS’ Hillbrow Crime Intelligence Unit arrested the complainant on possession of 17 ecstasy tablets. They demanded that she pay them an amount of ZAR4,000 on receipt of which they would drop charges and return the ecstasy tablets to her. She agreed to make the payment, but reported the incident to the SAPS Anti-Corruption Unit, whereupon the suspects were apprehended during a sting operation. On the extortion count they were sentenced to 4 yrs’ imprisonment one of which was suspended for 5 yrs on condition that they were not convicted of extortion or of a contravention of s 1(1) of the Corruption Act 94 of 1992 committed during the period of suspension.

²²⁶ Snyman (n193 *supra*) 531.

could qualify as non-proprietary prejudice.²²⁷ The forging²²⁸ and uttering²²⁹ of identification documents, passports or visas, with the aim of presenting such documents as being authentic, may also be employed to prosecute traffickers and their counterfeiting agents. A charge of uttering may only be instituted if the falsified document is brought to the attention of others, such as government officials or border guards.

Trafficking in body parts may be countered by crimes such as the unlawful and intentional tampering with or violation of a corpse,²³⁰ or illegal possession of body parts. There are many cases where organs or body parts are removed from victims specifically trafficked for this purpose. As it is often difficult to prove without direct evidence that body parts were harvested from the victims whilst alive, a charge of violation of a corpse will suffice. Body parts may also be illegally removed from mortuaries or graves and sold for profit.²³¹ It has been noted that evidence in cases such as these are difficult to collect, as individuals do not wish to testify as witnesses due to fear of repercussions. Offenders are rarely charged and generally released, if convicted, upon the payment of a fine of approximately ZAR2,000.

One can submit that though common-law crimes can be utilized to challenge some trafficking elements, these offences are not comprehensive enough to amply deal with the complexities of human trafficking. There are also further challenges when applying these laws to cases involving cross-border human trafficking. For example, if the person was kidnapped in another country and brought to South Africa; it would not be possible to charge the perpetrator with kidnapping as the actual kidnapping would fall outside the jurisdiction of South African courts. There are existing statutes that may perhaps be utilized in such and other cases. These laws will now be examined.

²²⁷ See Snyman (n193 *supra*) 538.

²²⁸ Forgery consists of the unlawful and intentional making of a false document to the actual or potential prejudice of another. See Snyman (n193 *supra*) 540.

²²⁹ Uttering is the unlawful and intentional passing off of a false document to the actual or potential prejudice of another. See Snyman (n193 *supra*) 543.

²³⁰ Snyman (n193 *supra*) 446. Also see *S v Coetzee* 1993 2 SACR 191 (T).

²³¹ By intentionally disturbing, destroying or damaging a grave, the offender can be charged with another crime, ie violating a grave. See Snyman (n193 *supra*) 445. Robbing the grave of human remains or theft of a body would fall under this crime. In *R v Sephuma* 1948 (3) SA 982 (T) the accused dug up a child's body and mutilated it to make *muthi*. He was sentenced to 6 months imprisonment.

7.3.2 Statutory Law

Various statutory crimes may be used to prosecute those involved in human trafficking. Some of these crimes may be employed to challenge components of trafficking, while two Acts were introduced as specific transitional legislation for the purpose of combating sexual exploitation of persons and child trafficking.

7.3.2.1 The Sexual Offences Act 23 of 1957

The Sexual Offences Act 23 of 1957 (originally known as the Immorality Act 1957)²³² contains various provisions that could be of use when prosecuting a case involving trafficking. Although a number of sections of this Act were repealed by the Sexual Offences Act 2007,²³³ certain sections are still valid and may be applicable in combating human trafficking. The Act prohibits prostitution, brothel-keeping and the procurement of women as prostitutes and other activities related to prostitution.²³⁴ It also prohibited various other sex offences which replaced offences created in terms of the Sexual Offences Act 2007. Other significant provisions relate to procuring and illegally detaining a woman for the purpose of sex, use of premises for the commission of any other offence in terms of the Act, soliciting by prostitutes, prostitution and living off the earnings of prostitutes are also of assistance in prosecuting suspected traffickers. Still, the Act does not make adequate provision for the prosecution of trafficking cases for purposes of sexual exploitation as it does not recognise that boys or men can be victims of rape.

²³² This Act was infamous for prohibiting sex between a white person and a person of another race, until that prohibition was removed by a 1985 amendment.

²³³ These are ss 9, 11, 12(2), 13-15, 18, 18A, 20A – see the Schedule to the Sexual Offences Act 2007 (n249 *infra*).

²³⁴ Ss 2-8 concern provisions regarding brothel-keeping and the closing of brothels. In the case of *Phillips and Others v National Director of Public Prosecutions* (CCT 55/04) [2005] ZACC 15; 2006 (2) BCLR 274 (CC); 2006 (1) SA 505 (CC), the appellant was convicted of running a brothel, living off the proceeds of prostitution, procuring women to have sex with clients (in contravention of the Sexual Offences Act 1957) and employing illegal immigrants (in contravention of the Aliens Control Act) at “The Ranch Executive Entertainment Centre”-complex. Although this case essentially concerned a restraint order in terms of the POCA, the legislation applied had the effect of secondary victimization of the victims of trafficking, as 40 women of foreign nationalities were arrested at the complex and deported.

Section 2 makes it illegal to keep a brothel²³⁵ while section 3 defines various people who are deemed to be brothel-keepers.²³⁶ These provisions assist with the identification of suspected traffickers or brothel owners as they provide for criminal sanctions against any person directly or indirectly involved in running a brothel, but no provision is made for the parent or custodian who prostitutes a child. This was rectified by the 1988 amendment to the Sexual Offences Act 1957 to include any parent or guardian of a child that orders, permits, or in any way assists in bringing about, or receives any consideration for, seduction, or prostitution of such a child.²³⁷ The onus to prove that the owner of a building used as a brothel knew that it was a brothel is placed on the prosecution.²³⁸ The procurement of a woman to have sex with a third party, enticing a woman to a brothel for the purpose of sex, inducing a woman to become a prostitute, procuring or attempting to procure a woman to become an inmate of a brothel, and using drugs or alcohol to overpower a woman to allow a third party to have sex with her is criminalised in section 10.²³⁹ Section 12 is significant for victims held in captivity, as the unlawful detention of a female against her will - either with the intention that she would have sexual intercourse with a male, or with the intention that she be detained in a brothel - is prohibited. Section 12A, inserted in 1967, creates the crime of assisting a person to communicate with

²³⁵ A brothel is defined as “any house or place kept for the purposes of prostitution or for persons to visit for the purposes of having unlawful carnal intercourse or any other lewd or indecent purpose”. See Sexual Offences Act 1957 (n232 *supra*) s1. In *S v Amien Andrews* (n206 *supra*), Andrews was convicted of running a brothel in terms of the *Sexual Offences Act* 23 of 1957 and of 2 counts of common-law rape.

²³⁶ This list includes anyone who resides in a brothel, manages or assist in a brothel, knowingly receives money taken from a brothel, knowingly permits a house or place to be used as a brothel, knowingly lets a house or place knowing that it is or will be used as a brothel, is found in a brothel and refuses to disclose the identity of the manager, and the spouse of any person who keeps a brothel (unless the spouse is ignorant of the undertaking). In *S v Sawatkan* Case No 41/2045/08 Durban (Unreported) and in *S v Wiphatawaithaya* Case No 317/2/09 Durban (Unreported), both accused persons were convicted in terms of the Sexual Offences Act 1957 as brothel-keepers.

²³⁷ See *Delpont et al* (n1 *supra*) 47; *Chichava & Kiremire* (n51 *supra*) 77. This is a significant improvement compared to the Child Care Act 1983, as amended in 1999. See *infra* para 7.3.2.4.

²³⁸ Sexual Offences Act 1957 (n232 *supra*) s 4. The onus of proof lies with the accused to prove that he was ignorant that a house or place was used as a brothel if the rent paid to the owner was exorbitant (having regard to the locality and accommodation), or the owner was notified by a police officer or by two householders from the vicinity that the building was used as a brothel. The penalty for brothel-keeping was originally imprisonment for up to 3 yrs with or without a fine of up to ZAR6,000; in 1988 the fine was raised to ZAR6,000. Ss 5, 6, 7 & 8 concern further procedural issues regarding the use of buildings as brothels; s 5 declares that any contract to let a building for use as a brothel is null and void, while s 6 voids any contract to let a building if that building subsequently becomes a brothel (but allows that an unknowing owner may still recover rent). S 7 allows the owner of a building being used as a brothel to apply to the local magistrate for a summary eviction order, and s 8 allows a magistrate to issue a warrant for the search of an alleged brothel and the arrest of the alleged brothel-keeper. Such a warrant must be based on the sworn testimony of 2 householders of good repute in the vicinity, a police officer, a welfare officer or a welfare organization registered under the National Welfare Act 1978 (Act 100 of 1978).

²³⁹ The penalty was originally imprisonment for up to 5 yrs, or until 1985, 7 yrs if the sexual intercourse in question was interracial.

another person for the purpose of sex for reward.²⁴⁰ The aim is to criminalise the activities of escort agencies, another establishment known for trafficking violations.²⁴¹

Persons indirectly involved in the crime such as those who have knowledge of the offence, or owners or occupiers of any house or place²⁴² who allow their place to be used in the commission of any other offence against the Act, is penalised in section 17.²⁴³ Brothel-keepers and traffickers who live off the earnings of prostitution or assisting in the commission of indecent acts are punished in terms of section 20. Of particular interest is section 20(1A) which provides that any person eighteen years or older who has unlawful intercourse or commits an act of indecency with any other person for reward is guilty of an offence. This section was inserted by the Sexual Offences Act 2007 after section 20(1)(aA)²⁴⁴ was declared inconsistent with the Constitution and therefore invalid in *Jordan and Others v The State* 2002 (1) SACR 19 (TPD). However, in *Jordan and Others (Sex Workers Education and Advocacy Task Force and others as Amici Curiae) v The State*, the Constitutional Court unanimously upheld the High Court's finding that the brothel provisions were valid.²⁴⁵

²⁴⁰ The penalty is imprisonment for up to 5 yrs. The Sexual Offences Act 2007 amended this section by specifying that the age of the persons involved in the offence should be 18 yrs or older.

²⁴¹ In this regard, see eg, *S v Egglestone* (482/07) [2008] ZASCA 77; [2008] 4 All SA 207 (SCA); 2009 (1) SACR 244 (SCA) where the owner of an escort agency was found guilty of raping and indecently assaulting a prospective prostitute during on-the-job training.

²⁴² A house includes a dwelling-house, building, room, out-house, shed or tent or any part thereof; while a place includes any field, enclosure, space, vehicle, or boat or any part thereof. See Sexual Offences Act 1957 (n232 *supra*) s1.

²⁴³ The penalty was originally up to 6 yrs imprisonment and a fine of up to ZAR1,000; in 1988 the fine was increased to ZAR12,000. In *National Director of Public Prosecutions v Geysers and Another* 2008 (2) SACR 103 (SCA) 16-17, 31, 36, the Court found that immovable property bought, revamped and used for the purpose of the offence of keeping a brothel in contravention of s 2 of the Sexual Offences Act 1957 (n232 *supra*) constituted an instrumentality of the offence of keeping a brothel.

²⁴⁴ S 20(1)(aA) was inserted by s 7 of the Immorality Amendment Act 1988. It provided that —~~any~~ person who ... (a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or (b) in public commits any act of indecency with another person ... shall be guilty of an offence”.

²⁴⁵ *Jordan and Others (Sex Workers Education and Advocacy Task Force and others as Amici Curiae) v The State* 2002 (6) SA 642 (CC). The appellants, a brothel owner, a brothel employee and a prostitute appealed to the Constitutional Court arguing that the brothel provisions should be found unconstitutional. In its judgment, the Constitutional Court ruled against the appellants, but it was divided 6 to 5 in the question of the legality of prostitution as an offence in accordance with the Sexual Offences Act 1957 (n232 *supra*) s 20(1)(aA). The majority upheld prostitution as an offence, whereas the minority stated that prostitution as an offence constitutes unfair gender discrimination as the prostitute and the customer are treated differently in the provision. Ngcobo J found on behalf of the majority that the provision criminalises both male and female prostitution and is therefore not directly discriminatory. He further found that there is a qualitative difference between the person who conducts business as a prostitute and a customer. This means that under the common law and statute, the prostitute is made the primary offender, whilst the customer is at most an accomplice. Through this provision, sexual double standards are reinforced and gender stereotypes perpetuated which is unacceptable in a society committed to advancing gender equality.

Although prostitution is criminalized by the amended Sexual Offences Act 1957,²⁴⁶ the South African sex industry is on the increase. A reason for this boom could be the new development projects in the region which may have caused an escalation in demand for commercial sex.²⁴⁷ This again may result in more persons being trafficked to satisfy this need. As observed, the penalties laid down for the offences created in the Sexual Offences Act 1957 are short-term imprisonment and fines, which are not at all appropriate to punish human trafficking. While seeking the appropriate legal interventions needed to combat and punish human trafficking, cognisance should be taken also of the SALRC's investigation into the legalisation and regulation of adult prostitution.²⁴⁸ In this regard, the legalisation and regulation of prostitution may assist victims of human trafficking to report victimization by human traffickers unreservedly.

7.3.2.2 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

As indicated in the long title, the preamble and the clause setting out the objects of the legislation, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act 2007)²⁴⁹ aspires to comprehensively review and amend all existing laws relating to sexual offences.²⁵⁰ The new provisions are intended that prosecutions relating to sexual offences be handled as quick and successful as possible,

²⁴⁶ In this regard, South Africa follows the prohibitionist approach to prostitution. Laws addressing trafficking for prostitution are generally divided into four theoretical subheadings: abolitionism, prohibitionist, regulation, and decriminalisation. See eg Jordan —“Commercial Sex Workers in Asia: A Blind Spot in Human Rights Law” in Askin & Koenig (eds) *Women and International Human Rights Law Vol II* (2000) 556, 525. Scibelli P —“Empowering Prostitutes: A Proposal for International Legal Reform” 1987 10 *Harvard Women's Law Journal* 117-157 divides all legal approaches to prostitution into 3 groups: prohibitionist, regulation, and abolitionism, and argues for the legalization of prostitution while coercion of women into prostitution should remain criminalized.

²⁴⁷ Delpont *et al* (n1 *supra*) 39.

²⁴⁸ The SALRC is currently investigating adult prostitution in order to determine whether the practice should be legalised, regulated, partially criminalised or totally criminalised. See SALRC *Adult Prostitution* (2009).

²⁴⁹ The Sexual Offences Act 2007 came into effect on 16 Dec 2007.

²⁵⁰ Any shortcomings in the common law crimes dealing with sexual offences, as well as in the Sexual Offences Act 1957 have been addressed in the Bill, with the view to bringing them into line with the new constitutional dispensation. Eg, in Chaps 2, 3 & 4 of the Act the common-law offence of rape is repealed, and replaced with the expanded statutory offence of rape. Rape is defined in the Sexual Offences Act 2007 (n249 *supra*) Chap 2, Part 1, s 3 as: —“Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence of rape.” Sexual penetration is described as: —“any act which causes penetration to any extent whatsoever by - (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person.”

with the least secondary trauma for the victims thereof. The Act is considered groundbreaking in that it advocates gender equality in all sexual offences and in protecting vulnerable groups, most notably women, children and persons who are mentally disabled from the scourge of sexual violence in its many manifestations. It is also the first time in South African legal history that a substantial portion of its criminal law is codified in a single statute. Apart from the introduction of a new definition of the crime of rape, new statutory offences are created such as sexual assault,²⁵¹ certain compelled acts of penetration or violation; for adults, compelling or causing the witnessing of certain sexual conduct and certain parts of the human anatomy, the exposure or display of child pornography and the engaging of sexual services of an adult. As the sexual exploitation of trafficking victims involves various acts of sexual abuse, these new offences may be utilised to address most of this type of conduct.

Chapters 3 and 4 of the Act have been devoted exclusively to protect particularly vulnerable victims of sexual offences, namely children²⁵² and persons who are mentally disabled. Four newly created crimes in Chapter 3 deals specifically with child victims, and can be successfully utilized to prosecute child sex trafficking offenders. The first crime of sexual exploitation of children²⁵³ aims to criminalise the actions of clients and other role players who are involved in the exploitation of children, for instance “pimps”. The second crime deals with the sexual grooming²⁵⁴ of a child, which is an entirely new concept in

²⁵¹ This augmentation of rape necessitated revisiting the common-law crime of indecent assault, which led to the creation of the new crime of sexual assault. This crime covers non-penetrative sexual acts, committed unlawfully and intentionally as contemplated in s 5 of the Act. Sexual assault takes place when: “A person (A) ... unlawfully and intentionally sexually violates a complainant (B), without the consent of B”, or when “[a] person (A) ... unlawfully and intentionally inspires the belief in a complainant (B) that B will be sexually violated.” See Sexual Offences Act 2007 (n249 *supra*) Chap 2, Part 1, s 5(1), (2).

²⁵² According to the Sexual Offences Act 2007 (n249 *supra*) Chap 1, a child is “a person under the age of 18 years; or with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years”. Giving particular protection to children is important as many child rapes are committed in the jurisdiction. Eg, the appellant in *S v Khumalo* (1957/2012) [2012] ZAKZPHC 27 faced one count of rape of a 13-yr-old female child, in contravention of s 3 read with ss 1, 56(1), 57, 58, 59, 60 & 61; in *S v Monageng* (590/06) [2008] ZASCA 129; [2009] 1 All SA 237 (SCA), the accused was sentenced to 18 yrs’ imprisonment for child rape; and an adult male was convicted of sexual assault on a 10-yr-old girl in contravention of s 5(1) read with the provisions of ss 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences Act 2007 (n249 *supra*) in *S v Van Rooyen* (CC128/2010) [2011] ZAECMHC 21. He received 8 yrs imprisonment of which half was suspended for a period of 5 yrs.

²⁵³ In terms of s17, a person who purchases or, on behalf of a child, sells the sexual services of a child, is guilty of the offence of sexual exploitation of a child. A person who engages the sexual services of a child for reward and then goes on to commit a sexual act with that child, can also be charged, prosecuted and convicted of a further offence, eg, rape or statutory rape, in addition to sexual exploitation.

²⁵⁴ Sexual grooming is described in the Sexual Offences Act 2007 (n249 *supra*) ss 18(2) & 24(2) as supplying, exposing or displaying to a child or a person who is mentally disabled an article which is intended to be

South African criminal law. The provision is specifically aimed at providing additional protection to children who are increasingly exposed to the danger of sex offenders who systematically groom them for sexual exploitation. This provision also covers those situations where sex offenders, through electronic communication tools such as cellular phones, the internet, and social networking websites, make contact with children to invite, persuade or entice children to respond to certain sexual activities, or lure them into sexual acts. However, the current definition of “grooming” does not include all types of non-contact sexual behaviour, which should be included according to some critics.²⁵⁵ This is important as it may illustrate progression in the grooming behaviour. The Act also does not clearly state whether the sexual grooming of a child is seen as premeditated, leading to the eventual sexual violation and/or penetration of the child, and thus as aggravating circumstances when a trafficker is found guilty of sexual violation of a child. Additionally, the Act has also been found to be limited in the scope of behaviour regarded as grooming, and in that the grooming process is limited to only the sexual grooming of the child.²⁵⁶ The last two crimes deal with the display or exposure of pornography and more particularly child pornography²⁵⁷ to children and using children in any manner whatsoever for the

used in the performance of a sexual act; child pornography or pornography; or a publication or film, with the intention to encourage, enable, instruct or persuade the child or mentally disabled person to perform a sexual act. Similarly, any act committed with or in the presence of these victims or describing any act to them with the intention to encourage or persuade them or to diminish or reduce any resistance or unwillingness to perform any type of sexual act will qualify as sexual grooming. Also, the acts of arranging or facilitating a meeting or communication, or travelling to meet and meeting these victims with such sexual purposes in mind will be seen as sexual grooming. A recent case which made use of this section concerned a 36-yr-old man who was charged with abduction and sexual grooming when he kidnapped a 13-yr-old girl on 28 Mar 2012 at the JJ van der Merwe Primary School in Ermelo. A search for the girl led to his arrest at Marloth Park in Komatipoort. See SAPA “Man in Court for Sexually Grooming a Teenager” *City Press* 04 Apr 2012 <http://www.citypress.co.za/SouthAfrica/News/Man-in-court-for-sexually-grooming-a-teenager-20120404> (accessed 2013-01-16).

²⁵⁵ See Aucamp, Steyn & Van Rensburg “A Critical Analysis of Legislation Pertaining to the Sexual Abuse of Children” 2012 13(1) *Child Abuse Research: A South African Journal* 1 3-4. According to these authors, —, the exclusion of other non-contact behaviours described in literature, such as sexual comments to a child, fetishism and voyeurism, can be seen as a shortcoming in the Act”.

²⁵⁶ See Minnie “Sexual Offences against Children” in Boezaart (ed) *Child Law in South Africa* (2009) 555. Various types of behaviour which have been recognised by practitioners and academics as grooming (eg emotional grooming, or establishing an emotionally rewarding relationship with the child for the purpose of sexual exploitation) are not included in the provisions of s 18(2) of the Act.

²⁵⁷ See Sexual Offences Act 2007 (n249 *supra*) Chap 1: —Child pornography means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person—
 (a) engaged in an act that constitutes a sexual offence;
 (b) engaged in an act of sexual penetration;
 (c) engaged in an act of sexual violation;
 (d) engaged in an act of self-masturbation;

creation of child pornography. These two provisions²⁵⁸ will undoubtedly contribute to more successful prosecutions in this area where children are so open to exploitation.

This legislation is novel since it actually provides for the care of victims of sexual abuse and persons trafficked for sexual exploitation. Chapter 5 provides that victims of sexual offences are entitled to be provided with comprehensive health services at state expense, commencing with post-exposure prophylaxis. This is on condition that they report the offence within 72 hours of its commission.²⁵⁹ Victims may also apply to court for an order directing that the alleged sex offender be tested for HIV, with the view to having the test results made available to the victim or any interested person on behalf of the victim.²⁶⁰ The Act also states that trafficking victims are not to be prosecuted for any directly-related offence such as the contravention of immigration laws or prostitution.²⁶¹

Chapter 6 - dealing with the creation of a National Register for Sex Offenders - reflects the government's resolve to promote the safety and security of certain vulnerable groups. Sex offenders are prohibited from being placed in positions of authority, supervision or care of children or persons who are mentally disabled.²⁶² The chapter aims to establish a record of convicted sex offenders of children or persons who are mentally disabled, whether such offences were committed before or after the commencement of the Chapter and whether

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- (e) displaying the genital organs of such person in a state of arousal or stimulation;
 - (f) unduly displaying the genital organs or anus of such person;
 - (g) displaying any form of stimulation of a sexual nature of such person's breasts;
 - (h) engaged in sexually suggestive or lewd acts;
 - (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
 - (j) engaged in any conduct or activity characteristically associated with sexual intercourse;
 - (k) showing or describing such person—
 - (i) participating in, or assisting or facilitating another person to participate in; or
 - (ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or
 - (l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons”.

²⁵⁸ Sexual Offences Act 2007 (n249 *supra*) ss 19 & 20.

²⁵⁹ See Sexual Offences Act 2007 (n249 *supra*) Chap 5 Part 1 s 28(1)(a)(i) – (iii) & s 28(2).

²⁶⁰ Sexual Offences Act 2007 (n249 *supra*) Chap 5 Part 1 s 28(1)(b) & s 30(1)(a). An investigating officer may also apply for compulsory HIV testing of alleged sex offenders, according to Chap 5, Part, s 32 of the Act. These provisions should not be interpreted as detracting from the importance of a victim determining his or her own HIV status, notwithstanding the outcome of the offender's HIV testing, and receive the necessary medical advice and treatment, after the commission of a sexual offence against him or her.

²⁶¹ Sexual Offences Act 2007 (n249 *supra*) s 71(5).

²⁶² Sexual Offences Act 2007 (n249 *supra*) s 41. Sex offenders' names must be listed on the register and employers are obliged to check that no potential or current employees are included therein.

they were committed in or outside the Republic.²⁶³ Most importantly for the giving of evidence by sexually-abused victims, the provisions of section 60 abolish the rigid application of the cautionary rule in sexual offences.²⁶⁴ This clause confirms the decision of the Supreme Court of Appeal in *S v Jackson*.²⁶⁵

Any person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official.²⁶⁶ A person who fails to report such knowledge is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment. However, what such knowledge constitutes in terms of the Act is not elucidated.²⁶⁷ For the mentally disabled, the requirements are more stringent - any person who has knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is mentally disabled must report this immediately to a police official. By differentiating between a child and a mentally-disabled person in terms of the public's obligation to report sexual abuse, the exposure of the crime committed against children may be impeded as people often only have a suspicion or a reasonable belief that a child is being sexually abused, although no concrete knowledge exists.

The Sexual Offences Act 2007 creates the new statutory crime of human trafficking for sexual purposes under Chapter 7, Part 6, section 6, yet it appears in a very limited manner. This Act is currently still the only statute providing guidance for adult trafficking crimes (but only to the extent of trafficking for sexual purposes). Still, prosecutors have

²⁶³ Sexual Offences Act 2007 (n249 *supra*) s 43. However, in 2012 the sex offenders' register is still not yet ready to be implemented. Although there are now already 1 000 names of convicted sex offenders on the register, schools, crèches and businesses which should be able to check prospective employees' criminal records, cannot access the information.

²⁶⁴ See Sexual Offences Act 2007 (n249 *supra*) Chap 6 s 60: "Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence."

²⁶⁵ See *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A). The evidence of complainants in sexual offences cases was, prior to the *Jackson*-case, treated with caution merely because of the nature of the offence. The Supreme Court of Appeal, in the *Jackson*-case, abolished the rule and stated that, in sexual assault cases, the rule is based --- on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable." The repeal of the common-law rule was confirmed in the cases of *S v M* 1999 (2) SACR 548 (SCA). However, this approach was not followed in *S v Van der Ross* 2002 (2) SACR 362 (C). Sexual Offences Act 2007 (n249 *supra*) s 60 eliminates any doubt as to what the law is in this regard.

²⁶⁶ Sexual Offences Act 2007 (n249 *supra*) Chap 7.

²⁶⁷ It could amount to verbal disclosure, or physical proof such as witnessing the abuse, or even a medical examination.

successfully made use of these provisions to charge human traffickers. For example, on 16 February 2012 the Mitchells Plain Magistrate's Court found Vukani Shembe (a 36-year-old man) guilty of trafficking a girl from Swaziland and raping her. The accused was sentenced to fifteen years on one count of human trafficking and fifteen years on one count of rape of which seven years run concurrently. Effectively, the accused was sentenced to a total of twenty-three years in prison.²⁶⁸

The Act specifically states that its clauses dealing with trafficking for sexual purposes are only a transitional mechanism until more comprehensive legislation is passed.²⁶⁹ The Act stipulates acts that amount to trafficking and states that any person who executes those actions is guilty of the offence of involvement in trafficking in persons for sexual purposes. A person who, in one way or another, is involved directly or indirectly in trafficking is guilty of the same offence. Section 71(1) formulates the offence of trafficking in persons for sexual purposes as any person (A) who trafficks any person (B), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes". Section 71(2) criminalizes any person who is involved in trafficking for sexual exploitation:

A person who -

- (a) orders, commands, organises, supervises, controls or directs trafficking;
- (b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking;
- or
- (c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking,

is guilty of an offence of involvement in trafficking in persons for sexual purposes.

²⁶⁸ See Legalbrief "Western Cape Secures First Human Trafficking Conviction" *Legalbrief Today* Issue 2978 20 Feb 2012 <http://www.legalbrief.co.za/article.php?story=20120220083143708> (accessed 2013-01-16). Also, in 2011 Adina dos Santos was convicted at the Pretoria Regional Court and sentenced to life imprisonment for trafficking 3 girls from Mozambique – aged between 14 and 17-yrs-old at the time - in Feb 2008. The girls were kept at a house in Moreleta Park in Pretoria East and were forced into prostitution. See *S v Dos Santos* 19 Jul 2011 Pretoria Regional Court (Unreported). Similarly, the accused in *S v Eloff* Case No SH599/08 Welkom (2008) was also convicted in terms of this Act.

²⁶⁹ Sexual Offences Act 2007 (n249 *supra*) ss 65-66. See also *Kreston* (n4 *supra*) 43.

The definition of trafficking replicates the definition in the Palermo Protocol although the terms “supply”, “sale”, “disposal or receiving of a person” and “threat of harm” are added. “Trafficking” is defined as:

the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of—

- (a) a threat of harm;
- (b) the threat or use of force, intimidation or other forms of coercion;
- (c) abduction;
- (d) fraud;
- (e) deception or false pretences;
- (f) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or
- (g) the giving or receiving of payments or benefits,

for the purpose of any form or manner of sexual exploitation, grooming or abuse of such person, whether committed in or outside the borders of the Republic, including for the purpose of the commission of a sexual offence or sexual act, or sexual exploitation or sexual grooming as contemplated in this Act, or exploitation for purposes of pornography or prostitution, with, against or of such person.²⁷⁰

Trafficking in persons for sexual purposes is criminalised where the trafficked person does not consent to the trafficking.²⁷¹ This is different to the approach followed in the Palermo Protocol which provides that the consent of the person is irrelevant where any of the

²⁷⁰ Sexual Offences Act 2007 (n249 *supra*) s 70(2)(b)(vii).

²⁷¹ Sexual Offences Act 2007 (n249 *supra*) s 71(1). As the Act eliminates the differentiation drawn between the age of consent for different consensual sexual acts, a trafficker or client may also not claim that an under-aged victim consented to sexual intercourse. See Sexual Offences Act 2007 (n249 *supra*) Chap 7 Part 2 s 56(2). The Sexual Offences Act 2007 repealed Sexual Offences Act 1957 (n232 *supra*) s 14 and fixed an equal age of consent of 16 yrs for all sexual acts. Originally, this section made it a crime for an adult man to have sex with a girl or boy under the age of 16. This age limit was raised in 1969 to 19 yrs for sex between 2 males. Equivalent provisions were added in 1988 which made it a crime for a woman to have sex with a male under 16 or a female under 19. This erstwhile inequality between the ages of consent for heterosexual and homosexual sex was struck down as unconstitutional in the case of *Geldenhuis v National Director of Public Prosecutions and Others* [2008] ZACC 21, 2009 (2) SA 310 (CC), 2009 (1) SACR 231 (CC), 2009 (5) BCLR 435 (CC).

prohibited means have been used or if the trafficked person is under eighteen years of age. The Act defines “consent” in section 71(3) as “voluntary or uncoerced agreement” and sets out the circumstances in which a trafficked person is coerced or forced into trafficking for sexual purposes in section 71(4):

Circumstances in which B does not voluntarily or without coercion agree to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following—

- (a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs (i) to (vii) of the definition of trafficking having been used or being present; or
- (b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such act—
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

Commercial carriers, their owners or operators that convey goods or people, commit an offence if they bring into or remove a person from South Africa with that person not having the requisite travel documents. These transporters will be held accountable for the care, safekeeping and return costs of the persons they have trafficked.²⁷² Although the Act describes sexual exploitation and trafficking as crimes, it does not prescribe specific sanctions for their violation.²⁷³ Based on the *Prins*-judgment, any of the sentences listed in

²⁷² Sexual Offences Act 2007 (n249 *supra*) s 71(6)(a) (b)(c)(d).

²⁷³ According to Hoor, Milton & Cowling *Criminal Law and Procedure Vol 3: Statutory Offences* 2nd ed (1997) paras 1 – 20, although the legislature in criminalizing conduct will generally specify the penalty attached to a contravention of the enactment —failure so to specify is not regarded as a serious flaw in the legislation. In such a case it is presumed that the determination of the appropriate punishment has been left to the courts.” See also Burchell (n174 *supra*) 99, Snyman (n193 *supra*) 41. This has been confirmed in the recent case of *Director of Public Prosecutions, Western Cape v Prins and Others* (369/12) [2012] ZASCA 106; 2012 (2) SACR 183 (SCA); 2012 (10) BCLR 1049 (SCA); [2012] 3 All SA 245 (SCA) (15 June 2012). In this case, Prins’ charge of sexual assault was dismissed as there was no penalty attached to the offence

section 276(1) of the Criminal Procedure Act 51 of 1977 may be imposed.²⁷⁴ In addition, the Criminal Law Amendment Act 105 of 1997 also prescribes life imprisonment for sections 71(1) and (2) of the Sexual Offences Act 2007, indicating very clearly how serious these crimes are regarded.²⁷⁵ Finally, there is no extra-territoriality asserted and extradition or mutual legal assistance is also not addressed.²⁷⁶

The Act follows a criminal-law approach towards combating sexual exploitation and trafficking. Consequently, it does not contain any specific human-rights protection, nor does it have any prevention provisions whatsoever.²⁷⁷ Victim assistance is restricted to the reporting of the offence within 72 hours of its commission. There are also no provisions for repatriation for both adults and children. As such, the best interests of the child are not considered in this regard. But the Act does protect trafficked persons in that it provides that a victim of trafficking cannot stand trial for any criminal- or migration-related offence if it was a consequence of being trafficked.²⁷⁸ An important amendment for the protection of persons trafficked who are assisting the prosecution by giving evidence against their trafficker, is the listing of criteria that the court must take into consideration when evidence relating to the previous sexual history of a complainant is deemed to be relevant.²⁷⁹ Before the court can admit such evidence, it has to consider whether such evidence is in the interests of justice, with due regard to the accused person's right to a fair trial and whether the evidence is in the interests of society in encouraging the reporting of sexual offences. Complainants will also be assisted by the amendments to sections 158 and 170A of the Criminal Procedure Act of 1977 (CPA). These two provisions concern the giving of

in the Act. In this regard, the judges followed the principles encapsulated in the maxims *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a law). The Supreme Court of Appeal upheld the state's appeal and declared at para 18 that the Act expressly created criminal offences in ss 2-26 and contemplated offenders being sentenced. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2012 explicitly states that courts have the discretion to impose sentences (similar to CPA s 276) where no penalties are provided. Still, courts may have difficulty in deciding the most appropriate penalties. See in this regard, *S v Booï* (14/2010) [2010] ZAFSHC 91 who was convicted of a contravention of s 15 of the Sexual Offences Act 2007 and sentenced to 9 yrs imprisonment, which the magistrate afterwards believed to be too strict a penalty. The newly rectified penalty directives further ensures only full compliance with South Africa's international obligations under the Palermo Protocol. See *Kreston* (n4 *supra*) 44.

²⁷⁴ See *Director of Public Prosecutions, Western Cape v Prins and Others* (n273 *supra*) paras 37, 38.

²⁷⁵ A further problem is that should the case remain in the district courts, the jurisdictional limit set of a maximum sentence of 3 yrs will fall below the suggested minimum sentence of 4 yrs specified by the CTOC. Also see *supra* n237.

²⁷⁶ *Kreston* (n4 *supra*) 44.

²⁷⁷ The Children's Act 2005 contains the same flaw.

²⁷⁸ Sexual Offences Act 2007 (n249 *supra*) s 71(5).

²⁷⁹ In this regard, CPA s 227 is completely overhauled by the Sexual Offences Act 2007.

evidence by means of a close-circuit television (CCTV) system or similar electronic media (particularly for child complainants below the age of fourteen) and the appointment of intermediaries through which complainants can testify.²⁸⁰ This guarantee of victim assistance is encouraging, though there are still gaps to be addressed in this area.²⁸¹

Although the law is still quite recent, its efficacy is contentious.²⁸² The law's power to punish and deter traffickers will depend on law enforcement and investigative procedures. However, the Act does not provide for any specialized investigation and prosecution, or even training for those involved in responding to this crime. Be that as it may, the jurisdiction is slowly moving towards creating comprehensive legislation that may combat human trafficking.

7.3.2.3 The Child Care Act 74 of 1983

The Child Care Act 74 of 1983 (Child Care Act)²⁸³ provides for children who are deemed to be at risk and in need of care.²⁸⁴ The provisions of the Child Care Act were repealed by the Children's Act 38 of 2005 in 2010; however the Child Care Act may still be utilized to prosecute cases before its rescission. Provision is made, amongst other things, for the protection of children,²⁸⁵ the regulation of child adoptions,²⁸⁶ and the prevention of ill-

²⁸⁰ The following subsection is substituted: "Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of 18 years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary". See Vetten —NewCrimes and Old Procedures - Can the New Sexual Offences Bill Deliver on its Promises?" 2007 22 SA *Crime Quarterly* 21 24.

²⁸¹ In the case of *S v Jacob Zuma* 2006 SA (WLD), the verdict was influenced by the decision of the court to grant the CPA s 227 application allowing evidence of the complainant's sexual history in court. Not only is this contrary to the Constitution in respect of human dignity and a fair trial (administration of justice), but the interests of society and other victims of sexual attacks were not taken into consideration. This verdict will not encourage the reporting of sexual offences by other victims.

²⁸² Although there has been a few successful trafficking- and sexual exploitation convictions, there have been teething problems with the Act. See *S v Acting Regional Magistrate, Boksburg, Venter and another* [2011] 2 All SA 452 (GSJ) where the accused was acquitted from a rape charge as the wording of the transitional provisions of the Sexual Offences Act 2007 contained a material flaw rendering them unconstitutional.

²⁸³ The immediate predecessor of the Child Care Act was the Children's Act 33 of 1960. Amendments were in turn made to the Child Care Act ie the Child Care Amendment Act 86 of 1991, the Child Care Amendment Act 96 of 1996, and the Child Care Amendment Act 13 of 1999.

²⁸⁴ Children in need of care are indicated as those children who have been physically, emotionally or sexually abused or ill-treated by their parent or guardian or the person in whose custody they are. See s 5 of Child Care Amendment Act 96 of 1996.

²⁸⁵ Child Care Act (n283 *supra*) ss 10-16A. In line with the definition of a child contained in the Constitution, the CRC and Palermo Protocol, the Child Care Act defines a child in s 1 as any person under the age of 18

treatment or abandonment of children (section 50). However, the legislation makes no mention of children who are heading households, who still remain very vulnerable to trafficking exploitations. In terms of section 50(1)(a)²⁸⁷ any parent or custodian of a child who ill-treats the child or allows the child to be ill-treated, is guilty of an offence. As the definition of “ill-treatment” is not proffered in the Act, any type of abuse should fall under this provision.²⁸⁸ Many children are abused at home or abandoned²⁸⁹ and become easy targets for child traffickers. The courts have held that in exceptional circumstances parents who leave their child with family could also be found guilty of “abandonment” in terms of this section.²⁹⁰ The tradition of child fostering which have led to children being trafficked for sexual and labour exploitation, would perhaps fall under this section.

Anyone who abducts a child, unlawfully removes a child, or induces a child to escape from a custody in which a child was lawfully placed; who knowingly harbours or conceals such a child; or who prevents a child from returning to custody from which he was abducted or removed, commits an offence.²⁹¹ In this regard, foreign unaccompanied children who have been trafficked to South Africa are also entitled to the protections of the Child Care Act, as propounded in *Centre for Child Law and Another v Minister of Home Affairs and Others*.²⁹² The Act, as amended in 1999, criminalizes the actions of those directly involved in child

yrs. The Act does, however, contain circumstances in which certain provisions of the Child Care Act apply to persons over the age of 18 yrs, eg. s 15(4).

²⁸⁶ Child Care Act ss 17-26. In the Constitutional Court case of *Minister for Welfare and Population Development v Fitzpatrick and others* (2000) (7) BCLR 713, s 18(4)(f) was found unconstitutional as it conflicted with s 28 of the Constitution which enumerates the rights of the child. In this case, a British couple wanted to adopt an abandoned child, yet the Child Care Act (n283 *supra*) s 18(4)(f) categorically prohibited the adoption of a South African child by a non-citizen, or by a person who has the necessary residential qualifications for the granting of South African citizenship but has not applied for a certificate of naturalisation. This section was found too limiting and did not consider the best interests of the child (see *Fitzpatrick*-case para 16). According to the Court, the best interests of a South African-born child born may well lie in such child being adopted by non-South African adoptive parents (*Fitzpatrick*-case para 19).

²⁸⁷ As amended by s 18(a) of Act 86 of 1991.

²⁸⁸ Ill-treatment constitutes not providing a child with adequate food, clothing, lodging and medical aid (s 50(2)); as well as the physical, emotional or sexual abuse or maltreatment of a child. Ill-treatment by omission could also be included, as in *S v Maree* 1990 (3) SA 365 (C) 370D-E and *S v Ben 'n Ander* 1994 (2) SA 237 (EC). Even if the prohibited conduct constitutes the common-law crime of assault, s 50(1)(a) is also contravened, see *S v Lamprecht* 1977 (1) SA 246 (EC) 248. Any proof of ill-treatment or abuse by a parent or guardian constitutes a ground for finding a child in need of care, and therefore a ground for removal, in terms of the Child Care Act (n283 *supra*) s14(4)(aB)(vi).

²⁸⁹ The abandonment of a child by a parent or guardian also constitutes an offence in terms of s 50(1)(b). Abandonment could either constitute a wilful omission (as in *R v Kruger* 1943 OPD 111 112-113) or a wilful commission (as in *S v Khumalo* 1995 (2) SACR 660 (W) or *S v Gadebe* 1971 (1) PH H (S) 37 (T)).

²⁹⁰ See *S v Mnyankama* 1992 (1) SACR 43 (C).

²⁹¹ Child Care Act (n283 *supra*) s 51. In the *Dos Santos*-case (see *supra* n268), Dos Santos was charged under the Child Care Act (n283 *supra*) ss 50A & 51 for exposing children to sexual abuse.

²⁹² *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) 56B-58F.

sexual exploitation as well as any person legally linked to a property where such exploitation takes place²⁹³ in section 50A,²⁹⁴ but do not specifically incriminate the child's parents or guardians. Children are protected by the criminalising of participation in the commercial sexual exploitation of a child, which makes the client's actions unlawful. Section 52A prohibits the employment of certain children, and makes it a criminal offence to employ a child under the age of 15 years.²⁹⁵ However, despite the fact that child labour and the trafficking of children for labour exploitation are serious problems in South Africa; the statutory provisions regulating child labour are not very extensive.

7.3.2.4 The Children's Act 38 of 2005

The Children's Act 38 of 2005 (Children's Act 2005)²⁹⁶ aims, amongst others, to give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children;²⁹⁷ to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction.²⁹⁸ The Act also makes new provision for the adoption of children,²⁹⁹ especially for procedures regarding inter-country adoption

²⁹³ Chichava & Kiremire (n51 *supra*) 76.

²⁹⁴ Child Care Act (n283 *supra*) s 50A states: –(1) Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.

(2) Any person who is an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence fails to report such occurrence at a police station, shall be guilty of an offence.

(3) Any person who is convicted of an offence in terms of this section shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.”

²⁹⁵ As inserted by s 19 of Child Care Amendment Act 1991. This section is similar to s 43 of the Basic Conditions of Employment Act 75 of 1997.

²⁹⁶ Although the Act was signed by State President in June 2006, certain sections of the Act remain non-promulgated (including the human trafficking provisions). The complete implementation of this Act has been delayed by the drafting of its consolidated regulations. As such, the Child Care Act of 1983 therefore still governs certain sections of child care. A quicker implementation process would have been more advantageous and more effective to protect children from trafficking.

²⁹⁷ One of the protective measures implemented in this Act is, similar to the Sexual Offences Act 2007, a national Child Protection Register (Children's Act 2005 (n296 *supra*) Chap 7, Part 2, ss 111-128). However, in 2012 only 40 names of convicted child abusers and sexual offenders are listed on the Child Protection Register (only one name appeared on the list in 2010). This is in contrast to the estimated 30,000 children a year who are victims of sexual abuse. See Williams —“Sex Predator Register ‘A Mess’” *Times* 5 Oct 2102 <http://www.timeslive.co.za/thetimes/2012/10/05/sex-predator-register-a-mess> (accessed 2013-01-16).

²⁹⁸ South Africa acceded to the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption (1993) in 2003. The Convention was enacted in order to provide relief for parents of children who are under the age of 16, and have been wrongfully removed in breach of the parent's rights. See *Central Authority v Reynders and Another* (12856/2010) [2010] ZAGPPHC 193; 2011 (2) SA 428 (GNP); [2011] 2 All SA 438 (GNP).

²⁹⁹ The South African approach to inter-country adoption is seen by many as a guiding principle for the rest of Africa. As Gallinetti & Kassan “Trafficking in Children in Africa: an Overview of Research, International Obligations and Existing Legal Provisions” in Sloth-Nielsen J (ed) *Children's Rights in Africa – a Legal*

following directives provided by the Hague Convention on Inter-country Adoption.³⁰⁰ The Children's Act has also incorporated the Hague Convention by way of an annexure. As such, any provision not contained in the Act is made directly applicable by means of the Convention.³⁰¹ The Children's Act 2005 even improves in certain areas on the Hague Convention, especially with regard to the consent requirements for adoption.³⁰² Section 233 requires that before consenting, parents and a child who is ten years of age or older should be mandatory counselled by an adoption social worker facilitating the adoption. This obligatory counselling shows progression as compared to the Hague Convention's Article 4(c)(1) which merely requires counselling if necessary.³⁰³ Provision is made for the South African authorities to withdraw its consent to the adoption within 140 days of the date of consent; however, the withdrawal can only occur if it is found to be in the best interests of the child. The possibility for withdrawal of consent is vital in situations of trafficking where the consent given was possibly not free and informed.

Whilst the inclusion of trafficking in the Sexual Offences Act 2007 is directed at both adults and children but limited to trafficking for sexual purposes, the provisions in the Children's Act 2005 restricts trafficking offences to those committed against children.³⁰⁴ Chapter 18 of the Act which criminalises child trafficking came into force in 2010. A child is defined by the Act as anyone under the age of eighteen. The Children's Act 2005 confirms that the Palermo Protocol has force of law in South Africa, mandating the country to afford all

Perspective (2008) 239 239 contend: "... in Southern Africa, a recent study on 6 countries noted that South Africa is the only country that has a specific legal provision criminalising 'child trafficking' as contained in the Children's Act 38 of 2005."

³⁰⁰ South Africa is one of only 7 countries in Africa that is a state party to the Hague Convention. The others are Burkina Faso, Burundi, Mali, Mauritius, Madagascar and Kenya. As the US only acceded to the Hague Convention in 2008, it is hoped that the US' accession could change some inter-country adoption practices to that country from the African continent. See Mezmur — "From Angelina (to Madonna) to Zoe's Ark: What are the A - Z' Lessons for Inter-Country Adoptions in Africa?" 2008 13 *International Journal of Law, Policy and the Family* 145 152. Traffickers could still avoid inter-country adoption procedures by utilizing guardianship orders. Fortunately, an application for sole custody and sole guardianship has to be made to the High Court, which serves as a deterrent for potential offenders of illegal adoption, as held in the case of *AD and Another v DW and Others* (CCT48/07) [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC).

³⁰¹ See Couzens — "A Very Long Engagement: The Children's Act 38 of 2005 and the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption" 2009 1 *Potchefstroom Electronic Law Journal* 54 64-65.

³⁰² Consent to adoption may also not be induced by the giving and receiving of any consideration in cash or in kind (s 249(1)). However, permissible "prescribed" payments in cash or in kind in respect of adoption are listed in s 249(2).

³⁰³ The consent should in addition be written and signed, and it should be made before and verified by a presiding officer of the children's court.

³⁰⁴ Children's Act 2005 (n296 *supra*) Chap 18 ss 281 – 291.

forms of assistance to victims as listed in the Protocol. The Act additionally defines both the term ~~trafficking~~³⁰⁵ as well as the term ~~exploitation~~³⁰⁶. In its definition of trafficking, the Palermo Protocol's definition is replicated with the added definitional elements of the ~~sale~~ and ~~supply~~ of children, and ~~the adoption of a child facilitated or secured through illegal means~~³⁰⁷. Exploitative purposes in the Children's Act has been explicitly augmented to include debt bondage, forced marriage, child labour and the removal of their body parts and other organs.³⁰⁸ The Act does not further expand on the trafficking of children for forced labour at all. However, the Children's Amendment Act 41 of 2007 specifically prohibits employing a child under fifteen years of age, procuring a child for the purpose of commercial sexual exploitation, and forcing a child to perform duties that would place at risk his/her well-being, education, physical or mental health, spiritual, moral or social development.³⁰⁹

³⁰⁵ According to the Children's Act 2005 (n296 *supra*) s 1 ~~trafficking~~ in relation to a child,
 (a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children within or cross the borders of the Republic
 (i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payment or benefits to achieve the consent of a person having control of a child; or
 (ii) due to a position of vulnerability, for the purpose of exploitation; and
 (b) includes the adoption of a child facilitated or secured through illegal means.
 Kassan ~~Trafficking in Children~~ in Davel & Skelton (eds) *Commentary on the Children's Act* (2007) 18-11 indicates that ~~any means~~ in the above definition could be interpreted as requiring one of the specified means to be present to constitute trafficking in children. This is not in accordance with the Palermo Protocol, which waives the means element as regards child trafficking.

³⁰⁶ The Children's Act 2005 (n296 *supra*) s 1 holds that ~~exploitation~~ in relation to a child, include
 (a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;
 (b) sexual exploitation;
 (c) servitude
 (d) forced labour or services;
 (e) child labour prohibited in terms of section 141 (worst forms of child labour); and
 (f) the removal of body parts.

³⁰⁷ Kassan (n305 *supra*) 18-16 points out that an illegal adoption constitutes the ~~exploitation~~ of the adoptive system and laws and not necessarily the exploitation of the adopted child".

³⁰⁸ In contrast, the Palermo Protocol includes certain examples of exploitative purposes ~~at a minimum~~, and does not list all possible examples of exploitative practices.

³⁰⁹ The Children's Amendment Act 41 of 2007 s 141 states: —(1)No person may—
 (a) use, procure or offer a child for slavery or practices similar to slavery, including but not limited to debt bondage, servitude and serfdom, or forced or compulsory labour or provision of services;
 (b) use, procure, offer or employ a child for purposes of commercial sexual exploitation;
 (c) use, procure, offer or employ a child for trafficking".

Until both the original bill and the amendment are passed, South Africa remains dependent on the existing Child Care Act 1983 which lacks provisions for child trafficking and child labour.

Section 284 of Chapter 18 explicitly disqualifies the consent of the child or that of the child's parents or guardians to the trafficking as a defence in a trafficking prosecution.³¹⁰ A person will be guilty of child trafficking even if the intended exploitation or adoption secured by illegal means did not in fact occur.³¹¹ This development makes the prosecution and punishment of perpetrators more effective. In order to discourage passivity or reluctance to assist in the protection of children from all forms of abuse, an agent or any other person acting on behalf of an employer or principal who engages in human trafficking may render that employer liable, and that may serve as a ground for revoking the license or registration of the employer.³¹²

A list of prohibited activities that facilitate trafficking in children is furnished in section 285. The Act criminalises the act of knowingly leasing or subleasing or allowing property to be used to harbour child victims of trafficking in section 285(1)(a). The use of information technologies such as the Internet in trafficking is also addressed. This provision may be seen as potentially contentious as it prohibits the advertisement, publication, printing, broadcasting or distribution of information, or causing any of the above "that suggests or alludes to trafficking by any means".³¹³ While this prohibition is constructive in regulating the publication of pornographic material (whether paper-based or on the Internet) in which trafficked children are used, the wording appears to inadvertently proscribe even the publication of mere reports that may not facilitate any trafficking process, but seek to expose them. Internet service providers are required to report sites that advertise or broadcast information on trafficking to the police,³¹⁴ although the Act prescribes no punishment for the contravention of the offences.

In the case of South African children trafficked abroad, the state is given the responsibility of facilitating the safe return of any child who is a citizen or permanent resident of the country, which includes the provision of travel documents and adult escort if required, at state expense in certain circumstances, for instance where the child is too young to travel

³¹⁰ Children's Act 2005 (n296 *supra*) s 284(2)(a).

³¹¹ Children's Act 2005 (n296 *supra*) s 284(2)(b).

³¹² Children's Act 2005 (n296 *supra*) s 284(3).

³¹³ Children's Act 2005 (n296 *supra*) s 285(1)(b).

³¹⁴ Children's Act 2005 (n296 *supra*) s 285(1)(b)(2).

alone.³¹⁵ This is only done in cases where the parents or legal guardian of the child does not have the financial means to travel to the place where the child is in order to escort the child back.³¹⁶ This responsibility includes referring the child to a designated social worker for investigation upon arrival.

Foreign children, who have been trafficked to South Africa, must first be referred to a designated social worker and placed in temporary care after which the child may be presented before a children's court for assistance in applying for asylum.³¹⁷ An order by this court that a foreign trafficked child is in need of care and protection, serves as an authorisation for the child to remain in South Africa for the duration of the court order.³¹⁸ Children trafficked from abroad may not be repatriated to their country of origin unless the state has ascertained that the best interest of the child is being pursued without prejudice. Procedures in this regard include ensuring that there are sufficient care arrangements in the country of return, that the child will be safe and free from the risk of being re-trafficked, harmed or killed, and providing an escort if necessary.³¹⁹ The Act is also vague as to what temporary care exactly constitutes.

It seems as if the Children's Act has provided for protective measures for both foreign children found in the jurisdiction as well as for South African children trafficked abroad. Yet victim services seem to be limited to mechanisms of repatriation or the acquisition of citizenship. There is no possible long-term reintegration process indicated at all. Nor are there any procedures to identify the trafficked child as a victim of crime, or any provision made for the preclusion of the child from being incriminated with any crime they may have committed as a result of being trafficked.³²⁰ The Act further neglects to address a number of the trafficking human-rights concerns such as providing for prevention, the institution of special investigation units, the identification and rehabilitation process, psychological and

³¹⁵ Children's Act 2005 (n296 *supra*) s 286(1).

³¹⁶ Children's Act 2005 (n296 *supra*) s 286(2). Further protective measures include the court's power to suspend the rights of a parent, guardian or any other person who has parental responsibilities and rights in respect of a child, and place a child in temporary safe care pending enquiry where it determines that the parties named above have trafficked or allowed the child to be trafficked (s 287). It is also required from immigration and police officials, social workers, medical practitioners or nurses to report and refer trafficked children to designated social workers for investigations (s 288).

³¹⁷ Children's Act 2005 (n296 *supra*) s 289(1), (2). This is in terms of the Refugees Act of 1998.

³¹⁸ Children's Act 2005 (n296 *supra*) s 289(3).

³¹⁹ Children's Act 2005 (n296 *supra*) s 290.

³²⁰ Kreston (n4 *supra*) 43.

medical care and the prohibition against charging children with any offences they may have committed while being trafficked.³²¹ It also does not address the issue of redress for child trafficking victims against traffickers or compensation for these victims.

Section 291 extends the scope of application of the Children's Act 2005 to other territories, as implied in article 4 of the Palermo Protocol, as long as the offence is committed by a South African citizen or those permanently residing in South Africa. This extra-territorial jurisdiction presents the advantage of mutual legal assistance and a more effective prosecution of South African trafficking offenders who commit the child trafficking in a country where it is not a crime, if such an act would have constituted an offence if committed in South Africa.

Section 305 of the Act deals with enforcement, and makes it an offence if an owner, lessor, manager, tenant or occupier of a premises gains information of the commercial sexual exploitation of a child on that premises and fails to promptly take reasonable steps to report the occurrence to the SAPS. The most severe penalty prescribed in the Act is for the offence of human trafficking, requiring a fine or imprisonment for a maximum of twenty years, or both, in addition to the sentence for any other offence of which an offender may be convicted. Other offences are punishable with a fine or imprisonment for a maximum period of ten years, or both, and second time offenders are liable to a fine or prison sentence of a maximum of twenty years, or both. However, no provision is made for special investigation units or, in lieu thereof, specialised training for all front-line professionals involved.

Although the Children's Act 2005 has been praised by many as a progressive piece of legislation, it is not always achieving its aims in practice. It has been argued by some critics that the justice- and social-development role players interpreted the new Act differently, which caused confusion and delays in determining the best course of action for a specific child, often to the detriment of the child'.³²² It is argued though that Chapter 18 of

³²¹ *Ibid.*

³²² The Law Society of the Northern Provinces *Newsflash* (2011-03-23) 6 - quoting Ruth Stapleton of *Wandisa* www.northernlaw.co.za/.../NewsFlash%2023%20March%2011.doc (accessed 2013-01-16).

the Children's Act is not a trafficking in persons' law *per se*, and only provides for temporary measures in anticipation of more specific legislation.

7.3.2.5 The Prevention of Organised Crime Act 121 of 1998

As it is sometimes difficult to prove the elements of trafficking for sexual offences, prosecutors rely to a great extent on the Prevention of Organised Crime Act (POCA) to convict sex traffickers.³²³ The POCA criminalises organised crime, money laundering³²⁴ and criminal gang³²⁵ activities; the involvement in certain racketeering activities;³²⁶ offences that relate to the proceeds of such unlawful activities, which includes the assistance of another in benefiting from the proceeds of unlawful activities.³²⁷ For purposes of trafficking this would consist of offences such as rape, kidnapping, indecent assault and the statutory offences of sections 14 and 20 of the Sexual Offences Act 1957.³²⁸ It is submitted that in terms of this Act, in this context, a number of other POCA

³²³ In *S v Sayed* Case No 041/2713/2008 (Unreported), South Africa's 1st sex traffickers were convicted in the Durban Regional Court in Mar 2010, using racketeering laws (ie managing an enterprise (s 2(1)), money-laundering (s 4), and acquiring, using or possessing the proceeds of illegal activities (s 6)). The couple, South African Basheer Sayed and Thai national, Somcharee Chuchumporn, was arrested in 2007 following the escape of Thai women from their brothel. The Thai female recruited, transported, and debt-bonded 7 Thai female prostitutes and brought them into South Africa to voluntarily work as prostitutes. The state also prosecuted the trafficked females for knowingly benefiting from criminal proceeds and entering and working in the country illegally.

³²⁴ POCA identifies money-laundering offences. The Financial Intelligence Centre Act 38 of 2001 (FICA) provides a definition in s 1(1) for "money laundering": "An activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in s 64 of FICA or ss 4, 5 or 6 of POCA." As a member of the Financial Action Task Force (FATF), an independent inter-governmental organization created by the Group of Seven countries (the G-7), South Africa is also assisted by other members in combating money laundering in the region.

³²⁵ A criminal gang is defined in s 1 as "... any formal or informal ongoing organisation, association or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity". Eg, in *S v Eyssen* (746/2007) [2008] ZASCA 97; [2009] 1 All SA 32 (SCA); 2009 (1) SACR 406 (SCA), the accused was convicted of racketeering and gang-related activities as the leader of a gang called the Fancy Boys in Salt River.

³²⁶ POCA Chap 2 covers offences relating to racketeering activities. It is an offence to receive, use and/or invest in any property derived from a "pattern of racketeering activity" (s 2(1)). A "pattern of racketeering activity" is the "planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least 2 offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1".

³²⁷ This refers to the involvement of any offence referred to in Schedule 1 of the CPA 51 of 1977. In *Dos Santos and another v The State* (726/07) [2010] ZASCA 73; 2010 (2) SACR 382 (SCA); [2010] 4 All SA 132 (SCA), the accused and his assistant were both found guilty of racketeering on convictions of dealing in unpolished diamonds.

³²⁸ These offences are specifically included in Schedule 1 of POCA.

provisions may also be of use, such as Chapter 3 which deals with the proceeds of unlawful activities, Chapter 4 deals with criminal gang activities, and Chapters 5 and 6 concern the forfeiture of assets obtained unlawfully.

The Act provides for the institution of civil proceedings on application for a confiscation order, a restraint order or forfeiture of the proceeds of the unlawful criminal activities.³²⁹ The POCA introduces a two-pronged system for recovering these proceeds: first, confiscation after a criminal conviction by a court of law,³³⁰ and, second, civil forfeiture without the need of a conviction.³³¹ The legislature has conferred extensive powers on the courts by allowing the issuing of a restraint order³³² without a legal conviction of the defendant, provided there is at least a reasonable prospect of getting a conviction.³³³ POCA also enables the National Prosecutor to take property when, on a balance of probabilities, it appears that the property is either the proceeds of unlawful activities, or was an instrumentality of an offence.³³⁴ It has been held that POCA Chapter 6 does not

³²⁹ POCA Chap 6 s 13(1) & s 30(5).

³³⁰ It has been held that criminal courts have a discretionary power to make a confiscation order against anybody convicted of any crime who benefited from it or even from “sufficiently related criminal activity” – see *Hendricks v S* (415/09) [2010] ZASCA 55; [2010] 4 All SA 184 (SCA).

³³¹ See POCA s 13(3)-(5). See also Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 59-124.

³³² It is argued that civil forfeiture as formulated under POCA infringes on several Constitutional rights if the owner is considered an accused person; eg the right to be represented by a legal practitioner, not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted, the right to a fair trial which includes the right to be presumed innocent until proven guilty. The power of the courts, granted by POCA, to issue a restraint order without legal conviction of the defendant, might especially offend the right to presumption of innocence. See Gupta – “Republic of South Africa’s Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis” 2002 37 *Harvard Civil Rights – Civil Liberties Law Review* 159 175-178. The restraint orders have also been criticised as no provision is made for the payment of a defendant’s reasonable legal expenses from a source other than the restrained assets held by that defendant. See *National Director of Public Prosecutions v Naidoo & Others* (419/09) [2010] ZASCA 143; 2011 (1) SACR 336 (SCA); [2011] 2 All SA 410 (SCA).

³³³ See POCA s 25 & s 51.

³³⁴ POCA s 38. In determining the “instrumentality of an offence” (see POCA s 1(1)(vii)), the focus is on the property that has been used in the commission of the crime or which constitutes the proceeds of crime and not on the wrongdoer *per se* – See also *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd* (260/03) [2004] ZASCA 36; *National Director of Public Prosecutions v Van der Merwe and Another* (A338/2010) [2011] ZAWCHC 8; 2011 (2) SACR 188 (WCC); [2011] 3 All SA 635 (WCC). In the case of *National Director of Public Prosecutions v Geyser and Another* (n243 *supra*), the accused forfeited a building (brothel) under the POCA. Such forfeiture was found not to be disproportionate, but made upon a weighing up of a number of relevant disparate and incommensurable considerations arising from the peculiar facts of the case to determine whether the forfeiture sought substantially serves the purposes of the Act and that it would not constitute an arbitrary deprivation of property. However, s 38 may perhaps be constitutionally challenged on the grounds of property rights. The constitutional right to property protects everyone from being arbitrarily deprived of his or her property except by law of general application. If any such person is so deprived, just compensation must be given. Thus, it may be possible to challenge the provision in POCA, allowing for civil forfeiture without a conviction, as the lack of a court order may render the forfeiture arbitrary.

only relate to organised-crime offences but also to criminal activity by individuals.³³⁵ In this manner both individuals and crime organisations who deal in the brokering of persons may be held responsible. Like most crimes, human trafficking is driven by the traffickers' appetite for large monetary profits.³³⁶ As such, money-laundering offences are ubiquitous in their organizations. Money laundering and related forfeiture provisions make it a crime to transfer money derived from human trafficking (and almost all related criminal offences) into seemingly legitimate channels, in an attempt to disguise the origin of the funds.³³⁷

The POCA provides effective means to target the asset bases of criminal enterprises. Trafficking in persons may be combated by eliminating the organisation and the proceeds of crime, rather than only punishing the individual criminal, who may be only one of the role players in the criminal chain.³³⁸

7.3.2.6 The Immigration Act 13 of 2002

The Immigration Act 13 of 2002 (Immigration Act) prohibits certain persons from entering the Republic, and determines the granting of temporary and permanent residence to foreigners. The focus of the Immigration Act is on arresting and repatriating illegal foreigners residing within South African borders. Most trafficked persons from abroad will typically be regarded as illegal foreigners.³³⁹ In terms of section 11(3) illegal foreigners

³³⁵ As in *Van der Burg and Another v National Director of Public Prosecutions* (CCT 75/11) [2012] ZACC 12; 2012 (2) SACR 331 (CC); 2012 (8) BCLR 881 (CC), where it was held that a forfeiture order against the property in terms of POCA s 50(1)(a) also includes the offence of illegally selling liquor by individuals.

³³⁶ This is especially evident in the drug- and sex-business. Eg, in *S v Mudaly and Others* Case No 41/890/2007 Durban Regional Court, the accused recruited Thai women to work as prostitutes at the "Aer Dark Escort Agency". The women's passports were confiscated by the accused and were retained until each woman had paid a bondage debt of ZAR60,000 which was allegedly the transport cost to South Africa, to the accused. The accused was charged with various offences in terms of the POCA and other applicable legislation.

³³⁷ See Torg —Human Trafficking Enforcement in the United States" 2006 14 *Tulane Journal of International and Comparative Law* 503 511.

³³⁸ This concept is aptly phrased by Ackerman J in *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (2) SACR 196 (CC) 203-204: "It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice ... it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crime, the purpose being to remove the incentive for crime, not to punish them." See also *National Director of Public Prosecutions v Prophet* 2003 (2) SACR 287 (CPD) 291 d-f.

³³⁹ As seen in the *S v Sayed*-case (n323 *supra*), where the trafficked victims were charged with the contravention of immigration laws (Immigration Act ss 16–19). They were regarded as foreigners who were in the Republic in contravention of the Act.

may receive a visitor's permit, but have to comply with any terms and conditions which may be prescribed from time to time and provide the prescribed deposit to be forfeited to the Department in case of their non-compliance with the Act. Permanent residence may be granted to a foreigner of good and sound character if the person is a refugee as referred to in section 27(c) of the Refugees Act 130 of 1998 (Refugee Act). However, foreigners infected with transmittable diseases, such as HIV/AIDS, do not qualify for a temporary or a permanent residence permit (section 29(1)). These provisions are quite challenging to comply with, especially for a trafficked person without any funds for a deposit or who may be viewed as not having a "sound" character (as a previous sex worker, for example). Many persons trafficked for sexual exploitation contract HIV/AIDS and will thus not qualify for permanent residence.

Section 32 further establishes that any illegal foreigners shall depart or be deported, unless authorised by the Department to remain in the Republic pending their application for a status. In contradistinction, section 34 states that an immigration officer may, without a warrant, arrest and summarily deport an illegal foreigner, or detain and then deport the illegal person. In a trafficking scenario, the trafficked person would likely be immediately deported if apprehended, which would lead to the re-trafficking of the person. Traffickers who knowingly enable their victims to illegally enter, remain in, or depart from the country would be guilty of contravening this Act and liable to either a fine or to imprisonment not exceeding one year.³⁴⁰ This means that a trafficker would only be prosecuted for breaking immigration laws if caught trafficking an illegal foreigner into South Africa.³⁴¹ In practice,

³⁴⁰ Immigration Act s 49(2). The penalty was amended by s 45 of Immigration Amendment Act 19 of 2004, and the Immigration Amendment Act 13 of 2011 to 5 yrs. This includes bribing or threatening border officials to contravene the Act. If the attempt failed, the trafficker would be liable to a fine or to imprisonment not exceeding 18 months, but if the act was successful and the officer breached his duties, the penalty would be a fine or imprisonment not exceeding 3 yrs. See Immigration Act s 49(10). Again, the punishment was enhanced by s 45 of both Immigration Amendment Acts to 5 yrs in both instances without the option of a fine. If traffickers themselves illegally enter, remain in, or depart from South Africa in contravention of this Act, they are only liable on conviction to either a fine or imprisonment not exceeding 3 months. See Immigration Act s 49(1)(a). S 45 of Immigration Amendment Act 19 of 2004 and the Immigration Amendment Act 13 of 2011 elevated the imprisonment term to 5 yrs, as harsher penalties were required to discourage traffickers from committing these offences.

³⁴¹ This is evident in the *S v Sayed*-case (n323 *supra*). The aiding, abetting, assisting, enabling or in any manner helping of a foreigner by, for example, "entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation" in terms of s 42(1) of the Act is criminalised.

the victims of human trafficking are targeted, and not necessarily their traffickers.³⁴² This is because trafficked persons have most likely been brought in from other countries and do not have the necessary valid documentation.³⁴³ This leads to secondary victimisation. The Act does not consider victim protection as regards trafficked persons. Although traffickers who are in possession of another person's travel document are criminalised, the confiscation or destruction of trafficked persons' personal documents is not addressed in the Act.

One of the objectives of immigration control is to promote a climate within the Republic which encourages illegal foreigners to depart voluntarily. To achieve this purpose, four principal bodies were appointed for migration policing: the SANDF,³⁴⁴ the SAPS, the SAPS Border Policing component (which includes the Internal Tracing Units of the Border Police),³⁴⁵ and the Department of Home Affairs (DHA). Although these forces should be able to effectively curb illegal migration as well as human trafficking, the coordination among these migration policing agencies has been minimal. For instance, SAPS internal tracing units do not have access to the DHA's computerized information after-hours.³⁴⁶ More comprehensive cooperation measures are needed to police the passage of trafficking offenders.

³⁴² Eg, in the case of *Phale v Minister of Home Affairs and Others* (22852/11) [2011] ZAGPPHC 71; [2011] 4 All SA 103 (GNP), the detention of a Botswana citizen who had fled to South Africa after being charged with murder in Botswana was considered unlawful in terms of ss 34(1), 34(5), 34(8) of the Immigration Act, as the right not to be deprived of freedom arbitrarily or without just cause applies to all persons in South Africa whether they are here illegally or not.

³⁴³ Traffickers most probably do possess travel documents. However, if they do make use of fabricated or falsified travel documents for either themselves or for trafficked persons in order to enter or exit the jurisdiction; or are in the possession of another person's travel document or of a blank, falsified or fabricated document used for the facilitation of movement across borders, they are liable on conviction to a maximum of 15 yrs without the option of a fine (as amended by s 45 of Act 19 of 2004). This is an improvement on the original penalty in the Immigration Act 2002 of either 4 yrs or a fine.

³⁴⁴ The SANDF mostly policed the borders in the past, eg by patrolling the electrified fence that is set up along part of the border between South Africa and Mozambique. See Klaaren & Ramji — "Migration Policing in South Africa after Apartheid" 2001 48(3) *Africa Today* 35 41.

³⁴⁵ This specialized unit operates in the major urban areas as well as in border areas with high concentrations of undocumented migrants. The policing of suspected undocumented migrants are executed by means of roadblocks both within short distances of the border and within the central Gauteng economic region. See Klaaren & Ramji (n344 *supra*) 40-41.

³⁴⁶ See Klaaren & Ramji (n344 *supra*) 41.

7.3.2.7 The Refugees Act 130 of 1998

The Immigration Act is in many aspects complemented by the Refugees Act which provides for the reception into South Africa of asylum seekers and regulates applications for and recognition of refugee status. Trafficked persons may apply for refugee status if they have a well-founded fear of being persecuted by reason of their nationality.³⁴⁷ In this regard, refugee legislation guarantees asylum seekers and refugees certain rights and responsibilities, which are further strengthened by the provisions of the Constitution.³⁴⁸ South Africa has a policy of urban integration for asylum seekers and refugees, which entails a no-encampment policy for refugees as camps are perceived as “discouraging integration and contributing to the emergence of protracted refugee situations”.³⁴⁹ This policy is disadvantageous for refugees as there are neither refugee camps nor government subsidies for them. As a consequence, refugees need to secure their own funding for shelter and food.³⁵⁰ Another drawback of the integration approach is the spate of xenophobic attacks against immigrants in South Africa, which is evidence that this option is perhaps not ideal to guarantee the safety and human rights of trafficked persons who have applied for refugee or asylum status.

7.3.2.8 The Extradition Act 67 of 1962

The Extradition Act 67 of 1962 (Extradition Act)³⁵¹ provides for the extradition of persons accused or convicted of certain crimes. Human trafficking is a crime with an international

³⁴⁷ After the replacement of the old Aliens Control legislation through the promulgation of the Refugee Act in 2000, refugee status has been granted to more than 50,000 forced migrants in the RSA and more than 100,000 asylum seekers have been processed. See Mkhwebane-Tshehla —“South Africa’s Immigration Policy: International Norms as Guidelines” in Fischer & Vollmer (eds) *Migration and Displacement in Sub-Saharan Africa* (2009) 82.

³⁴⁸ See Refugees Act Chap 5. Eg, when asylum seekers are granted a permit or status (as established in the Immigration Act s 23(2)), such persons are no longer regarded as illegal foreigners. Accordingly, no proceedings may be instituted or continued against them with regard to their unlawful entry into or presence in the country until a decision has been made on their application or they have exhausted their rights of review or appeal. See *Arse v Minister of Home Affairs and Others* (25/2010) [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA); [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA).

³⁴⁹ Mkhwebane-Tshehla (n347 *supra*) 82.

³⁵⁰ The DHA has however opened a temporary Refugee Reception Centre in Musina in 2008, especially to address the plight of asylum-seeking Zimbabweans. See Mkhwebane-Tshehla (n347 *supra*) 82-83. NGOs provide some refugees with social assistance and psycho-social support.

³⁵¹ Certain provisions were amended by Extradition Amendment Act 46 of 1987, and the Extradition Amendment Act 77 of 1996.

dimension, and also an extraditable offence.³⁵² As such, South Africa may request countries with which it has extradition agreements to surrender persons accused or convicted of committing a trafficking crime within its jurisdiction.³⁵³ A person accused or convicted of the offence of human trafficking who is located in a country with which South Africa has an extradition agreement shall be liable to surrender the person to the jurisdiction. Although the request for extradition and the response to the request are governed by the rules of public international law, the requested state must also comply with its own domestic laws before surrendering the requested individual. South Africa is obliged to honour its international law obligations in terms of the Extradition Act with other requesting states, but there have been cases where requests were refused as the requested foreign national would have been at risk of being subjected to the death penalty, which is contrary to the Constitution and invalid.³⁵⁴ The Extradition Act also permits the surrender in extradition of persons to foreign countries who are not a party to an extradition agreement with South Africa, but only if the President consents on an *ad hoc* basis to the extradition.³⁵⁵ This Act is particularly beneficial to trace trafficking offenders who have escaped to other countries to stand trial for their crimes in South Africa.

7.3.2.9 The International Cooperation in Criminal Matters Act 75 of 1996

The increase in the mobility of traffickers together with the increase of crime with a transnational element has necessitated closer international judicial cooperation between countries of origin, transit and destination. As a form of cooperation wider than that of the traditionally limited form of extradition, the International Cooperation in Criminal Matters

³⁵² In this context, Goldstone J commented in *Geuking v President of the Republic of South Africa and Others* (CCT35/02) [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) 2: “The need for extradition has increased because of the ever-growing frequency with which criminals take advantage of modern technology, both to perpetrate serious crime and to evade arrest by fleeing to other lands.”

³⁵³ See Extradition Act (n351 *supra*) s 2(1) & s 3.

³⁵⁴ See *Tsebe and Another v Minister of Home Affairs and Others, Phale v Minister of Home Affairs and Others* (27682/10, 51010/10) [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (GSJ); [2012] 1 All SA 83 (GSJ), where, although an extradition treaty is in existence between South Africa and Botswana, the country refused to surrender a fugitive of justice as the death penalty exists in Botswana for certain crimes committed. This was done in accordance with the Extradition Act (n351 *supra*) s 11. Also, in *Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC), the appellant was unlawfully removed from Cape Town to New York to face a possible death sentence for the prosecution of the terrorist bombing of the US Embassy in Tanzania in 1998. The Constitutional Court ruled in Mohamed’s favour, the US honoured SA’s request that Mohamed not receive the death sentence, and he received a life sentence.

³⁵⁵ Extradition Act (n351 *supra*) s 3(2). See also *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478.

Act 75 of 1996 (ICCMA) promotes mutual legal assistance on an international level. Assistance which may be provided includes, amongst others, the giving or sharing of information, making available public documents such as judgments and orders, locating persons and witnesses, obtaining witnesses' statements, the confiscation of the proceeds of crime and the enforcement of a foreign court order.

The Act facilitates the provision of evidence from other countries for purposes of criminal prosecution.³⁵⁶ This mainly takes the form of the issuing of a letter of request for assistance from a foreign state in obtaining evidence necessary for proceedings from a person in such a foreign state whose attendance cannot be obtained without undue delay.³⁵⁷ Such a person may subsequently either submit interrogatories, or appear in person or through a legal representative at the examination.³⁵⁸ It is important to note that foreign witnesses who attend proceedings in South Africa, and who have either pending criminal charges or civil warrants against them in South Africa, will not be arrested. This is an assurance to foreign victims of trafficking who wish to testify against their traffickers in South Africa, but may be afraid to return to this country because of certain charges against them. If a convicted trafficker is ordered to pay a fine or compensation to a victim, but he does not have sufficient property in the Republic from which the compensatory order can be recovered, a letter of request to the foreign state for assistance in recovering the benefits may be issued.³⁵⁹

The Act also facilitates the confiscation and transfer of the proceeds of crime between the Republic and foreign states.³⁶⁰ If a court in South Africa recognizes that a confiscation order will not be sufficiently satisfied by assets owned by the perpetrator in the jurisdiction, and that the person against whom the order has been made owns property in a foreign

³⁵⁶ ICCMA Chaps 2 & 3. Foreign countries may also request assistance from South Africa. Equatorial Guinea requested South Africa in 2004 to obtain the testimony of Sir Mark Thatcher to assist it in the prosecution of certain alleged coup plotters. The South African government acceded to the request and a subpoena was issued requiring him to appear and answer a list of questions. In *Thatcher v Minister of Justice and Others* Cape High Court 24 Nov 2004 (Unreported), Thatcher challenged the issue of the subpoena in the High Court and lost. Also, in *Tulip Diamonds Fze v Minister of Justice and Constitutional Development* (810/2011) [2012] ZASCA 111, an appeal against a request made by Belgium to the South African authorities to inspect, seize and make copies of all relevant documents relating to criminal activities in which the appellant was seemingly involved, was dismissed.

³⁵⁷ ICCMA s 2.

³⁵⁸ ICCMA s 3.

³⁵⁹ ICCMA ss 13-18.

³⁶⁰ ICCMA Chap 4.

state, the court may request assistance from that state in enforcing the confiscation order.³⁶¹ As perceived, international cooperation is crucial in order to prevent and combat transnational criminal activity such as human trafficking. Additionally, the rule of law is also promoted on the basis of a joint commitment to combat cross-border crimes.

7.3.2.10 The Riotous Assemblies Act 17 of 1956

Because most trafficking acts require the collusion of two or more persons, a charge of conspiracy³⁶² to commit some underlying offence is an effective means to prosecute and hold accountable all culpable parties. Nearly every contemporary human trafficking indictment contains some allegation of conspiratorial activity which can be prosecuted in terms of the Riotous Assemblies Act 17 of 1956 (Riotous Assemblies Act).³⁶³ To constitute a crime of conspiracy, a person must subjectively agree with another to commit a crime.³⁶⁴ It appears that for a conviction on a charge of conspiracy to be achieved, the commission of an offence must be the focal point of the agreement between the perpetrators. It is, however, not a requisite for a conviction on a charge of conspiracy for the actual offence to have been committed. Once the planned offence is committed it appears that it is preferable to rather convict of that offence than the conspiracy or both.³⁶⁵ If a trafficker conspires with another person to aid the commission of a crime against a victim of trafficking or incites another person to commit an offence against the person of a victim of trafficking, he or she could be charged in terms of the Riotous Assemblies Act.³⁶⁶ It

³⁶¹ ICCMA ss19-26.

³⁶² The crime of conspiracy is committed ~~if~~ what the parties agree to do is a crime. There can be a conspiracy only if there is a definite agreement between at least two persons to commit a crime". See Burchell (n174 *supra*) 652.

³⁶³ Although conspiracy is punishable in terms of this statute dealing with riotous assemblies, the crime of conspiracy as defined in the Act is not limited to acts relating to riotous assemblies. The definition is wide enough to cover conspiracy to commit a crime. The Riotous Assemblies Act declares in s 18(2)(a) that any person who conspires with any other person to aid or procures the commission of or to commit a crime is guilty of an offence.

³⁶⁴ Snyman (n193 *supra*) 294-295 asserts that at this stage ~~...~~ the subjective contemplation advances to the stage of objective expression, and the agreement is an act which amounts to a conspiracy".

³⁶⁵ See *S v Fraser* (n201 *supra*) 7, where the following is stated: ~~Normally~~, where a person conspires with another to commit a crime and the crime in question is committed, then the conspirator is liable for the crime itself and should be so charged". See Burchell (n191 *supra*) 367 and also *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) 823G.

³⁶⁶ In terms of the Riotous Assemblies Act s 18(2)(b): ~~Any~~ person who incites, instigates, commands, or pressures any other person to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable". In *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6)

appears though that section 18(2) of the Act does not criminalise conspiracies entered into in South Africa to commit crimes beyond the borders of South Africa.³⁶⁷ Consequently, the application of this Act to prosecute trafficking offenders who commit their crimes abroad is restricted.

7.3.2.11 The Intimidation Act 72 of 1982

Various provisions of the Intimidation Act 72 of 1982 (Intimidation Act), as amended, criminalises acts of intimidation that may be used in a very wide variety of circumstances, including but not limited to intimidating a person into various trafficking situations. This Act provides in s 1(1)(a) that any person who without lawful reason and with intent compels or induces another person or persons to do or refrain from doing any act, or assaults or injures that person, threatens to kill, assault or injure that person is guilty of the offence of intimidation. Punishment is prescribed as a fine not exceeding ZAR200,000 or imprisonment for a maximum of ten years, or both. Section 1(1)(b) provides the same punishment for the very broadly defined offence where a person intimidates another either verbally or in print, so that the person fears for his own safety or that of his family and property or the security of his livelihood.³⁶⁸ The intentional commission of a certain intimidating act is criminalised in section 1(1)(a) while section 1(1)(b) criminalises the causing of a certain threatening condition without any requirement of intention and in which the victim may not have been in fact intimidated. All that is required is that the accused person's conduct either had certain consequences or that it might reasonably be expected to have those consequences.³⁶⁹ A trafficker who threatens a victim to the point

SA 642; 2002 (11) BCLR 1117 (CC) the majority judgment found that a client of a prostitute commits an offence under s 18(2)(b) of the Riotous Assemblies Act. The unlawful and intentional pressure to procure the commission of the offence can be applied in terms of any crime such as drug- or weapon-smuggling. See respectively *Sheryl Cwele & another v The State* (671/11) [2012] ZASCA 155 and *S v Daniel Geiges and Gerhard Wisser* Case No CC332/2005 (Unreported).

³⁶⁷ See *S v Basson* [2000] 3 All SA 59 (T) 75 (b)-(d).

³⁶⁸ Intimidation Act s 1(1)(b) provides: —“Any person who ... acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person ... is guilty of an offence”.

³⁶⁹ Interestingly, the Intimidation Act could be applied to 2 recent racketeering trials involving allegations of brothel-keeping. See *S v Sayed* (n323 *supra*), and the on-going KZN Durban High Court-case of *S v Kogilan Mudlay, Lionel Johnstone and Rannsay Suwannakoop* (2011). These trials are stalled as the Thai interpreters are too intimidated to translate in these cases against their fellow countrymen. In the *Sayed-*

that the victim harbours the necessary fear, irrespective of the trafficker's intention or of whether the victim had been reasonable in harbouring the fear, will be guilty of this crime.³⁷⁰ Conversely, even if the conduct was likely to have caused fear, but no fear had in fact been felt by the victim or intended by the trafficker, the crime is committed. This would also find application where a trafficker threatens one victim to frighten another victim.

The Intimidation Act intersects with other criminal offences which have led to the conjecture that other laws should rather be applied in certain circumstances.³⁷¹ It is argued, for example, that in the case of a domestic quarrel where a husband assaults his wife, either common-law assault or the provisions of the Domestic Violence Act 116 of 1998 should be employed.³⁷²

7.3.2.12 The Prevention and Combating of Corrupt Activities Act 12 of 2004

In South Africa, to bribe someone or accept a bribe is an offence under the Prevention and Combating of Corrupt Activities Act 12 of 2004 (Corrupt Activities Act),³⁷³ which provides for the criminalisation of corruption. Corruption provides a breeding ground for organized crime, amongst which human traffickers are found. The Act creates the general, broad and all-encompassing offence of corruption, as well as various crimes in which specific corrupt activities are criminalised.³⁷⁴ The general offence of corruption is formulated in section 3 of

trial, the interpreter disguised her identity by wearing a head scarf with only her eyes showing and hiding behind large clothing. However, she has since declined to return to court, and no other interpreter is available. See Broughton –Lack of Thai Interpreters Stalls Court Cases” *The Mercury* 16 Mar 2011 <http://m.iol.co.za/article/view/s/11/a/54800> (accessed 2013-01-16).

³⁷⁰ See *S v Cele and Others* 2009 (1) SACR 59 (NPD) 63d-64a. In this case, 3 prison wardens became involved in a verbal altercation with 2 of their superiors, during the course of which one of them had allegedly uttered the words –we will crucify you”. They were found guilty of contravening s 1 of the Intimidation Act, but the convictions and sentences were set aside on appeal.

³⁷¹ Plasket & Spoor –The New Offence of Intimidation” 1991 12(4) *Industrial Law Journal* 747 747.

³⁷² In *S v Motshari* 2001 (1) SACR 550 (NC) 556-560, the accused threatened to kill his live-in lover of 7 yrs and was charged with contravening s 1(1)(b) of the Intimidation Act. The conviction by the lower court was set aside, as the statute was not applicable to domestic matters and the judge was not convinced the complainant was truly intimidated.

³⁷³ This Act repealed *in toto* the Corruption Act 94 of 1992, which replaced the common-law crime of bribery. The Corruption Act was effective in combating the corruption of public officials, but sentences awarded were quite lenient as in *S v Matsabu* (186/08) [2008] ZASCA 149; 2009 (1) SACR 513 (SCA); [2009] 2 All SA 150 (SCA). In this case, a traffic officer in Viljoenskroon was arrested during an anti-corruption operation for accepting a bribe of ZAR300. He was convicted in terms of s 1(1)(b) of the Corruption Act and sentenced to 2 yrs imprisonment. The offence of corruption created by the Corrupt Activities Act is also much wider than that which prevailed under the Corruption Act.

³⁷⁴ Corrupt Activities Act Preamble.

the Act which makes it an offence for anyone that either accepts any gratification from any other person, or gives any gratification to any other person in order to act in a manner that amounts to the illegal exercise of any duties. In almost all trafficking-related cases involving corruption, the trafficker gives a gratification to any other party who accepts it as inducement to act in a certain way. The recipients may be law-enforcement officers, borders officials, or any other individual the trafficker may wish to influence. The gratification could be in the form of money, a gift, or any favour or advantage of any description, including non-patrimonial benefits such as sexual services.

Corruption is rife in South Africa, especially amongst public officers, judicial officers, prosecutors, witnesses, and members of legislative authority.³⁷⁵ Trafficking cases where public officials are induced or enticed by the trafficker constitute a contravention of section 4 of the Corrupt Activities Act. The elements of this offence are set out as the giving or offering of a benefit with the intention of influencing the recipient of the benefit to perform or disregard his duty, and the receiving, obtaining, agreeing or attempting to receive any benefit in order to behave in a certain corrupt manner.³⁷⁶ However, the offence is difficult to prove. The Corrupt Activities Act further creates a reporting obligation for any person in a position of authority who knows or suspects that acts of corruption, fraud, theft, extortion, forgery and uttering are carried out by any other person or entity to report the person or institution to the SAPS and other designated officials.³⁷⁷ In addition to the imposition of this

³⁷⁵ As stated in *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) 4, corruption undermines the institutions and values of democracy: —Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.”

³⁷⁶ In *Senkhane v S* (300/10) [2011] ZASCA 94, the appellant, a manager of corporate services for the Mqohaka Municipality had procured payment from members of 2 businesses who had tendered for municipal projects on the basis that he would secure the tenders for them. He was convicted of contravening s 1(1)(b)(i) of the Corrupt Activities Act and on this charge sentenced to one year imprisonment. Also, in *Selebi v State* (240/2011) [2011] ZASCA 249, the appellant, Jacob Sello Selebi, was convicted of corruption and sentenced to 15 yrs' imprisonment. On appeal, it was held that the appellant received payment and provided *quid pro quo* for such payment as envisaged in s 4(1)(a) of the Corrupt Activities Act.

³⁷⁷ See Corrupt Activities Act s 34. Eg, the court held on 17 May 2012 in *S v Amier Moosagie* Case No CC 29/2010 (Unreported), that the accused person contravened s 3(b)(i)(aa) read with ss 1, 2, 24, 25, 26(1)(a) of the Corrupt Activities Act. In this case, the accused attempted to bribe a SARS auditor by presenting her with a Phillippe Loren gold-plated watch and a desk ornament. She accepted the gifts but immediately reported the matter to her superior and handed the articles to him. The accused also attempted to bribe the superior with a sum of ZAR9,800 as well as a SARS investigator with gifts of a Mont Blanc pen, a Rolex watch and 2 Armani suits as an inducement to act favourably in regard to his tax affairs.

obligation, failure to meet this obligation is a criminal offence, subject to imprisonment. This Act is more comprehensive than its predecessor as it allows for prosecution in the case of transactions between private persons, not only in the public sphere, and it prohibits cross-border acts of corruption which provides for extra-territorial jurisdiction for South African courts. Consequently, the anti-corruption offences created by the Corrupt Activities Act may indeed be constructive in combating trafficking in persons.

7.3.2.13 The Witness Protection Act 112 of 1998

The Witness Protection Act 112 of 1998 (Witness Protection Act) allows for the protection and placement of vulnerable witnesses and related persons under protection. As the evidence of trafficking survivors form the basis for a successful investigation and prosecution of the crime and its offenders, they need to be re-assured that they will be protected from intimidation and any possible harm that may befall them because of their testimonies. In this regard, the Act grants temporary³⁷⁸ or permanent placement³⁷⁹ protection to witnesses and related persons at risk in appropriate circumstances. Related persons are broadly defined in the Act to include any member of the family or household of a witness, or any other person in a close relationship to, or association with, the witness.³⁸⁰ This definition seems comprehensive enough to be extended to witnesses' relatives and other persons close to them, whose lives may also be in jeopardy.³⁸¹ Many victims also abandon witness protection programmes as they do not want to be separated from their family members forever, thus this inclusion is encouraging.

Section 7(1) of the Witness Protection Act provides that witnesses who have reason to believe that their or any related person's safety is threatened by any person or group of persons, whether known to them or not, because they are witnesses, may apply for witness protection with any appropriate law enforcement officer, public prosecutor or office

³⁷⁸ In terms of the Witness Protection Act s 8, an officer may provide temporary protection of not more than 14 days to an applicant pending a final decision on witness protection.

³⁷⁹ According to Witness Protection Act s 11, permanent placement can only result after a protection agreement has been signed by the witness.

³⁸⁰ Witness Protection Act s 1.

³⁸¹ As required by CTOC art 24(1).

member.³⁸² There are a number of legislative safeguards built into the Act, such as that any interested person or an investigating officer may report or apply for protection if witnesses are unable to do this themselves.³⁸³ If a child is trafficked by a parent or guardian, an application may be made on behalf of the child without the consent of the parent or guardian.³⁸⁴ However, this is only possible provided the child will testify in proceedings where the parent or guardian is a suspect.³⁸⁵ During court proceedings, a witness need not reveal his or her name to the court, as determined in *S v Ntoae and Others*.³⁸⁶ If the defence requires the name, it could make an application for disclosure at a later stage.³⁸⁷ The Witness Protection Act also provides for the payment of a daily allowance to a person placed under protective custody, which would assist victims if they do not generate any income themselves.³⁸⁸ Another contribution is the creation of the Office for Witness Protection (OWP) as administered by the National Prosecuting Authority (NPA). The OWP reports annually on the functioning and performance of the National Witness Protection Programme introduced in terms of the Witness Protection Act.³⁸⁹ The 2011/2012 annual report states that 407 witnesses and 462 related persons were handled on the programme with a total of 28 criminal prosecutions finalised where witnesses were on the programme. No witnesses were harmed or threatened by persons from whom they were protected while on the programme during the past year.³⁹⁰ The Witness Protection

³⁸² This was evident in *Lekolwane and Another v Minister of Justice* (CCT47/05) [2006] ZACC 19; 2007 (3) BCLR 280 (CC) where the applicant, his wife and their 3 children were placed under protective custody in terms of the National Witness Protection Programme (NWPP). The facts of the case are that during a disagreement, the applicant allegedly insulted the Chief, whereupon the community attacked the family and destroyed the applicants' home, business and belongings. The applicant feared for his and his family's lives.

³⁸³ See Witness Protection Act s 7(2).

³⁸⁴ Witness Protection Act s 7(2)(b).

³⁸⁵ Witness Protection Act s 12(1). Application may also be made on behalf of the child if the parent or guardian cannot be identified or found, the child has no parent or guardian, or the parent or guardian unreasonably withholds or is unable to give consent.

³⁸⁶ *S v Ntoae and Others* 2000 (1) SACR 17.

³⁸⁷ See also *S v Pastoors* 1986 (4) SA 222 (W); *S v Leepile* 1986 (2) SA 333; (4) 1986 (3) SA 661; (5) 1986 (4) SA 187. Before the promulgation of the Witness Protection Act, witnesses were placed under protective custody when deemed necessary by virtue of the CPA.

³⁸⁸ Witness Protection Act s 22(1).

³⁸⁹ See NPA 2011/2012 Annual Report (2012) 46 NPA%20Annual%20Report%202011-12%29Final%20Copy [1].pdf (accessed 2013-01-16).

³⁹⁰ However, one witness was harmed in an altercation while attending a social event. The Witness Protection Programme has shown a significant improvement as regards the number of witnesses that walked off the programme. In 2011/2012, 1.8% witnesses (representing a total of 32 witnesses) voluntarily left the programme because they did not seek protection services any longer. This is an improvement of 3.2% on the 2010/2011 numbers, and in stark contrast to the 28% witnesses who left the programme in 2009/2010. After completing their testimonies, 31 witnesses with 21 dependants were successfully discharged, relocated and reintegrated back in to society throughout the year. See NPA (n389 *supra*) 8, 46.

Act provides for good practices in establishing the structures, rules and operational procedures for the protection of witnesses. There are still certain deficiencies in the legislation, for instance no time limitation is specified for how long the witness protection program may run, and no structure is in place to provide for long term-witnesses. Most importantly, the Act does not indicate what happens after witnesses have given their testimony, an inadequacy which could lead to reluctance of potential witnesses to assist law enforcement and prosecutorial authorities.

7.3.2.14 The Films and Publications Act 65 of 1996

The Films and Publications Act 65 of 1996 (FPA), as amended,³⁹¹ regulates the creation, production, possession and distribution of specific publications, interactive computer games and films by way of classification, the imposition of age restrictions, and the provision of consumer advice.³⁹² The purpose of the FPA was specifically amended in 2009 to include the protection of children from exposure to pornographic and other harmful materials, and from being exploited in child pornography productions.³⁹³ Amongst the offences provided for are the production, possession and distribution of prohibited publications.³⁹⁴ Such publications must contain XX-rated visual presentations.³⁹⁵ Child- and adult-abuse images produced by traffickers will fall under this prohibition. Persons

³⁹¹ As amended by the Films and Publications Amendment Acts of 1999, 2004 and 2009.

³⁹² FPA (n391 *supra*) s 2(a).

³⁹³ FPA (n391 *supra*) s 2(b), (c).

³⁹⁴ FPA (n391 *supra*) s 27(1). The provisions of this section of the Act has been unsuccessfully challenged in the Constitutional Court in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333. The applicant, a film producer, averred that s 27(1) read with the definition of child pornography in s 1 of the Act, limited the right to privacy, freedom of expression and equality, and that the limitation was not justifiable as it was vague and overbroad. The court found that the Act established legitimate objectives in terms of the protection of children which outweighed the relatively narrow infringement of expression, privacy and equality.

³⁹⁵ According to FPA (n391 *supra*) (1996), a publication is rated as XX if the visual presentation (whether simulated or real) is of-

- (a) a person who is, or is depicted as being, under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity;
 - (b) explicit violent sexual conduct;
 - (c) bestiality;
 - (d) explicit sexual conduct which degrades a person and which constitutes incitement to cause harm; or
 - (e) the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm.
- The Films and Publications Amendment Act 3 of 2009 modified the 1996 XX-classification to include:
- (i) explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;
 - (ii) bestiality, incest, rape or conduct or an act which is degrading of human beings;
 - (iii) conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour;
 - (iv) explicit infliction of sexual or domestic violence; or
 - (v) explicit visual presentations of extreme violence.”

convicted of producing child-abuse images or who are in possession of or distribute child pornography can be sentenced to imprisonment for a maximum of ten years.³⁹⁶ The Act also creates an obligation to report any knowledge of suspicion of offences involving child pornography to the SAPS as soon as possible.³⁹⁷

The FPA intends to strike a reasonable balance between the right of a child to be protected against exploitation and harm,³⁹⁸ and other fundamental freedoms and rights, such as the freedom of expression, as enshrined in the Constitution. However, it has been argued that the classification criteria as set out in the Amendment Act 2009 are too broadly framed and that they are based on inherent subjective and moralistic notions of what “harmful sexual behaviour”, “conduct which is degrading of human beings” or “conduct which violates or shows disrespect for the right to human dignity of any person” constitute.³⁹⁹ Still, the legislative purposes of the Act are essential in order to protect the dignity of children, to guard against acts of abuse against children, to stamp out the market for photographs and films made by abusing children, and to prevent these images being used to harm children. Such conduct perpetrated by sex traffickers can be successfully prosecuted under this Act.

7.3.2.15 The Electronic Communications and Transactions Act 25 of 2002

While sex traffickers may possess child pornography by way of storage on any type of electronic data storage medium, the distribution thereof normally transpires by exchanging digital messages across the Internet or electronic mail. In this regard, one of the objectives

³⁹⁶ FPA (n391 *supra*) s 30.

³⁹⁷ FPA (n391 *supra*) s 27(2)(a). No penalty is prescribed for non-compliance with this section. The Films and Publications Amendment Act 3 of 2009 rectified this omission and imposes a fine or imprisonment for a period not exceeding 5 yrs or to both a fine and imprisonment.

³⁹⁸ As mandated in s 28 of the Constitution, in that children should be protected from abuse, degradation, and maltreatment.

³⁹⁹ In *Print Media South Africa and Others v Minister of Home Affairs* Case No 14343/2010 CCT113/11, the applicants complained that the manner in which s 16(2) of the Act is drafted means that large numbers of publications dealing with matters of substantial public interest will have to be submitted to the Films and Publication Board for classification before they can be distributed, which will cause severe delays for the publication as well as for the public. Another concern was that the Act grants exemption to newspapers that are subject to a self-regulatory mechanism but fail to grant magazines a similar exemption. The court ordered that FPA (n391 *supra*) s 16(2)(a) was declared invalid and to be removed; FPA (n391 *supra*) ss 16(1), 16(2) and 24A(2)(a) were declared unconstitutional to the extent that they did not apply to magazines; that the words “omagazine” were to be read in after the word “ewspaper” in ss 16(1), 16(2) and 24A(2)(a); and that s 24A(2) was declared invalid to the extent that it is made applicable to s 16(1) of the Act.

of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) is to regulate all forms of electronic communications⁴⁰⁰ in South Africa and prevent abuse of information systems. Traffickers may be prosecuted and convicted by way of digital evidence such as e-mails, electronic documents, spreadsheets, databases, and other digital formats. The ECTA gives data messages⁴⁰¹ the same legal status as information generated conventionally on paper.⁴⁰² Section 15 reflects a further attempt to secure computer-generated evidence, by giving e-mail messages evidential weight in both civil and criminal proceedings.⁴⁰³ The Act responds to the challenge posed by the Internet in two ways: it does not allow courts a discretion regarding admissibility of such data messages, but it does afford them a discretion concerning the evidential weight to be attached to such message.⁴⁰⁴ The Act also endeavours to bolster the strength of the state in combating Internet crime by creating “cyber inspectors” who have extensive search and seizure rights.⁴⁰⁵ In an increasingly electronic age where organised crime syndicates and traffickers progressively commit their crimes in a cyber environment, these types of cyber-crimes are comprehensively dealt with by the ECTA.⁴⁰⁶

⁴⁰⁰ ECTA s 1 defines “electronic communications” as “a communication by means of data messages”. “Data” is defined as “electronic representations of information in any form”.

⁴⁰¹ “Data messages” are defined in ECTA s 1 as data generated, sent, received or stored by electronic means and includes voice where the voice is used in an automated transaction and a stored record. Eg, in *Motata v S* (A345/2010) [2010] ZAGPJHC 134 electronic information (data in the form of images and sound) from a cell phone was admitted into evidence in a trial within a trial.

⁴⁰² ECTA s 11(1) provides that “information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message”.

⁴⁰³ ECTA s 15 provides that in any legal proceeding, “... the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence –
a. on the mere grounds that it is constituted by a data message; or
b. if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

2. Information in the form of a data message must be given due evidential weight.
⁴⁰⁴ In this regard, Van Zyl J remarked in *S v Ndiki* [2007] 2 All SA 185 (CK) 53: “It seems that it is often too readily assumed that, because the computer and the technology it represents is a relatively recent invention and subject to continuous development, the law of evidence is incapable or inadequate to allow for evidence associated with this technology to be admissible in legal proceedings. A preferable point of departure in my view is to rather closely examine the evidence in issue and to determine what kind of evidence it is that one is dealing with and what the requirements for its admissibility are.”

⁴⁰⁵ See ECTA s 30(3). This includes the use of an “Aton Pillar” order which is “... directed at the preservation of vital evidence that might otherwise be lost” and only granted if “...there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some way or manner be spirited away by the time the case comes to trial or to the stage of discovery”. See *Van Niekerk v Van Niekerk* (2007) JOL 20660 10.

⁴⁰⁶ As in *Thozama Khanyiso Gcwabe v The State* Case No CA&R 03/2012 (unreported), where the appellant was found guilty of contravening ECTA in that he cloned various credit and debit cards belonging to overseas account holders for criminal purposes.

7.3.2.16 The Basic Conditions of Employment Act 75 of 1997

The Basic Conditions of Employment Act 75 of 1997 (BCEA) establishes basic fair labour practices, regulates variation of basic labour terms and conditions, and prohibits child labour. Section 48 of the BCEA provides that, subject to the Constitution, all forced labour is prohibited and that no person may for his or her own benefit or for the benefit of someone else cause, demand or impose forced labour.⁴⁰⁷ The penalty for violations of these provisions is a fine or imprisonment not exceeding three years.⁴⁰⁸ The BCEA specifies the minimum employment standards and regulations for all possible contracts of employment, which includes, amongst others, maximum working hours,⁴⁰⁹ overtime,⁴¹⁰ meal intervals,⁴¹¹ daily and weekly rest periods,⁴¹² annual leave,⁴¹³ as well as sick and maternity leave.⁴¹⁴ These directives are commonly violated in cases of trafficking for labour exploitation.

Chapter 6 of the BCEA regards the prohibition of child employment and forced labour, and establishes an absolute minimum age limit on the employment of children while setting conditions for the employ of older children.⁴¹⁵ Under the Act, it is prohibited to employ a

⁴⁰⁷ Although these provisions prohibit forced labour, the phrase is not defined in the Act or in any other domestic legislation. However, the Basic Conditions of Employment Amendment Bill 2010 has corrected this situation and defines in s 1 —forced labour” as —work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

⁴⁰⁸ BCEA s 93. This penalty is insufficient for labour trafficking offences.

⁴⁰⁹ BCEA s 9. Adults are subjected to the ordinary working hours of either 9 hours per day in a 5-day-working-week, or a maximum of 8 hours per day if the person works 6 days per week.

⁴¹⁰ BCEA s 10 states that working overtime is by agreement only, and is limited to 10 hours per week or 3 hours per day, while BCEA s 12 determines that under a collective agreement, one may work 15 hours per week overtime. However the 2002 Amendment has reduced this type of overtime to no more than 12 hours per day.

⁴¹¹ BCEA s 14. Any employee who works continuously for more than 5 hours must have a meal interval of at least one continuous hour.

⁴¹² BCEA s 15. A daily rest period of at least 12 consecutive hours between ending and recommencing work; and a weekly rest period of at least 36 consecutive hours which, unless otherwise agreed, must include Sunday, must be given to an employee.

⁴¹³ BCEA s 20. In the case of *Jooste v Kohler Packaging Limited* 2003 12 (LLC), the court held that the purpose of the BCEA is to ensure employees take annual leave. It is the employee's responsibility to insist on annual leave and if the employer refuses to grant such, the matter be dealt with in terms of the BCEA.

⁴¹⁴ BCEA s 22. In *De Beer v SA Export Connection CC t/a Global Paws* JS270/06, an employee agreed to return to work one month after the birth of her twins. However, the twins were sickly and she requested another month's leave. She was offered 2 additional weeks which she refused. She was summarily dismissed. The court held that the dismissal was automatically unfair and that the agreement was invalid vis-à-vis the BCEA.

⁴¹⁵ A few cases have resulted from enforcing these provisions. In an unreported case, *Dewald Barnard*, 43, of Young Hope Farm, Groot Brak River, was found guilty of employing 3 12-yr old boys and one 13-yr old girl (who subsequently passed away), and was sentenced to a 3-yr jail term (suspended for 5 yrs) and a fine

child who is under fifteen years of age,⁴¹⁶ who is under the minimum school-leaving age (where the age is fifteen years or older),⁴¹⁷ or who is over fifteen years but under eighteen years if the employment is inappropriate for their age or that places their wellbeing at risk.⁴¹⁸ The Basic Conditions of Employment Amendment Bill 2010 has restructured and improved the provisions and prohibitions on the exploitation of child workers and certain abusive child-labour practices. For instance, the maximum prison term for breach of child labour is increased from three to six years, and the Bill also provides for compulsory medical examinations for children who perform any work.⁴¹⁹ Clause 4 prohibits work by children as an employee or as an independent contractor if the child is under the minimum school-leaving age of fifteen years. This amendment is required to achieve full compliance with South Africa's obligations under the relevant International Labour Standards as well as to create consistency with the Constitution and other legislation protecting the rights of children. Lastly, the Amendment Bill explicitly acknowledges South Africa's international law obligations in terms of the ILO Convention No 182 on the Worst Forms of Child Labour and any other international instruments dealing with work by children in BCEA section 44, as substituted. These amendments will regulate and inspect child labour markets more capably and also facilitate more effectively the combating of forced labour and illegal child labour practices, a common outcome of trafficking.

ZAR12,000. One of the children gave up schooling for about 3 months to work on the farm. The children received weekly wages varied from ZAR30 to ZAR150 depending on the hours of work. See Zikalala —*Mladlana Welcomes Sentence in Mossel Bay Child Labour Case*” *Department of Labour Information Services* 3 Nov 2003 <http://www.info.gov.za/speeches/2003/03110409461003.htm> (accessed 2013-01-16). In a more recent case, Mlungisi Mantana, a farmer in the Eastern Cape Province was found guilty of employing minors in breach of BCEA and was only fined by the Peddie Magistrates' Court for employing 19 under-aged children in his fields. He was also guilty of employing 5 other youths who within the required age limit, but performed duties inappropriate for their age. This placed their physical, mental, spiritual, moral and social well-being at risk. The farmer - who owns *Siyazama* Cotton Project in the Prudhoe Administrative Area - was arrested after a raid by national Labour Department inspectors. See Legalbrief —*Child Labour Conviction*” *Legalbrief Africa* Issue no 277 21 Apr 2008 http://www.legalbrief.co.za/publication/archives.php?mode=archive&p_id=Legalbrief_Africa&issueno=277&format=html (accessed 2013-01-16).

⁴¹⁶ Unless a permit is obtained from the Department of Labour to employ the child in the performance of advertising, sports, artistic or cultural activities, see BCEA s 50(2)(b).

⁴¹⁷ See in this regard s 31(1) of the South African Schools Act 84 of 1996.

⁴¹⁸ BCEA s 43 determines: —(1) No person may employ a child—

(a) who is under 15 years of age; or

(b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older. ”

(2) No person may employ a child in employment—

(a) that is inappropriate for a person of that age;

(b) that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.

The ILO 138 (Minimum Age Convention) states that employment of a child less than 15 yrs of age (in developed countries) and 14 yrs of age (in developing countries) is prohibited by international law.

⁴¹⁹ The Basic Conditions of Employment Amendment Bill s 45.

7.3.2.17 The South African Schools Act 84 of 1996

The South African Schools Act 84 of 1996 (SASA) re-affirms the constitutional right that every child is entitled to a basic education in South Africa, and prohibits any interference with this right without just cause to do so. The Act prescribes compulsory education for children from the age of seven until fifteen years old. Compulsory attendance is explained in section 3(1) in that "... every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first".⁴²⁰ An obligation rests on provincial Members of the Executive Council (MEC) to initiate an investigation when a learner falling within the compulsory phase is not at school and to take the necessary steps to ensure his or her attendance.⁴²¹ Section 3(6) states that any person who prevents a learner, who is subject to compulsory attendance, from attending a school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months. If children, who according to the stipulations of the Act are still of school-going age, are removed from the institution for illicit purposes, whether for labour or any other type of exploitation, the perpetrators can be convicted of contravening the provisions of SASA.

7.3.2.18 The Domestic Violence Act 116 of 1998

Several cases of trafficking abuse may be perceived as simple domestic altercations, and in this regard the Domestic Violence Act 116 of 1998 (the Domestic Violence Act) may be utilized. Similar to the offence of trafficking in persons, domestic violence is considered to be a crime against society and not a private matter.⁴²² This Act responds to the high incidence of domestic violence in South Africa and treats all acts of gender-based

⁴²⁰ In *Schneider NO and Others v Aspeling and Another* (8675/09) [2010] ZAWCHC 3; 2010 (5) SA 203 (WCC); [2010] 3 All SA 332 (WCC), the court utilized s 3(1) of SASA in a decision by a parent to home-school children and uproot them from their current schooling and environment. The verdict was that the children should be enrolled at a proper educational institution, which was in their best interest.

⁴²¹ SASA s 3(5) provides that if a learner who is subject to compulsory attendance in terms of s3(1) is not enrolled at or fails to attend a school, the head of department may (a) investigate the circumstances of the learners absence from school, (b) take appropriate measures to remedy the situation, (c) failing such a remedy, issue written notice to the parent of the learner requiring compliance.

⁴²² See Domestic Violence Act Preamble.

violence, whether physical, emotional, verbal, psychological or sexual abuse that are within interpersonal relationships such as marriage or cohabitation, or any other actual or perceived intimate or romantic relationship.⁴²³ All possible varieties of abuse are covered by a catchall provision that includes “any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant”.⁴²⁴ Acts of trafficking exploitation will also fall under this broad definition.

A panoply of rights and remedies are available to victims of domestic violence.⁴²⁵ The Domestic Violence Act makes it a legal duty for SAPS to help victims of violence. When police respond to a possible situation of domestic violence, the Act allows police officers to arrest, without a warrant; a person they reasonably suspect has committed or is threatening to commit an act of domestic violence, at the scene of the incident.⁴²⁶ Additional assistance must be provided to the victim such as obtaining suitable accommodation and medical help, and explaining victims’ rights to them in their language of choice either on paper or verbally.⁴²⁷ Most importantly, victims are protected by making provision for the issuing of protection orders.⁴²⁸ If victims are unable to apply for a protection order, applications can also be made on behalf of the victim.⁴²⁹ When a court issues a protection order, it may simultaneously also authorise a warrant of arrest for the perpetrator, with the suspension of the warrant subject to whether any breach of the terms

⁴²³ See definitions in Domestic Violence Act s 1(vii) “domestic relationship”, (viii) “domestic violence”.

⁴²⁴ Domestic Violence Act s 1(viii)(j).

⁴²⁵ The Constitution s 12(1) imposes a duty on the State to protect the right of everyone to be free from private or domestic violence. See *S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC).

⁴²⁶ Domestic Violence Act s 3.

⁴²⁷ Domestic Violence Act s 2.

⁴²⁸ Domestic Violence Act s 4. A study by Mathews & Abrahams *Combining Stories and Numbers: An Analysis of the Impact of the Domestic Violence Act (No 116 of 1998) on Women* (2001) 2-3 has shown that the Protection Order has a limited impact as a tool to shelter women from domestic violence. The findings also indicate that women still experience the police as ineffective due to attitudes and perceptions of intimate violence. This was evident in *Minister of Safety and Security v Venter* (570/09) [2011] ZASCA 42. In this case, the Minister of Safety and Security was held liable for damages suffered by the respondents because of the negligent failure by members of the SAPS to perform their statutory duties under the Domestic Violence Act. The police were requested several times to apprehend the ex-husband of the female respondent who threatened to kill her and their children. He made incessant telephone calls, sent abusive text messages to her and threatened to set their house on fire and kill them. Because of their neglect, he consequently raped his ex-wife and shot and injured the male respondent. The appeal was dismissed.

⁴²⁹ Domestic Violence Act s 4(3), (4). This has to be done with their written consent, unless the victim is a minor, mentally retarded or unconscious.

of the protection order has occurred.⁴³⁰ Although the Domestic Violence Act provides short-term protection measures for possible victims of trafficking, its provisions may also be of value to escape abusive situations.

7.3.2.19 The Recognition of Customary Marriages Act 120 of 1998

The abuse of the *ukuthwala* custom⁴³¹ can be combated by means of the requirements for validity of customary marriages as stipulated in the Recognition of Customary Marriages Act 120 of 1998 (Customary Marriages Act). This Act regulates the registration of customary marriages. In terms of section 3(1)(a) of the Act, both prospective spouses must be above the age of eighteen years and both must consent to marry each other under customary law. The marriage must be negotiated and entered into or celebrated in accordance with customary law.⁴³² In the event of either the prospective spouses being a minor, it is stipulated that both parents, or if the minor has no parents, his or her legal guardian must consent to the marriage.⁴³³ Partners in a customary marriage, who have been coerced into an exploitative situation, may also rely on the guarantee provided in the Act that in a valid customary marriage both spouses have equal status and capacity, equivalent to married couples in civil matrimonies.⁴³⁴

⁴³⁰ Domestic Violence Act s 8. The constitutionality of s 8, measured against the rights to freedom and security of the person, a fair trial and access to courts, has been questioned in *Omar v Government of the Republic of South Africa and Others* (CCT 47/04) [2005] ZACC 17; 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC), and was found to be constitutional.

⁴³¹ See *supra* n124 for an explanation of the custom.

⁴³² Customary Marriages Act s 3(1)(b).

⁴³³ Customary Marriages Act s 3(3)(a). Cognisance should however also be taken of the Sexual Offences Act 2007 (n249 *supra*) s 15 which criminalises sexual intercourse with a minor under the age of 16 yrs. It seems from case law that the courts apply this Act rather than the Customary Marriages Act to prosecute *ukuthwala* situations, as seen in one of the first cases of its kind: In 2012 in the Wynberg Regional Court, Mvuleni Jezile was found guilty of kidnapping a 14-year-old girl from the Eastern Cape, marrying her against her will, and then bringing her to the Western Cape where he raped and beat her. See Capazorio — *Man Kidnapped, Forced Girl to Marry Him* IOL News 5 Feb 2012 <http://www.iol.co.za/news/crime-courts/man-kidnapped-forced-girl-to-marry-him-1.1227492> (accessed 2013-01-16).

⁴³⁴ See Customary Marriages Act ss 6, 7(6). The case of *Mayelane v Ngwenyama and another* [2010] 4 All SA 211 (GNP) dealt with s 7 of the Customary Marriages Act, which aimed at protecting both the existing spouse or the new intended spouse from unfair cultural practices to which the spouse did not consent to.

7.3.2.20 The National Health Act 61 of 2003

South Africa has as yet no specific law on the trafficking of human body parts. The closest relevant legislation may be the National Health Act 61 of 2003 (NHA),⁴³⁵ which primarily aims at regulating the medical field. Chapter 8 of the NHA,⁴³⁶ entitled “Control of Use of Blood, Blood Products, Tissue and Gametes in Humans”, concerns the criminalisation of commerce in human tissue.⁴³⁷

The provisions of Chapter 8 of the National Health Act, read with the regulations promulgated on 2 March 2012,⁴³⁸ allows for a properly regulated and controlled environment for the use of human tissue, which include body organs or parts. Some of the provisions include, amongst others, tissue removal from living persons;⁴³⁹ organ transplantations into non-South African citizens and non-permanent residents;⁴⁴⁰ donations of human bodies and tissue of deceased persons;⁴⁴¹ and consent to donations of human tissue on behalf of deceased persons.⁴⁴²

⁴³⁵ The NHA s 93(1) repealed its predecessor, the Human Tissue Act 65 of 1983 (HTA) entirely in 2012. The HTA held that tissue, blood and gametes removed from a living donor may only be used for medical and dental purposes. The Act provided on a very limited scale for the prosecution of persons who provide, supply and receive human tissue, or tampered with a dead body. S 34(a) stated that any person who without legal authorisation “acquires, uses or supplies a body of a deceased person or any tissue, blood or gamete of a living or deceased person” is guilty of an offence.

⁴³⁶ All of the sections of Chap 8 have been enacted: s 53 came into force on 30 Jun 2008; ss 55, 56 and 68 on 17 May 2012; and, the remaining sections 54 and 57 - 67 were enacted on 1 Mar 2012.

⁴³⁷ NHA s 60.

⁴³⁸ Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes in Government Notice R175-R183 of Government Gazette No 35099 of 2 Mar 2012. The regulations were issued in order to incorporate certain provisions of the HTA that were not included in the NHA.

⁴³⁹ NHA s 55. This section is similar to s 18 of the HTA in that it requires written consent of a person from whom the tissue, blood, blood products or gametes are removed. Absent in the NHA, the Regulations further stipulate that consent can be given by donors older than 18 yrs, or by the parents or guardians of donors aged less than 18 yrs (see Regulation 2). In terms of the NHA s 56(2), persons younger than 18 yrs may not donate tissue that is not replaceable by natural processes, nor may they donate gametes. The donation may only be used for medical or dental purposes (NHA s 56). The NHA does not list the institutions or persons to whom tissue, blood, blood products or gametes from living persons may be donated, but these are provided for in Regulation 4: (i) hospitals; (ii) universities or universities of technology; (iii) authorised institutions; (iv) medical practitioners or dentists; or (v) a tissue bank or any person who requires therapy in which the tissue concerned can be used.

⁴⁴⁰ NHA s 61(3).

⁴⁴¹ NHA s 62. Persons may specify in a will or any other written or oral instrument that they wish to donate their bodies or any specified tissue thereof for transplantation or treatment, training or research. A donee institution or person must be nominated; else the donation is null and void.

⁴⁴² NHA s 62(2). Persons who can give consent to donations from deceased persons are the spouse, partner, major child, parent, guardian, major brother or major sister of that person. This list has been expanded from that in the HTA to include “partners”, who now take precedence over all other relatives except spouses.

The NHA stipulates that human organs obtained from deceased persons may only be used for the purpose of transplantation or treatment, or medical or dental training or research,⁴⁴³ and outlaws the charging of fees for human organs.⁴⁴⁴ It is an offence for a donor of any human organ to receive financial or other reward for such donation except for reimbursing their reasonable costs incurred, such as medical bills and travel costs. The selling and trade in human organs is prohibited.⁴⁴⁵ A person convicted of either of these offences may be fined or imprisoned for up to five years or both.⁴⁴⁶ The organ trade and the harvesting and selling of body parts are problems experienced globally where vulnerable persons are exploited by unscrupulous individuals whose monetary motives exceed any consideration for the wellbeing of another person. The newly enacted legislation will, in applicable circumstances, contribute towards curbing this scourge.

7.3.2.21 The Drugs and Drug Trafficking Act 140 of 1992

Human trafficking syndicates often expand their criminal activities to include offences such drug dealing. A number of trafficking victims are also exploited as drug mules for the illicit importation and export of drugs. Consequently, drug-offence legislation may contribute towards combating the organised crime. The Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) prohibits the dealing⁴⁴⁷ as well as the use and possession of drugs.⁴⁴⁸ Possession of a drug may either be in the form of *possessio civilis* or *possessio naturalis*.⁴⁴⁹ Traffickers may be culpable for both types of possession, as they exercise control over the drug as an owner (for self-use or trading) or they possess the drug for or

⁴⁴³ NHA s 61(1).

⁴⁴⁴ NHA s 60. The Act does however allow for a health-care provider registered with a statutory health professional council to receive remuneration for any professional service rendered. See NHA s 60(3).

⁴⁴⁵ NHA s 60(4). Except as provided for in the Act, for medical and research purposes. The only case yet tried in South Africa regarding the illegal trade in human organs for transplants is the case of *S v Netcare Kwa-Zulu (Pty) Ltd* Case No 41/1804/2010, 8 Nov 2010 Durban Regional Court, where the private company, its CEO and 8 others were found guilty on 102 counts related to charges stemming from conducting illegal kidney transplant operations at St Augustine's Hospital, as under HTA Chap 2. The scheme involved recruiters to source individuals ready to supply kidneys from Israel, Romania and Brazil for transplants on Israeli patients who would be brought to South Africa for the procedure.

⁴⁴⁶ NHA s 60(2).

⁴⁴⁷ Drugs Act s 5(b) & s13(f).

⁴⁴⁸ Drugs are classified into dependence-producing substances, dangerous dependence-producing substances (eg coca leaf, morphine and opium) and undesirable dependence-producing substances (eg cannabis (dagga), heroin and mandrax). See Drugs Act Chap 1 & Schedule 2.

⁴⁴⁹ Drugs Act s 4. Presumption relating to the possession of drugs as in s 20 (that any drug found in the immediate vicinity of the accused presumes possession of such drug, unless the contrary is proved) was declared invalid on the ground that it is inconsistent with s 35(3)(h) of the Constitution. See *S v Mello* (CCT5/98) [1998] ZACC 7; 1998 (3) SA 712; 1998 (7) BCLR 908.

on behalf of somebody else. These drugs are sometimes administered to the trafficked persons to subdue them and keep them compliant. The legislation does not only punish the supplying of drugs to users, but also the sale of drugs as well as the production, manufacture, distribution and provision of drugs.⁴⁵⁰ The punishment for drug trafficking offences is quite severe. For dealing in a dependence-producing substance a court may impose a fine, or imprisonment for a period not exceeding ten years, or both. Dealing in the more dangerous or an undesirable dependence-producing drug elicits imprisonment for a period not exceeding 25 years, or imprisonment and a fine. Unfortunately, it is mostly the subjugated drugs mules who suffer these consequences.⁴⁵¹ Of course, there may be defences available to trafficked persons, for example the defence of necessity.

7.3.2.22 The National Liquor Act 59 of 2003

Many clubs that control trafficked persons also supply liquor illegally, which makes these traffickers liable to prosecution of contravening section 4 of the National Liquor Act 59 of 2003 (NLA)⁴⁵² for selling liquor without a licence. The NLA regulates the three tiers involved in the liquor trade, namely manufacturers, distributors and retailers. As such, its aim is to administer the manufacture and wholesale distribution of liquor by setting national norms and standards for the regulation of the retail sale and micro-manufacture of liquor.⁴⁵³ The NLA also protects children under the age of sixteen from being exploited in bars or any type of liquor industries unsuitable for a child. Section 8 further prohibits the engaging of under-aged children in any activity relating to the manufacture or distribution of liquor or methylated spirits,⁴⁵⁴ while section 10 prohibits the supply of liquor or

⁴⁵⁰ In *S v Solomon* 1986 (3) SA 705 (A) Smalberger JA held that the legislature intended to punish only activities in furnishing drugs as "dealing in" drugs, and not the acquisition of drugs for personal use. See also *Pamela Alona Pain v The State* 2006 Case No CA&R 67/06 Northern Cape High Court (Unreported) where a sentence for dealing in drugs as in the Drugs Act s 5(b) was set aside because of this distinction.

⁴⁵¹ See eg *S v Jimenez* 2002 (2) SACR 190 (W) who smuggled 60 "tablets" of cocaine (condoms filled with cocaine) that he had swallowed before boarding an aeroplane to South Africa. As a first offender, he was sentenced with 15 yrs imprisonment.

⁴⁵² This prohibition is similarly contained in the predecessor of the NLA; the Liquor Act 27 of 1989 s 154(1)(a). See also NLA Schedule 1(2).

⁴⁵³ NLA s 2. Eg, that liquor licensing in the retail sphere falls within the area of provincial legislative powers, as decided in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC).

⁴⁵⁴ Unless the employee is undergoing training or a learnership as contemplated in s 16 of the Skills Development Act.

methylated spirits to juveniles. Although relatively minor offences; these provisions could be utilized to punish traffickers involved in such illegalities.

7.3.2.23 The Identification Act 68 of 1997

The Identification Act 68 of 1997 (Identification Act) sets out the laws relating to the issuing of identity documents and certificates, and is only applicable to South African citizens and persons who are lawfully and permanently resident in the Republic.⁴⁵⁵ Any person in the jurisdiction who has attained the age of sixteen years is legally obliged to obtain an identity card.⁴⁵⁶ Human trafficking has been closely linked to document or identity fraud in order to illegally gain entry to and remain in a country. Traffickers may manufacture, counterfeit, alter, sell or use identity documents and other fraudulent documents to circumvent immigration laws or for other criminal activities. By merely possessing an identity card of another person (whether genuine or fraudulent), or by altering or destroying the card, or by providing incorrect particulars for a card, a perpetrator may be prosecuted in terms of this Act.⁴⁵⁷ Any person who contravenes these provisions is liable to a fine or to imprisonment of not more than five years. Identity fraud also involves identity theft in some cases, where an imposter takes on the identity of a real person (living or deceased) for some illegal purpose. It is possible to also prosecute this type of offence with the Identification Act, but more comprehensive legislation will have to be drafted in this regard, especially in terms of punishment.

7.3.2.24 Miscellaneous legislation

In addition to the statutes discussed above, various other pieces of municipal by-laws may be utilized as critical tools in disabling human traffickers and dismantling their support structures. With regard to municipal by-laws, the crimes of trade, performing a sexual activity, nudity, loitering, prohibiting any person from causing distraction of street users by walking, running, standing, sitting, or lying in a way that generates inconvenience to other

⁴⁵⁵ Identification Act s 3.

⁴⁵⁶ Identification Act s 15. See also *Nomzamo Geza v The Minister of Home Affairs* Case No 1070/2009 Grahamstown High Court (22 Feb 2010) 5 for a discussion of this section.

⁴⁵⁷ Identification Act s 18(1)(d)-(i). Cases where traffickers confiscate trafficked persons' identity documents as means of control would be covered by possession of another person's identity card.

road users are of use.⁴⁵⁸ Although it would seem that enforcing these laws would be detrimental to prostitutes and their activities, it could serve as a measure to ensure that young women and girls forced into prostitution are identified and rescued from human traffickers.⁴⁵⁹ Research has however shown that when caught performing the activities listed above, prostitutes are rarely charged and prosecuted.⁴⁶⁰ Police also regard the monitoring of prostitution as a minor activity in comparison to the more serious, violent crimes encountered on South African streets. Municipal by-laws and policies should be created to respond specifically to human trafficking, similar to drug-trafficking and drug-abuse by-laws already established.⁴⁶¹

7.3.3 Summary of current legal position

It is debatable whether the existing range of legal provisions available can be successfully applied to prosecute offences relating to trafficking in persons, and whether they are sufficient to combat trafficking or to protect victims effectively. The sundry common law and statutory offences in South Africa at present do not prohibit trafficking in persons in accordance with the Palermo Protocol. Even the Acts that do address some of the most pernicious forms of trafficking, only deal with children and with sexual trafficking. They do not cover the trafficking of adults, and those who are trafficked for non-sexual purposes. Until the Prevention and Combating of Trafficking in Persons Bill is passed, trafficking can only be dealt with under a *mélange* of legislation that addresses only part of the problem and does not tackle the problem of human trafficking in its entirety.

⁴⁵⁸ Fick *Policing Sex Workers: A Violation of Rights?* (SWEAT 2006) 8.

⁴⁵⁹ See Lutya —“Criminological Responses to Human Trafficking of Young Women and Girls for Involuntary Prostitution in South Africa” 2009 10(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 59 72.

⁴⁶⁰ Gould & Fick *Report to the South African Law Commission: Preliminary Research Findings or Relevance to Combat Trafficking in Persons and Legislation Pertaining Adult Prostitution* (2007) 21.

⁴⁶¹ See City of Tshwane —“By-laws pertaining to Municipal Functions Relating to Drug Abuse in Tshwane” 8 Dec 2011 [http://www.tshwane.gov.za/AboutTshwane/CityManagement/CityDepartments/ Corporateand SharedServices/legalservices/By-Law Listing/Pages/Draft-By-Laws.aspx](http://www.tshwane.gov.za/AboutTshwane/CityManagement/CityDepartments/CorporateandSharedServices/legalservices/By-Law%20Listing/Pages/Draft-By-Laws.aspx) (accessed 2013-01-16).

7.3.4 The Prevention and Combating of Trafficking in Persons Bill (TIP Bill)

The draft Prevention and Combating of Trafficking in Persons Bill was introduced into Parliament on 16 March 2010, though it has not yet been adopted.⁴⁶² The inspiration behind the Prevention and Combating of Trafficking in Persons Bill (TIP Bill) is to bridge the gaps left by common-law and statutory provisions,⁴⁶³ to provide a clear definition of the crime and a comprehensive approach to the fight against trafficking in persons. In creating a specific and separate crime of human trafficking, it is anticipated that a regulatory framework based on concrete and understandable legal provisions will be clearer and easier to work with. Specific legislation may also promote responsible efficiency in the justice system as it may assist under-trained prosecutors to have a single codified piece of legislation to refer to in handling these cases”.⁴⁶⁴ Consequently, the investigation and prosecution of trafficking will be accomplished with more ease and focus, which again will result in shortened investigations of possible offenders, as well as shortened trials. The legislation on trafficking in persons also gives domestic legal effect to South Africa’s international obligations under the Palermo Protocol.⁴⁶⁵ It draws from international-best practices, while also being relevant and tailored to local realities.

The draft bill describes trafficking crimes and anti-trafficking measures with great precision. The Bill consists of ten substantive law chapters, while Chapter 11 deals with miscellaneous matters. Clause 1 contains the definitions of terms discussed in the Bill. The

⁴⁶² This process was preceded by 2 discussion papers and an issue paper on human trafficking investigated and presented by the SALRC. See SALRC *Report on Trafficking in Persons* (2002); SALRC *Trafficking in Persons* (2004); SALRC *Trafficking in Persons* (2006). Changes are likely to still result from the parliamentary process. See Stuurman *Recommendations for New Legislation in South Africa* (Unpublished paper presented at the *Trafficking in Human Beings: National and International Perspectives* Conference, 17 Aug 2007, University of the Free State, Bloemfontein) 1-8.

⁴⁶³ Pithey —“New Crimes Need New Laws? Legal Provisions Available for Prosecuting Human Trafficking” 2004 18(9) *South African Crime Quarterly* 7 9 maintain that “... given the complexity of identifying the appropriate legal provisions that need to be applied to any particular case, it may be argued that there is need for a single piece of legislation that encapsulates all the above provisions, with alterations where necessary”. Although some existing legislation is unclear or difficult to use in practice to combat trafficking, the penal provisions provided for these crimes are not serious enough. With the patchwork approach victims sometimes only receive partial justice when evidence of other criminal activities cannot be found.

⁴⁶⁴ Legget —“Hidden Agendas? The Risks of Human Trafficking Legislation” 2004 18(9) *South African Crime Quarterly* 1 4. The author surmises at 4 that a single trafficking law may also be necessary for the comprehensive prosecution of non-sexual trafficking crimes as “... there may be a need for more flexibility in prosecuting slavery or organ removal cases”.

⁴⁶⁵ The draft law specifically refers to the international obligations entered into when the state became a signatory to the Palermo Protocols in the Preamble and in the Objects of the Act. See also Dept of Justice and Constitutional Development *Government Gazette 29 Jan 2010 No 32906 General Notice 61* (2010) 3.

TIP Bill adopts the definition of human trafficking provided in the Palermo Protocol⁴⁶⁶ verbatim, yet has widened it in scope:

–Trafficking” includes the *delivery, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, exchange, lease, disposal* or receiving of a person, or the *adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic*, of a person trafficked or an *immediate family member of the person trafficked*, by means of—

- (a) *a threat of harm*;
- (b) the threat or use of force, intimidation or other forms of coercion;
- (c) the abuse of vulnerability;
- (d) fraud;
- (e) deception or *false pretences*;
- (f) *debt bondage*;
- (g) abduction;
- (h) *kidnapping*;
- (i) the abuse of power;
- (j) the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
- (k) *the giving or receiving of payments, compensation, rewards, benefits or any other advantage*,

for the purpose of any form or manner of exploitation, *sexual grooming* or abuse of such person, including the commission of *any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person*, whether committed *in or outside the borders* of the Republic.⁴⁶⁷

The South African TIP Bill replicates the Palermo Protocol's acts of human trafficking as the recruitment, transportation, transfer, harbouring or receipt of persons. The TIP Bill

⁴⁶⁶ The TIP Bill includes the full Palermo Protocol in Schedule 2 and, under the Chap 1 definitions. For more information of the Palermo Protocol, see Chap 4, para 4.2.1.1.

⁴⁶⁷ TIP Bill (n462 *supra*) clause 1 (own italics to indicate additional definitional elements in the South African Bill which are absent in the Palermo Protocol's definition).

further extends these acts to include the delivery, procurement,⁴⁶⁸ capture, removal, sale, exchange, lease, and disposal of persons, or the adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic. The first quandary in both the Bill and the Palermo Protocol is the fact that a number of the terms are vaguely defined or undefined.⁴⁶⁹ The TIP Bill also contains many repetitions of related concepts. In this regard, both the terms ~~delivery~~ and ~~removal~~ imply ~~transport~~ or ~~transfer~~ which are already present in the original trafficking definition. Similarly, ~~disposal~~, ~~exchange~~, ~~lease~~ and ~~sale~~ all involve the exchange of a commodity for a benefit, and should perhaps be grouped together under a single concept for legal certainty.⁴⁷⁰

A major development in the definition is the introduction of the concept of domestic human trafficking, which makes the crossing of borders immaterial. This improves on a significant limitation of the Protocol and attempts to protect victims whose movement has not gone beyond a state frontier. This enhancement is particularly important because studies conducted by local and international organizations in South Africa suggest that domestic human trafficking is a significant problem in this country.⁴⁷¹ Furthermore, from the perspective of victims, the harm can be just as great no matter whether the trafficking is cross-border or internal.

The means of control over human trafficking victims are also extended in the South African definition to include ~~a~~ threat of harm", ~~false~~ pretences", ~~debt~~ bondage", ~~kidnapping~~",

⁴⁶⁸ It has been argued that the term ~~procurement~~ should perhaps be defined so as to distinguish it from procurement as defined in the Preferential Procurement Policy Framework Act 5 of 2000 (which includes the combined functions of purchasing, inventory control, traffic and transportation, receiving, inspection, store-keeping, and salvage and disposal operations) as well as in s 217 of the Constitution. Although the term is generally understood as ~~obtaining~~ or ~~acquiring~~ something, Kruger *Combating Human Trafficking: A South African Legal Perspective* (2010) 513 suggests that the definition used in *R v V* 1950 (4) SA 64 (SR) 65 be utilised. ~~To~~ procure" is interpreted here as ~~to~~ obtain a woman, to cause or bring about her availability for intercourse" in terms of the *Criminal Law Amendment Act* (Southern Rhodesia) s 9(a). Kruger submits that if ~~procurement~~ is similarly interpreted in the TIP Bill to mean ~~obtaining~~, causing or bringing about the availability of a person for trafficking by any of the listed prohibited means" (*ibid*), the term ~~capture~~" should be excluded from the definition as it is already covered by ~~procurement~~".

⁴⁶⁹ Eg, the Palermo Protocol does not define ~~servitude~~" or ~~serfdom~~". While the TIP Bill does define ~~servitude~~", there is no corresponding definition or crime that could be identified in South African law. The TIP Bill also does not define the concept of ~~procurement~~".

⁴⁷⁰ See in this regard also Kruger (n468 *supra*) 514. The insertion of the phrase ~~an~~ immediate family member of the person trafficked" also seem redundant, as the description qualifies as ~~a~~ person trafficked", which is already present in the definition. This phrase was apparently inserted to protect family of trafficked victims.

⁴⁷¹ Kreston (n4 *supra*) 36-37. It is argued that trafficking within some countries is as serious as, or more serious than, cross-border trafficking.

and ~~the~~ giving or receiving of payments, compensation, rewards, benefits or any other advantage". It is submitted that some of the terms seem to be replications of one another. The term ~~a~~ "threat of harm" may already be incorporated in the Palermo Protocol's ~~the~~ "threat or use of force, intimidation or other forms of coercion" which implies a threat of injury. Similarly, ~~false~~ "pretences" corresponds to ~~deception~~ already present in the Palermo Protocol's definition, and could be eliminated. Although there is no harm in repetition, these additional elements make the definition clumsy and long. The crime of kidnapping was perhaps included to differentiate from abduction, introduced in the original definition.⁴⁷² The final phrase ~~the~~ "giving or receiving of payments, compensation, rewards, benefits or any other advantage"⁴⁷³ is also very similar to the already-included ~~the~~ "giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person". However, the South African phrase is more comprehensive than that of the Palermo Protocol. The inclusion of the words ~~or~~ "any other advantage" serves as a catch-all phrase and is necessary in the definition as it is wider and could cover more possible human-trafficking situations. The segment ~~...~~ "of a person having control or authority over another person" could perhaps be deleted, so as not to restrict the giving of consent to certain persons only. The related concepts may be confusing as the definition is very long, but on the other hand, the wide definition includes all types of possible conduct which makes it easier for the prosecution.

The methods of manipulation in the national definitions centre mainly on the words ~~coercion~~ and ~~abuse of power~~; "deception or ~~abuse of vulnerability~~". As it requires extensive investigation of the situation, it is often difficult to prove. Although the state prosecutes and must prove all the elements of the offence, victims have to provide evidence that they were trafficked, coerced or deceived into a trafficking situation. This will naturally also involve a police investigation into their alleged trafficking situations. This further underpins the importance of victim support and protection, as the victim's testimony is usually indispensable for the investigation and prosecution of traffickers and for effective prosecution stable witnesses are required.

⁴⁷² Concepts such as ~~intimidation~~, ~~kidnapping~~ and ~~slav~~ "bondage" did not form part of the draft *Prevention and Combating of Trafficking in Persons Bill* published for comment in the *Government Gazette No 32222 8 May 2009 General Notice 431 (2009)*, but were included in the *Trafficking in Persons Bill B7-2010*.

⁴⁷³ This phrase is equivalent to the definition of trafficking in the Sexual Offences Act 2007.

While the Palermo Protocol incorporates the expression “at a minimum” to cover any future possible forms and means of exploitation, the TIP Bill provides an extensive list of different types of exploitation,⁴⁷⁴ but remains open-ended as it is not limited to them. Although all exploitative practices covered by the international definition of trafficking are expressly included, the TIP Bill lists many more exploitative situations than the Protocol but not that of forced prostitution. This is, of course, covered by being included in the concept “sexual exploitation”.⁴⁷⁵ The forms of sexual grooming and sexual abuse⁴⁷⁶ are added to “any form or manner of exploitation”, but again are superfluous as these forms are contained in the concept of sexual exploitation. The appendage and complete definition of “exploitation” in clause 1 may appear to emphasize sexual exploitation but the flexible terms in the definition, such as “slavery or practices similar to slavery”, “servitude”, “debt bondage”, “forced labour”, “for the purpose of any form or manner of exploitation, sexual grooming or abuse of such person” indicate the wide ambit of the proposed offence. Both the Protocol and the TIP Bill fail to include the worst forms of child labour as identified by the ILO Convention 182 in its list of forms of exploitation which of course, is not necessary since “child labour” in any form is criminalised.⁴⁷⁷

The Protocol was criticised for containing a rather lengthy and difficult definition which has led to complications experienced by practitioners and researchers in the field.⁴⁷⁸ The TIP Bill includes an even longer definition. The drafters in South Africa seem to be cautious by including almost all relevant and locally appropriate exploitative contexts. The definition does not specifically require the involvement of organised crime groups, as domestic

⁴⁷⁴ According to the TIP Bill (n462 *supra*) clause 1 “exploitation” includes, but is not limited to—

- (a) all forms of slavery or practices similar to slavery;
 - (b) forced marriage;
 - (c) sexual exploitation;
 - (d) servitude;
 - (e) debt bondage;
 - (f) forced labour;
 - (g) child labour as defined in section 1 of the Children’s Act;
 - (h) the removal of body parts; and
 - (i) the impregnation of a female person against her will for the purpose of selling her child when the child is born,
- for the purpose of any form or manner of exploitation, sexual grooming or abuse of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic.

⁴⁷⁵ As defined in the TIP Bill (n462 *supra*) clause 1.

⁴⁷⁶ These forms were included to correlate with the trafficking definition of the Sexual Offences Act 2007.

⁴⁷⁷ For more information on the worst forms of child labour (ILO C182), see *supra* Chap 4, para 4.2.2.6.

⁴⁷⁸ See *supra* Chap 2, para 2.3.2.4 for criticisms of the Palermo Protocol.

trafficking literature has shown that the offence is only sometimes linked to organised crime in South Africa.⁴⁷⁹ It may be argued that an overly-broad definition could lead to problems such as distinguishing trafficking from mere assisted migration and people smuggling although this should not be problematic since the distinguishing features of trafficking are the means employed (for example, deception or abuse of a position of vulnerability) and the purpose namely, an intention to exploit. The broad definition may mean that sexual abuse of students by teachers also amounts to human trafficking.⁴⁸⁰ Pharoah, for instance, questions this wide ambit by suggesting that limits are necessary for the practical application of the concept.⁴⁸¹ It is thus submitted that an operational definition which clearly delineates all aspects is especially necessary for the purpose of effective prosecution, victim protection, research and data gathering.

The draft TIP Bill further contains provisions for the prevention and combating of trafficking in persons in Chapter 2. This is mainly to be undertaken by means of public awareness, and is the responsibility of the Intersectoral Committee on Prevention and Combating of Trafficking in Persons as established by clause 40 of the Bill. This Committee, after consultation with relevant NGOs, must establish public-awareness programmes or other measures for the prevention and combating of trafficking in persons. These programs must focus on supplying the public, especially those at risk of trafficking, with information and educate them on trafficking practices as well as their legal rights in the country. Programs must also be created in order to discourage the demand for trafficked persons.⁴⁸²

Chapter 3 concerns the prosecution of persons involved in trafficking and appropriate penalties. Except for the newly-created crime of trafficking in persons, the TIP Bill also

⁴⁷⁹ Pharoah (n164 *supra*) 51-52, 61-62.

⁴⁸⁰ Pharoah (n164 *supra*) 32. The alleged sexual abuse of Lesotho children by Free State farmers arguable also falls into this category. Although trafficking activities suggest the movement of persons from one place to another, other core elements in the trafficking definition such as other means of trafficking and the purpose of trafficking may include other acts which do not necessarily amount to "movement". These are, eg, "recruitment", "harbouring" and "receiving" of a person by, eg, abuse of a position of vulnerability or "deception: and with the purpose (intention) to exploit. See in this regard *supra* Chap 2, paras 2.3.2.1 - 2.3.2.3.

⁴⁸¹ Pharoah (n164 *supra*) 77-78.

⁴⁸² TIP Bill (n462 *supra*) clause 3(1). These programs are in line with the OCHCR's Recommended Guidelines on Human Rights and Human Trafficking Guidelines 1(2), 7 & 8.

create separate offences of debt bondage,⁴⁸³ the possession, destruction, confiscation, concealment of and tampering with travel documents of victims of trafficking,⁴⁸⁴ using the services of victims of trafficking,⁴⁸⁵ and facilitating trafficking in persons.⁴⁸⁶ By specifying the nature of every type of trafficking offence and their corresponding penalties, the legislation will assist the police and the courts in applying the law. The clear differentiation between the various offences should also ensure just and appropriate sentences.

The penalties envisioned in the Bill vary from a fine only or a maximum of five years imprisonment for the least severe offences to a maximum of life imprisonment for the most severe ones.⁴⁸⁷ Clause 4(1) criminalises trafficking irrespective of the victim's age or the type of trafficking involved.⁴⁸⁸ Liability for the offence is also extended to include juristic persons and partnerships.⁴⁸⁹ Upon conviction, a human trafficker will be liable to a fine or imprisonment, including imprisonment for life, or imprisonment without the option of a fine or both. The philosophy of the text is to respond as best as possible to the principles of the Palermo Protocol.

⁴⁸³ TIP Bill (n462 *supra*) clause 5. Debt bondage is defined in s 1 as ~~the~~ status or condition that arises from a pledge by a person of—
(a) his or her personal services; or
(b) the personal services of another person under his or her control, as security for a debt owed, or claimed to be owed, including any debt incurred or claimed to be incurred after the pledge is given, by that person if the—
(i) debt owed or claimed to be owed, as reasonably assessed, is manifestly excessive;
(ii) length and nature of those services are not respectively limited and defined; or
(iii) value of those services as reasonably assessed is not applied towards the liquidation of the debt or purported debt.

The penalty for debt bondage may be a fine or imprisonment for a period not exceeding 15 yrs.

⁴⁸⁴ TIP Bill (n462 *supra*) clause 6. This offence is penalised with a fine or imprisonment of up to 10 yrs. This section could be utilized to even penalise border employees or agents who confiscate travel and immigration documents from persons entering a country legally.

⁴⁸⁵ TIP Bill (n462 *supra*) clause 7.

⁴⁸⁶ TIP Bill (n462 *supra*) clause 8. The penalty for facilitation is a fine or imprisonment for a period not exceeding 10 yrs.

⁴⁸⁷ These sanctions are severe enough to punish offenders appropriately and deter potential perpetrators, and consequently adhere to the prescriptions in CTOC art 11(6).

⁴⁸⁸ Unlike the Protocol, the TIP Bill does not specifically specify that intent is the only form of fault required for this offence (although the words ~~of~~ "for the purpose of" in the definition should indicate that intention is required). It has been submitted that in the absence of a clear indication that negligence is sufficient for criminal liability, intent is the exclusive form of fault required by the legislature. See Burchell (n174 *supra*) 499-500 for a discussion of the case of *S v Van Zyl* 2000 (1) SACR 259 (C) for a further explanation. See also Kruger (n468 *supra*) 518.

⁴⁸⁹ This provision is in accordance with CTOC art 10. TIP Bill (n462 *supra*) clause 1 defines a "person" as ~~a~~ natural person, a juristic person and a partnership, unless the context indicates otherwise". See also TIP Bill clause 10(1)(f).

Any type of involvement in human trafficking by way of attempting to commit trafficking, inciting or directing others and conspiring to commit the crime is criminalised in clause 4(2).⁴⁹⁰ Attempts to commit human trafficking as prohibited in the Palermo Protocol article 5(2) appear in the TIP Bill as occurring when a person “performs any act aimed at committing an offence”. For a conviction of attempting to commit a crime, the prohibited conduct must not be “merely preparatory, but [must have] ... reached at least the commencement of the execution of the intended crime”.⁴⁹¹ The phrase “any act aimed at” the commission of human trafficking seems broad enough to also include acts that are merely preparatory, and should consequently be replaced with the more unambiguous term of “attempt”.⁴⁹² Attempt as well as incitement and conspiracy that are criminalised in clauses 4(2)(b) and 4(2)(c) respectively. The inclusion of these inchoate crimes seem superfluous as the crimes already exist in the Riotous Assemblies Act, and could merely be applied to the TIP Bill. However, the act of inciting others to commit the crime as in the TIP Bill includes further conduct such as directing, aiding, promoting, advising, recruiting and encouraging others to commit human trafficking.⁴⁹³

Clause 7 prohibits the use of services procured from trafficking victims, and prescribes a punishment of up to fifteen years for individuals who make use of such services. The clause provides that:

Any person who intentionally benefits, financially or otherwise, from the services of a victim of trafficking or uses or enables another person to use the services of a victim of trafficking and knows or ought reasonably to have known that such person is a victim of trafficking, is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding fifteen years.

⁴⁹⁰ Much trafficking occurs with involvement of government officials such as police officers and immigration officials. Their participation as accomplices or organising or directing other persons to commit the offence is criminalised here. This offence did not form part of the draft TIP Bill of 2009, but was only included in the current draft TIP Bill B7-2010 by the Office of the Chief State Law Advisor. See Kruger (n468 *supra*) 519.

⁴⁹¹ Snyman (n193 *supra*) 285.

⁴⁹² Kruger (n468 *supra*) 521-522.

⁴⁹³ The TIP Bill has not included the “organising” of others to commit the crime as specified in the Palermo Protocol. This is regrettable for as an organised crime, trafficking is organised by key players who use others to perform the actual activity.

This provision is said to be controversial as it would be difficult to assess a client's good faith with the standard reasonable-person test.⁴⁹⁴ In the case of prostitution, for instance, clients already encounter practical difficulties in assessing the age of prostitutes. It will be highly unlikely that clients should know or suspect whether sex workers are freely engaging in the practice, or whether they are victims of trafficking. Nevertheless, the rationale behind the provision is undoubtedly to discourage the demand side of trafficking, as contemplated by clause 8.

Conduct facilitating trafficking in persons is criminalised in clause 8. This section is reminiscent of certain sections of the Sexual Offences Act 2007,⁴⁹⁵ as it regulates the leasing of a building for use in trafficking, or the publication of information that facilitates trafficking in persons. An Internet service provider that fails to comply with certain duties in terms of the Bill may be held liable to a fine or imprisonment for a period not exceeding five years, and the revocation or cancellation of its licence.⁴⁹⁶ Internet service providers are obliged to report internet addresses on their servers which are suspected of containing information that facilitates or promotes trafficking in persons. Carriers⁴⁹⁷ which transport a victim of trafficking into, or remove a victim from South Africa, knowing that the victim does not have a valid passport, or where applicable, a valid visa, also commit an offence.⁴⁹⁸ A carrier may be fined an amount not exceeding ZAR1 million or imprisoned for a period not exceeding five years.⁴⁹⁹

Extra-territorial jurisdiction is an important feature of the TIP Bill. Given the global nature of the crime, South African courts will have extra-territorial jurisdiction in respect of acts committed outside South Africa if those acts would have been an offence under the Bill

⁴⁹⁴ Stuurman (n462 *supra*) 5.

⁴⁹⁵ See para 7.3.2.2 *supra*.

⁴⁹⁶ TIP Bill (n462 *supra*) clause 8(2). The duties required are the taking of all reasonable steps to prevent the use of its service for the hosting of information of trafficking, and if such an offender is detected, reporting to the SAPS of the discovery, preserving any evidence for later prosecution and preventing access to that Internet address by any person.

⁴⁹⁷ The TIP Bill employs the word "carrier", which is broader than the Palermo Protocol's "commercial carrier" in art 11(2), (3). A "carrier" is defined in TIP Bill clause 1 as "a company, or the owner, agent, operator, lessor, driver, charterer or master of any means of transport".

⁴⁹⁸ TIP Bill (n462 *supra*) s 9. This provision corresponds to the Palermo Protocol's art 11(2), (3).

⁴⁹⁹ TIP Bill (n462 *supra*) clause 9(1). The carrier is also liable to pay the expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim (see TIP Bill (n462 *supra*) clause 9(3)).

had they been committed in South Africa.⁵⁰⁰ Extra-territorial jurisdiction is limited by the fact that the offender has to be a South African citizen; or resident in South Africa; has committed an offence against a South African citizen or resident; or who is present in the jurisdiction of the Republic after the commission of the offence. The Bill also provides a list of aggravating factors a court must consider, but is not limited to, when imposing a sentence for trafficking.⁵⁰¹ In respect of the extra-territoriality of jurisdiction, the reasoning developed under the Children's Act will prevail.⁵⁰² In terms of clause 19(1)(a) of the Supreme Courts Act, the High Court is empowered to exercise universal jurisdiction over international crimes such as slavery.⁵⁰³ It is suggested that this jurisdiction be extended to include trafficking. Persons implicated in the commission of trafficking are to be denied visa privileges.⁵⁰⁴

Victim identification and protection is given priority in Chapter 4 of the Trafficking Bill. The guiding principles in this section is to procure the best protection possible for trafficked victims who are often treated as tantamount to criminals, thereby losing the benefit of appropriate protection of the law. On protection of child victims of trafficking, the Bill provides for the mandatory reporting and referral of child trafficking victims by police and immigration officials, labour inspectors, social workers and social service professionals, medical practitioners, registered nurses, traditional healers, and traditional leaders to the SAPS for investigation.⁵⁰⁵ Non-reporting of suspected child trafficking amounts to a crime. Any other person, who on reasonable grounds suspects that a child is a victim of trafficking, must report that suspicion, and provide good reasons for the suspicion, to a police official for investigation. This report must be *bona fide*; else the person will be liable

⁵⁰⁰ TIP Bill (n462 *supra*) clause 10(1). This provision is in line with the standards set by the CTOC Art 15 for extra-territorial jurisdiction.

⁵⁰¹ TIP Bill (n462 *supra*) clause 11 lists these factors as:

- (a) The significance of the role of the convicted person in the trafficking process;
- (b) previous convictions relating to the crime of trafficking in persons;
- (c) whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance;
- (d) the conditions in which the victim was kept;
- (e) whether the victim was held captive for any period;
- (f) whether the victim suffered abuse and the physical and psychological effects the abuse had on the victim;
- (g) whether the offence formed part of organised crime; and
- (h) whether the victim was a child.

⁵⁰² Children's Act s 291. See para 7.3.2.4 *supra*.

⁵⁰³ Stuurman (n462 *supra*) 6-7.

⁵⁰⁴ As recommended in the Palermo Protocol art 11(5), and inserted in the Immigration Act s 29(b)(1A).

⁵⁰⁵ TIP Bill (n462 *supra*) clause 12(1).

to civil action on the basis of the report.⁵⁰⁶ Child victims of trafficking will also fall under all the protective measures of the Children's Act.⁵⁰⁷ Similar requisites are stipulated in terms of the reporting of adult victims of trafficking; however, reporting is made subject to the written consent of the victim.⁵⁰⁸ Whereas suspected child victims should be immediately assisted, reported adult victims should be referred to accredited organisations or the provincial department of social development for an assessment as to whether the person concerned is a victim of trafficking.⁵⁰⁹ Furthermore, organizations that provide services to adult victims must be accredited and must comply with certain norms and standards and must offer specific programmes to victims of trafficking. All foreign trafficked victims are entitled to the same public health care services as those provided to South African citizens.⁵¹⁰ Clause 14 clarifies the position of unaccompanied foreign minors and is in line with the provisions of the Children's Act which seeks to ensure that the maximum protection and assistance is afforded to children.⁵¹¹ The TIP Bill logically prohibits discrimination against trafficking victims on the basis of gender, race, religion, nationality, and so forth.

In the case of child victims of trafficking found in the Republic, the primary responsibility is to place the child in temporary safe care in terms of section 151 of the Children's Act. The illegal foreign child is then brought before the children's court with the intention that assistance in applying for asylum in terms of the Refugees Act may be provided. The prosecution of child trafficking victims and certified adult victims of trafficking for any illegalities committed as a direct result of his or her situation as a victim of trafficking is prohibited in clause 16. The Bill also establishes that if a prosecutor has a reasonable suspicion that a child or adult in any criminal prosecution is a victim of trafficking, the trial

⁵⁰⁶ TIP Bill (n462 *supra*) clause 12(3)(a), (b). If the listed persons are convicted of not reporting a case of child trafficking, they will be liable to a fine or imprisonment for a period not exceeding 1 year (clause 12(6)).

⁵⁰⁷ TIP Bill (n462 *supra*) clause 12(5).

⁵⁰⁸ TIP Bill (n462 *supra*) clause 13(1)(b). Consent is required unless the person is mentally disabled, or on any type of substance resulting in an altered state of consciousness.

⁵⁰⁹ TIP Bill (n462 *supra*) clause 13(5), (6), (7). If identified as a veritable trafficking victim, the adult will be issued with a certificate of authenticity. According to clause 20 of the TIP Bill, an adult may only be referred to an accredited organisation in possession of a valid certificate of accreditation. This is a questionable regulation, as any organisation willing to assist trafficking victims must be allowed to help. The prescribed minimum norms and standards for accredited organisations also seem rather stringent, especially for a country such as South Africa. See TIP Bill (n462 *supra*) clause 21(1).

⁵¹⁰ TIP Bill (n462 *supra*) clause 15. The provision does not specify which health care services will be provided and whether such services are mandatory. Additional initiatives will have to be detailed in order to be compliant with the OHCHR's Guideline 8(7) & Palermo Protocol art 6(4).

⁵¹¹ TIP Bill (n462 *supra*) clause 14(2), (3).

must be postponed for verification of the trafficking status. If found to be accurate; the criminal prosecution must be withdrawn or the victim of trafficking discharged.⁵¹²

Chapter 5 provides for other protective measures for foreign trafficked victims that include the granting of a recovery and reflection period⁵¹³ and, under certain circumstances, the issuing of temporary residence permits and permanent residence permits to foreign victims of trafficking.⁵¹⁴ A certified victim of trafficking is allowed a non-renewable recovery or reflection period of not more than 90 days, which may be extended to six months if the investigation is not completed within the initially allocated time period. This period allows victims to cogitate on their current position and to make informed decisions as to whether they want to assist in the investigation and prosecution of their traffickers. As such, this residency is dependent on the cooperation of the victim in a case against the trafficker. If, after 30 days, it is noticeable that the victim is unwilling to cooperate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker, she may be repatriated to her country of origin.⁵¹⁵

Temporary residence may be issued to trafficked victims if they are cooperative, and if it is perilous to return them to their countries of origin. The temporary residence or visitor's permit may be renewed or extended for the duration of the investigation and the prosecution of a case of trafficking in persons. In such a case, the victim may conduct work or study in the Republic. A victim of trafficking is entitled to apply for a permanent residence permit in terms of section 27 of the Immigration Act, after five years' continuous residence in South Africa. As observed from the provisos above, the recovery and reflection period is assessed on a case-by-case basis as, in practice; some victims have suffered more trauma than others and may be more unwilling to suffer this again by exposing their experiences.

⁵¹² TIP Bill (n462 *supra*) clause 16(2), (3).

⁵¹³ TIP Bill (n462 *supra*) clause 17. This provision follows the principles established in the Palermo Protocol Art 6(3), CTOC Art 25(1) and the OHCHR's Guideline 5(9).

⁵¹⁴ TIP Bill (n462 *supra*) clauses 18-19. See also s 27(d) of the Immigration Act and s 27(c) of the Refugees Act. This will require an amendment to s 3 of the Refugees Act, in order that a trafficking victim qualifies for refugee status if that person proves to the satisfaction of the DHA that he or she may be harmed, killed or trafficked again if returned to his or her country of origin.

⁵¹⁵ TIP Bill (n462 *supra*) clause 17(2).

The TIP Bill also establishes inter-sectoral and coordinated service delivery to victims of trafficking in Chapter 6. Adult victims of trafficking are entitled to services provided to them by certified organisations. These mandatory services include accommodation, medical care, counselling, legal assistance and reintegration into their families and communities.⁵¹⁶ Trafficked victims may also request rehabilitation services, education and skills development training.⁵¹⁷ The immediate and long-term needs of these victims must be attended to in a specific plan of action.⁵¹⁸ Trafficked victims with children are to be provided with additional care and child-development programs. The children may not be removed to another facility without the express consent of the trafficked parent or guardian.⁵¹⁹ The Bill also provides proper processes when returning a victim who has been trafficked within South Africa, taking cognizance of the safety of the victim and the possibility that the person might be harmed, killed or trafficked again if returned.⁵²⁰

Of significance is the directive providing that the accredited organisation must systematically collect detailed information on the number of victims of trafficking treated, their countries of origin, purpose of trafficking, trafficking methods and routes, and the types of travel documents use in trafficking.⁵²¹ As South Africa does not have a centralized database on trafficking, this type of information is invaluable for further research and the prevention of the crime. There is also limited literature on the subject of human trafficking in South African, particularly a lack of research-based publications. To respond more effectively to the problem, concrete data based on sound empirical data is crucial. More sources of data could be included such as estimates (taken at point of origin or source area) of the number of women and children reported missing at community level. Of these, a proportion may be assumed to have been trafficked. Additionally, data regarding persons moving out of a country (which may be a destination or transit point) should be collected at border crossings or at the point of destination.

According to Chapter 7, victims of trafficking are entitled to the payment of appropriate compensation from a convicted trafficker but only at the discretion of the court or at the

⁵¹⁶ TIP Bill (n462 *supra*) clause 21(1)(a).

⁵¹⁷ TIP Bill (n462 *supra*) clause 21(1)(b).

⁵¹⁸ TIP Bill (n462 *supra*) clause 24.

⁵¹⁹ TIP Bill (n462 *supra*) clause 21(3) - (5).

⁵²⁰ TIP Bill (n462 *supra*) clause 25.

⁵²¹ TIP Bill (n462 *supra*) clause 26.

request of the complainant or the prosecutor.⁵²² The payment is for loss of property; physical, psychological or other injury; being infected with a life-threatening disease; loss of income or support and any expenses incurred. A civil action may also be instituted by the victim to recover any amounts not covered by the order for compensation.⁵²³ The court may even order the convicted person to make a payment of compensation to the state for expenses incurred with regard to the care, accommodation, transportation and repatriation of the victim of the offence.⁵²⁴

Chapter 8 concerns the deportation and repatriation of victims of trafficking. The Bill clearly states that the summary deportation of foreign victims is strictly prohibited.⁵²⁵ The repatriation of child victims to their country of origin is prohibited without due consideration of their best interests, safety and the possibility that the children might be harmed, killed or trafficked again.⁵²⁶ If there are reasons to believe that the children are at risk of re-victimisation once back home, their interests would compel the Republic to offer a better alternative in South Africa. Similarly, adult victims of trafficking may not be returned to their country of origin if there is any possibility that the safety of the persons will be in jeopardy, or that the person may be hurt, murdered or re-trafficked.⁵²⁷ Before returning persons to their native countries, the Director-General of Social Development must attempt to find the victims' family members, or an organisation that renders assistance to trafficking victims in their home country.⁵²⁸ The trafficked persons must also be informed of any arrangements that have been made for their secure reception in the country to which they will be returning to. Likewise, a South African victim who has been trafficked out of the country, must immediately be repatriated to the Republic while giving due regard to the person's safety. The Director-General of International Relations and Co-operation together with the Director-General of Social Development must assess the risks to the wellbeing and life of such a person, and facilitate the safe return.⁵²⁹ Upon return in the country, a child must be

⁵²² TIP Bill (n462 *supra*) clause 27(1).

⁵²³ TIP Bill (n462 *supra*) clause 27(2).

⁵²⁴ TIP Bill (n462 *supra*) clause 28. In this regard, the TIP Bill complies with the standard set in the Palermo Protocol art 6(6), and even enhances the model.

⁵²⁵ TIP Bill (n462 *supra*) clause 29.

⁵²⁶ TIP Bill (n462 *supra*) clause 30(1).

⁵²⁷ TIP Bill (n462 *supra*) clause 30(2).

⁵²⁸ TIP Bill (n462 *supra*) clause 31.

⁵²⁹ TIP Bill (n462 *supra*) clause 32(a), (b).

referred to a designated social worker, and an adult to an accredited organisation for further assessment.

Parental responsibility for the trafficking of children is considered in Chapter 9, clause 34. This provision pronounces that if a court has reason to believe that a 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 or allowed the child to be trafficked, the court may suspend all parental rights and responsibilities and place the child in temporary safe care, pending a children's court inquiry.⁵³⁰ This, however, does not exclude that person's liability for committing the offence of trafficking in persons. This clause is identical to Chapter 18; section 287 of the Children's Act, except that in the Children's Act the entire case is from its initial prosecution the responsibility of a children's court. These clauses have made the law with regard to parental responsibility very clear.

Trafficking in persons is a criminal-justice issue which must be dealt with in the criminal-justice system with domestic inputs from relevant government departments and institutions, but also involves international cooperation.⁵³¹ The Bill acknowledges the necessity for close cooperation and coordination of government and civil society activities. A system of regulated service provision is envisioned in clause 36. Currently, most of the assistance to victims of trafficking, both cross-border and in-country, is provided by local and international NGOs, various faith-based organizations and individual activists. The involvement of civil society will be crucial for the implementation of the TIP Bill. The Bill provides that the National Commissioner of the SAPS, the Departments of Home Affairs and Labour and the National Director of Public Prosecutions must issue national instructions and directives which must be followed by their respective officials in dealing with trafficking in persons' matters.⁵³² Non-compliance by these functionaries may result in disciplinary steps, therefore ensuring the effectiveness of the Bill.⁵³³ The National Commissioner of the SAPS must provide an annual report on all available information on

⁵³⁰ These clauses adhere to the CRC arts 19(1), 32, 34, 36, & 37(1) as well as s 305(3) of the Children's Act.

⁵³¹ International cooperation is considered in TIP Bill (n462 *supra*) clause 35, which mainly provides for the President to enter into, amend or revoke agreements with foreign states pertaining to cooperation in human trafficking matters. No stipulations are made as to the specific types of cooperation in human trafficking matters, international exchange of information or other mutual legal assistance, as required by the Palermo Protocol Arts 6, 9(3), 10 and CTOC Arts 13, 16, 18.

⁵³² TIP Bill (n462 *supra*) clause 36(1).

⁵³³ TIP Bill (n462 *supra*) clause 36(10).

trafficking in the region.⁵³⁴ The Bill further provides for the adoption of a National Policy Framework relating to all matters dealt with in the Bill in order to ensure a uniform, coordinated and cooperative approach by all government departments and institutions in dealing with trafficking in persons' matters.⁵³⁵

However, even though it fully complies with the government's obligations under the Protocol, and indeed strengthens some of the Protocol's provisions, the Bill fails to address some of the gaps and ambiguities in its last draft. For example, apart from mentioning the root causes of trafficking in clause 9 of the Bill, these issues are not addressed anywhere else; thereby failing to bolster preventative measures. In order for human traffickers to continue operations, a socio-legal environment conducive to the trafficking trade and related vice industry is required. Consequently, all aspects contributing to the vulnerability of people to trafficking recruitment must be examined. Policy should be formulated relating to socio-economic problems to eradicate the breeding ground for trafficking.

The Palermo Protocol requires states to adopt or strengthen legislative or other measures in order to discourage the demand that fosters all forms of exploitation of persons that leads to trafficking. However, the instrument does not specify the initiatives and measures to be undertaken. This allows a specific state, such as South Africa, to determine what measures to undertake, in accordance with the jurisdiction's domestic legislation and policies as well as to its financial and human resource capabilities. Unfortunately, the TIP Bill does not include such initiatives.

The Bill also does not address issues arising from cultural and customary practices. Traditionally acceptable rituals and practices, such as *ukuthwala* or *lobola*, are misused to subsequently force females into domestic labour, or send young children to work with or for relatives in urban areas, or even selling children for illegal adoptions. These exploitative practices could – and arguably should – be brought under the definition of human trafficking or should be excluded as possible grounds of justification. However, these issues are not expressly dealt with in the TIP Bill (or the Protocol, for that case). Thus,

⁵³⁴ TIP Bill (n462 *supra*) clause 36(2)-(9).

⁵³⁵ TIP Bill (n462 *supra*) clause 39.

while the definition of trafficking has been expanded in the Bill, it does not fully address issues that may arise in the South African context.

As regards prevention initiatives, the Bill does not provide for the specialised training of persons who are to assist victims of trafficking, or for specialisation in the prosecution of these crimes.⁵³⁶ For instance, specialist training should be offered to prosecutors to assist them in dealing with evidential and admissibility issues when prosecuting alleged traffickers.⁵³⁷ The TIP Bill also does not include any mandatory health care services for the victims of trafficking, except for a general provision in clause 15.

Another potential weakness of the TIP Bill is the introduction of accreditation requirements for organizations working with trafficking victims. The Bill specifies that organizations providing accommodation, health, counselling and other services to victims of trafficking will have to secure government approval.⁵³⁸ It is possible that many of the organizations currently working in the field, such as various church communities, might be unable to comply with all the accreditation requirements as they may provide only two or three of these services. For example, some organizations provide essential, but very basic accommodation for victims of trafficking. These facilities might not satisfy the Bill's requirements for accreditation. Similarly, such organizations might not be able to fulfil the requirements relating to reporting, counselling and other specialist services, even though they have established themselves as trusted shelters for victims.

The South African legal response to human trafficking is comprehensive and on the whole aligned with international standards. For an effective implementation and operation of the domestic legal measures, reviews of or amendments to other related Acts of Parliament, such as the CPA, the Immigration Act, the Children's Act and the Sexual Offences Act 2007 may be necessary to bring them into line with the provisions of the TIP Bill and to insert provisions in those laws to deal more effectively with trafficking in persons. In the following sections, the manner in which the jurisdiction has dealt with the protection of

⁵³⁶ This is similar to both the Children's Act and the Sexual Offences Act 2007. These pieces of legislation fail to contain any prevention programmes as regards the crime of trafficking, and do not contribute to bringing the jurisdiction into compliance with the Palermo Protocol. These initiatives could however be addressed on government policy level.

⁵³⁷ Kreston (n4 *supra*) 47.

⁵³⁸ TIP Bill (n462 *supra*) clauses 20-26.

victims, the prevention of the phenomenon and the prosecution of traffickers will be more closely examined.

(i) Prevention

The task of initiating, implementing and enforcing preventative measures as regards human trafficking is mainly allocated to the Minister of Social Development. However, because the Bill provides for an enhanced and coordinated cross-sector response, other interested parties such as the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Basic Education, Finance, Health, Home Affairs, Justice and Constitutional Development, Social Development, Labour, Police and State Security, must also be consulted.

In its endeavour to combat human trafficking through prevention, the government has established a National Intersectoral Trafficking in Persons Task Team in 2003.⁵³⁹ This group is located within the agency of the NPA and headed by the Sexual Offences and Community Affairs (SOCA) office. It unites various government departments as well as the SAPS Organized and Commercial Crime Unit, the SAPS Witness Protection Unit, border authorities such as the SAPS Ports of Entry Police, the IOM, UNODC and various other NGO's.⁵⁴⁰ Additionally, the SOCA has implemented the Tsireledzani Program over a three-year period (2008-2010) in order to assist with national compliance to the Palermo Protocol, to increase capacity to deal with trafficking problems and to enhance the network of organizations combating trafficking. The SAPS also has a Human Trafficking Desk within its Organized Crime Unit, but little information related to actions or investigations taken by the Desk is available. The NPA has established additional ancillary squads intended to combat trafficking from other avenues, such as by means of the POCA. To enforce the POCA, a Directorate for Special Operations has been formed to oversee case management. This Directorate consists of a multi-disciplinary team of investigators, analysts, operational support personnel (such as undercover experts and forensic auditors) and prosecutors. A Financial Intelligence Centre was further established by FICA for the detection of money laundering as well as a Criminal Assets Recovery Fund to

⁵³⁹ The Task Team is mandated to develop a National Strategy to Combat Human Trafficking in keeping with the Palermo Protocol's directives.

⁵⁴⁰ This group and other stakeholders involved in the managing of trafficking constitute the Trafficking in Persons Consultative Forum, which holds quarterly meetings. See Allais (ed) (n123 *supra*) 11.

confiscate the proceeds of crime by the Asset Forfeiture Unit. In this manner, the crime is combated from all possible fronts.

The relevant South African ministries, intergovernmental organizations, NGOs, and other institutions in civil society are assisted by various international and regional stakeholders such as the ILO, IOM,⁵⁴¹ UNODC,⁵⁴² UNICEF, UNIFEM, UNDOC, Oxfam GB, *Terre des Hommes*, the AU, SADC, WALSA (Women and Law in South Africa), SANTAC (Southern Africa regional Network against Trafficking and Abuse of Children), GEMSA (Gender and Media Southern Africa) and the African Gender Monitor, amongst others. For example, the European Community (EC) has co-sponsored a three-year assistance program to prevent or react to human trafficking and provide support to victims of the crime.⁵⁴³ The EC committed EUR6.3 million to the program. The South African government also forged partnerships in 2009 with its counterparts from Lesotho and Swaziland to plan anti-trafficking activities and raise awareness. Established organisations such as the Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO)⁵⁴⁴ that are tasked with the promotion, strengthening and perpetuation of cooperation and fostering of joint strategies for the management of all forms of cross-border and related crimes with regional implications, could also be employed to focus on the investigation of human trafficking.

Capacity-building and training workshops, public education and awareness programmes, as well as education campaigns are some of the methods common in an attempt to identify persons at risk. Education must be aimed at potential victims, the public at large and those who interact with victims. South Africa has launched many initiatives to raise awareness of the growing threat of human trafficking. There has been annual Human

⁵⁴¹ The IOM has invested funding, training and skills provision in South Africa's efforts to fight trafficking. A US\$1.9 million two-year programme was launched in 2004 to prevent human trafficking, to protect victims and to provide them with rehabilitative assistance and/or return and reintegration options.

⁵⁴² In 2006-2007, UNODC provided counter-trafficking training for police, border guards, prosecutors, judges and NGO staff in South Africa. See Bhagat *Human Trafficking - Biggest Social Crime* (2009) 8.

⁵⁴³ The strategy of the —Programme of Assistance to the South African Government to Prevent, React to Human Trafficking and Provide Support to Victims of Crime” was the providing of information through research and public education, capacity building and development, victim support and integration, the development of legislation and trafficking policies, the monitoring and evaluation of trafficking trends, and lastly liaison and consultation with all stakeholders and interested parties. See Allais (ed) (n123 *supra*) 2, 166.

⁵⁴⁴ This organisation was formed in 1995 by 11 SADC member states, namely Angola, Botswana, Lesotho, Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. They were later joined by the DRC and the Seychelles. UNODC and SARPCCO have collaborated on the compilation of training manuals on trafficking. See Gallinetti (n101 *supra*) 48.

Trafficking Awareness Weeks⁵⁴⁵ since 2006, which have assisted in alerting the public to the threat of trafficking. Public awareness was also raised through media campaigns. The government has also instituted innovative initiatives such as the “LoveLife” programme which promotes healthy living and sexual responsibility among young people. New 24-hour telephone trafficking hotlines⁵⁴⁶ for victims and the World Cup attendees’ helpline was initiated in 2009. However, comprehensive prevention strategies addressing socio-economic conditions that contribute to vulnerability to trafficking have not yet been instituted.

In partnership with the IOM, the NPA has already trained 812 law enforcement and other government officials as part of an on-going program funded by the EU.⁵⁴⁷ Training covered victim-identification criteria, legal frameworks, and roles of various government departments and community actors. Most importantly, the difference between trafficking and smuggling were highlighted. Past anti-trafficking prevention programmes have frequently focused on discouraging people from migrating internally and cross-border. These have included “stranger/danger” campaigns which made little impact since the majority of traffickers and smugglers are known to their victims. Another 238 representatives from the SAPS, DSD, Department of Health, DHA, and other agencies were certified through “Train-the-Trainers” programs.⁵⁴⁸ Projects on the prevention of human trafficking and HIV/AIDS infection, in particular with reference to the care and protection of trafficked survivors in care centres, should also be implemented in an integrated and sensitive manner. Awareness-raising projects should also be extended to

⁵⁴⁵ See Meehan “SA Marks 2nd Annual Human Trafficking Awareness Week” 2007 15 *Eye On Human Trafficking* 11-2; US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 317.

⁵⁴⁶ Other established anti-trafficking hotlines are that of the IOM that has a toll-free National Human Trafficking Helpline (0800 555999) which is operational from 07h00 to 22h00 daily for the reporting of trafficking cases and for victim assistance. Childline also provides a 24-hour, toll-free child helpline at 0800 055555 or 0800 122333. The Salvation Army offers counter-trafficking assistance at 08000 RESCU.

⁵⁴⁷ US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 317.

⁵⁴⁸ *Ibid.* The “Train-the-Trainer” programme is a SAQA-accredited (South African Qualifications Authority) curriculum which includes a generic module on human trafficking as well as content-specific modules.

the communities by means of road-shows,⁵⁴⁹ and educating or involving the community leaders or elders,⁵⁵⁰ and any other possible role-player in the trafficking process.⁵⁵¹

It was especially the preparation for the 2010 FIFA World Cup that provided the impetus for the government to begin making strides towards the prevention of human trafficking.⁵⁵² South African law-enforcement authorities developed specialized strategies to prevent and investigate sex trafficking during the games, which included a national law enforcement information-sharing network and greater police presence at the sporting venues.⁵⁵³ Politicians and prominent public figures promoted anti-trafficking efforts. For example, national soccer stars Kaizer Chiefs called attention to the issue of human trafficking by wearing T-shirts with a counter-trafficking message and the toll-free telephone number during a pre-game warm-up match. Posters and flyers were displayed in key areas where fans gathered to watch games on large outdoor screens, reaching a much larger audience than previous anti-trafficking campaigns. Numerous organizations have championed anti-trafficking campaigns during the World Cup, for instance the “Not For Sale” campaign launched the “Red Card” campaign in order to highlight international trafficking issues, primarily children’s rights abuses, the Red Light Campaign, and ESPN. In its program “Outside the Lines”, the relationship between human trafficking and the South African

⁵⁴⁹ In this regard the US Dept of State *Trafficking in Persons Report 2011* (n149 *supra*) 330 reports that the NPA conducted “road shows” during the 16 Days of Activism for No Violence against Women and Children. The Durban Trafficking Task Team rode aboard a float in the Durban Float Parade, bound and gagged to represent the concept of human trafficking. Other low cost-high impact awareness tools included peer education worksheets and a radio drama.

⁵⁵⁰ In this regard, South Africa should consider the community-structure system employed in Benin to monitor the movement of children. Village Committees closely watch and immediately report missing children, child abuse and children exposed to trafficking to authorities. Not only does the system have a quick response time to crime, but awareness is created and the reintegration of trafficked children monitored. See Kamidi A *Legal Response to Child Trafficking in Africa: A Case Study of South Africa and Benin* (2007) 38.

⁵⁵¹ Eg, programs must be designed in association with the unions for long-distance drivers or truckers to educate and sensitize them to the danger and ills of human trafficking. In this manner, truckers can be mobilised to intercept and repatriate human trafficking victims. In regions where especially child trafficking is prevalent, an anti-trafficking alert system can be set up at bus stations, etc. Likewise, training can be provided to taxi drivers to help crack down on trafficking and child-sex tourism by identifying and reporting suspicious behaviour by traffickers and sex tourists who may intend to exploit adults and children.

⁵⁵² Prior to the World Cup, international concerns were raised in anticipation of the influx of tourists that would likely lead to an increased demand for sexual services and therefore the commercial sexual exploitation of women and children. While Germany reported hardly any rise in their trafficking numbers during their 2006 World Cup event, it was feared that South Africa’s weak legal infrastructure and other enabling factors such as poverty, relaxed visa requirements, and so on would permit the sexual exploitation of women and children throughout the region.

⁵⁵³ As no security was provided at venues other than stadiums hosting official matches, civil society groups independently carried out trafficking prevention activities at “child-friendly spaces” at fan parks and other World Cup-related venues.

World Cup was investigated.⁵⁵⁴ Furthermore, the Nelson Mandela Children's Fund aided the cause by launching the "Champions for Children Campaign: 2010 and Beyond" in order to raise awareness about trafficking and to promote child protection and educate the communities about the risks posed to children. The Victim Empowerment Directorate drafted a national Child Protection Strategy, and each province hosting an official match was tasked with forming a multi-stakeholder provincial task team on trafficking and writing its own local plan. It is essential that the government continue to support these prevention strategies developed by NGOs to address demand for commercial sex acts and protect woman and children from commercial sexual exploitation beyond the 2010 World Cup.

The DHA also demonstrated a stronger commitment in curbing internal corruption, and reduce document and identity fraud within the department.⁵⁵⁵ This will make the dealings of traffickers more difficult as their efforts to move victims into and out of South Africa are hampered. The project also focused on registering all South Africans with proper identification (complete with biometric data), ending late birth registrations, and producing a secure South African passport within the next few years.

South Africa has developed a National Action Plan to Combat Human Trafficking,⁵⁵⁶ which was approved in 2012, but coordination, momentum and political commitment at the state and municipal levels are required to give meaning to the plan. Integrated networks of various agencies (health, justice, security, women's policies and others) must be established to work cooperatively with civil society groups, international organizations and the private sector. The jurisdiction does not have a national database or rapporteur on human trafficking, and need to work towards achieving these objectives. Finally, even though South Africa has conducted counter-trafficking and prevention programmes, very few have been tracked, audited or evaluated. The purpose is to increase awareness among the general public and all levels of government officials as to their responsibilities

⁵⁵⁴ Reports were released on young Asian and Chinese girls trafficked to South Africa. Another survey revealed that there were twice as many foreign girls working as prostitutes in Johannesburg as before and the ages of the girls were devastatingly low.

⁵⁵⁵ Eg, in *S v Mudaly and Others* (n336 *supra*), officials from the DHA in Durban were arrested in 2006 for facilitating the movement of Thai victims into South Africa in the so-called "After Dark"-case. Cases in Durban and Rustenburg also involve police allegedly complicit with trafficking gangs.

⁵⁵⁶ The National Action Plan was generated at the Tsireledzani Conference in 2009 in order to ensure cohesion between government departments, civil society and international organisations and improve their alignment with private efforts in combating human trafficking. See Allais (ed) (n123 *supra*) 12.

under the TIP Act, and to institute formal procedures to regularly compile national statistics on the number of trafficking cases prosecuted and victims assisted, as is done for other crimes.

(ii) Protection

At present, South Africa has no official mechanism or standard operating procedure to ensure the referral of trafficking victims for assistance, or any standard procedures for serving the victims of trafficking. There is also no comprehensive policy framework relating to human trafficking in place in South Africa. Trafficking victims nevertheless benefit from policies that have been established relating to the management of sexual assault or the provision of services to victims of crime generally.⁵⁵⁷ Victim protection is however provided for in the draft TIP Bill. As indicated in the Bill, victims need physical and emotional security, as their testimony is essential in establishing a case against a trafficker.⁵⁵⁸ South Africa has a weak witness protection programme,⁵⁵⁹ which means that victims are less likely to come forward and testify against their sexual exploiters. Many victims are deterred from agreeing to give oral evidence for fear of facing their traffickers in court, unsympathetic cross-examination by the defence counsel, and reprisals from their abusers. Many women, if trafficked, will not seek help or even report the incident to the authorities because their situation exposes them to potential harassment by the police and officials and possibly to the threat of deportation. For these victims there are other avenues through which testimony can be secured. Under the CPA witnesses can give evidence by closed-circuit television, or by way of *in camera* proceedings, if it is in the interests of justice to do so.⁵⁶⁰

⁵⁵⁷ Allais (ed) (n123 *supra*) 48. One has to consider National Policy Guidelines for Victim Empowerment (2009) which lists priority target groups for victim empowerment, including women, abused children, victims of domestic violence, sexual abuse and rape, and victims of human trafficking.

⁵⁵⁸ Yet, curiously, almost all foreign victims preferred to return home without pressing charges. See Allais (ed) (n123 *supra*) 63, 67. The TIP Bill does not have any provisions on witness protection, but legislative measures relating to this matter are already in place, eg the Criminal Procedure Act 52 of 1977 s 153(2)(b) and the Witness Protection Act ss 2 & 4.

⁵⁵⁹ Not many victims have previously made use of the witness protection programme or leave the programme after entering it. Still, there are victims who make use of the voluntary witness protection programmes, eg, at the end of 2009 there were 7 victims in witness protection in KwaZulu-Natal alone.

⁵⁶⁰ In *Director of Public Prosecutions, Transvaal v The Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (C), the Constitutional Court held that the rights of child complainants in sexual offence cases are threatened by the non-availability of intermediaries and related protective facilities such as closed-circuit cameras in court.

The new TIP Bill should also provide for access to services in spite of limited resources. Victims should also be assisted immediately. Although the South African government ensures trafficking victims access to protective services, there have been various complaints regarding inadequate trauma-counselling facilities available and victims' maltreatment at the hands of those meant to protect them.⁵⁶¹ Both identified and suspected trafficking victims receive care at over-burdened facilities for victims of domestic abuse, gender-based violence, rape, and sexual assault. Few South African shelters can accommodate the special needs of trafficked foreigners which include high-level security and translation services to assist with communication and counselling, legal assistance, English lessons and skills training to facilitate access to employment opportunities. These centres are run by NGOs,⁵⁶² faith-based organizations, and community charities, but they do not receive sufficient funding from the government, specifically not from the Department of Social Development (DSD). The government also does not offer long-term care to victims,⁵⁶³ except for foreigners assisting with investigations or in need of protection. Officials from the DSD monitor victims' care, prepare them for court, and accompany them through trial and repatriation stages. The DSD and the SAPS formally notify each other of trafficking cases to enable rapid access to care, and effective gathering of evidence and testimony. Although there are no dedicated centres for victims of human trafficking, the NPA has established Thuthuzela Care Centres to serve as a one-stop, integrated response to violent sexual acts against women and children.⁵⁶⁴ These facilities have been internationally recognized as models of best practice in the care and treatment of women and children who have experienced sexual violence, particularly rape.⁵⁶⁵ The government also has to abide by the requirements set out in the Sexual Offences Act 2007 and Children's Act to provide child victims with safe shelter, medical aid, and legal support.

⁵⁶¹ US Dept of State *Trafficking in Persons Report 2012* (n118 *supra*) 317.

⁵⁶² As persons who have been trafficked have first-hand knowledge of the exploitation and abuse associated with human trafficking, it would perhaps be feasible for trafficking survivors to form an NGO in order to assist other trafficked persons, as well as to make expertise available to the government.

⁵⁶³ No provision for the long-term care of victims is made in the TIP Bill as well.

⁵⁶⁴ There are 37 operational Thuthuzela Care Centres in the country of which 11 are not fully operational, and 7 are still being established. See Shukumisa "Thuthuzela Care Centres in South Africa" <http://www.shukumisa.org.za/index.php/thuthuzela-care-centres-list/> (accessed 2013-01-16). The Centres operate on a 24-hour basis and provide professional support and services required by victims of sexual abuse. They often attend to immediate medical, psychological and social needs, provide provisional shelter and also function as referral centres for legal assistance. See Bhagat (n542 *supra*) 27.

⁵⁶⁵ Allais (ed) (n123 *supra*) 51.

Reports state that provision of services in South Africa is uneven and lacking mostly in rural areas.⁵⁶⁶

The South African government's commitment to a victim-centred approach can be seen in its development of measures aimed at protecting and promoting victims' rights in the criminal-justice system. The National Victim Empowerment Programme (VEP),⁵⁶⁷ the Service Charter for Victims of Crime (Victims' Charter) and the Minimum Standards on Services for Victims of Crime (Minimum Standards) are three important policy documents elaborating and consolidating rights and obligations relating to services applicable to victims and survivors of crime in South Africa. The objectives of the Service Charter are to address victims' rights and to eliminate secondary victimisation in the criminal justice process and to ensure that victims remain central in this process.⁵⁶⁸ The Minimum Standards document elaborates on the rights set out in the Service Charter to enable victims to exercise their rights.⁵⁶⁹ Similarly, the SAPS National Instruction 3/2008 in Terms of the Sexual Offences Act 2007⁵⁷⁰ provides for procedural issues such as taking victims' statements in private, remaining professional and sensitive at all times, informing victims frequently of the investigations' progress as well as of the witness protection programme. The Department of Health also issued a National Sexual Assault Policy and Management Guidelines in 2005, with the aim of providing comprehensive sexual assault care by trained staff.

The victim of human trafficking should be, and is, entitled to some form of compensation. Except for the compensation provided in the TIP Bill, the Criminal Procedure Act provides for available compensation for loss of property or money. However, it does not include relief for psychological or physical suffering. In addition, POCA provides for compensation

⁵⁶⁶ US Dept of State *Trafficking in Persons Report 2012* (n118 supra) 317.

⁵⁶⁷ The VEP has a dedicated sub-directorate of Transnational and Violent Crimes, which addresses the needs of victims of crime and violence, including victims of human trafficking. See Allais (ed) (n123 supra) ii.

⁵⁶⁸ Allais (ed) (n123 supra) 49-50.

⁵⁶⁹ The principles set out in the Minimum Standards document are of particular significance to child and sexual assault victims, as it states that a victim can expect that the presiding officer will "do his best" to ensure that the trial proceedings are conducted fairly and respect for the dignity and privacy of the victim. Prosecutors are also expected to protect victims from unduly aggressive, harmful and degrading cross-examination. Cases involving sexual offences may be heard in specialised courts if such courts are available. Unfortunately, South Africa's specialised sexual offences courts have been phased out since 2006. See Skelton (ed) *Justice for Child Victims and Witnesses of Crime* (UP Centre for Child Law 2008) 10.

⁵⁷⁰ SAPS National Instruction 3/2008 in Terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act GNR 865 of 15 Aug 2008 (*Government Gazette* No 31330).

for loss of property and also for injury to the victim concerned. Besides providing compensation or any other forms of monetary damages, the principal goal of any human rights remedy ought to be rectification and restitution. The top priority of any remedy should be the restoration of the victim's rights, in order to bring the victim into the *ex ante* position.⁵⁷¹ In terms of the state's protective relationship, it is the responsibility of the state to protect victims' rights and provide victim assistance for the violation of their human rights.⁵⁷² Therefore, the state will be liable to provide punitive or exemplary damages and non-monetary remedies such as victim rehabilitation.⁵⁷³ Rehabilitation is a wider concept and necessarily includes adequate emergency and long-term health services, education, and all other possible help to the victims for proper social adjustment. The TIP Bill does not make provision for all of these victim services.

Other legislation can cause secondary victimisation of trafficked persons. In this regard, it is especially the Immigration Act⁵⁷⁴ which is focused on getting illegal foreigners out of the country and is unconcerned with the plight of victims of trafficking. Moreover, the typical result of law enforcement and prosecution is that the trafficked person is punished, instead of the trafficker. The *Phillips*-case is a classic example of how such legislation operates. After the conclusion of the police raid on a brothel, 40 women were arrested, of whom fifteen were charged and convicted of contravening the provisions of the Aliens Control Act.⁵⁷⁵ These fifteen women, plus another three, were summarily removed from the country. Furthermore, victims of forced labour on farms near the borders of Lesotho and Mozambique are still routinely denied care and summarily deported.⁵⁷⁶ The current legal regime does not provide trafficking victims with legal alternatives to deportation to their countries of origin where they may face hardship or retribution. The Sexual Offences Act 2007 stipulates that sex trafficking victims must not be charged with crimes committed as a

⁵⁷¹ See generally Shelton *Remedies in International Human Rights Law* (1999) 54.

⁵⁷² See Shelton (n571 *supra*) 77-79. The TIP Bill does not contain any provision on human rights or the protection of victims' human rights, but the Bill refers to the Constitution in its Preamble which human rights provisions will also apply to the TIP Bill.

⁵⁷³ This is only if there was a duty of care. Non-monetary remedies also include the acts of punishment to the perpetrators and restitution of rights and property. See Shelton (n571 *supra*) 69-77.

⁵⁷⁴ The Immigration Act (and its predecessor the Aliens Control Act) states that an illegal foreigner must be deported, and facilitates such deportation by conferring powers on an immigration officer to, without a warrant, arrest an illegal foreigner and deport him or her. See *infra* para 7.3.2.6.

⁵⁷⁵ See *Phillips and Others v National Director of Public Prosecutions* (n234 *supra*) for a discussion of the case. Of the 15 charged, 11 women were convicted for possessing invalid temporary residence permits and 4 for possessing expired permits.

⁵⁷⁶ Allais (ed) (n123 *supra*) 117-118.

direct result of being trafficked, yet some victims were still arrested after the Act came into operation.⁵⁷⁷ Victims are left without any remedy upon the prosecution of the trafficker. They may be expatriated to their home country having nothing after being exploited.⁵⁷⁸

As the TIP Bill has not yet been implemented, victims still suffer through a lack of support mechanisms, anti-immigration legislation, and a lack of sufficient police protection before, during and after court procedures. South Africa cannot provide any official statistics concerning the number of victims assisted in previous years, as there is no national database, and police records continue to classify victims of trafficking as victims of rape, domestic abuse, gender-based violence, and forced labour. A general complaint by international stakeholders, civil society and NGOs is that the government does not provide dedicated funding for the protection of trafficking victims, despite the availability of government resources.

(iii) Prosecution⁵⁷⁹

At the current juncture, anti-trafficking efforts in South Africa have been primarily aimed at awareness campaigns as opposed to implementing strong legal- and law-enforcement frameworks. The country still needs to employ effective enforcement measures (investigation, prosecution and adjudication) to prevent and combat trafficking. In this respect, specialized police units or task forces (in addition to the local police force), such as those found in Germany and the US should be created to deal with trafficking cases, which would include both trafficking investigations and the protection of victims from reprisals.

Efficient criminal prosecution is critical to combat human trafficking as it discourages further trafficking and protects victims.⁵⁸⁰ Due to the lack of an all-inclusive definition in the current legal framework, most prosecutions focus on child trafficking, or for sexual exploitation purposes. Correspondingly, the National Prosecution Service (NPS) is also not

⁵⁷⁷ US Dept of State *Trafficking in Persons Report 2011* (n149 *supra*) 330. Mention is made of a case where a trafficked victim was locked in the same cell with the alleged trafficker.

⁵⁷⁸ Pearson —“Half-hearted Protection: What Does Victim Protection Really Mean for Victims of Trafficking in Europe?” in Masika (ed) *Gender, Trafficking and Slavery* (2002) 56.

⁵⁷⁹ Obokata —“Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System” 2005 54(2) *International and Comparative Law Quarterly* 445 445.

⁵⁸⁰ Overbaugh —“Human Trafficking: The Need for Federal Prosecution of Accused Traffickers” 2009 39 *Seton Hall Law Review* 635 642.

in a position to properly record trafficking prosecutions and statistics. Information is only available via the media, but remains incomplete.⁵⁸¹

Concerning the transitional trafficking provisions in the Sexual Offences Act 2007 and the Children's Act, the number of arrests, prosecutions, and convictions remain very low in South Africa.⁵⁸² The low number of arrests and convictions does not necessarily reflect the inadequacy of the system, but the complexity of these types of cases for effective law enforcement. Common-law crimes or related statutes are still being employed for transgressions which include a number of strong indicators consistent with trafficking in persons.⁵⁸³ The absence of specific human-trafficking legislation also limits prosecutors to

⁵⁸¹ Numerous reports regarding trafficking cases instituted or trafficking offenders apprehended are found in the media, but cannot be traced further because of the lack of a central database or reporting system. Eg, the *Rekord* reports that in Hillbrow, 2 trafficked women were repeatedly raped after being kidnapped and tied naked to beds by Nigerian immigrants. They were locked in rooms with other 9 other girls, some as young as 8-yrs-old. They were continually injected with heroin and raped. See Blackie —“Human Trafficking a Reality” *Rekord* 13 July 2007. *News24* gives an account of 9 Nigerian men arrested for alleged human trafficking in Ermelo. The men forcefully abducted 12 women - aged between ages of 18 and 30 - from rural towns in the region, forced them to take drugs to ensure they remained addicts, and forced them into prostitution. The men took all their earnings and they were not paid for the jobs that they were doing. See SAPA —“Held for Human Trafficking” *News24* 23 Mar 2010 <http://www.news24.com/SouthAfrica/News/9-held-for-human-trafficking-20100323> (accessed 2013-01-16). Also, *The Sowetan* details the case of a businessman from Welkom - 42-yr-old Daniel Zondani —“Thola” Rune - and his 2 pimps who have been arrested on charges of human trafficking and sex slavery. It is alleged that he is the kingpin behind an alleged prostitution ring. He owns nightclubs and taverns in Welkom. Police rescued 8 women - 6 from Gauteng and 2 from the Free State - from an upmarket club —“Club Gemini” in Welkom. The women were promised lucrative jobs, but were kept captive in rooms at the back of the club, where they were forced to entertain clients. If not compliant, they were assaulted and sometimes electrocuted. They were never paid the promised salaries, but instead found themselves indebted to their employer, who was charging them for food and accommodation. See Makhafole —“Shock as Trafficking Suspects Receive Bail” *The Sowetan* 26 Jul 2010 <http://www.sowetanlive.co.za/news/2010/07/26/shock-as-trafficking-suspects-receive-bail> (accessed 2013-01-16).

⁵⁸² The NPA's annual report has revealed that the number of finalised sexual offence cases has dropped for 2011/12. Only 6,913 sexual offence cases were finalised in 2011/12. The conviction rate of these cases was only 65.1%. Considering the fact that 64,415 sexual offences were reported to the police in 2011/12 means only 11% of reported cases were finalised and only 6.9% - or 4,500 - actually resulted in a conviction. See NPA (n389 *supra*) 38, 40.

⁵⁸³ Eg, the case of *Mavericks Revue CC and Others v Director General of the Department of Home Affairs and Another* (22369/11) [2012] ZAWCHC 5 (3 February 2012) involved an urgent application by Mavericks Revue bar, a —“gentlemen's club” in Cape Town, to stop the DHA from terminating its corporate permits, pending a separate judicial review of the withdrawal of the permits. Mavericks Revue bar required the corporate permits in order to legally employ foreign exotic dancers at the establishment, however the dancers were not paid a wage or salary but had to pay Mavericks ZAR2,000 per week, contrary to the conditions of the relevant legislation. The court further remarked that the conditions under which the foreign dancers were procured, housed and expected to work made them susceptible to exploitation. The application was thus dismissed. See also the case of *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] 3 All SA 86 (WCC) which has all the elements of a human-trafficking situation, but concerned the procedures regarding the arrest and detention of a civil debtor. Ms Malachi was recruited from her country of Moldova by the Dance Academy as an exotic dancer. Upon her arrival in South Africa, her passport was confiscated and she was told that she would get it back when she had reimbursed her employers the money they allegedly spent on her travel expenses and accommodation. After working for

deal only with components of the crimes or with the perpetrator directly linked to the crime to the exclusion of the perpetrators behind the scenes. Despite the low number of convictions, current law enforcement measures have value in that it exposes exploitative practices and ensure that these offenders are held accountable for their actions. The clandestine nature of trafficking in persons as well as the multi-jurisdictional nature of many of these cases makes law enforcement challenging and consumes significant resources. It is argued that even if convictions may increase significantly, it is uncertain that this will have the desired deterrent effect, mainly because harsh criminal sanctions and convictions are counteracted by the huge financial incentives for traffickers.

While some of the sentences prescribed by existing legislation such as the Sexual Offences Act 2007 are sufficiently stringent and commensurate with penalties prescribed for other serious offenses, such as rape, these sentences still do not address all the different abuses executed against a trafficked person.⁵⁸⁴ Some laws, for example the Basic Conditions of Employment Act 1997 do not provide for strict enough penalties to punish trafficking for labour exploitation. This law only provides for up to three years' imprisonment for forced labour. Even though South Africa does not yet have specific anti-trafficking legislation, the jurisdiction took active steps against human trafficking offences as from 2006. However, as the records reflect, most prosecutions opened were not concluded.⁵⁸⁵ The first successful trafficking prosecution of the jurisdiction was achieved in March 2010. In *S v Sayed*, a husband and wife were charged with 22 counts of racketeering, money laundering, and offences under the Sexual Offences Act 2007 and

several months, Ms Malachi expressed dissatisfaction to her employers with her conditions of employment and enlisted the assistance of the Consul General of Russia to secure an air ticket to return to her country of origin. Before her departure, her employers applied for and were granted an order by the Cape Town Magistrates' Court, and had her arrested allegedly for attempting to flee the country without paying her debt of ZAR100. The appellant challenged the constitutional validity of ss 30(1) and (3)2 of the Magistrates' Courts Act which allowed for her arrest, known as "arrest *tanquam suspectus de fuga*". The Constitutional Court held that the common law and the impugned provisions infringed the applicant's constitutional rights. Ss 30(1) and 30(3) were declared unconstitutional and invalid.

⁵⁸⁴ Eg, in *S v Sawatkan* (n236 *supra*), 5 female Thai traffickers pled guilty in terms of the Sexual Offences Act 2007 (n249 *supra*) s 105A, and were fined only R2,000 or 6 months imprisonment wholly suspended for 5 yrs on condition that the accused are not found guilty of contravening the Immigration Act s 49(1)(a).

⁵⁸⁵ In many cases, the investigations are still ongoing or postponed for further investigations. Eg, in *S v Reynecke* Case No 134/06/10 (Unreported), a 17-year-old human trafficking victim were brought from her home town of Klerksdorp under false pretences of babysitting and found herself working in a Table View brothel. The matter has been remanded with no further developments. Also, the case of *S v Emeka Nwadiogbu and Another* Case No 701/6/00 Linden (Unreported) concerned 2 Nigerian brothers who trafficked Nigerian as well as South African females for sexual exploitation. No information on the progress of the case has been available since the refusal of bail.

the Immigration Act. Both defendants were convicted on seventeen counts.⁵⁸⁶ There have not been many prosecutions for forced labour cases. However in December 2009, more than 260 illegal gold mine diggers were found in Barberton working for organized crime gangs; more than 80 were Zimbabwean and Mozambican teenage boys who had been brutally coerced to work as mine robbers. Still, no prosecutions were instituted.⁵⁸⁷

In prosecuting alleged trafficking cases, South Africa follows a typical law enforcement-centred approach. Whilst useful to combat the crime as it is modelled on the assumption that criminal-law sanctions provide a deterrent effect and will prevent further exploitation, exclusive reliance on this type of approach overlooks the fact that law enforcement has limited deterrence value and cannot achieve the ultimate unified goal of prevention and protection of potential victims.⁵⁸⁸ If not undertaken with the victim in mind, law enforcement risks further traumatising of already severely injured victims.⁵⁸⁹

7.4 Criminal-justice responses from South Africa

There are various civil society organisations and NGOs in South Africa that are actively involved in victim assistance and the prevention of human trafficking. To illustrate, the Southern African Counter-Trafficking Assistance Programme (SACTAP),⁵⁹⁰ Southern Africa Network against Trafficking and Abuse of Children (SANTAC), Resources Aimed at

⁵⁸⁶ See *S v Sayed* (n323 *supra*) for a discussion of the case. The case of *S v Mudaly and Others* (n336 *supra*) concerned a South African woman originally from Thailand who was arrested for promising Thai women jobs in Durban massage parlours, then forcing them into prostitution. Two 10-year old Basotho girls were also rescued from a brothel in Johannesburg, and an investigation was started. In 2010, the mother of a young girl was arrested and charged with sexual exploitation, sexual grooming, and failure to report a sexual offense against a child. She allowed a businessman from Uitenhage to repeatedly rape her child for 2 yrs with payment of US\$10 to US\$15 each time.

⁵⁸⁷ See US Dept of State *Trafficking in Persons Report 2010* (2010) 298. In a case concerning trafficking for labour exploitation, *S v Patel and Others* Case No 49/04/06 Orta (Unreported), the accused persons as well as the victims were from India. One of the accused, Siddique Goder, pleaded guilty and was sentenced to 5 yrs imprisonment suspended for 3 yrs, while the case against the other two accused (Inayat Patel and Hassim Mulla) is still pending. See NPA (n168 *supra*) 3.

⁵⁸⁸ Todres —“aking Prevention Seriously: Developing a Comprehensive Response to Child Trafficking and Sexual Exploitation” 2010 43(1) *Vanderbilt Journal of Transnational Law* 1 32. Law enforcement does not address the root causes of human rights violations in trafficking exploitation. It does not deal with systemic supply and demand issues in trafficking.

⁵⁸⁹ *Ibid.* This is because most trafficked person are arrested and initially treated as criminals rather than as victims.

⁵⁹⁰ SACTA P is funded by the US Bureau for Population, Refugees and Migration and the Government of Norway and focuses on research and the dissemination of counter-trafficking information, and capacity-building.

the Prevention of Child Abuse and Neglect (RAPCAN),⁵⁹¹ International Campaign Against Child Trafficking (ICACT),⁵⁹² and Molo Songololo⁵⁹³ are amongst those that are at the forefront in the fight against trafficking.⁵⁹⁴ Molo Songololo, for example, is a non-profit organisation that advocates for children's rights on local, national, and international levels and aims to increase awareness of trafficking and stakeholder accountability. Molo Songololo also lobbies for law reform, for example, the Sexual Offences Act 2007 was changed to include provisions that address the sexual exploitation and trafficking of children because of this organisation's work. A few other organisations, such as ChildLine, Streetwise and LifeLine, may indirectly address aspects of trafficking through their efforts to prevent youths from becoming street children, re-uniting these children with their families and providing emergency support. Childline services began in response to the very high levels of child sexual abuse in South Africa. Childline has developed supportive therapeutic social services for children who have been victims of violence, and their families. They have education- and awareness-raising programmes facilitating the prevention of violence against children; conduct networking for policy changes as well as research into child abuse within the South African context, and ongoing training and development. The projects also include prevention and rehabilitation programmes for male perpetrators. Regional support centres focus on various components of human trafficking such as the Masimanyane Women's Support Centre which explores traditional practices giving rise to human trafficking. Based in East London, this organisation builds women's capacities in rural areas and townships where little information is received on the crime.⁵⁹⁵ More trafficking-specific support is provided by the Red Light Campaign, an initiative of a group of regional organizations working together to combat human trafficking and the

⁵⁹¹ RAPCAN holds the belief that ending the culture of child abuse and exploitation will help stop child trafficking. Trafficking is treated as both cause and result of child abuse. RAPCAN's key activities include training programmes, legislative changes, curriculum changes and direct support for child witnesses.

⁵⁹² Although this organisation is international, they are situated specifically in Southern Africa. They create national and international awareness on child trafficking by means of promotional pamphlets using both hard copies and electronic communiqués on the Internet. The booklets explain the causes and conditions surrounding sex trafficking. Additionally, the organisation offers support services to both victims and their families.

⁵⁹³ Founded in 1979 and located in Cape Town, this organization strives to protect children's rights by awareness creation and education in the form of workshops and conferences to the national parliament, legislature, local government officials, parents, and children. Children are empowered through knowledge about their rights and their direct participation in workshops against child trafficking.

⁵⁹⁴ Chichava & Kiremire (n51 *supra*) 7, 81-82.

⁵⁹⁵ See Lutya (n459 *supra*) 73. Other centres such as the Amazing Grace Children's Centre in Mpumalanga, Othandweni Project (which started as a feeding scheme in 1995, but was changed to a non-profit organization after a need was identified to give support to street children and youth) and Sithabile Centre in Johannesburg, are also involved in victim assistance activities. See Pharoah (n164 *supra*) 30.

exploitation and abuse of women and children in Southern Africa, as well as the Network Against Child Labour.⁵⁹⁶ The Women's Parliament functions as a platform with the purpose to illuminate and eliminate gender inequalities. This organisation also presents annual reports such as the 2006 report specifically addressing the trafficking of women and children. High-ranking female judicial officers from the International Association of Women Judges (IAWJ) have also united to consider the crime of trafficking viewed from an African perspective and to urge for the adoption of appropriate laws to fight trafficking.⁵⁹⁷

South Africa also has strong religious communities and faith-based NGOs that empower trafficking victims, give support and elevate the moral threshold.⁵⁹⁸ In January 2008, the Leadership Conference of Consecrated Religious (LCCL)(SA) and the Southern African Catholic Bishops' Conference of the Catholic Church established the *Counter Trafficking in Persons Desk* in South Africa. Declarations have been formulated in which the urgency to adopt new strategies to combat trafficking in women and children have been elucidated. They have also pledged their support for the government's efforts in their fight against trafficking. The Salvation Army is also actively involved in the fight against trafficking and has established an anti-human trafficking task team in January 2009. Their anti-trafficking awareness messages have been heard on radio and TV, and seen in the printed media.

Except for the National Intersectoral Trafficking in Persons Task Team, law enforcement agencies, ministries and NGOs involved with human trafficking, South Africa does not, at this stage, have any specific criminal justice response. The Interpol Sub-regional Bureau for Southern Africa assists SARPCCO by studying and evaluating crime trends and coordinating counter-trafficking training. The Interpol National Central Bureau further has a human trafficking desk for South Africa, which monitors and deals with requests for

⁵⁹⁶ This organisation was established in 1991 with the aim of ending the economic labour exploitation of children through awareness raising, advocacy, policymaking, research, networking, and legal and inter-sectoral interventions.

⁵⁹⁷ These have mainly been in the form of conferences on human trafficking. See IAWJ *Regional Response to Combat Human Trafficking* (Conference held in Boksburg, South Africa, 18-20 Oct 2007); IAWJ *Human Trafficking: Equal Rights, Equal Opportunities and Progress for All* (Conference held in Bloemfontein, South Africa, on 6-8 Aug 2010) www.justice.gov.za/saiawj/reports/2010agm-report-condensed.pdf (accessed 2013-01-16).

⁵⁹⁸ An example of one their initiatives is the Cape Town Interfaith Dialogue to Combat Human Trafficking Conference which was held in Cape Town, from 3 to 5 Oct 2007. Input by religious communities has ~~the~~ potential to bring unique perspectives and particular contributions to the battle to defeat this terrible scourge". See Ndungane *Welcome Address* (Paper delivered at the *Global Initiative to Fight Human Trafficking Interfaith Dialogue* held in Cape Town, South Africa, 3-5 Oct 2007).

investigations from and to other countries. In 2001 the NPA established a very successful multi-disciplinary agency that investigated and prosecuted organised crime and corruption called the Directorate of Special Operations (or Scorpions). The Scorpions dealt with national priority high-profile offences and supplemented the efforts of existing law enforcement agencies in tackling serious crime. In 2008, this crime-fighting unit was disbanded and replaced with a SAPS' Directorate for Priority Crime Investigation called the Hawks. The Hawks have also been active in tracking down criminal syndicates and corrupt officials, but there has been criticism that the agency is not matching the standards and efficiency of the Scorpions.⁵⁹⁹

7.5 Summary

In this chapter the phenomenon of trafficking in persons in the jurisdiction was contextualised and national attempts to address human trafficking set out. The history of slavery in the jurisdiction was traced from its earliest colonial origins to the remnants thereof in subsequent legislation. It was observed that the Cape Colony became a fully-fledged slave society which could not function without the labour of slaves. After the abolishment of slavery, the first cases of human trafficking were recorded in the late nineteenth century. Although these cases concerned trafficking for sexual exploitation, trafficking for labour exploitation would have been more prolific yet no cases were recorded. It was suggested that the institution of slavery has shaped South Africa as the “slave-master” dichotomy has left its mark on South Africa’s political, social and economic structures.

The modern-day trafficking situation in South Africa was examined. It was shown that trafficking in South Africa is complex and diverse as it consists of culturally-unique ways of trafficking. Trafficking also involves regional and international trafficking to, from and within South Africa. With the continent’s history of southward migration flows, permeable borders, high rates of poverty, unemployment, and child-headed households because of HIV/AIDS-related deaths, South Africa is fertile ground for human trafficking. Cultural power

⁵⁹⁹ The possible lack of independence of the Hawks is another point in debate, as found in *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC). The Constitutional Court held that the Hawks was open to political interference by senior politicians and that this situation had to be remedied in legislation.

structures and practices in the country reinforce gender inequalities. Consequently, the empowerment of the most vulnerable people in South African society, that is, women and children, is central to advancing security against human trafficking. Cultural practices rooted in social norms and values such as *ukuthwala* and child placement have furthermore created opportunities for human traffickers to recruit, for purposes of exploitation, financially struggling relatives or neighbours. It was illustrated that South Africa is a major migrant destination country in Africa, yet the government has failed to identify or adequately address forced labour of migrant workers. Law enforcement efforts remain mainly focused on sex trafficking, a response which has been reinforced in transitional trafficking provisions.

Given that investigations of trafficking networks and prosecutions of traffickers are complex processes cutting across jurisdictions, it is essential that effective collaboration exists at regional and international levels. South Africa has concluded many cooperative mechanisms in the form of direct bilateral or multilateral agreements or international treaties and conventions. It was shown that previous South African governments concluded many of the older international treaties, whilst the post-apartheid national executive focused more on concluding regional treaties and the ratification of a few earlier instruments not signed or ratified by the previous dispensation. The efficacy of these treaties or agreements can only be assessed when the state applies its provisions at the national level. In this regard, South Africa generally lags behind; especially concerning the application of the Palermo Protocol's provisions. The jurisdiction also has not fully committed itself to combating the trafficking problem by adopting fundamental treaties especially on immigration laws. Ratification of such treaties will bring South Africa into agreement with internationally accepted standards. But, as pointed out, even where South Africa has not ratified a particular document or where the document itself does not have binding effect, the provisions of such documents (or the cumulative effect of a number of non-binding documents) can have an impact on the combating of trafficking through interpretation by our courts of rights enumerated in the Bill of Rights of the Constitution of South Africa. Regarding regional mechanisms, there is no agreement focusing on the development of comprehensive, harmonized legislation and policies to address human trafficking. This needs to be rectified. There are subsidiary agreements on, for example, the exchange of information, experiences and other practical measures, cooperation

during investigations and criminal proceedings, and socio-economic measures which may assist in alleviating the crime at national and regional levels. The government's general non-compliance with its reporting obligations under core treaties is glaring and unconstructive towards their effective implementation.

A brief background to the origin and development of South African criminal law was provided. The relevant national legislative measures currently in place to address trafficking in South Africa were examined. The common-law and statutory offences which may be utilised to punish the phenomenon of trafficking were identified and discussed. It was conceded that though common-law crimes can be utilized to challenge some trafficking elements, these offences are not comprehensive enough to amply deal with the crime's complexities. Reliance on existing common-law crimes does not address the phenomenon of cross-border trafficking. It was shown that the sentences that may be imposed in terms of current law are not appropriate in order to have any effect such as the desired deterrence. Also, conviction rates are low and if convicted, offenders generally receive minimal sentences - often just a monetary fine. Similar to that of the common-law offences, statutes which could assist in the prosecution of trafficking provide a fragmented approach to combating the crime. Although legislation such as the POCA criminalises organised crime and racketeering, it does not deal with all the elements of trafficking. Other Acts such as the Immigration Act also seem to target victims of human trafficking more so than their traffickers. It was further observed that most of the penalties that may be imposed for the statutory offences - such as those created in the Sexual Offences Act 1957 - are short-term imprisonment and fines which do not truly reflect the gravity of the crime of human trafficking. Yet these Acts can still successfully be used by prosecutors in cases where the specific conduct charged falls within the parameters of the provisions of the relevant Act.

Regarding the transitional legislation in place to prosecute trafficking offenders, it was noted that although the Sexual Offences Act of 2007 and the Children's Act of 2005 include the crime of trafficking, the crime appears in a limited manner in both Acts. Trafficking in the Sexual Offences Act 2007 is directed at both adults and children but the offence is limited to trafficking for sexual purposes, and the provisions in the Children's Act restricts trafficking offences to those committed against children. The Sexual Offences Act

2007 does however create diverse new sexual offences which cover various types of sexual exploitation of trafficking victims. The Children's Act also creates new crimes that deals specifically with child victims, and which can be successfully utilized to prosecute child trafficking offenders. It is highly commended that this Act extends exploitative purposes to include debt bondage, forced marriage, child labour and the removal of their body parts and other organs. Both Acts provide for the protection of foreign trafficked persons found in the jurisdiction as well as for South Africans trafficked abroad. In this regard, both Acts also assert extra-territorial jurisdiction, which presents the advantage of mutual legal assistance and more effective prosecution of South African trafficking offenders who commit human trafficking in a country where it is not a crime, if such an act would have constituted an offence if committed in South Africa. Yet there are still shortcomings in the provisions of the Acts. Both Acts neglect to address a number of human-rights concerns such as pro-active measures to prevent trafficking, the institution of special investigation units, the identification and rehabilitation process, psychological and medical care as well as the prohibition against charging victims with any offences they may have committed while being trafficked. Victim services also seem to be limited to mechanisms of repatriation or the acquisition of citizenship; however, there is no possible long-term reintegration process provided for. The Acts also do not attend to the issue of redress for trafficking victims against traffickers or compensation to these victims. As a result, the current legal response to trafficking in persons, whether common-law provisions, statutes or interim counter-trafficking legislation, do not comply with the minimum standards to combat trafficking as provided for in the Palermo Protocol and other international instruments.

The most important development is of course the TIP Bill. This key initiative to combat human trafficking in South Africa was outlined, analysed and evaluated. The definition of human trafficking proposed in this Bill, as well as the need for widespread conceptual clarity of the trafficking definition, and for that definition to be aligned with the Palermo Protocol were examined. The many replications of terms in the definition were highlighted and advantages of disadvantages of such a broad definition considered. It was pointed out that the definition of trafficking reflects the need for special safeguards and care for especially children. It was indicated that the TIP Bill seeks to effectively criminalise all forms of human trafficking, as well as attempts to commit or participation as an accomplice

in human trafficking, and organizing or directing other persons to commit human trafficking. The legislation furthermore is intended to apply to victims of all ages and both sexes; prohibits both internal and transnational trafficking, and acknowledges that trafficking by certain means (including abuse of the vulnerability of a person) may be for the purpose of *any* form of exploitation. The potentially wide ambit of application of the proposed offence was considered with reference to concrete cases.

It was noted that the new TIP Bill aims to integrate and synchronize law enforcement mechanisms in order to strengthen actions against traffickers, from the investigative to the prosecution stages. One of these measures suggested is to guarantee the integrity and security of travel and identity documents so that they cannot be unlawfully altered, issued or in any other manner misused. Provision is made in the TIP Bill for the imposition of appropriate and proportional criminal penalties to be imposed on persons found guilty of trafficking. Trafficking offences committed or involving complicity by state officials are also criminalised, as well as those who use the services of a victim. This is an improvement on the standards set by the Palermo Protocol.

In accordance with its international obligation, South Africa now also purports to guarantee victims of trafficking effective protection in the TIP Bill. Measures that may be implemented to provide for victims' assistance and testimony, and to protect the privacy and identity of victims during prosecutions, as well as to prevent their re-victimization, are included in the Bill. Victims even have the possibility of obtaining compensation for damages suffered. In terms of the Bill, trafficked persons cannot be held liable for any offences or activities relating to them having been trafficked. They may also not be summarily deported or returned home to unsafe settings. Temporary or permanent residency is also an option that may be considered by trafficking victims in exchange for testimony against alleged traffickers, or may be granted on humanitarian and compassionate grounds. However, the Bill has no specific provision for asset confiscation, seizure, and forfeiture for the restitution of the victim. It is argued that in these cases the provisions of POCA may be used to recover the proceeds and instrumentalities of criminal activities related to human trafficking.

Most countries have responded to human trafficking as a crisis, rather than in a planned manner. South Africa, because of its slow response to introduce legislation to criminalise the conduct, has the unique opportunity to learn from the mistakes of other countries that may have responded too hastily to the Palermo Protocol. The country was given the opportunity to create effective evidence-based legislation that is country-specific; to institute measures that take the rights of trafficked people and other migrants into account and to respond in ways that also address the root causes of trafficking. However, as perceived in the chapter, the government did not establish linkages between human trafficking and related crimes such as illegal migration. By not pointing out the differences between trafficking and smuggling of persons, the legislation risks a faulty understanding of what the concepts mean. This may lead to cases of smuggling being identified as human trafficking incidents. Although the TIP Bill does not explicitly distinguish smuggling and illegal migration from trafficking, it is clear that the difference between trafficking on the one hand and smuggling or illegal migration on the other hand, lies mainly in the *means* employed and the *intent* of the trafficker or smuggler. It is submitted that it is clear from the definition of trafficking in terms of the TIP Bill that the means employed (for example, deception; abuse etcetera) as well as the intent to “exploit” distinguishes the trafficker from the smuggler or mere illegal migrant.

A criticism of the TIP Bill is that it does not elaborate on the root causes of trafficking in the region or illustrate the nuances of South African forms of human trafficking which also manifests itself in certain cultural practices.

The coming into force of the proposed legislation will be a giant step forward. But trafficking cannot be solved by legislation alone. Trafficking occurs because of serious social problems and enabling conditions such as poverty. This cannot be eradicated merely by criminalization of conduct. National and international NGOs have made copious contributions towards the fight against human trafficking in South Africa, but there are still many challenges facing the jurisdiction in its efforts to respond adequately to human trafficking. These include, amongst others, fragmented knowledge and research on trafficking, judicial disharmony within and between national and regional legislative systems, weak social institutions with logistic problems and inadequate professional capability to lend support to trafficked persons. As existing information about the

magnitude and process of human trafficking is based on anecdotal evidence, the jurisdiction is in need of a national trafficking information management system. Demand for trafficking has to be discouraged. Combating trafficking requires people to challenge prevailing patriarchal attitudes towards women. In this regard, gender dimensions and gender-based violence are also not dealt with adequately as a counter-trafficking strategy. Given these realities, it is important for legislation to be situated within an overall framework that promotes and strengthens basic human and constitutional rights. More specifically, there is a need to protect the human rights of all trafficked persons, whether trafficked for sexual exploitation or for other purposes. These rights are considered in more depth in the following chapter.

CHAPTER 8

HUMAN TRAFFICKING AND THE SOUTH AFRICAN CONSTITUTION

8.1 Introduction

As was illustrated in the previous chapter, South Africa has ratified several international and regional human-rights instruments, in terms of which trafficking is strictly prohibited. These instruments also impose specific duties upon the jurisdiction to effectively prohibit and penalise the crime and to protect the rights of victims. It was also determined that South Africa's current legal response to human trafficking is still not in accordance with the directives issued by these international instruments. The new TIP Bill can be viewed as an attempt to effectively penalise human trafficking and protect the rights of victims of trafficking. However, the statute is not yet promulgated.

Trafficking in persons violates universal and fundamental human rights,¹ which are protected by the International Bill of Human Rights² as well as by the Constitution of the Republic of South Africa of 1996 (the Constitution), the supreme law of the country. The jurisdiction has, since its democratic transition and adoption of its Constitution, actively sought to create progressive policy and legislation to counter these violations, much of it influenced by a human-rights framework.

¹ A human right is described as a universal moral right owing to a person simply for being a human being, something which all people inalienably have everywhere and at all times, and of which one may not be deprived of without a grave affront to justice. See Cranston *What are Human Rights?* (1973) 36. Henkin (ed) "Introduction" in *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 1-2 proclaims that human rights are not an abstract "idea of our time" but that they assert that every human being on earth is "entitled to have basic autonomy and freedoms respected and basic needs satisfied". Fundamental rights and freedoms are afforded to citizens of a country (and perhaps also others within its jurisdiction) by the government's Constitution. The difference is important as universal human rights provide an individual more protection than the fundamental human rights of a country.

² The practice has been to call the combination of UDHR, ICCPR, and ICESCR the International Bill of Human Rights. The infringement of a trafficked individual's human rights is one of the core current concerns of international law. See generally Henkin, Pugh, Schachter & Smit (eds) *International Law, Cases and Materials* 3rd ed (1993) 596-597, 638, 675-676; Cook "State Responsibility for Violations of Women's Human Rights" 1994 (7) *Harvard Human Rights Journal* 126 126; Shelton *Remedies in International Human Rights Law* (1999) 9-11; Harris *Cases and Materials on International Law* 4th ed (1991) 601-604.

South Africa has one of the most progressive Bill of Rights of any developing nation.³ Several constitutional imperatives contained in the Bill of Rights may be particularly relevant in combating the violation of rights in human-trafficking scenarios. However, in assessing whether trafficking victims' rights may have been infringed by the conduct of the trafficker (or other applicable parties) or by a certain law, the courts have to interpret the provisions in the Bill of Rights and consider the merits of the facts in each case.⁴ Interpretation involves determining the meaning, purpose or scope of a right, and whether the challenged conduct or law conflicts with the right.⁵ If the court finds that a right in the Bill of Rights has been violated, it has to consider whether the infringement is a justifiable limitation. All affected rights can be limited in terms of section 36⁶ of the Constitution provided that it is reasonable and justifiable in an open and democratic society, taking into account certain relevant prescriptions.⁷ This process involves the balancing of the infringed rights on the one hand with the rights of the respondent or the purpose of the disputed law on the other.⁸ The notions of dignity, equality and freedom are central to the proportionality inquiry and balancing of interests undertaken by the Court in terms of the general limitation clause. The Court has stressed though that "... there is no absolute standard which can be

³ Bermudez *"No Experience Necessary": The Internal Trafficking of Persons in South Africa* (2008) 15.

⁴ Currie & De Waal *The Bill of Rights Handbook* (2005) 24, 26.

⁵ See Currie & De Waal (n4 *supra*) 145.

⁶ Constitution s 36 provides: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

⁷ This stipulation is in contrast to certain international human-rights provisions which are non-derogable and their derogation is unjustifiable under any circumstances as they directly attach to the physical integrity and dignity of individuals. Non-derogable rights are certain rights guaranteed under any circumstances by international human-rights law such as the UDHR and the ICCPR, and found also in the Constitution. No human being shall be denied the right to exercise these inherent and inalienable rights. Examples of these rights found in international human-rights instruments are the right to life; right against torture or cruel, inhuman or degrading treatment; right against slavery or servitude and right to recognition as a person before the law. See Chap 4.

⁸ As asserted in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 104: "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality." The assessment must be on a balanced view of all the material information, see *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (CC).

laid down for determining reasonableness and necessity”.⁹ In respect of the burden of proof in the stages of interpretation and limitation, the courts have held that the applicant has the onus to prove that a violation of a right has occurred, while the respondent has to prove that the infringement is a justifiable limitation in terms of section 36. This approach is aptly summarized by Ackermann J in *Ferreira v Levin NO*:

The task of determining whether the provisions of ...[an] Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages, first, an enquiry as to whether there has been an infringement of the ... guaranteed right; if so, a further enquiry as to whether such infringement is justified under ... the limitation clause. The task of interpreting the ... fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question. Concerning the second stage, “[it] is for the legislature, or the party relying on the legislation, to establish this justification (in terms of ... [the limitation clause] of the Constitution), and not for the party challenging it, to show that it was not justified.”¹⁰

When the courts have determined that the violation of the fundamental right is not a justifiable limitation, appropriate remedies must be found for its infringement. As such, this Chapter will not only discuss the impact of human trafficking on human rights, but also analyse the rights of individuals that may be relevant for trafficked persons in terms of their possible interpretations and limitations.

Established as a constitutional institution, the Constitutional Court¹¹ refers extensively to international human rights instruments.¹² Section 39¹³ - an interpretive tool provided in the

⁹ *S v Makwanyane* (n8 *supra*) para 104. This necessarily means that although “[p]rinciples can be established ... the application of those principles to particular circumstances can only be done on a case-by-case basis.” *Ibid*.

¹⁰ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 44.

¹¹ The Court is based on the German and Canadian constitutional-court model. Its jurisdiction is limited exclusively to constitutional matters and it makes the final decision whether a matter is constitutional or not. The Court is composed of 11 judges appointed for a non-renewable 12-yr term.

¹² Eg, see judgment of *S v Makwanyane* (n8 *supra*) where the right to life was considered.

¹³ Constitution s 39 provides: (1) When interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

Constitution – specifically instructs courts to consider both binding and non-binding international law¹⁴ when interpreting the specific rights listed in Chapter 2 to contravening law and conduct. The Court in *S v Makwanyane* confirmed this interpretation:

International agreements and customary international law accordingly provide a framework within which Chapter [2] ... can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter [2]¹⁵

The Constitutional Court's decisions in most cases concerning violations of human rights are premised on a pragmatic approach that it is not always desirable for a constitutional court to strike down legislation just because it can. The Constitutional Court has also adopted a contextual approach to interpretation with regards to rights in the Bill of Rights which requires the Court to not only construe the right in its textual setting, but also considering the right in its social and historical context.

In its decisions, the Constitutional Court not only employs the constitutional imperatives¹⁶ but also certain principles of normative customary humanity known as *ubuntu*¹⁷ to regulate

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

¹⁴ Currie & De Waal (n4 *supra*) 160 pronounce that binding international law naturally has "greater persuasive force". In terms of the Court in *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996) (CC) para 26, this is so because "the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of [such] international law".

¹⁵ *S v Makwanyane* (n8 *supra*) para 35.

¹⁶ Following the method of interpretation provided in the Constitution, the Court's modes of analysis in interpreting constitutional provisions is firstly sourced in the principle of legality. The Court further uses

not only the acceptable behaviour of individuals but also as a basis for measuring activities of the legislature, judiciary and administrative organs. Any legislation or conduct which does not comply with the prescriptions of the Constitution may be declared invalid. In this regard, there may still be several provisions in domestic laws which contain discriminatory legal provisions contrary to the spirit of the Constitution. Many domestic law provisions have been declared unconstitutional by the Constitutional Court, as shown in the previous chapter.¹⁸

In the last seventeen years, the Court has pronounced on a variety of common-law rules, legislation as well as common-law crimes.¹⁹ However, it has not as yet considered any form of human trafficking violation. The aim of this chapter will be to consider the Court's jurisprudence on human-rights violations and determine the relevance of such jurisprudence to the trafficking scenario. Certain fundamental rights of the accused for instance, the accused person's right to a fair trial, right to freedom and security of the person, and right to equality before the law will also be considered.

8.2 Universal, non-universal and other rights in the South African Constitution

Within the Bill of Rights a distinction may be made between universal rights and non-universal rights. Universal rights are "... accorded to all natural persons with the territory of the Republic".²⁰ These rights are for the benefit of citizens as well as non-citizens within the jurisdiction and "... may be claimed by anyone within the national territory, irrespective

traditional constitutional techniques such as textualism, structuralism and precedential analysis, and supplements these techniques with a comparative methodology as professed in s 39(1).

¹⁷ *Ubuntu* (which directly translates as "humanity" in the Nguni languages) relates to the treatment of others in a respectful, humane manner, preserving their human dignity. It expresses itself in the proverb *umuntu ngumuntu ngabantu* (a person is a person through persons), describing the significance of social solidarity and co-dependence. See Mtimkulu "Criminal Exploitation of Women and Children: A South African Perspective" in Ebbe & Das *Criminal Abuse of Women and Children – An International Perspective* (2010) 164. The principles of *ubuntu* have been considered in the following constitutional cases, amongst others: *S v Makwanyane* (n8 *supra*) paras 223-225, 307-308; *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) para 38; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), 2004 12 BCLR 1268 (CC) para 37; *Dikoko v Mokhatla* 2006 6 SA 235 (CC), 2007 1 BCLR 1 (CC) paras 68-69, 112-120; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC), 2007 4 BCLR 339 (CC) para 382D-H. The affinity between human dignity and *ubuntu* was also illuminated in of *S v Makwanyane* (n8 *supra*) paras 224-225, 307-313. The postscript to the Interim Constitution also referred to the concept but there is no mention of the concept in the final Constitution.

¹⁸ See Chap 7 in this regard.

¹⁹ Rulings which may be of value in the context of human trafficking will be discussed in this Chapter.

²⁰ Currie & De Waal (n4 *supra*) 35.

of whether they are there legally or illegally, temporarily or permanently”.²¹ Similarly, rights awarded to “every child” (section 28), “every worker” and “every employer” (section 23) in the Constitution are regarded as universal rights.²² Non-universal rights are more restricted in terms of the category of beneficiaries and are granted only to citizens of the country. Further restrictions of rights to particular categories include certain persons belonging to a specific cultural, religious or linguistic community or those who have been arrested, detained and accused.²³ Non-universal rights “has a more limited scope of operation than a rights accorded universally”.²⁴ The distinction between universal and non-universal rights is important in the trafficking context as many trafficked persons found within the jurisdiction of South Africa may be non-citizens whose human-rights protection will consequently be limited to only the universal rights recognised in the Constitution. Both universal and non-universal rights may be further categorised into first-generation and second-generation rights. First-generation rights are civil and political rights and include the “... „traditional” liberal rights to equality, personal liberty, property, free speech, assembly and association”.²⁵ Second-generation rights are socio-economic rights or positive rights that require the state to ensure that society’s social and economic rights are secured, respected and protected. In the following discussion, the focus will first be on the various universal rights which trafficking victims may rely on. Thereafter non-universal rights, socio-economic rights, children’s rights and the rights of accused, detained and convicted persons as found in the Bill of Rights will be elaborated on.

8.2.1 Universal and non-universal constitutional rights

There are certain universal and non-universal human rights that are relevant to human trafficking. These rights may be also described as “strong” rights, as violations of these rights receive immediate judicial remedies. This is because “... legislatures have a quite narrow range of choices available to them with respect to the right, and that in such circumstances, all enforcement must be strong in the sense that it forces policy outcomes

²¹ *Ibid.* See also *Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) para 3.

²² See Currie & De Waal (n4 *supra*) 36 n14.

²³ As found in ss 31 and 35 respectively. Also see Currie & De Waal (n4 *supra*) 36.

²⁴ Currie & De Waal (n4 *supra*) 36. The authors further state that “[t]he circumscription of rights in this manner does not really concern the application of rights, but may raise difficult issues of interpretation”.

²⁵ Currie & De Waal (n4 *supra*) 567. These rights are also called “negative rights” as they take power away from the state by imposing a duty not to act in a certain way, eg, a duty not to discriminate.

into the narrow range that the constitution permits”.²⁶ The universal rights will be considered first, thereafter the other rights will be discussed.

8.2.1.1 The right to human dignity

A primary provision of relevance to human trafficking is the right to human dignity.²⁷ The Constitution of South Africa guarantees that: “Everyone has inherent dignity and the right to have their dignity respected and protected.”²⁸ The dignity of persons is also confirmed in the founding provisions of the Constitution which provides that the Republic is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms;²⁹ as well as in section 7(1) which again affirms the democratic values of human dignity, equality and freedom.³⁰ These values must according to the Constitution be respected, defended and developed by the state.³¹ The emphasis on the value of human dignity informs the substance and spirit of the entire Constitution.³²

The recognition of the inherent dignity of every person affirms the fact that dignity is inviolable and accrues to all people. The treatment of trafficked individuals as mere objects or as a means to an end by traffickers breaches this right.³³ It was held in the

²⁶ Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008) 250.

²⁷ UDHR art 1 states that: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

²⁸ Constitution s 10. This is re-affirmed in *S v Makwanyane* (n8 *supra*), a decision where the rights to life, equality and dignity were relied on to support a finding that the death penalty violates the right not to be subjected to cruel, inhuman or degrading punishment. In para 328 O'Regan J held: “Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... [the Bill of Rights]”. See also *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC) para 36; where dignity is described as the “cornerstone of human rights”.

²⁹ Constitution s 1(a).

³⁰ Constitution s 7(1) provides: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” Mention is also made of human dignity in s 35(e), s 36, s 39, s 165(4), 181(3), and s 196(3).

³¹ Constitution s 7(2).

³² The value of dignity also guides the interpretation of legislation (as in *Daniels v Campbell* NO 2004 5 SA 331 (CC), 2004 7 BCLR 735 (CC) para 54), and the development of all areas of law, including the common law (see *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 54).

³³ *Dawood; Shalabi; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), 2000 8 BCLR 837 (CC) para 35 proclaims dignity to be “... a value that informs the interpretation of many, possibly all, other rights”.

Makwanyane-case that the death penalty “dehumanises the person and objectifies him or her as a tool for crime control”.³⁴ This sentiment was reverberated in *S v Dodo*³⁵ where it was stated:

Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.³⁶

The crime of human trafficking dehumanises and degrades victims through their exploitation. In this regard the Court has held in *S v Jordan and Others*³⁷ that prostitution commodifies human bodies and in *De Reuck v Director of Public Prosecutions*³⁸ that children are debased and objectified by child pornography. These are two typical exploitative situations that are regularly encountered in human trafficking. Consequently, these rulings will find application in any possible case of trafficking in persons.

The Constitutional Court has however previously held that a violation of dignity on its own must be of a very serious nature and must be combined with the constitutional violations of other, more specific rights.³⁹ In this regard, “[d]ignity thus assumes the role of a residual right which is used to interpret and give shape to more specific rights, and which is relied upon directly only in cases in which no more specific right is available”.⁴⁰ The Court has also held that the state has a positive duty to protect the rights to dignity, life, and freedom and security of any person.⁴¹ Consequently, the state may face delictual liability for any

³⁴ *S v Makwanyane* (n8 *supra*) para 316.

³⁵ *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).

³⁶ *S v Dodo* (n35 *supra*) para 38.

³⁷ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC) para 74.

³⁸ *De Reuck v Director of Public Prosecutions* (Witwatersrand Local Division) and *Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 63.

³⁹ *Dawood; Shalabi; Thomas v Minister of Home Affairs* (n33 *supra*) para 36.

⁴⁰ Botha “Human Dignity in Comparative Perspective” 2009 2 *Stellenbosch Law Review* 171 198. See also *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (the rights to life and dignity were implicated in the exclusion of permanent residents from social security benefits).

⁴¹ See *Carmichele v Minister of Safety and Security* (n32 *supra*) para 44. See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC), 2005 4 BCLR 301 (recognising the positive duty of the responsible organ of state to take reasonable measures to provide for the security of rail commuters).

failures by its law enforcement officers to take reasonable steps to protect the safety of its citizens, amongst which may be trafficked persons.

The treatment of victims of trafficking by the state itself and its agents may also violate their right to dignity. Instead of regarding trafficked persons as victims of abuse, they are often considered criminals. The majority of victims of trafficking are either automatically deported to their country of origin or prosecuted for prostitution. This conduct also prevents the prosecution of traffickers, as the assistance and evidence of victims is needed to successfully prosecute transgressors.

8.2.1.2 The right to life

The right to dignity is closely related to a number of other rights entrenched in the Constitution, such as the right to life as found in the Constitution section 11: “Everyone has the right to life”.⁴² In *S v Makwanyane*, the Court described dignity together with the right to life as “the most important of all human rights, and the source of all other personal rights”⁴³ in the Bill of Rights. O’Regan J explains the concomitance of these two rights as follows:

The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. ... The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence; it is a

⁴² This provision is modelled on the UDHR art 3: “Everyone has the right to life, liberty and security of person.”

⁴³ See *S v Makwanyane* (n8 *supra*) para 144.

right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.⁴⁴

In this case, Langa J further linked the right to life and dignity to the concept of *ubuntu* where the life of another person is regarded as “at least as valuable as one’s own”.⁴⁵ The right to life has also been called “the supreme human right”.⁴⁶ Every life is precious and sacred; therefore all human beings have to be protected and allowed to enjoy their life. The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization. If there were no right to life, the guarantee of all other rights would make no sense. It has been suggested that “... civilized society cannot exist without legal protection of the right to life”.⁴⁷

The word “everyone” used in the right-to-life provision has significant meaning as it corresponds to the fact that the right to life is inherent in and meant for everyone,⁴⁸ whether a citizen of a concerned country or not. This should necessarily also include persons trafficked from other countries who are not citizens of South Africa. But similar to the other rights in the Constitution, the right to life is not absolute, and may be limited in terms of the limitation clause.⁴⁹

The right to life guarantees a right to physical existence, for example, the right not to be killed. The state has a duty to promote and protect the right to life of its citizens and that of any non-citizen in its territory which may be threatened by capital punishment or any direct

⁴⁴ See *S v Makhwanyane* (n8 *supra*) paras 326-327. O’Regan’s statement was endorsed in *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696, where the Court had to decide upon the parameters of the right to life. In this case, the right to life or the prolonging of life was restricted by the state’s limited resources in accommodating everyone who needed such treatment.

⁴⁵ See *S v Makhwanyane* (n8 *supra*) para 225. See also Currie & De Waal (n4 *supra*) 281.

⁴⁶ UNHCR “General Comment No 06: The Right to Life (art 6)” para 1 <http://www.unhcr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3> (accessed 2013-01-16). UDHR art 3 declares that “... everyone has the right to life, liberty and the security of person”; the ICCPR art 6(1) states that “... every human being has the inherent right to life.”

⁴⁷ Dinstein “The Right to Life, Physical Integrity, and Liberty” in Henkin (ed) *The International Bill of Rights, the Covenant on Civil and Political Rights* (1981) 114.

⁴⁸ The contention that everyone has a right to life has been challenged in the Constitutional Court. In *Christian Education South Africa v Minister of Education* (n28 *supra*), the claim that the term “everyone” includes the unborn was denied. The constitutional protection of children in s 28 was made use of to establish that had the Constitution intended to include the unborn child in the term “everyone”, one may reasonably expect to find mention of the unborn child or foetus in this section. See also *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T).

⁴⁹ See Currie & De Waal (n4 *supra*) 282-283. Limitation may be justified in cases of self-defence or necessity.

excessive political act of the state. In the *Mohamed and Another v President of the Republic of South Africa and Others*-case,⁵⁰ the Court held that the applicant's extradition to the US was in breach of the law and that his constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment was infringed. As the death penalty is unconstitutional in South Africa, the government could not expose a person to the risk of execution, regardless of consent. Similarly, it could be argued that illegal non-citizens trafficked to South Africa may not be summarily deported in terms of the Immigration Act 13 of 2002 if their return to their country of origin would expose them to a risk of being harmed or even killed. The right to life also obliges the state to protect its citizens from life-threatening attacks as held in the *Carmichele v Minister of Safety and Security*-case.⁵¹ In the same vein, it may be argued that there is a duty on the state to provide appropriate protection to trafficked persons against exploitation and violence.

In exploitative trafficking situations where violence, exhaustion or any other abuse result in death, the victim's right to life is infringed. The sexual exploitation of trafficked persons potentially threatens the life of the victims as forced sexual intercourse or indiscriminate rape may result in death, as their bodies are unable to sustain the assaults. Persons trafficked for sexual exploitation are also at a greater risk of STDs and HIV/AIDS-infection because of indiscriminate and unprotected sex. According to the Palermo Protocol, states are obliged to adopt positive measures⁵² to protect possible victims of trafficking, but must further support trafficking survivors in reclaiming their right to a respectful and meaningful life. This may include providing victims with HIV/AIDS preventative measures.⁵³ In this regard, the state's failure or negligence to address these human-rights violations needs serious consideration. Additionally, the government has a positive obligation to provide for

⁵⁰ See *Mohamed and Another* (n21 *supra*) para 3. It was held at para 38: "According to the argument the Constitution not only enjoins the South African government to promote and protect these rights but precludes it from imposing cruel, inhuman or degrading punishment. The Constitution also forbids it knowingly to participate, directly or indirectly, in any way in imposing or facilitating the imposition of such punishment. In particular, so the argument runs, this strikes at the imposition of a sentence of death". See also *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* (CCT 110/11, CCT 126/11) [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

⁵¹ See *Carmichele v Minister of Safety and Security* (n32 *supra*) para 44.

⁵² See Chap 4 para 4.2.1.1(ii); Palermo Protocol arts 6-8. Measures already established in South Africa include, amongst others, the reduction of infant mortality and to increase life expectancy by eliminating malnutrition and epidemics.

⁵³ See *Minister of Health and Others v Treatment Action Campaign and Others* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033.

basic socio-economic circumstances for its citizens, within its available resources.⁵⁴ This is important as the right to life – and especially the right to a life worth living - may be severely constrained for poverty-stricken people, and economic deprivation is one of the major causes of trafficked persons' inability to exercise an inherent right to life. In this regard, the right to life may impose a duty on the state to meet basic conditions by removing obstacles and creating opportunities in order to realise the effective enjoyment of the right to life.⁵⁵

8.2.1.3 The right guaranteeing freedom and security of the person

In the context of the phenomenon of human trafficking, the right guaranteeing freedom and security of the person⁵⁶ is particularly important. This right is quite comprehensive as it safeguards all persons against the arbitrarily deprivation of freedom, freedom from all forms of violence, from any type of torture or cruel, inhuman or degrading treatment,⁵⁷ and includes the right to bodily and psychological integrity.⁵⁸ Trafficked persons face severe forms of physical and mental torture, and many other forms of cruel, inhuman or degrading treatment, which may amount to a flagrant violation of this fundamental right. A person coerced into a trafficking situation will most probably be deprived of any liberty as he or she may be confined and closely watched. An integral part of the trafficking process is the breaking-in or training of victims that consist of physical and psychological abuse, rape, torture, threats and intimidation. Forcing someone to engage in prostitution itself is a cruel, inhuman and degrading treatment as it involves violence, physical and mental suffering,

⁵⁴ See Constitution s 27(2). The socio-economic rights will be discussed in more detail *infra*.

⁵⁵ This is affirmed by Sachs J in *S v Makhwanyane* (n8 *supra*) para 353.

⁵⁶ This right is also guaranteed in the UDHR art 3 which states that: "Everyone has the right to life, liberty and security of person."

⁵⁷ Torture and inhumane treatment are uniformly condemned by all international instruments. UDHR art 5 declares: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This right is similarly reiterated in the ICCPR art 7.

⁵⁸ Constitution s 12 states: "(1) Everyone has the right to freedom and security of the person, which includes the right -

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

societal stigma and ostracism. Even voluntary prostitution, exploited by traffickers, that is, so-called “pimps” may amount to inhuman and degrading treatment. It is submitted that the overall working environments of trafficked persons are ghastly and may amount to cruel, inhuman and degrading treatment.⁵⁹

The arbitrary deprivation of freedom has been the focus of many Constitutional Court decisions.⁶⁰ In *Lawyers for Human Rights and Other v Minister of Home Affairs and Other*,⁶¹ section 34(8) of the Immigration Act 13 of 2002 was held by the High Court to be arbitrary and inconsistent with section 12 of the Constitution. This section provided that illegal foreigners⁶² could be detained on the vehicle in which they arrived in the country, in order to be removed from South Africa in that vehicle, if an immigration officer so decided.⁶³ The fact that the detention of an illegal foreigner in this manner could be decided “... solely by an immigration officer informing the person who has arrived at the port of entry, or the master of the ship, that he or she is an illegal foreigner, regardless of the absence⁶⁴ of any justification for the statement”⁶⁴ was found to be constitutionally invalid by the High Court. The Court held that “... section 34(8) is inconsistent with the Constitution because it does not allow the protection afforded to a detainee in terms of

⁵⁹ In this regard, the Constitution s 24(a) provides that everyone has a right to an environment that is not harmful. Socio-economic rights (which will be discussed at para 8.2.2 *infra*) provided for in the Constitution such as access to adequate housing (s 26) may also assist trafficked victims in this regard. Eg, see *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 paras 23, 44, 83; *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) para 21; *Khosa and Others* (n40 *supra*) paras 41, 44.

⁶⁰ Eg, in *De Lange v Smuts NO and Others* (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779, where it was held that s 66(3) of the Insolvency Act 24 of 1936 unjustifiably infringes on the right not to be deprived of freedom arbitrarily or without just cause.

⁶¹ *Lawyers for Human Rights and Other v Minister of Home Affairs and Other* (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775.

⁶² According to s 1(1) of the Immigration Act 13 of 2002, an illegal foreigner “means a foreigner who is in the Republic in contravention of this Act and includes a prohibited person”. A foreigner “means an individual who is neither a citizen nor a resident, but is not an illegal foreigner”. According to these definitions, persons trafficked into South Africa will be regarded as illegal foreigners (unless they are in possession of a temporary residence permit, as provided for in s 10 of the Act).

⁶³ Immigration Act s 34(8) states: “A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General.” The term “ship” is widely used and includes all modes of transport applicable. See *Lawyers for Human Rights* (n61 *supra*) para 11.

⁶⁴ See *Lawyers for Human Rights* (n61 *supra*) para 13.

section 34(1)(d) to a person detained on a ship in terms of subsection (8)".⁶⁵ Section 34(2) further provided that detained illegal foreigners had to be released from detention within 48 hours, however, this protection was not granted to those detained in a ship [vehicle]. The Court ruled, in this particular instance, that the failure to grant to illegal persons detained in a vehicle the right to be released within 48 hours was a justifiable limitation of the right to freedom bearing in mind that these persons had not formally entered South Africa.⁶⁶ However, the provision was declared unconstitutional to the extent that it did not provide for a *court* to confirm the detention of illegal foreigners on a vehicle for a period of more than 30 days.

The case is useful also for trafficked persons who have entered the country illegally since it recognises that the section 12 right to freedom of security may be relied upon to contest certain provisions of Immigration legislation.⁶⁷ In testing the constitutionality of the provisions of the Immigration Act, the Court recognised that this right applies to "everyone", which includes illegal foreigners.

The constitutional validity of the section 12 provisions has especially been challenged as regards institutional imprisonment.⁶⁸ A demand for damages as a result of police torture was heard in *Fose v Minister of Safety and Security*,⁶⁹ where such a victim claimed a remedy of special or punitive "constitutional damages" under the provisions of section 7(4)(a) of the Interim Constitution of the Republic of South Africa, Act 200 of 1993.

⁶⁵ *Lawyers for Human Rights* (n61 *supra*) para 47.

⁶⁶ *Lawyers for Human Rights* (n61 *supra*) para 46. As such, there was a rational connection between the deprivation of freedom and the objectively determinable purpose, and the purpose for the deprivation of freedom was just. See Currie & De Waal (n4 *supra*) 296.

⁶⁷ *Lawyers for Human Rights* (n61 *supra*) paras 26, 41.

⁶⁸ See *S v Makhwanyane* (n8 *supra*); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445. In *S v Dodo* (n35 *supra*) para 35, s 51(1) read with s 51(3)(a) of the Criminal Law Amendment Act was challenged. This section obliges High Courts to sentence people convicted of certain serious offences to life imprisonment, unless "substantial and compelling circumstances" justify the imposition of a lesser sentence. In a unanimous decision Ackermann J held that there was no infringement of constitutional right to freedom and security of the person or of the separation of powers.

⁶⁹ *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786. South Africa has also been challenged internationally on allegations of torture in prison. See *McCallum v South Africa* Communication No 1818/2008, UN Doc CCPR/C/100/D/1818/2008 (2010). This case concerned torture by prison warders in a Port Elizabeth prison. The government has however not yet responded to these allegations. See also Chap 7 n84.

The reference to a prohibition on torture, inhuman or degrading treatment includes a duty of the state to prevent violence by private or government actors.⁷⁰ In the case of *Carmichele v Minister of Safety and Security*, the Court held that in certain circumstances, a positive obligation is placed on the state by section 12 in the Bill of Rights “... which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection”.⁷¹ In addition to the development of new legislation, a positive obligation may also be enforced on the state “... in certain well-defined circumstances ... to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another”.⁷² In terms of this constitutional right, trafficked persons in South Africa have to be protected from exploitation and violence by the adoption of appropriate legislation to combat the practice as well as to safeguard their safety by means of preventative operational measures. These protective measures are not as yet in place.

This constitutional provision is particularly relevant in the context of trafficking crimes committed by government officials, such as rape or torture by police officers, border officials or prison warders. In this regard, the Constitutional Court has held in *K v Minister of Safety and Security*⁷³ that the common law of vicarious liability must be applied in such a way that it is consistent with the terms of the Constitution as well as the spirit, purport and objects of the Bill of Rights, which led to the conclusion that the Minister of Police is liable for the criminal conduct of his three employees. This decision was confirmed in *Minister of Safety and Security v Luiters*,⁷⁴ where the Minister was held vicariously liable for the criminal actions of an off-duty policeman who had subjectively placed himself on duty. It is implicit from these provisions that any type of violence-based treatment, unlawful confinement or abuse of a person’s right to security and bodily integrity may amount to an infringement of the individual’s fundamental right to security of the person.

⁷⁰ Constitution s 12(1)(c).

⁷¹ *Carmichele v Minister of Safety and Security* (n32 *supra*) para 44.

⁷² *Carmichele v Minister of Safety and Security* (n32 *supra*) para 45.

⁷³ *K v Minister of Safety and Security* (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); [2005] 8 BLLR 749. In this case, the applicant had instituted an action for damages in delict against the Minister of Safety and Security, seeking to hold him vicariously liable for her rape at the hands of 3 policemen. O’Regan J concluded that although the rape was a deviation from the employment duties of the policemen, there was a sufficiently close connection between their employment and the wrongful conduct, and the Minister was found to be vicariously liable.

⁷⁴ *Minister of Safety and Security v Luiters* (CCT23/06) [2006] ZACC 21; 2007 (3) BCLR 287 (CC).

8.2.1.4 The right to equality

Given South Africa's history of racial discrimination, the fundamental right to equality and non-discrimination has been allocated prime importance in the Bill of Rights.⁷⁵ Individuals are protected in section 9⁷⁶ from discrimination by the state or by other persons on the basis of certain grounds, and any discriminatory treatment or creation of any law⁷⁷ that discriminates on the basis of these grounds is prohibited.⁷⁸ Children may also not be discriminated against in their entitlement to the protection of the law. The Constitution of South Africa seeks to protect individuals from being directly or indirectly discriminated against on the basis of sex, gender,⁷⁹ sexual orientation,⁸⁰ marital status,⁸¹ or culture,⁸² amongst others.

⁷⁵ Goldstone J affirmed the jurisdiction's commitment to equality in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC), 1997 6 BCLR 708 para 41: "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups". This universal right is also found in the UDHR art 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

⁷⁶ Constitution s 9 explicitly guarantees everyone the right to equality:
"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

⁷⁷ The principle of non-discrimination to the equal protection of law is enunciated by many international treaty instruments. The UDHR art 1 declares that all human beings have equal dignity and rights. UDHR art 7 continues that: "All are equal before the law and entitled without any discrimination to equal protection of the law". The ICCPR art 26 elaborates on this principle by incorporating the discriminatory grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The ICESCR art 2(2) also guarantees the right to non-discrimination.

⁷⁸ For cases concerning discriminatory legislation, see *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC) paras 31-33; *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) paras 46, 50, 51, 53, 91, 92.

⁷⁹ See eg *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC). In this case, s 20A of the Sexual Offences Act prohibiting consensual sexual activities between men was struck down on the grounds of gender or sex discrimination. As such, the common-law offence of sodomy was held to be unconstitutional. The Court considered discrimination on account of culture, race, sex, gender, marital status, ethnic or social origin, and birth in *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC). The Court ruled that women are not to be treated as perpetual minors on account of their gender, and that children should not unfairly be discriminated against because of their illegitimate birth.

As a universal right, equality extends to both citizens and non-citizens of the Republic. However, in order to regulate the affairs of a country, a state's laws inexorably distinguished between persons such as nationals of the country and non-residents. As such, the state does categorize persons and treat some different to others. This is permissible as "... the principle of equality does not require everyone to be treated the same, but simply that people in the same position from a moral point of view should be treated the same".⁸³ Still, it may be found that certain laws unfairly discriminate against illegal non-citizens who may have been trafficked from abroad.

As held by the Court in *Harksen v Lane NO*, an allegation regarding the violation of the equality clause involves an enquiry consisting of several stages.⁸⁴ In the first stage it has to be determined whether the contested law or conduct differentiates between people or different categories of people. If a differentiation is found to exist, it further has to be established whether the differentiation bears a rational connection to a legitimate government purpose. If not, a violation has occurred. If it does bear a rational connection, there still may be discrimination. A second stage requires the investigation into whether the differentiation amounts to unfair discrimination. In the test for unfair discrimination, one first has to establish if the differentiation amounts to discrimination, whether on a specific ground or not. If found to be discrimination; one has to ascertain if it is unfair discrimination. This test basically regards the impact of the discrimination on the

⁸⁰ In *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524, it was held that the common-law definition of marriage excluded gay and lesbian couples from marriage, and constituted unfair discrimination on the grounds of sexual orientation. The definition holds a perspective that individuals in same-sex relationships are not worthy of the respect possessed by and accorded to heterosexuals and their relationships. Harmful and hurtful stereotypes such as these have caused gays and lesbians to be treated as second-class citizens or as being incapable of forming meaningful intimate relationships.

⁸¹ In the case of *National Coalition for Gay and Lesbian Equality and Others* (n79 *supra*), the constitutionality of s 25(5) of the Aliens Control Act was challenged and held invalid. This provision facilitated the immigration into South Africa of the spouses of permanent South African residents but did not afford the same benefits to gays and lesbians in permanent same-sex life partnerships.

⁸² S 31 of the Bill of Rights provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, to practise their religion and use their language. In *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99, it was alleged that cultural practices were discriminated against. An Indian learner was barred from wearing a gold nose-stud at school as it contravened the school's Code of Conduct. The Court held that the prohibition violated the learner's constitutional right to practice her religious and cultural traditions. See paras 53, 62-66, 150, 155-157, 177.

⁸³ Currie & De Waal (n4 *supra*) 239.

⁸⁴ *Harksen v Lane NO and Others* (n78 *supra*) para 53. See also Currie & De Waal (n4 *supra*) 235-237.

complainant and others in a similar situation. If it is found to be unfair discrimination, then it will have to be determined whether the provision can be justified under s 36.

Gender-based violence has been addressed by the Constitutional Court of South Africa as violations of provisions on freedom and security of the person,⁸⁵ as well as equal treatment and non-discrimination.⁸⁶ Gender-based violence also concerns culture as the acts reflects and reinforces patriarchal domination, power and force.⁸⁷ Since the vast majority of victims of gender-based violence are women, it is the duty of the state to protect women from such violence. Laws, customs and harmful cultural practices that oppress women or adversely affect their physical or mental well-being should also be prohibited as regards the provision on equality. In *S v Baloyi and Others*,⁸⁸ the Court reaffirmed the state's constitutional duty to provide effective remedies against domestic violence, while simultaneously respecting the accused person's constitutional rights to a fair trial. The state's obligations under the Constitution and international law to combat domestic violence in the jurisdiction were further validated in *Omar v Government of the Republic of South Africa and Others*.⁸⁹

The right to marry and establish a family is not expressly addressed in the Bill of Rights,⁹⁰ but can arguably be inferred from the right to equality and non-discrimination or the right to

⁸⁵ Constitution s 12. See para 8.2.1.3 *supra*.

⁸⁶ The Constitution does not make any direct mention of gender-based-, sexual- or domestic violence. Yet the Constitution Court has found that "... the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way". See *S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC) para 11.

⁸⁷ See *S v Baloyi and Others* (n86 *supra*) para 12.

⁸⁸ See *S v Baloyi and Others* (n86 *supra*) paras 1, 16, 19. In this case, s 3(5) of the Prevention of Family Violence Act 133 of 1993 was declared unconstitutional as it placed a reverse onus of proving absence of guilt on a person charged with breach of a family violence interdict.

⁸⁹ *Omar v Government of the Republic of South Africa and Others* (CCT 47/04) [2005] ZACC 17; 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC). The applicant applied for leave to appeal against the High Court's dismissal of an application to declare s 8 of the Domestic Violence Act unconstitutional. The application was dismissed and the Act serves an important social and legal purpose in addressing domestic violence. Any possible manipulation of the Act is far outweighed by the Act's potential to afford police protection to the victims of domestic violence.

⁹⁰ This is however a subject given attention to by international human-rights instruments. The UDHR art 16 states that: "(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by

freedom and security (section 12(2)). In certain cultures and societies where a female is not regarded as an equal to her male counterpart, she may be forced to wed a person she does not wish to marry, or she may be refused permission to wed a person she does wish to marry. The family is the principal foundation of a society, and marriage is the first steps to establishing a family. In many South African cultures, a woman's worth is ascertained by whom she weds as well as her reproductive capacity in the marriage. Persons trafficked for sexual exploitation often experience forced rape, unsafe abortions and untreated sexually transmitted diseases which may affect their sexual and reproductive capacity. This again impinges on their ability to marry and start a family in certain communities. Infertility is seen in many cultures as a social disgrace or a cause for divorce or taking another wife. Many trafficking survivors are infertile due to their sexual exploitation and thus have little hope for any long-term reintegration into the family and society.

Since a legal response to human trafficking in South Africa is still in a developing phase, trafficked persons are still highly vulnerable. Consequently, they still suffer neglect and discrimination as their right to equal protection under the law is not satisfied.⁹¹ Pervasive practices of discrimination exist in a trafficking situation. Not only are various crimes committed against them as they are regarded as objects to be exploited by all possible perpetrators, but law enforcement officers and other authorities may also exhibit discriminatory attitudes which contribute to the abuse. Persons who have been trafficked for sexual exploitation may experience severe humiliation and discrimination when repatriated back into their societies. Their forced prostitution may evoke stigmatization and ostracism in their communities. They may be shunned if infected with HIV/AIDS.⁹² In this

society and the State." The ICCPR art 23(1) & (2) recognise the right of men and women of marriageable age to marry and to found a family. It further asserts that "... the family is the natural and fundamental group unit of society and is entitled to protection by society and the state". Under art 10(1) of the ICESCR, States Parties have a duty to provide the widest possible protection and assistance to the family, which is the natural and fundamental group unit of society.

⁹¹ Although the Sexual Offences Act 2007 does recognise the offence of trafficking for sexual exploitation, trafficked victims have to provide evidence of their alleged trafficking, followed by a police investigation into their allegations, before they are issued with a certificate verifying their trafficking status. See TIP Bill clauses 13(4) - (7). Until the trafficking has been validated, they are considered illegal prostitutes under the present law.

⁹² In most African cultures a taboo still exists around the subject of sexuality, and the contraction of HIV is linked with immoral sexual conduct.

regard, the South African Constitution should effectively protect these victims right to equality and non-discrimination, as required in terms of our constitutional jurisprudence.⁹³

8.2.1.5 The right against slavery, servitude and forced labour

The enslavement of trafficked persons restricts their freedom of movement, their right to freedom and security of a person, and the right to pursue a profession of choice.⁹⁴ Slavery or servitude is the most severe expression of power one human being exercise over another, and it represents the most direct assault on the very essence of human personality, dignity, and respect.⁹⁵ Slavery occurs where “one human being effectively „owns“ another, so the former person can exploit the latter with impunity”⁹⁶ whereas, servitude is considered a broader term referring to “egregious economic exploitation or dominance exercised by one person over another, or slavery-like practices”.⁹⁷ There is evidence from court cases in South Africa that persons trafficked from abroad are forced to repay so-called debt money before they will be released.⁹⁸ The pretext of debt is not to collect the actual debt but to keep persons in bondage for as long as they are capable to earn money for the owner. Trafficking – whether for sexual or other economic exploitation - satisfies the above definition of slavery and servitude as victims are bought, sold, forcibly

⁹³ See, eg, discussion of cases in para 8.2.1.2 *supra*. The Court has also held that access to socio-economic rights is also implicit in the equality reference, as those who are unable to survive without social assistance are equally desperate and equally in need of such assistance. Eg, certain provisions of the Social Assistance Act 59 of 1992 were challenged in *Khosa and Others* (n40 *supra*). These regulations disqualified persons who were not South African citizens from receiving certain welfare grants. The applicants were non-citizens who had acquired permanent residence status in South Africa in terms of exemptions granted to them under the now repealed Aliens Control Act 96 of 1991. The Court held that by excluding these persons from social-security programmes placed an undue burden on them to secure benefits from families, friends and the community in which they lived. By casting permanent residents in the role of supplicants, the court found that they were unfairly being discriminated against. This case however considered only non-citizens with a permanent resident status and not non-citizens generally (which would include most persons trafficked to South Africa). See also *Government of the Republic of South Africa v Grootboom* (n59 *supra*).

⁹⁴ This right is also guaranteed in the UDHR art 4: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” The autonomy in choosing a job for oneself is also part of the freedom informing the constitutional value of human dignity. An unreasonable restriction of a person’s right to freedom of trade, occupation or profession as guaranteed by s 22 of the Constitution would thus be contrary to public policy and attract constitutional invalidity.

⁹⁵ See eg, Nowak “Civil and Political Rights” in Symonides (ed) *Human Rights: Concepts and Standards* (2000) 80, 69.

⁹⁶ See Joseph, Schultz & Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 2nd ed (2004) 199.

⁹⁷ *Ibid.*

⁹⁸ Eg, see Chap 7 (n583 *supra*).

detained, indiscriminately abused for the sole benefit of the traffickers and their accomplices.⁹⁹

In this regard, the Constitution stipulates that no one may be subjected to slavery, servitude or forced labour.¹⁰⁰ This constitutional provision is significant as it outlaws every form of enslavement.¹⁰¹ The structure of this prohibition is also important as it groups human trafficking, slavery, and forced labour under the same category. Similar to all other rights in the Bill of Rights, the state has to protect persons from being exploited in situations of slavery, servitude and forced labour. Contemporary forms of slavery must be identified and effective measures put in place to eliminate this practice within and across the borders.

⁹⁹ See Askin & Koenig (eds) *Women and International Human Rights Law Volume II* (2000) 84: “If a person is unlawfully held or detained, and not free to make their own choices or decisions about their bodies, including whether to refuse sexual services or to make decisions as to how the services should be provided (such as requiring a condom, refusing oral or anal sex, insisting on no beatings, etc.), that should satisfy the definition of slavery”. See generally Gallagher “Contemporary Forms of Female Slavery” in Askin & Koenig (eds) *Women and International Human Rights Law Volume II* (2000) 487.

¹⁰⁰ Constitution s 13 states that: “No one may be subjected to slavery, servitude or forced labour.” This provision follows the UDHR art 4: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”, and ICCPR art 8(1), (2): “No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited” and “no one shall be held in servitude”. See Trebilcock “Slavery” in Bernhardt (ed) *Encyclopaedia of Public International Law Vol 8* (1985) 481-484. The Court’s commitment to fair labour practices as entrenched in the Constitution has been confirmed in cases such as *South African Police Service v Public Servants Association* (CCT68/05) [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383.

¹⁰¹ Although the Court in *S v Jordan and Others* (n37 *supra*) did not decide on a violation of s 13, some of the individual judgments in this decision are of value also for trafficking. The majority of the Court as per Ngcobo J held at paras 11 & 14 that section 20(1)(aA) of the Sexual Offences Act which outlaws commercial sex is not unfairly discriminatory as both the sex worker and the customer are guilty of criminal conduct and will receive the same punishment. Although this provision does not elaborate on the culpability of the trafficker or pimp, it can be deduced that the pimp or trafficker will receive at least a similar punishment to the other two parties. This is because these persons are, similar to the customer, also regarded as *socius criminis* and also commit an offence under s 18 of the Riotous Assemblies Act. The state held at para 86 that the purpose of the prohibition of prostitution in the country is that the practice in itself is degrading to women; that it is conducive to violent abuse of prostitutes both by customers and pimps, and that it is associated with and encourages the international trafficking in women, which South Africa is obliged by its international law commitments to suppress. The counter-argument by the appellants were that although they “... agreed that trafficking in women and child prostitution ought to be prohibited, [they] ... contended that the general suppression of commercial sex makes it more rather than less difficult to single out these evils for focused attention.” See *S v Jordan and Others* (n37 *supra*) para 87.

8.2.1.6 The right to privacy

Trafficking victims are usually powerless to assert a right to privacy while in bondage in the trafficking process. However, the right to privacy¹⁰² has been considered in many Constitutional cases which may serve as a basis for potential challenges to a violation of this right in a trafficking situation. Ackermann J has pronounced in *Bernstein and Others v Bester NO and Others* that the "...concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate. The scope of privacy has been closely related to the concept of identity and it has been stated that rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity".¹⁰³ In the *Bernstein*-case, the applicants' submission that their privacy was violated by the forced legislative disclosure of information as compelled by sections 417 and 418 of the Companies Act 61 of 1973 (as amended) was rejected, as the right to privacy is extended less expressly to the carrying on of business activities than to that of the private sphere.¹⁰⁴

Privacy violations may relate to either personal privacy,¹⁰⁵ or to relations of legal privilege and confidentiality.¹⁰⁶ Breaches of personal privacy could occur either by way of a wrongful

¹⁰² Constitution s 14: "Everyone has the right to privacy, which includes the right not to have -
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed."

See also UDHR art 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

¹⁰³ See *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (CC) para 65. The applicants submitted that being forced to disclose books and documents which one wants to keep confidential is an invasion of privacy. See also *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) para 18 where a claim to s 14 violation was also rejected in terms of juristic persons. It was held that juristic persons do enjoy the right to privacy, although not to the same extent as natural persons. This case regarded the search and seizure powers relating to a preliminary investigation under s 29 of the National Prosecuting Authority Act 32 of 1998. It was held that the Act contains considerable privacy safeguards and the infringement of the right was therefore held to be justifiable. However in *Magajane v Chairperson, North West Gambling Board* (CCT49/05) [2006] ZACC 8; 2006 (10) BCLR 1133 (CC); 2006 (5) SA 250; 2006 (2) SACR 447, the North West Gambling Board Act was held to be unconstitutional for infringing the right to privacy insofar it authorised warrantless searches of premises which were not licensed under the Act. The Court held that the objectives of such searches could have been achieved by requiring warrants, which would have been less invasive of the right to privacy.

¹⁰⁴ See in this regard *National Coalition for Gay and Lesbian Equality and Another* (n79 *supra*) paras 30, 120.

¹⁰⁵ In the case of *Mistry v Interim National Medical and Dental Council and Others* (CCT13/97) [1998] ZACC

intrusion upon the personal privacy of another (such as entry into a private residence), or by way of unlawful disclosure of private facts about a person. It could also occur by the reading of private documents, listening in to private conversations, stalking a person, or disclosing private facts which were either acquired by a wrongful act of intrusion or facts contrary to the existence of a confidential relationship.¹⁰⁷

An important case concerning the privacy of vulnerable persons at risk is the case of *NM and Others v Smith and Others*.¹⁰⁸ The Court held in this case that the HIV-positive applicants' right to privacy entitled them not to have their private medical information disclosed without their consent to the public. Although there may be certain legitimate restrictions on the sacrosanctity of personal space, the right to privacy recognises the importance of protecting individuals' entitlement to have their personal daily lives concealed from the public. This right may be significant for trafficked survivors not to have their abusive experiences in the past be revealed, and establishing a new life for themselves.

8.2.1.7 The right to freedom of religion, belief and opinion

The constitutional right to freedom of religion, belief and opinion guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion.¹⁰⁹ This right consists of two elements: "a free exercise component and an equal treatment component".¹¹⁰ It is the first element which may be implicated in trafficking situations but which is not usually afforded to trafficked persons. Religious beliefs, thoughts or opinions are usually limited or refused in trafficking circumstances as there is no freedom of choice. Yet the pledge in the

10; 1998 (4) SA 1127; 1998 (7) BCLR 880 (CC), it was held that the communication of confidential information constituted an infringement of the applicant's rights to privacy.

¹⁰⁶ In *S v Bierman* (CCT52/01) [2002] ZACC 7; 2002 (5) SA 243; 2002 (10) BCLR 1078 (CC), the applicant argued that the High Court infringed her constitutional rights to privacy in admitting the evidence of a minister of religion to whom she had confessed that she was guilty of murder. Her appeal was refused as the applicant had not raised the constitutional issue in her application for leave to appeal to the SCA.

¹⁰⁷ Ackerman J in *Bernstein and Others* (n103 *supra*) paras 68-69.

¹⁰⁸ *NM and Others v Smith and Others* (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) paras 131-132.

¹⁰⁹ Constitution s 15(1). UDHR art 18 states that: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

¹¹⁰ *Currie & De Waal* (n4 *supra*) 338.

constitutional provision to religious self-determination is taken seriously by the jurisdiction. This is evident in a Constitutional Court judgment which dealt with religious and cultural diversity and illustrated the use of dignity to “avoid both the radical individualist conception of a self that is unencumbered by social ties and relations, and a thick, essentialist view of a self that is incapable of escaping the strictures imposed by attributes like culture and religion”.¹¹¹ In *MEC for Education: Kwazulu-Natal and Others v Pillay*,¹¹² a school prohibition on the wearing of jewellery was regarded as constituting unfair discrimination, as the learner wore the nose-stud as an expression of her South Indian Tamil Hindu culture. Although Langa CJ noted the “importance of community to individual identity and hence to human dignity”,¹¹³ he emphasized the point that cultures are “... living and contested formations. The protection of the Constitution extends to all those for whom culture give meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation”.¹¹⁴ The infringement of trafficked persons’ right to have a belief and to express that belief publicly may be challenged constitutionally, according to these cases.¹¹⁵ Any coercion or constraints by the trafficker to force these persons “... to act or refrain from acting in a manner contrary to their religious beliefs”¹¹⁶ is also prohibited in terms of this section.

The cultural practice of *ukuthwala*¹¹⁷ has been implicated in South Africa as possible situations involving human trafficking. It has been argued that *ukuthwala* may violate the gender equality provisions in section 9 of the Constitution, as only unmarried girls are subjected to the practice.¹¹⁸ However, the Constitution expressly recognises the right to practice one’s culture, provided that persons exercising cultural rights may not do so in a manner that is inconsistent with any other provisions of the Bill of Rights.¹¹⁹ Anti-trafficking

¹¹¹ Botha (n40 *supra*) 206. See also Fick *Consenting to Objectifying Treatment? Human Dignity and Individual Freedom* (Unpublished LLM Dissertation University of Stellenbosch 2012) 40.

¹¹² *MEC for Education: Kwazulu-Natal and Others v Pillay* (n82 *supra*).

¹¹³ *MEC for Education: Kwazulu-Natal and Others v Pillay* (n82 *supra*) para 53.

¹¹⁴ *MEC for Education: Kwazulu-Natal and Others v Pillay* (n82 *supra*) para 54.

¹¹⁵ See also *S v Lawrence*, *S v Negal*; *S v Solberg* (CCT38/96, CCT39/96, CCT40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 (CC).

¹¹⁶ Currie & De Waal (n4 *supra*) 339.

¹¹⁷ See Chap 7 (n125 *supra*).

¹¹⁸ Mwambene & Sloth-Nielsen “Benign Accommodation? *Ukuthwala*, „Forced Marriage“ and the South African Children’s Act” 2011 2(1) *Journal of Family Law and Practice* 5 8-10.

¹¹⁹ See Constitution s 30: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”, Constitution s 31: “(1) Persons belonging to a cultural, religious or linguistic community

legislation prohibiting this practice as human trafficking may violate the person's freedom to culture or of belief. This may require a balancing of constitutional rights namely, the right to freedom of culture and belief on the one hand, and the right to freedom and security of the person, on the other hand. If a cultural practice, such as *ukuthwala*, is found to be an unjustifiable infringement of the section 12 right to freedom and security (for example, because it is harmful) it may be found to be unconstitutional.

Aspects of religious worship have also been given attention to in the *Christian Education South Africa v Minister of Education*-case,¹²⁰ where a ban on corporal punishment in independent schools was found not to constitute an impermissible limitation on freedom of religion. Furthermore, an applicant from the Rastafarian religion alleged that the criminal prohibition on use and possession of cannabis in the Drug Traffic Control Act 140 of 1992 infringed the right to freely practice his religion in *Prince v President of the Law Society of the Cape of Good Hope*.¹²¹ The Court rejected his contention, though acknowledged that there was an infringement on his religion but that it was justifiable in terms of the limitation clause. Considered in the context of the broad definition of human trafficking, the right to freedom of religion may possibly also be relevant in circumstances where people are unduly influenced or coerced to join extremist religious cult groups. This is because the state must, according to the Constitutional Court's interpretation of section 31(2), prohibit practices that cause physical or emotional harm to persons.¹²²

may not be denied the right, with other members of that community-
(a) to enjoy their culture, practise their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

¹²⁰ *Christian Education South Africa v Minister of Education* (n28 *supra*) para 36 states that: "... freedom of religion goes beyond protecting the inviolability of the individual conscience". See also *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC) paras 88-98 where religious institutions opposed the application for same-sex unions as the common-law institution of marriage simply could not sustain the intrusion of these unions, and that it gravely offended what religious societies deem to be acceptable.

¹²¹ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC), 2002 3 BCLR 231 paras 48-51.

¹²² *Currie & De Waal* (n4 *supra*) 344. See also *Prince v President of the Law Society of the Cape of Good Hope* (n121 *supra*) para 108 where the court pointed out that anti-social conduct is prohibited by adopting legislation and the prohibition enforced by criminal sanctions, where necessary.

8.2.1.8 The right to freedom of expression

Freedom of expression¹²³ is widely held to be an essential component of any functioning democracy. It was pronounced in *South African National Defence Union v Minister of Defence and Another*¹²⁴ that:

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

The right to free speech is closely related to other rights such as the right to dignity, to privacy,¹²⁵ freedom of religion, belief and opinion, as well as the right to freedom of association¹²⁶ and the right to vote.¹²⁷ As human beings without any autonomy, it is commonsense that trafficked persons do not possess any free expression, since they are

¹²³ Constitution s 16 states: "(1) Everyone has the right to freedom of expression, which includes –
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to –
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

This right is also guaranteed by the UDHR art 19 which affirms that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

¹²⁴ *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 para 7. This case concerned the question whether it is constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions which they regarded as forming part of their right to freedom of expression.

¹²⁵ See *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* (CCT20/95, CCT21/95) [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 (CC) where freedom of expression (and the right to privacy) was asserted in contravention of s 2(1) of the Indecent or Obscene Photographic Matter Act prohibiting the possession of indecent or obscene photographic matter. The section was struck down. See also *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* CCT 14/95 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 re the constitutionality of the Publications Act and the Indecent or Obscene Photographic Matter Act.

¹²⁶ Constitution s 18.

¹²⁷ Constitution s 19(3). Without freedom of expression, citizens would not be able to make responsible political decisions. See *August and Another v Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (CC) para 17.

intimidated. Their thoughts are controlled by the traffickers by means of threats or the reality of violence. As such, their right to free speech may be severely violated. Trafficking survivors have an entitlement to this right to protect their dignity. The Constitutional Court has held in many defamation actions between two private parties that the provisions of freedom of expression and dignity are particularly affected.¹²⁸ Although the importance of the right to freedom of expression has been repeatedly emphasised by the Court,¹²⁹ the right is not absolute and subject to limitations. In *S v Mamabolo*, it was pointed out "... that freedom of expression does not enjoy superior status in our law".¹³⁰ Kriegler J remarked that the right to freedom of expression is not an unqualified right in the Constitution:

It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection. Moreover, the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression.¹³¹

¹²⁸ Most of these cases concern the print, broadcast and electronic media. See in this regard *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (CC) paras 21, 41. Similarly in *The Citizen 1978 (Pty) Ltd and Others v McBride* (CCT 23/10) [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816, where a number of defamatory articles were published. The claim for defamation and for impairment of dignity was upheld by the Court as the defence of fair comment could not be sustained. In the case of *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC); BCLR 446, the principle of the best interests of the child also had to be considered as the case concerned the defamation of a deputy principal of a school by 3 schoolchildren. The learners super-imposed the face of the deputy principle onto that of a naked man's body, sitting in a sexually-suggestive posture with another man. Their claim of freedom of expression especially that of satirical expression; was repudiated.

¹²⁹ See *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 para 37 where the Court held that: "Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm".

¹³⁰ *S v Mamabolo* (n129 *supra*) para 37. It was held in this case that while the common law crime of scandalising the court limits freedom of expression, the limitation is justifiable on condition that the crime is properly defined with the aim of safeguarding confidence in the administration of justice. See also *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* (CCT58/06) [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167(CC); [2006] JOL 18339 para 120; *NM and Others* (n108 *supra*) paras 23-25, 145, and *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (CC) paras 25-30 for similar verdicts.

¹³¹ *S v Mamabolo* (n129 *supra*) para 41.

The limits of this right ought to be defined to curb traffickers' construction and use of sex websites in cyberspace. The two various defences for freedom of expression, namely that free speech is instrumental in producing good outcomes for the rest of society, and that it is constitutive as an important part of a just political society, do not justify harmful behaviour such as child pornography.¹³² This was confirmed in *De Reuck v Director of Public Prosecutions*, where the Court differentiated between the "core values" of the freedom of expression in pornography and "expression of little value which is found at the periphery of the right".¹³³ Expression at the core of the right will obviously receive greater protection than the latter-mentioned form. Although pornography is protected as a form of expression by the Constitution,¹³⁴ any pornography that causes harm to vulnerable groups, and especially child pornography, is prohibited.¹³⁵ This prohibition is a limitation of the right to freedom of expression, but it has been ruled to be a reasonable and justifiable limitation.¹³⁶ The harm done outweighs any possible benefits obtained from child pornography.¹³⁷ Similarly, the trafficker's right to freedom of expression in all activities surrounding sex websites and child pornography should be held to be unconstitutional.

8.2.1.9 The right to freedom of movement

The Bill of Rights further guarantees everyone the right to freedom of movement and residence:

(1) Everyone has the right to freedom of movement.

¹³² These 2 categories were identified in Dworkin's *Freedom's Law* (1996), as quoted in Currie & De Waal (n4 *supra*) 360-361. See also *Khumalo and Others v Holomisa* (n128 *supra*) para 21, where it was held that freedom of expression is constitutive of the dignity and autonomy of human beings, and that the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled without this right. In *South African National Defence Union* (n124 *supra*) para 7, it was held that freedom of expression "... lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters".

¹³³ *De Reuck v Director of Public Prosecutions* (n38 *supra*) para 59.

¹³⁴ *De Reuck v Director of Public Prosecutions* (n38 *supra*) para 48.

¹³⁵ Eg, as in the Films and Publications Act 65 of 1996.

¹³⁶ See *De Reuck v Director of Public Prosecutions* (n38 *supra*) paras 70-71.

¹³⁷ See *De Reuck v Director of Public Prosecutions* (n38 *supra*) para 67: "I conclude that the state has established three legitimate objectives which the limitation aims to serve, namely, protecting the dignity of children, stamping out the market for photographs made by abusing children and preventing a reasonable risk that images will be used to harm children."

- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
- (4) Every citizen has the right to a passport.¹³⁸

This universal right is hybrid as it is qualified regarding citizens' rights to enter, to remain in and to reside anywhere in the country and to have a passport. The universal right to freedom of movement and to leave the jurisdiction is directly applicable to the situation of trafficked persons. The personal freedom of trafficked persons is controlled by their traffickers who first confiscate the passports of the victims and restrict their movement. Incarceration necessarily limits trafficked persons' personal rights and liberties. They do not have a choice regarding the place of their detention (which may be outside the Republic), and their contact with the outside world is limited and regulated. They must submit themselves to the wishes of the trafficker. These are all infringements under section 21 of the Constitution, as well as many other fundamental rights. Ackermann J has held in *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others*:

Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.¹³⁹

Freedom of movement has an intrinsic constitutional value, which includes the right of every person not to be restricted in any way by private parties or the state, without having just cause to do so. Limitations of this right have to be necessary, in addition to being reasonable. In the *Dawood*-case,¹⁴⁰ the applicants argued that section 26(1) of the Aliens Control Act 96 of 1991 interfered with their right to a relationship (to cohabit and to enjoy family life) as it infringed the rights to freedom of movement and the rights of citizens to reside in South Africa. This provision required foreign spouses who have applied for

¹³⁸ Constitution s 21. The UDHR art 13(1) also guarantees this right: "Everyone has the right to freedom of movement and residence within the borders of each state."

¹³⁹ *Ferreira v Levin NO and Others* (n10 *supra*) para 49.

¹⁴⁰ *Dawood; Shalabi; Thomas v Minister of Home Affairs* (n33 *supra*) para 36-37.

permanent residence by reason of their marriage to South African citizens, to return to their country of origin before any consideration will be given to the application for permanent residence.¹⁴¹ The Court upheld their application and declared certain provisions of the Aliens Control Act invalid.

In a similar manner, legislation such as the Immigration Act 13 of 2002 may place restrictions on the freedom of movement of non-citizens who have been trafficked to the Republic. As only citizens are granted the right to enter, to remain in and to reside anywhere in the country, trafficked persons may be automatically deported as illegal foreigners to their country of origin,¹⁴² where they may run the risk of being re-trafficked or harmed. In terms of this section, South African citizens accused of the crime of human trafficking in another jurisdiction, may be extradited to that country. This has been held to be an acceptable limitation of the right to remain in the Republic.¹⁴³ Extradition can however only take place if the correct procedures have been followed in terms of the Extradition Act 67 of 1962, and if the receiving state will not punish the extradited person for his political views or subject him to torture, inhuman or degrading treatment or punishment, such as the death penalty.¹⁴⁴ This rule will also apply "... to the unilateral act of deporting an undesirable alien from South Africa",¹⁴⁵ who may be a trafficked person.

8.2.1.10 The right to freedom of trade, occupation and profession

Section 22 of the Bill of Rights guarantees every *citizen* "... the right to choose their trade, occupation or profession freely". Citizens' freedom of choice to be economically active in any preferred profession becomes non-existent if they are caught in the web of human trafficking. The market for human trafficking demands all forms of labour and commercial sexual exploitation without any freedom of choice by the trafficked person. Trafficked persons often may not even enjoy the fruits of their labour. When a person is trafficked, personal agency is lost or limited: "In many cases, the trafficked individual does not have

¹⁴¹ See Currie & De Waal (n4 *supra*) 481.

¹⁴² This is in terms of the Immigration Act ss 32 & 34, "unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status". See Immigration Act s 32(1).

¹⁴³ *Geuking v President of the Republic of South Africa and Others* (CCT35/02) [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895.

¹⁴⁴ See *Mohamed and Another* (n21 *supra*) para 53; Currie & De Waal (n4 *supra*) 479.

¹⁴⁵ Currie & De Waal (n4 *supra*) 479; *Mohamed and Another* (n21 *supra*) para 53.

the right to decide whether to work, how many hours to work, or what kind of work to do".¹⁴⁶ This severely impacts on the individual's rights:

From the point of view of the individual, occupational freedom is also a crucial element of individual autonomy and constitutes a basis for the exercise of other rights and freedoms. It is therefore more than a right to provide materially for oneself, but is aimed at enabling individuals to live profitable, dignified and fulfilling lives.¹⁴⁷

Because of certain constraints to practice the freedom of trade, occupation and profession such as poverty, citizens may be vulnerable to trafficking situations. This right is hampered by various factors, such as the lack of employment opportunities. Many persons turn to various forms of informal, unregulated trades out of need. These may include prostitution, forced labour and human trafficking. Each of these compromises the basic human right of the individual to choose a trade.

But traffickers may equally claim the right to freedom of one's own choice of profession. Any type of prohibition on the practice of human trafficking may be challenged by the trafficker on the grounds that these constitute "... unconstitutional violations of the right to free economic activity".¹⁴⁸ In *S v Lawrence*,¹⁴⁹ the appellants claimed that certain provisions of the Liquor Act 27 of 1989 breached their freedom of trade rights. The Court held that although the prohibitions did place constraints on their economic activity, the measures had to be justifiable in an open and democratic society based on freedom and equality. This meant that there had to be a rational connection between the means and the ends: "The rational basis test permits a court to ensure that when a state uses its powers to regulate or restrict private economic activity it does not do so arbitrarily, or for no good reason".¹⁵⁰ In this regard, the Court found that excessive use of alcohol is harmful, and that controlling measures reducing the consumption thereof were necessary.¹⁵¹ The restrictions

¹⁴⁶ Bales *Disposable People: New Slavery in the Global Economy* (1999) 9.

¹⁴⁷ Currie & De Waal (n4 *supra*) 491.

¹⁴⁸ Currie & De Waal (n4 *supra*) 484.

¹⁴⁹ *S v Lawrence* (n115 *supra*). This case concerned with the contravention of the terms of the grocer's wine licence authorising the sale of only table wine (and no other liquor) at the stores at which the appellants were employed. The Act also placed restrictions on the hours and days on which sales may be effected.

¹⁵⁰ Currie & De Waal (n4 *supra*) 485.

¹⁵¹ *S v Lawrence* (n115 *supra*) para 54. Although this case was decided in terms of the Interim Constitution, the basic premise of the right still remains similar in the 1996 Constitution.

placed on holders of liquor licences by the Liquor Act were held not to be in violation of the freedom to trade guarantee. The Court also emphasised that:

... the right to engage in economic activity and to pursue a livelihood anywhere in the national territory would entail a right to do so freely with others. Implicit in this is that the participation should be in accordance with law.¹⁵²

According to the findings of the Court, it can be assumed that the right of a trafficker to freely trade human beings would be held unconstitutional on similar grounds. This was confirmed in *S v Jordan*¹⁵³ where the statutory prohibition on prostitution and brothel-keeping was challenged also on the ground that it impacted on the right to free trade. The purpose of the legislation to combat prostitution and all harms associated with the practice were ruled to be measures which protect and promote the quality of life.¹⁵⁴

8.2.1.11 The right to labour relations

The right to freedom of trade, occupation and profession is closely related to the right to labour relations.¹⁵⁵ This right mainly concerns fair labour practices and may in certain circumstances be challenged by trafficked persons. This may be possible as the use of the word “everyone” in section 23(1) “... has broadened the scope of protection in labour

¹⁵² *S v Lawrence* (n115 *supra*) para 34.

¹⁵³ *S v Jordan and Others* (n37 *supra*).

¹⁵⁴ *S v Jordan and Others* (n37 *supra*) para 26.

¹⁵⁵ Constitution s 23: (1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right-

(a) to form and join an employers’ organisation; and

(b) to participate in the activities and programmes of an employers’ organisation.

(4) Every trade union and every employers’ organisation has the right-

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

relations beyond the traditional employer/employee relations”.¹⁵⁶ However, as there mostly is no legal employment relationship between the trafficked person and the trafficker, it is doubtful that this right will ever be challenged in the context of human trafficking.

In certain circumstances in the trafficking scenario, valid employment relationships may turn into more exploitative, forced labour.¹⁵⁷ In this regard, victims may challenge their right in section 23(1) to fair labour practices. In terms of the Labour Relations Act 66 of 1995 (LRA), unfair labour practices:

... means any unfair act or omission that arises between an employer and an employee, involving -

- (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
- (b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;
- (c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;
- (d) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.¹⁵⁸

It has been seen though that “[f]of the vast majority of employees, whether in the public or private sectors, it is the provisions of ... [the LRA and the Employment Equity Act 55 of 1998], rather than the Bill of Rights, that are the principal guarantee of fair labour practices”.¹⁵⁹ Trafficked persons in related abusive labour relations would theoretically also turn to this legislation for relief.

¹⁵⁶ Currie & De Waal (n4 *supra*) 499.

¹⁵⁷ TIP Bill Chap 1(1) defines forced labour as: “labour or services of a person obtained or maintained through threats or perceived threats of harm, the use of force, intimidation or other forms of coercion, or physical restraint to that person or another person.”

¹⁵⁸ LRA Schedule 7, Part B, s 2(1).

¹⁵⁹ Currie & De Waal (n4 *supra*) 502.

8.2.2 Socio-economic rights

Socio-economic rights are regarded as universal rights guaranteed not only by the South African Bill of Rights, but by several international human rights instruments.¹⁶⁰ Although a distinction is made between socio-economic rights and civil and political rights, the Constitutional Court has acknowledged these rights’ interrelatedness and interdependence:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.¹⁶¹

The socio-economic rights in the Bill of Rights that are relevant to the situation of trafficked persons are entrenched in the right to an environment that is not harmful to their health or well-being (section 24),¹⁶² to adequate housing (section 26) and to health care, food, water and social security (section 27). The socio-economic rights of children and the right to education are also protected.¹⁶³ These rights have been described as “weak” rights as they mostly receive deferred judicial remedies. This is implicit in the constitutional provisions providing terms such as “within available resources” and “progressive realization” as part

¹⁶⁰ Social security is a universal right guaranteed by the UDHR art 22: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” Health care and food are guaranteed by the UDHR art 25(1): “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

¹⁶¹ *Government of the Republic of South Africa and Others v Grootboom and Others* (n59 *supra*) para 23.

¹⁶² See n59 *supra*.

¹⁶³ These rights will be elaborated on in the next paragraph.

of the definition of the right, “seemingly folding the remedy into the right’s definition itself”.¹⁶⁴

In this regard, it has been stated that “... the principal difficulty with socio-economic rights lies in their justiciability – the extent to which they can and should be enforced by a court”.¹⁶⁵ The main objection against the judicial enforcement of socio-economic rights is that by prescribing to the state as to how their resources should be distributed, the judiciary would be exceeding their boundaries in terms of the separation of powers doctrine. A further predicament with the justiciability of socio-economic rights concerns the budgetary issues that their enforcement may raise. These problems were discussed by the Court in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment)*:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers. ... Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the New Constitution does not result in a breach of the CPs [Constitutional Principles].¹⁶⁶

¹⁶⁴ Tushnet (n26 *supra*) 250.

¹⁶⁵ Currie & De Waal (n4 *supra*) 568-569.

¹⁶⁶ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic*

The Court's verification regarding the justiciability of these rights has resulted in judgments enforcing the government's compliance with their socio-economic obligations. These judgments and the socio-economic rights attached to them will now be considered, especially to the extent in which these rights may assist a trafficked person.

8.2.2.1 The right to a healthy environment and to housing

The right to a life worth living includes the right to a decent standard of living. In order to fulfil this standard, access to adequate housing and to an environment that is not harmful to one's health or well-being is required. These two socio-economic rights, found in section 24¹⁶⁷ and section 26,¹⁶⁸ are guaranteed to everyone, citizens and non-citizens alike.¹⁶⁹ Many trafficked persons experience poor, unhygienic conditions in their various places of detention. This directly contravenes the right guaranteeing a healthy environment. As such, this right may be of assistance to such a challenge by trafficked persons.

Not only does adequate housing fulfil people's physical needs by providing security and shelter from weather and climate, it provides a sense of personal space and privacy and serves as communal centre for the basic unit of society; the family. As decided in *Jaftha v Schoeman and Others*,¹⁷⁰ government not only has a duty not to interfere in people's efforts to exercise their socio-economic rights,¹⁷¹ it has a duty to take steps to prevent interference by private individuals. Traffickers hinder trafficked persons' right of access to

of South Africa 1996 1996 (4) SA 744 (CC) paras 77-78.

¹⁶⁷ Everyone has the right -

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

¹⁶⁸ (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

¹⁶⁹ UDHR art 25(1) guarantees similar rights: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

¹⁷⁰ *Jaftha v Schoeman and Others* (n59 *supra*) paras 31, 33. See also Currie & De Waal (n4 *supra*) 573.

¹⁷¹ Eg, as stated in the negative right of s 26(3) by prohibiting arbitrary evictions.

adequate housing, in other words, the right to acquire and sustain a secure home and community in which to live in peace and dignity. Trafficked persons may consequently claim that their right to housing was violated by their trafficker.

Widespread homelessness and habitation in inadequate housing are ripe grounds for human trafficking. In this regard, the government may be challenged in that they did not endeavour to fulfil their constitutional obligation of providing adequate housing to victims.¹⁷² This right is qualified by requiring the state to take reasonable measures within available resources. As such, the right does not purport to be a guaranteed entitlement, but may be limited according to the reasonableness of socio-economic measures required,¹⁷³ the progressive realisation of the rights¹⁷⁴ and the resources available. Still, the state must give effect to its duty to protect this right through the enactment of statutes which give protection to persons whose tenure of their homes is insecure, and subsequently may become vulnerable to being trafficked.

8.2.2.2 The right to health care, food, water and social security

The importance of health in human life is indisputable. Good health is paramount for the enjoyment of all fundamental human rights such as the right to life. Trafficked victims are subjected to dangerous working conditions where they are absolutely powerless, vulnerable to violence and exposed to widespread diseases or sexually transmitted diseases. Health services are also inaccessible to them. For victims trafficked for sexual exploitation, repetitive rapes combined with the non-treatment of STDs may lead to a high

¹⁷² This is considered a violation of the negative obligation in s 26(1) as held by the Court in *Government of the Republic of South Africa and Others v Grootboom and Others* (n59 *supra*) para 88.

¹⁷³ Currie & De Waal (n4 *supra*) 580 hold that “[r]easonableness ... requires the design, adoption and implementation of measures to realise socio-economic rights that are comprehensive, in a sense that they do not exclude those most in need of the protection of those rights”. This was the conclusion reached by the Court in *Government of the Republic of South Africa and Others v Grootboom and Others* (n59 *supra*) para 99. The Court in *Khosa and Others* (n40 *supra*) para 44 underlined that the impact of the measure on other rights is an important factor in determining the reasonableness thereof: “When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness”.

¹⁷⁴ As interpreted in *Soobramoney v Minister of Health (Kwazulu-Natal)* (n44 *supra*) para 11, although the state is bound to only a progressive realisation of the right, this does not change the state’s obligation to give realisation to the right as soon as possible.

risk of ectopic pregnancies, cervical cancer and infertility,¹⁷⁵ which also violates the right to a family. Unsafe abortion adds to the health hazards of these victims. The cruel and harmful physical exploitation combined with feelings of shame, guilt, low self-esteem and worthlessness; also trigger severe psychological disorders, such as acute anxiety-, stress- and post-traumatic stress disorders.¹⁷⁶ Self-mutilation, suicide attempts, drug- and alcohol addiction, and engaging in violent, abusive relationships are likely results of the mental and psychological impact of sex trafficking on victims.¹⁷⁷ The detrimental diseases and psychological neurosis can permanently damage trafficking victims' ability to exercise human rights enjoyed by all other people.

Considering the significant direct and indirect effects any type of torture or cruel, inhuman or degrading treatment has on the physical and psychological health of victims, constitutional provisions that provide for a right to health are very relevant in establishing the duty of the state to combat and prevent trafficking offences. The Constitution provides that everyone has the right to have access to health care.¹⁷⁸ Children are given further protection in section 28(1)(c), which provides that every child has the right to basic nutrition, shelter, basic health care services and social services.

The constitutional requirements of the right to health have been clarified in several landmark cases. In the case of *Soobramoney v Minister of Health (Kwazulu-Natal)*,¹⁷⁹ the right given to everyone to have access to public healthcare services was restricted. The rights to emergency healthcare and to life were weighed in this case against an under-

¹⁷⁵ See Wiesenfeld & Cates "Sexually Transmitted Diseases and Infertility" in Holmes, Sparling & Stamm (eds) *Sexually Transmitted Diseases* 4th ed (2008) 1511.

¹⁷⁶ Beyrer & Stachowiak "Health Consequences of Trafficking of Women and Girls in Southeast Asia" 2003 X(1) *Brown Journal of World Affairs* 105 105-106.

¹⁷⁷ *Ibid.*

¹⁷⁸ Constitution s 27 provides: "(1) Everyone has the right to have access to -
(a) health care services, including reproductive health care;
(b) sufficient food and water..."

This provision follows international human rights instruments such as the ICESCR art 12(1) which guarantees the "... right of everyone to the enjoyment of the highest attainable standard of physical and mental health". The CRC art 24 proclaims that: "... states parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services".

¹⁷⁹ See *Soobramoney v Minister of Health (Kwazulu-Natal)* (n44 *supra*). This case concerned a man suffering from irreversible kidney failure who required renal dialysis for survival. His application for free treatment from the Addington Hospital's dialysis program was rejected as his condition did not fulfill the requirements for eligibility - he had to be curable within a short period of time, or be eligible for a kidney transplant.

resourced healthcare system. The court held that in terms of equal access to healthcare, the South African healthcare system could not accommodate all persons who request emergency medical treatment. As such, Soobramoney's right to health services were not unfairly violated. However, in *Minister of Health and Others v Treatment Action Campaign and Others*,¹⁸⁰ the Court ordered the government to provide the anti-retroviral drug Nevirapine to all pregnant women, and not only in certain pilot sites which would effectively have denied most mothers access to treatment. On the other hand, the Court rejected the ICESCR's defined standard of minimum core rights, stating that: "It is impossible to give everyone access even to a „core“ service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 (Right to Housing) and 27 (Rights to Health Care, Food, Water and Social Security) on a progressive basis".¹⁸¹ Persons who have contracted the HIV/AIDS virus are also protected against unfair discrimination, such as in *Hoffmann v South African Airways*.¹⁸² The Constitutional Court has further invalidated certain restrictions to access to healthcare services.¹⁸³ These developments are positive in the light of protection also of trafficking survivors.

8.2.3 Children's rights in the Constitution

According to the Constitution of South Africa, children are particularly vulnerable to the violation of their rights. As such, they are entitled to the protection of all rights in the Bill of Rights, as well as to special and specific safeguards as provided for in section 28. This provision defines a child,¹⁸⁴ and presents all the rights to which the child is entitled.¹⁸⁵ In

¹⁸⁰ See *Minister of Health and Others v Treatment Action Campaign and Others* (n53 *supra*).

¹⁸¹ *Minister of Health and Others v Treatment Action Campaign and Others* (n53 *supra*) para 35.

¹⁸² *Hoffmann v South African Airways* (n17 *supra*). It was held in this case that an eligible asymptomatic HIV-positive job applicant for employment as cabin attendant may not be excluded from the obtaining the post because of his infection.

¹⁸³ Eg, see *Affordable Medicines Trust and Others v Minister of Health and Another* (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 where ss 18(3) & (18(5) of the Medicines and Related Substances Control Amendment Act 2002 were declared unconstitutional and invalid as the regulations limited patients' reasonable access to obtain dispensed medicines. In *Law Society of South Africa and Others v Minister for Transport and Another* (CCT 38/10) [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150, regulation 5(1) of the Road Accident Fund Amendment Act 2005 which concerned the Uniform Patient Fee Schedule (UPFS) was declared wholly inadequate and unsuited for paying compensation for medical treatment of road accident victims in the private health care sector. That meant that all road accident victims who cannot afford private medical treatment will have no option but to submit to treatment at public health establishments.

¹⁸⁴ According to the Constitution s 28(3), a child means a person under the age of 18 yrs.

addition to the general socio-economic rights provided in sections 26 and 27, specified socio-economic rights for children are entrenched in this section. According to this section, every child has the right to basic nutrition and shelter. These children's rights were discussed in *Government of the Republic of South Africa and Others v Grootboom and Others*.¹⁸⁶ The Court held that, in terms of section 28(c), the state was obliged to provide rudimentary shelter to children and their parents. It was found that the state had failed to make provision in terms of the section 28 obligation to deal with people in crisis such as the applicants, and was ordered to devise and implement a reasonable programme that would progressively provide for adequate housing for all.

Section 28 also places a duty on the state to provide basic health care and social services to children, and furthermore to provide their families with the means to support these basic requirements.¹⁸⁷ These duties and responsibilities as regards the child's basic needs extend to the parents of a child, who also has to protect the child from maltreatment and neglect. The child's right to not be subjected to maltreatment, neglect, abuse or degradation in section 28(1)(d) was the focus of the Court in *S v Williams and Others*.¹⁸⁸ In this case, the Court declared corporal punishment in terms of section 294 of the CPA unconstitutional as it was cruel, inhuman and degrading. The section further reiterates that

¹⁸⁵ Constitution s 28 provides that: (1) Every child has the right -
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that-
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
(2) A child's best interests are of paramount importance in every matter concerning the child.

¹⁸⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* (n59 *supra*).

¹⁸⁷ Currie & De Waal (n4 *supra*) 603.

¹⁸⁸ *S v Williams and Others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) para 92.

a child shall not be subjected to any forms of slavery, abuse or exploitative labour practices.¹⁸⁹

As the purpose of section 28 is to protect children in situations where they are particularly vulnerable, the provisions may assist trafficked children in this regard. Children are mainly trafficked for the purposes of forced child labour and commercial sexual exploitation. In all types of exploitative trafficking situations, children may be denied access to basic healthcare which increases their chances of serious or permanent injury and death. These children may also be subjected to domestic violence or maltreatment where they are either beaten or starved in order to ensure obedience. Substance-abuse is also prevalent in these situations. It is obvious that the trauma suffered by trafficked children may lead to severe psychological problems. The state has the duty to provide protection and assistance to these children, as listed in section 28. The government has given effect to these duties by enacting the Children's Act 38 of 2005 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, where children's rights and responsibilities are set out and protected.¹⁹⁰

Where trafficked children are detained or arrested, specific requirements are set out by the subsections in section 28(1)(g) in order to ensure a lawful detention as a measure of last resort. These include the right to be detained only for the shortest appropriate period of time, a right to legal assistance and to be separated from adults. Section 28(1)(h) further provides accused children the right to legal representation at state expense in both criminal and civil proceedings.

Children are also accorded the right to family and parental care¹⁹¹ by section 28(1)(b). In this regard, the state has the duty to support the right to family life. This may involve amending legislation or administrative action which could interfere with children's right to a family life, or where children are abused or neglected by parents, to remove such children

¹⁸⁹ Constitution s 28(1)(d)-(f) read with s 13.

¹⁹⁰ For more information, see Chap 7 paras 7.3.2.4 and 7.3.2.2 respectively.

¹⁹¹ As decided in *Fraser v Children's Court Pretoria North and Others* (CCT31/96) [1997] ZACC 1; 1996 (8) BCLR 1085; 1997 (2) SA 218 (CC) para 24, the fathers of children may not unfairly be discriminated against in terms of parental care. Also, in *Du Toit and Another v Minister of Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) para 22, lesbian and gay cohabitants are allowed to adopt children and exercise parental care.

from their care when it is in the best interests of the children to do so.¹⁹² There remains a duty on the state to provide a suitable family environment for these children with a standard of care similar to that which they would have had in the family environment.¹⁹³ This would possibly be the procedure followed for trafficked children where the parents were involved in the child's trafficking.

In addition to section 29,¹⁹⁴ children's right to basic education is reinforced in section 28(1)(f)(ii).¹⁹⁵ Withholding children from education is to deprive them from intellectual growth. Education is an indispensable tool for realizing other human rights. Education is an empowering human right, as it is the primary vehicle by which economically and socially marginalized adults and children – the most vulnerable victims of trafficking - can escape from poverty and ignorance. The section underlines the overriding consideration of the child's „best interests“ principle.¹⁹⁶ All these provisions aim to protect the child from all kinds of violation of his or her dignity and to be treated with compassion.¹⁹⁷

¹⁹² The best interests“ requirement obligates parents to properly care for children, but also requires the state to establish the necessary legal or administrative structures to ascertain children receive adequate protection. See *Bannatyne v Bannatyne and Another* (CCT18/02) [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) para 24.

¹⁹³ Currie & De Waal (n4 *supra*) 606.

¹⁹⁴ Constitution s 29(1) states that: Everyone has the right - (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

¹⁹⁵ See *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 para 9, where the Court emphasizes that the section “... creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.”

¹⁹⁶ Constitution s 28(2) declares: “A child's best interests are of paramount importance in every matter concerning the child.” This sub-section is continually taken into account by the courts, as in *Khosa and Others* (n40 *supra*) paras 135, 136, where it was contended that s 4B(b)(ii) of the Welfare Laws Amendment Act infringed the rights that children have under s 28 of the Constitution. The effect of the provision was that, although a child was a South African citizen, because the primary care-giver is a non-South African citizen, the child could not have access to a child-support grant. The Court ruled that citizenship is an irrelevant consideration in assessing the needs of the children, and declared the relevant provision invalid. In *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC), the Court considered the best interest of the children in the imposition of imprisonment on the primary caregiver of young children. See also *Sonderup v Tondelli and Another* (CCT53/00) [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171 (CC) paras 28-30.

¹⁹⁷ Constitution s 1.

8.2.4 Constitutional rights of accused, detained and convicted persons

A human trafficker is recognised as a person before the law afforded with all the rights and privileges available to that of a trafficked person.¹⁹⁸ As such, violations of dignity, equality, privacy and so on may be claimed by the trafficker. As arrested, detained or accused persons, human traffickers (as well as trafficked persons) have additional rights under the Constitution. Key constitutional rights afforded to arrested, detained or accused persons include the right to due process and the right to equal protection under the law. Section 35(1) of the Constitution guarantees every person arrested for allegedly committing an offence the right to remain silent, to be promptly informed of this right, not to be compelled to make a confession, to be brought before a court, charged for an offence or released as soon as reasonably possible.¹⁹⁹ The constitutional right of access to courts²⁰⁰ is replicated in this provision, which demonstrates the importance of this right for all arrested persons. It can be argued that access to courts is a pivotal right upon which the vindication of the arrested persons' other constitutional protections depends. In certain circumstances, limitations may be imposed on this right as in the case of *Mnguni v Minister of Correctional Services and Others*.²⁰¹ In this case, a convicted prisoner serving a sentence and diagnosed with HIV/AIDS applied for direct access to review a decision in which he was

¹⁹⁸ Legal recognition as a human being with rights and privileges is one of the supreme human rights, as all other rights emanate from this right. Eg, see UDHR art 6: "Everyone has the right to recognition as a person before the law"; ICCPR art 16: "... if one's humanity is not legally recognised, one will lose legal recognition of, and therefore be effectively denied, one's other human rights". The ACHPR art 5 guarantees recognition as a person before the law together with the prohibition of torture and slavery.

¹⁹⁹ These rights have been subjected to constitutional review as regards bail hearings, eg as in *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (CC).

²⁰⁰ See Constitution s 34 which states that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." The right of access to courts has been raised by many groups. In *Beinash and Another v Ernst & Young and Others* (CCT12/98) [1998] ZACC 19; 1999 (2) SA 91; 1999 (2) BCLR 125 (CC) para 16, the company challenged the constitutionality of s 2(1)(b) of the Vexatious Proceedings Act on the basis that it is inconsistent with s 34 of the Constitution. This Act proclaims that a court may order that no legal proceedings be instituted if it is satisfied that a person has persistently and without any reasonable ground instituted legal proceedings. The Court held that the limitation was reasonable and justifiable, taking into account all the relevant factors. Similarly, an application for direct access was denied in *Dormehl v Minister of Justice and Others* (CCT10/00) [2000] ZACC 4; 2000 (2) SA 825; 2000 (5) BCLR 471 (CC), as the Court could not act as a court of first and last instance, therefore eliminating any possibility of appeal. This decision did not constitute an infringement of s 34 of the Constitution. See also *Bruce and Another v Fleecytex Johannesburg CC and Others* (CCT1/98) [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR 415 para 8; *Ex Parte Omar* (CCT32/03) [2003] ZACC 13; 2006 (2) SA 284 (CC); 2003 (10) BCLR 1087 para 4.

²⁰¹ *Mnguni v Minister of Correctional Services and Others* (CCT 42/05) [2005] ZACC 13; 2005 (12) BCLR 1187 (CC).

refused compassionate parole on medical grounds. The Court held that the applicant had failed to show exceptional circumstances that would justify direct access, and the application was dismissed.

The Constitution further provides that detained persons, including sentenced prisoners, are treated fairly by the criminal-justice system. They have to be informed promptly of the reason for being detained as well as their right to a legal practitioner. Where detainees are able to make their own arrangements for the representation, they are allowed to choose their own legal representative. However, no personal choice of a lawyer is afforded impoverished persons who are depended on the state to provide legal representation to them free of charge.²⁰² The principle of a fair trial combined with the controversy of the entitlement of indigent persons to free legal representation has been the subject of many court cases.²⁰³ Although the right to a legal representative is a fundamental one to be protected by the courts,²⁰⁴ it is not an absolute right and is subject to reasonable limitations.²⁰⁵ In such cases, the Court has to determine whether “substantial injustice”²⁰⁶ would ensue were the accused to proceed to trial without representation, and if it would be the case, whether the costs of that representation must be borne by the accused from his or her own resources. One also has to weigh the notion of the fairness of a trial with the fact that the Constitution imposes a duty on the state to provide legal aid or assistance

²⁰² Constitution s 35(2) states that: “Everyone who is detained, including every sentenced prisoner, has the right -

(b) to choose, and to consult with, a legal practitioner, and to be informed of this, right promptly;
(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

These rights are verbatim those granted to accused persons in s 35(3)(f), (g).

²⁰³ See *S v Vermaas*, *S v Du Plessis* (CCT1/94, CCT2/94) [1995] ZACC 5; 1995 (3) SA 292; 1995 (7) BCLR 851 (CC); *S v Rudman and Another*; *S v Mthwana* (18/90, 658/89) [1991] ZASCA 129; [1992] 1 All SA 294 (A); [1992] 3 All SA 806 (AD); *S v Lombard en 'n Ander* 1994 (3) SA 776(T); 1994 (2) SACR 104 (T). In most of these cases, it was accentuated that the courts should not be able to coerce the government into providing legal aid, but could assist in deciding when state support should be granted. The state will also not be able to shoulder the financial burden in order to provide a meaningful service to the large number of indigent detainees, accused or sentenced persons in South Africa. See McQuoid-Mason “Access to Justice in South Africa” 1999 17 *Windsor Yearbook of Access to Justice* 230 236.

²⁰⁴ Constitution s 35(3)(g).

²⁰⁵ In *S v Vermaas* (n203 *supra*) para 15, some of the constraints considered were: “... the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be „substantial injustice””.

²⁰⁶ This term is not defined in the Constitution or the CPA. It is submitted that the nature of substantial injustice will depend on the circumstance of each case, but will mostly involve social justice or equality considerations.

only to arrested, detained or accused persons, and not to any other persons in a civil case who cannot afford it. Moreover, as determined in *S v Vermaas, S v Du Plessis*,²⁰⁷ the decision to provide state-funded counsel is that of the presiding officer and cannot be applied in the sphere of detention, where no case is being tried.

With reference to the unrepresented inmates, the need to inform them of the right was articulated by the court in *S v Melanie & Others*:²⁰⁸

The purpose of the right to counsel and its corollary to be informed of that right is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Section 35(2)(c) make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of evidence adduced at trial.

The incarceration of detained or sentenced persons must be such that it does not infringe on their human dignity, and adequate accommodation, nutrition, reading material and medical treatment must be made available at state expense. These persons are also permitted access to communicate with a spouse or partner; next of kin; chosen religious counsellor; and chosen medical practitioner.

Trafficking is a transnational crime. Human traffickers commit their crimes across borders and when arrested, may object to a charge arguing that the specific crime with which they have been charged is not an offence in terms of the South African criminal law or is not an extraditable offence.²⁰⁹ Difficulties may also arise with the application of international law rules which are different to that of the state's national law, especially in terms of the

²⁰⁷ *S v Vermaas* (n203 *supra*) paras 15, 16.

²⁰⁸ *S v Melanie & Others* 1996 (1) SACR 335 (E) paras 348, 349.

²⁰⁹ See CPA s 85(1)(c). Extradition has been considered in many constitutional cases such as in *Director of Public Prosecutions, Cape of Good Hope v Robinson* (CCT15/04) [2004] ZACC 22; 2005 (4) SA 1 (CC); 2005 (2) BCLR 103, where the respondent had been convicted of sexual assault in Canada but immediately fled to South Africa and was sentenced in his absence. In terms of s10 of the Extradition Act of 1962, the magistrate judged him liable for surrender back to Canada. The High Court overruled this decision in that the sentence imposed in his absence breached his right to a fair trial. The Constitutional Court re-instated the magistrate's order of extradition.

constitutional applicability of such laws.²¹⁰ In this regard, section 35(3)(l) of the Constitution provides that a court may only convict an accused for an act or omission if it was regarded as an offence either national or international law at the time it was committed or omitted.²¹¹

The accused may further challenge the court's competence to adjudicate the matter²¹² in terms of jurisdiction or legislation. Sections 231, 232 and 233 of the Constitution which deal with the status and use of international law in the jurisdiction, may clarify the quandaries in this regard. In terms of section 231, an international agreement²¹³ is binding on the jurisdiction but only becomes domestic law after it is incorporated as such by Parliament.²¹⁴ As such, South Africa is bound by the provisions of the Palermo Protocol in terms of international law, although the Protocol has not yet been integrated into national

²¹⁰ See Lamprecht *Nullum Crimen Sine Lege (Iure) and Jurisdiction in the Adjudication of International Crimes in National Jurisdictions* (Unpublished LLD-thesis University of South Africa 2009) 13.

²¹¹ Constitution s 35(3)(l) states that: "Every accused person has a right to a fair trial, which includes the right – (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted." This section is exceptional as it is the first explicit mention of crimes under international law for purposes of delineating the scope and contents of the legality principle. See Lamprecht (n210 *supra*) 13.

²¹² Ss 167-173 of the Constitution determine the powers or jurisdiction of the different courts in SA.

²¹³ Although this section does not give a definition of what the term "international agreement" entails, the general view is that the term is synonymous with "treaty" and refers to legally binding, enforceable agreements as defined in the Vienna Convention on the Law of Treaties of 1969 art 2: "... an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". See Dugard *International Law – A South African Perspective* 3rd ed (2008) 63. In *Harksen v President of the Republic of South Africa and Others* 2000 1 SA 1185 (CPD) para 52, the court stated that "... it is this very intention and consent that distinguishes treaties from informal or ad hoc arrangements or agreements." As such, the term "international agreement" as used by section 231 applies only to legally binding agreements creating reciprocal, enforceable rights and obligations.

²¹⁴ The Court has elucidated s 231 further in *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478 para 18. In this case, the appellant asserted that the President's consent to extradition proceedings under s 3(2) of the Extradition Act of 1962 (see Chap 7 para 7.3.2.8) is unconstitutional, as it constitutes the conclusion of an international agreement which is not made subject to parliamentary approval as mandated by the Constitution s 231(2). This section states that "... an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)". Subsection (3) explains that "... an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time". The Court held that the presidential consent to extradition proceedings under s 3(2) did not constitute an international agreement as envisaged in s 231(2) of the Constitution. An informal request for extradition and consent thereto by the President consequently does not amount to an international agreement with a status similar to that of a treaty. Goldstone J held at para 21: "It [the Extradition Act] was a domestic act never intended to create international legal rights and obligations. It was not an agreement at all: neither an international agreement as maintained by the appellant nor an "informal agreement" as suggested by the High Court". As such, the constitutional requirements of s 231 relating to international agreements do not apply. See also Olivier "Interpretation of the Constitutional Provisions Relating to International Law" 2003 6(2) *Potchefstroom Electronic Law Journal* 26 35-37.

law by an act of Parliament. Customary international law is further given constitutional endorsement in section 232 of the Constitution.²¹⁵ The elevation of the status of customary international law has resulted in that it is no longer subject to subordinate legislation, and "... only a provision of the Constitution or an Act of Parliament that is clearly inconsistent with customary international law will trump it".²¹⁶ Customary international law therefore forms part of South African law and courts are required to ascertain and administer rules of customary international law.²¹⁷ When a court interprets any legislation, section 233 dictates that the court must "prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".²¹⁸ These stipulations allow for the introduction into evidence of international law in South African courts.²¹⁹ The Constitutional Court has also clarified that international law extends beyond international agreements, such as the Palermo Protocol, and may include non-binding international law.²²⁰

It is thus obvious that an accused, detained or convicted human trafficker has the capacity to claim rights and seek protection from the state in terms of the Constitution of South Africa. Arrested, detained, accused and convicted persons are afforded additional rights and privileges to ensure their fair treatment and right to a fair trial at every stage of the judicial process. These rights are further protected in terms of section 7(2) of the Constitution, as the state is enjoined to "respect, protect, promote and fulfil the rights in the Bill of Rights". Courts are also compelled to uphold and promote the spirit, purport and

²¹⁵ Constitution s 232 claims that: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

²¹⁶ Dugard (n213 *supra*) 55-56. This is also emphasised in s 233 of the Constitution.

²¹⁷ In this regard, Dugard (n213 *supra*) 56 states that "[i]t will still be necessary to turn to judicial precedent to decide which rules of customary international law are to be applied and how they are to be proved".

²¹⁸ Constitution s 233. This provision is corroborated by s 39(1)(b) which compels a court, tribunal or forum to consider international law when interpreting the Bill of Rights. Also see Pithey "Do New Crimes Need New Laws? Legal Provisions Available for Prosecuting Human Trafficking" 2004 18(9) *South African Crime Quarterly* 7 8 who argues that the effect of these sections is that international law has persuasive authority in the courts and not binding authority, unless passed into domestic law.

²¹⁹ This is significant as the country has signed and ratified a number of international conventions and treaties that directly address trafficking in persons. See Chap 7.

²²⁰ See *S v Makhwanyane* (n8 *supra*) para 35: "Customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1) [of the Interim Constitution], public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three [of the Interim Constitution] can be evaluated and understood".

objects of the Bill of Rights as required by the Constitution.²²¹ These obligations apply to all the rights enumerated in the Chapter.

8.3 Summary

In this chapter it was made evident that human-rights protection for trafficked persons is not exclusively an international concern but must be enforced in the domestic domain as well. It is imperative that victims of trafficking receive protection and assistance in accordance with generally accepted standards of international human-rights law. In South Africa, these standards are mainly found in Chapter 2 of the Constitution. The primary purpose of this chapter was to examine the most relevant human-rights norms found in the Constitution that could be applied to combat the crime of trafficking and to assist trafficked persons. In this process, the constitutional protection and promotion of human rights of trafficked persons as well as that of their traffickers were investigated. It was observed that a human-rights perspective on human trafficking complements the criminal-justice approach to human trafficking as it integrates human rights into the prevention of the crime, protection of its victims and prosecution of its perpetrators.

The discussion established that the crime of trafficking in persons has widespread human-rights consequences. In light of the variety of fundamental rights encroached upon in any instance of human trafficking, many constitutional provisions are relevant. Before the applicable constitutional provisions were discussed in more detail, a distinction was drawn between universal and non-universal rights. It was demonstrated that human trafficking involves the violation of the rights of trafficked persons, for example, the right to dignity, the right to freedom and security of the person, the right to freedom from cruel, inhuman and degrading treatment, freedom from slavery, freedom of movement and the right to life, amongst others. These rights are essential for the enjoyment of a meaningful human life. Violations of these rights were addressed as human-rights concerns during the human trafficking process, but also after trafficking have occurred.

²²¹ Constitution s 39(2): "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." See *Carmichele v Minister of Safety and Security* (n32 *supra*) where Ackermann J and Goldstone J held that when the common law deviates from the spirit, purport and objects of the Bill of Rights, courts are under a general constitutional duty to develop it.

The applicability of other constitutional rights such as socio-economic rights and children's rights were discussed and their importance highlighted. It was further observed that while the Constitution outlaws infringements of these rights, these rights have not been enforced in South Africa to combat trafficking and assist trafficked persons to be reintegrated into society. A human-rights approach would, without a doubt, contribute substantially towards ending impunity for traffickers and securing justice and redress for victims.

It was established that accused, detained and convicted human traffickers are additionally protected by the Constitution in their rights to a fair trial. The right to a fair trial forms part of the Constitution's holistic approach to criminal justice as provided for in section 39(2). It was recognized that the existing constitutional jurisprudence has the potential to protect vulnerable people against trafficking in persons. But, it was also pointed out that the Constitution not only mandates the state and courts to protect and respect the human rights of trafficking victims, but also to investigate, prosecute and punish traffickers as well as to address the causes and consequences of human trafficking. Moreover, the state may also be held liable delictually for wrongs committed by its employees if it fails to prevent, investigate or punish those who have violated certain core human rights.

The Constitutional Court's jurisprudence was examined in order to determine which principles may be applied to trafficking situations. The Court has considered several strong rights such as the right to life, the right to human dignity, the right to freedom and security of person, amongst others. It was seen that these rights were strongly enforced where violations were perceived. In contradistinction, weaker rights, such as the socio-economic rights, are notably weak judicially enforceable rights. The Constitutional Court has ruled that these rights are only guaranteed to the extent that the government has the resources to enforce them. The Court has, however, indicated that it cannot interfere in government policy regarding budgetary allocations. This finding severely limits the government's legal obligation to provide for the level and type of socio-economic benefits and services to affected persons which the constitution appears to envisage. It was put forward that there is still a need to address all the factors that make persons vulnerable to trafficking in order to develop meaningful preventive measures as well as to address human rights violations that occur during and after trafficking.

Although the philosophy of *ubuntu* has already influenced the Constitutional Court and jurisprudence in divergent issues such as capital punishment, eviction and the sentencing of primary care-givers of children, it is submitted that the values of *ubuntu* must be revived so as to inculcate a culture based on recognition of the improvement of the quality of life for vulnerable human beings.

CHAPTER 9

RECOMMENDATIONS AND CONCLUSION

9.1 Recommendations

The following recommendations reflect some of the main challenges for implementation of strategies to combat human trafficking in South Africa. Although existing laws may be amended, it is submitted that the adoption as legislation of the draft TIP Bill will bring South Africa into full compliance with its obligations under the Palermo Protocol. The TIP Bill complies with the minimum standards and recommended guidelines set out by the UNODC as it focuses on preventing trafficking, punishing the perpetrators and protecting, rehabilitating and reintegrating the victims. However, the Bill still needs to be restructured in certain areas. Recommendations will first be made on the possible legislative reform of the TIP Bill. Other or general recommendations will follow.

9.1.1 Recommendations in terms of the proposed TIP Bill

- **Definitions in the TIP Bill**

The research has shown that in order to begin a dialogue on trafficking, a clear understanding of the concept is crucial. It was seen that the trafficking definition proposed in the TIP Bill is in accordance with the definition of the Palermo Protocol but that its scope is probably broader. As indicated in Chapter 7, the South African definition contains various proscribed acts which, in some instances, overlap.¹ The many proscribed acts will make it easier for the prosecution to prove various forms of the crime, but some aspects of the definition may nevertheless be criticised. For instance, one of the acts set out in the Palermo Protocol of trafficking, namely that of “the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person” is in fact included in the TIP Bill trafficking definition in clause 1(k) “the giving or receiving of payments, compensation, rewards, benefits or any other advantage for the purpose of any form or manner of exploitation”. It is submitted that the provisions in clause 1(k) is broader than the provisions in the Palermo Protocol. Hence the submission that the proscribed act set out under (j) is superfluous and could be removed since it is covered by (k).

¹ See Chap 7 n470.

Although the TIP Bill applies to victims of all ages and both sexes, gender is regarded as a variable in identifying those at risk as the preamble pertinently states that women and girls are more vulnerable to human trafficking than men. In this regard, the definition also appears to emphasize sexual exploitation as it not only lists sexual exploitation as a type of exploitation but further accentuates the “sexual grooming or abuse of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person”. This emphasis is unnecessary as the definition of “sexual exploitation” in the Bill follows that of Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007,² which includes both sexual grooming and sexual abuse as offences. Although it is not crucial, it is recommended that this addition also be removed from the definition.

Certain culturally-unique forms of trafficking such as *ukuthwala* or *lobola* are also not addressed in the definition of trafficking, unlike the definition in the ECOWAS Plan where local cultures and traditions are considered.³ These exploitative practices could – and arguably should – be brought under the definition of human trafficking. If they are not specifically prohibited in the definition, it will of course be for the courts to determine the constitutionality of these practices and/or their merits as possible grounds of justification.

The Bill does not directly refer to either voluntary or involuntary prostitution, and consequently also does not provide guidelines to distinguish between these two concepts. As prostitution is currently criminalized in South Africa, an issue of concern is the treatment of prostitutes who initially accept an offer of sex work which turns into an exploitative situation. Such prostitutes will, in the first place, be reluctant to reveal their exploitation for the very reason that they may incriminate themselves in the process. Also, some sex workers without legal documentation might claim that they are victims of human trafficking to avoid arrest or prosecution. It has been shown in the research that some organisations maintain that prostitutes do not exercise a free will in choosing the profession, but are forced by socio-economic and socio-cultural circumstances to perform sex work. As indicated in the research, the criminalisation of prostitution complicates the effective combating of human trafficking.⁴ Although some researchers

² See Chap 7 para 7.3.2.2.

³ See Chap 5 para 5.2.3.2.

⁴ See Chap 6 n293 *et seq*; n332 *et seq*.

are of the opinion that the demand for sexual services in countries with legalized prostitution is greater than in those criminalizing prostitution, it is argued that the legalisation of prostitution may result in better protection of victims of human trafficking. Legalisation or regulation of prostitution, such as in Germany,⁵ affords the sex worker legal protection against coercion and exploitation, which may contribute in countering all criminal activities accompanying prostitution such as human trafficking. The Constitutional Court ruled that the criminalisation of prostitution is not unconstitutional⁶ but the SALRC is currently reviewing the legalisation and regulation of prostitution and compiling a report for the consideration of the full Commission and subsequently for submission to the Minister of Justice and Constitutional Development for his consideration.⁷ It is submitted that legalisation of prostitution will contribute to more effective co-operation between sex workers who are victims of trafficking and law-enforcement agencies.

Clause 1 of the Bill states that “exploitation” includes amongst others, but is not limited to “(a) all forms of slavery or practices similar to slavery”. The types of exploitations listed under this sub-section would generally resort under a “form of slavery or practice similar to slavery”. This is especially the case with the concept of “servitude”. As shown, this term is defined in the TIP Bill⁸ but is not a known crime in South African law. Although forced labour is criminalised in the TIP Bill as well as in the Basic Conditions of Employment Act, servitude cannot be equated with this type of exploitation as there are minor differences in meaning, as was illustrated in Chapter 2.⁹ It is thus recommended that this type of exploitation could be removed from the section as it is already represented as a “form of slavery or practice similar to slavery”. The TIP Bill also does not specifically criminalise sex tourism, however this crime is found in both the TVPA¹⁰ and the German StGB.¹¹ The offence is also not found in the Sexual Offences Amendment Act 2007. It is recommended that “sex tourism” be included as a form of trafficking in the TIP Bill.

⁵ See Chap 6 n293.

⁶ See Chap 8 n101.

⁷ See Chap 7 n248.

⁸ See Chap 7 n469.

⁹ See Chap 2 para 2.7.3.2.

¹⁰ See Chap 6 n144.

¹¹ See Chap 6 n371.

- **Trafficking in persons and acts aimed at committing, acquiring another person to commit, or conspiring to commit an offence**

The Bill criminalises conduct constituting involvement in human trafficking such as perpetrator liability, as well as the anticipatory crimes of attempt, conspiracy and incitement. Although legislation such as the Sexual Offences Act 2007¹² and the Corrupt Activities Act¹³ also include anticipatory crimes in the legislation itself, the anticipatory crimes in clauses 4(2)(a)-(c) of the TIP Bill could also have been left out in view of the provisions of the Riotous Assemblies Act.¹⁴ These offences did not form part of the draft TIP Bill of 2009, but was only included in the current draft TIP Bill B7-2010 by the Office of the Chief State Law Advisor.¹⁵

The Palermo Protocol article 5(2)(b) criminalises incitement to commit the crime of human trafficking by prohibiting the “organising or directing [of] other persons to commit human trafficking”.¹⁶ The TIP Bill broadens the scope of incitement by adding additional elements of instigation, command, directing, adding, promoting, advising, recruiting, encouraging or procuring any other person to commit human trafficking. However, the TIP Bill did not include the Palermo Protocol’s “organising”, which should perhaps be included in this broad description. It could be argued that “directing” covers this term, but it does not have the exact meaning of the term “organising”.

The penalties envisioned in the Bill vary from a fine only or a maximum of five years imprisonment for the least severe offences to a maximum of life imprisonment for the most severe ones. Upon conviction, a human trafficker may be sentenced to a fine or imprisonment, including imprisonment for life, or imprisonment without the option of a fine or both. Considering the seriousness of the crime, it is arguable whether a court will ever impose the option of a fine on a human trafficker. However, sentencing discretion is the prerogative of a court. It is recommended that if the option of only a fine is imposed by a court, the monies from the fine should not be allocated to the state, but goes towards the compensation of the victim. It is further recommended that public identification and condemnation of perpetrators (in either country of destination or origin) should also be considered as a deterrent in the jurisdiction.

¹² See Chap 7 para 7.3.2.2.

¹³ See Chap 7 para 7.3.2.12.

¹⁴ See Chap 7 para 7.3.2.10.

¹⁵ See Chap 7 n490.

¹⁶ See Chap 4 n44.

- **Using services of victims of trafficking**

This provision punishes any person who makes use of the services of a victim and “knows or ought reasonably to have known that such person is a victim of trafficking”, and is included in the TIP Bill to discourage the demand side of trafficking, as contemplated by clause 8. Negligence is therefore a sufficient form of liability irrespective of whether the trafficked person was an adult or a minor. According to the TVPRA 2008, prosecutors do not have to prove that defendants who come into contact with victims of trafficking actually had knowledge that these persons were trafficked - mere *dolus eventualis* is sufficient.¹⁷ Since liability based upon negligence is perhaps too sweeping, the TIP Bill should similarly limit the culpability requirement to actual foresight including *dolus eventualis*. On the one hand, the criminalising of the end-user of human-trafficking services may contribute to combating trafficking as it serves as a deterrent measure but, on the other hand, in some areas such as voluntary prostitution, prostitutes may endeavour to protect their clients by continuing the trade underground. This again will make trafficking cases more difficult to detect. In this clause, the TIP Bill also does not differentiate between using the services of adult victims of trafficking and those of minors. Such distinction is found in the TVPA.¹⁸ It is suggested that using the services of trafficked children be specifically addressed in this clause. It is submitted that as in the Sexual Offences Act 2007, negligence should be a sufficient form of culpability for users of child-victims of trafficking.¹⁹

- **Reporting and referral of adult victims of trafficking**

The TIP Bill makes provision for the reporting and referral of both children and adult victims of trafficking to a police official for investigation. However, whereas suspected child victims are to be assisted immediately, reported adult victims are referred to accredited organisations or the provincial department of social development for an assessment as to whether the person concerned is a victim of trafficking. If identified as a veritable trafficking victim, the adult will be issued with a certificate of authenticity. According to clause 20 of the TIP Bill, an adult may only be referred to an accredited organisation if in possession of a valid certificate of accreditation. This is a questionable regulation, as any organisation willing to assist trafficking victims should be allowed to help. It is understandable though that some sort of regulatory process should be included to screen the *bona fides* of the organisation, however, the

¹⁷ See Chap 6 n200.

¹⁸ See Chap 6 n202.

¹⁹ See Chap 7 n252 *et seq.*

prescribed minimum norms and standards for accredited organisations seem rather stringent and impractical, especially for a country such as South Africa. It is suggested that these minimum standards be adapted so as to allow more organisations to qualify.

Clause 13(1)(b) of the TIP Bill provides that a social worker, social service professional, medical practitioner, nurse, traditional health practitioner, traditional healer or traditional leader may only report any reasonable suspicion that an adult person is a victim of trafficking after obtaining the written consent of the victim. Consent is not required where the person is mentally disabled, or on any type of substance resulting in an altered state of consciousness. If any of the persons listed above report their suspicion to a police official without obtaining the written consent of the adult victim, they may be liable on conviction to a fine or imprisonment for a period not exceeding one year. To obtain the written consent of a trafficked victim may in many circumstances be practically impossible, for example, where the victim is closely guarded by the trafficker or where the victim does not understand the local languages. It is suggested that the written consent requirement perhaps be slackened or even omitted as in the case of child victims. This issue is, however, complex as it concerns the trafficked person's right to privacy, which is a constitutionally-protected right.²⁰ However, as shown in the research, trafficking victims are usually powerless to assert any rights while in bondage in the trafficking process. There are furthermore other backing provisions built into the Bill to prevent any abuse of the reporting procedures.

As no method for victims' identification are provided in the Bill, it is recommended that, in terms of clause 36 of the Bill, the various Director-Generals of relevant departments issue directives and national instructions to assist in the early identification of victims of trafficking. It is further recommended that the jurisdiction involve independent international organs, such as the IOM or national NGOs in the identification process of trafficking victims. Law-enforcement agencies should collaborate with these organisations in order to develop identification guidelines for victims of trafficking.

- **Provision of health care services**

The TIP Bill also does not guarantee health-care services for the victims of trafficking, except for a general provision in clause 15 which provides that a foreign trafficked victim is entitled to the same public health care services as those to which the citizens

²⁰ See Chap 8 para 8.2.1.6.

of the Republic have access. Under clause 21(2) “Minimum norms and standards”, access to and provision of adequate health care are provided to victims. There is no description in the Bill as to what “adequate health care” specifically entails. As trafficked victims require specialised medical and psychological care, it is suggested that a more detailed list of services be provided. In this regard, the TIP Bill could replicate the Ouagadougou Action Plan which provides that every trafficked person’s special vulnerabilities and needs should be taken into account.²¹ This includes giving short or long-term psychological, medical and social assistance and includes adopting a HIV/AIDS-sensitive approach toward victims. It is further recommended in terms of clause 36 of the Bill that the Department of Health issue directives to address the gaps in public health-education campaigns, especially by providing male end-users of trafficking services with education and information on certain health myths, and on their responsibility to have protected sex with any sex worker.

- **Recovery and reflection period**

One of the many protections guaranteed to trafficking victims in the TIP Bill is a non-renewable recovery and reflection period of not more than 90 days. This period is granted to trafficked persons (who have been issued a certificate of authenticity) regardless of their willingness to co-operate with law enforcement and prosecuting authorities in the investigation and prosecution of their cases. However, if after 30 days they are still unwilling to cooperate, investigations are made into the feasibility of returning them to their country of origin. After 90 days, they may be repatriated depending on the outcome of the investigation.

The recovery and reflection period for victims of trafficking in the TIP Bill seems similar to that of continued presence provided for in the United States’ TVPA²² and the German AufenthaltG.²³ The stipulations found in the TVPA are almost identical to those in the TIP Bill where it seems that victims’ willingness to co-operate with law enforcement and prosecuting authorities still remain the deciding factor for consideration of a reflection and recovery period. It was seen in the study that the T-visa is only available to victims of a “severe form of trafficking” who cooperated with law enforcement and participate in prosecutions, and would suffer extreme hardship if deported. However, even those who cooperate are not guaranteed to receive a T-visa. In terms of the

²¹ See Chap 5 n286 – n289.

²² See Chap 6 n76.

²³ See Chap 6 n388.

TVPA, those who do not cooperate face deportation - once deported, they face a ten-year ban on re-entering the US.²⁴ The TIP Bill does not place such restrictions on trafficking victims found in South Africa, and is an improvement also on the German law that only grants a four-week reflection and recovery period as well as the Nigerian NAPTIP Act that grants only a six-week recovery period.

However, the TVPA also grants these victims a three-year temporary relief period as found in the category T non-immigrant status or "T-visa".²⁵ This period was further extended by the TVPRA 2008 to beyond the three-year limit, in certain circumstances. The TIP Bill also allows for temporary residence for the duration of the investigation and the prosecution of a case of trafficking in persons, and if the return of the victim to his or her country of origin is not safe. There is no exact period attached to the temporary residence, but it is stipulated that the period depends on the duration of the investigation or the prosecution of the particular case. The visitor's permit may also be extended by the Director-General of Home Affairs. In this case, the TIP Bill is an improvement on the TVPA by not limiting the time-period as found in the T-visa. T-visa holders may after three years apply for adjustment of status such as permanent residency or legal immigration status. The TIP Bill makes provision for permanent residency only after five years of continuous residence in the jurisdiction. The application for permanent residency is further dependent on proof of any possible harm that may befall the victim or any possible re-trafficking of the victim in his or her country of origin. No provision is made here for permanent residency if the victim simply wants to stay in the country. It is also suggested that the duration of five years for an application for permanent residency be shortened to three years, similar to that in the TVPA. This will make the process of permanently settling in South Africa easier for those victims who may possibly be subjected to harm in their country of origin and wish to stay.

Still, temporary residency as provided in the TIP Bill clause 18(1) is dependent on the cooperation of the victim in a case against the trafficker. The provisions seem to coerce the victim into cooperating with authorities which is unreasonable as some victims may have suffered more trauma than others and may be more unwilling to suffer this again by exposing their experiences. It is suggested that instead of rigid time-frames for

²⁴ See Chap 6 n116.

²⁵ See Chap 6 n75.

cooperation, the recovery and reflection period should be assessed on a case-by-case basis.

- **Victims' assistance and testimony**

It was shown in the study that countries which have the most comprehensive measures for assisting victims also fare better in prosecuting and convicting traffickers of various crimes.

In this regard, specific measures for victims' assistance are provided for in the TIP Bill in clauses 21 and 22. These include the provision of separate facilities for male and female victims, hygienic and adequate toilet facilities, access to refuse disposal services, emergency action plans, confidentiality of victim's information, accommodation, counselling, rehabilitation services and education and skills development training. These services are comparable to those offered in the TVPA. However, the TVPA also guarantees comprehensive victim services such as legal services and interpreting services, amongst others. Victims are also not only provided with education and vocational training, but also with employment placement. These benefits can even be extended to a victim's family when appropriate.²⁶ South Africa should consider these improvements of victim assistance for a more enhanced service. It has also been shown in the research that South Africa does not have enough shelters that specifically provide for victims of human trafficking.²⁷ More resource centres should be established that shelters victims, providing counselling and information, legal assistance, protection, rehabilitation and reintegration. Transit shelters at certain key border crossings should also be established to house these victims.

Except for the payment of compensation to the victim by the trafficker as provided for in clause 27, the TIP Bill does not directly make mention of any financial support system for victims of trafficking. Trafficking victims of a severe form of trafficking in persons are eligible for US immigration relief and government benefits under Federal or State grant programs. These benefits include employment authorization and Supplemental Security Income, amongst others. Trafficking victims in the US are also eligible for compensation from state and federal crime-victims programs.²⁸ In Germany, victims of human trafficking can pursue claims for compensation as injured persons against the

²⁶ See Chap 6 n78.

²⁷ See Chap 7 n561 *et seq.*

²⁸ See Chap 6 n73.

state in accordance with the Crime Victims' Compensation Law (*Opferentschädigungsgesetz* 1976, as amended 1985).²⁹ In case the claim is rejected the victim can challenge the decision of the maintenance office (*Versorgungsamt*) in court. The victim can also apply for legal aid for those proceedings. Trafficked persons can also assert their claims to payment of wages before the Labour Courts (*Arbeitsgericht*) if the injury is related to an employment relationship. Human-trafficking victims can only claim subsidies in accordance with the Asylum Seekers' Benefits Law (*Asylbewerberleistungsgesetz* 1993). If the trafficking victim decides to return home, the German government pays for their travel costs, and, in some cases, a small grant to enable the victims to establish a new life for themselves upon their return.³⁰ To assist these trafficking victims in claiming compensation in German courts, the government has even initiated the German Institute for Human Rights in 2009.³¹ In Nigeria, the NAPTIP Amendment Act established the Victims of Trafficking Trust Fund into which confiscated assets of traffickers are paid to provide trafficking victims with monetary assistance.³² Similar programs should be instituted in South Africa to assist victims of trafficking financially.

The provisions protecting the privacy and identities of witnesses in terms of the Witness Protection Act and the CPA extend to providing protection to witnesses in certain circumstances only, and not to victims who are not willing or able to testify. These provisions are similar to, but more restrictive than those found in the TVPA³³ and Germany.³⁴ In this regard, it is recommended that the protection for witnesses be expanded to include any person who has, or may have, information that is, or may be, relevant to the investigation or prosecution of an offence listed in the Schedule to the Witness Protection Act. Section 22(1) of the Witness Protection Act punishes the unlawful disclosure of a protected person's identity, location or any other information acquired by officials in the course of their official duties that will allow trafficked victim to be identified. As victim's assistance and testimony is crucial for the prosecution of the trafficker, it is recommended that this provision be included under "General Provisions" to protect the victim's identity from the reporting stage to the final possible repatriation phase, and even thereafter.

²⁹ See Chap 6 n342.

³⁰ See Chap 6 n394.

³¹ See Chap 6 n395.

³² See Chap 6 n605.

³³ See Chap 6 n74 – n76.

³⁴ See Chap 6 n342.

In the German system (by means of the *Nebenklage*),³⁵ trafficking victims can participate through counsel in the main proceedings on a nearly equal footing with the public prosecutor and the defence by means of an accessory prosecution procedure. The *Nebenklage* grants the victim the right to participate as a joint plaintiff in most criminal proceedings. It is argued that this system allows the victim to participate in court, thereby strengthening her rights in that she may represent herself, view her case file, participation in all sessions of the main trial and make use of the right to refuse to give evidence. Such a right to participate in the criminal-justice process is not afforded to victims of trafficking in South Africa. In terms of the TIP Bill, the state prosecutor manages the victim's case. In this regard it is recommended that the National Director of Public Prosecutions issue directives in terms of clause 36(7) of the TIP Bill, to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in cases relating to trafficking in persons, to investigate the possibility of amending the criminal procedure in order to secure possible victim participation in the criminal-justice process.

- **Protection of fundamental human rights**

In contrast to the Palermo Protocol, the TIP Bill does not specifically include as its purpose the protection of trafficked persons with full respect for their human rights. The Bill also does not contain any explicit provisions on the protection of victims' human rights, unlike that of the Council of Europe Convention on Action against Trafficking in Human Beings.³⁶ It is imperative that victims of trafficking receive protection and assistance in accordance with generally accepted standards of international human-rights law. The preamble in the TIP Bill does however state that the Bill of Rights in the Constitution enshrines various fundamental human rights relevant to human-trafficking violations. It was however observed that while the Constitution outlaws infringements of certain fundamental rights which may be applicable to the trafficking scenario, these rights have not been enforced in South Africa to combat trafficking and assist trafficked persons to be reintegrated into society. A human-rights approach would, without a doubt, contribute substantially towards ending impunity for traffickers and securing justice and redress for victims. The TVPA has been questioned on similar grounds namely whether it effectively balances the human rights of trafficking victims with its law enforcement obligations. Most critics contend that the humanitarian aims of the Act

³⁵ See Chap 6 n392.

³⁶ See Chap 5 n43.

have been underemphasized in favour of prosecution.³⁷ The TIP Bill should include a human-rights focus on human trafficking. The recognition of human rights ought to be integrated into the strategies aimed at the prevention of the crime, protection of its victims and prosecution of its perpetrators. However, while not explicitly acknowledging the rights of humans to be free from mistreatment, cruel and inhuman treatment, and torture, the TVPA does refer to several international human-rights treaties.³⁸ Except for naming the Palermo Protocol and the CTOC in its preamble, the TIP Bill does not make any further reference to international human-rights treaties. Acknowledgement of these treaties would further bind the jurisdiction to honour the norms of international human-rights law.³⁹

Combating trafficking may require challenging established attitudes, customs or traditions of a society which violate a person's basic human rights. Given these realities, it is important for legislation to be situated within an overall framework that promotes and strengthens basic human and constitutional rights. It is further suggested that the principles of *ubuntu* be promoted so as to reconstruct respect for human dignity. In this manner vulnerable human beings, especially women and children will not be perceived as objects of commerce or playthings, but as human beings *per se*.

- **Increase in public awareness of human trafficking**

A best practice for the prevention of trafficking in human beings is certainly to increase public awareness of the phenomenon as part of a comprehensive strategy to combat trafficking in human beings. With greater public awareness of the problematic nature of trafficking, the public's resolve to prosecute offenders should coalesce with law-enforcement efforts to combat trafficking. The TIP Bill has committed itself to inform and educate members of the public, especially those who are vulnerable or at risk of becoming victims of trafficking. In clause 3(1)(b) victims of trafficking are also to be provided with information and education as to their rights as victims, legal or other measures in place to ensure their safety, recovery and repatriation, and relevant organisations and agencies that may be approached for assistance.

In this regard, the TIP Bill may learn from the experience of other jurisdictions' efforts in combating human trafficking and protecting victims of trafficking. For example, in the

³⁷ See Chap 6 n123.

³⁸ *Ibid.*

³⁹ See Chap 4 n269 *et seq.*

US, the TVPRA prescribes that public awareness programs be established via television productions and radio programming in order to inform vulnerable populations abroad of the dangers of trafficking. The use of international media to educate and alert potential victims as propagated by the TVPRA inform individuals travelling to foreign destinations where sex tourism is significant about US laws against sex tourism.⁴⁰ Nigeria has instituted programs to raise awareness and educate the public and government agencies on a national and local level on problem of trafficking in persons. The population is made aware of the issue of human trafficking through workshops, conferences, media (such as television, radio, newspapers, magazines, online journals), arts and theatre, sport events (“race against human trafficking”), essay competitions for secondary-level students, and state tours. The NAPTIP Agency also works at grassroots level, and frequently has “town hall” meetings with communities and traditional leaders in order to raise awareness of the dangers of trafficking and the available legal protections and resources. In these efforts, NAPTIP works closely not only with other government agencies and NGOs, but also with faith- and community-based organisations, educational institutions, especially primary and secondary schools.⁴¹ Germany also employs measures supplementary to its legislation to prevent the exploitation of human beings, such as action plans, special projects and funding, training and awareness-raising campaigns.⁴² The German government funds all state-initiated national projects as well as dozens of NGOs that produce public awareness campaigns in Germany and abroad through websites, postcards, telephone hotlines, pamphlets, and speaking engagements.⁴³

It is further recommended that awareness- or publicity campaigns must ensure that legal concepts are translated into vernacular languages to facilitate the understanding of anti-trafficking policies, and not only where possible as provided in the TIP Bill clause 3(2)(b). Public awareness of the dangers of trafficking should start at school level already. As such it is recommended that the Minister of Education include in the curriculum for primary, secondary, and tertiary institutions, age-appropriate information on human trafficking, its causes, forms, processes, consequences and solutions.

⁴⁰ See Chap 6 n143 – n144.

⁴¹ See Chap 6 n616 – n621.

⁴² See Chap 6 n377.

⁴³ See Chap 6 n380.

Chapter 2 contains the only reference to the “demand” for trafficked persons in the TIP Bill as clause 3(1)(c) directs the Intersectoral Committee with the instruction to “discourage the demand for and the supply of victims of trafficking that fosters the exploitation of those victims, especially women and children”. The Palermo Protocol requires states to adopt or strengthen legislative or other measures in order to discourage the demand that fosters all forms of exploitation of persons that leads to trafficking. The instrument allows the jurisdiction to determine what measures to undertake, in accordance with the jurisdiction’s domestic legislation and policies as well as to its financial and human resource capabilities. Unfortunately, the TIP Bill does not include such initiatives. It is suggested that these state-specific measures, which include amongst others educational, social or cultural measures, through the development of bilateral and multilateral cooperation be established.

Lastly, combating the phenomenon of human trafficking by means of public awareness programs requires adequate funding. For example, since the passage of the TVPA of 2000, the US government has invested hundreds of millions of dollars in various law enforcement and social awareness programs aimed at combating the problem home and abroad.⁴⁴ Similar to the US, Germany provides financial support to domestic trafficking programs but also assists other countries financially in their efforts against human trafficking.⁴⁵ The South African government can learn from these jurisdictions’ resource allocation to deserving programmes aimed at combating human trafficking.

- **International cooperation**

South Africa has drawn upon international best practices for guidance. The TIP Bill also provides for international cooperation, but focuses mainly on the capacity of the President to enter into, amend or revoke agreements with foreign states in respect of any matter pertaining to trafficking in persons. The TIP Bill does not elaborate on the types of cooperation that can be entered into. In this regard, mutual legal assistance and information sharing on human-trafficking research, data collection and proper victim classification should be included and promoted among the various states’ relevant stakeholders. The importance of extradition agreements between jurisdictions, especially those in the same region should also be emphasised in the Bill. Agreements on international cooperation must go beyond mere lip service, and must ensure

⁴⁴ See Chap 6 n126.

⁴⁵ See Chap 6 n381.

effective enforcement within countries and at their borders. In this regard, the jurisdiction should strive towards a high level of compliance with national and international human trafficking and human rights instruments, similar to the situation in Germany.⁴⁶

- **National instructions and directives**

The Bill acknowledges the necessity for close cooperation and coordination of government and civil society activities. A system of regulated service provision is envisioned in clause 36. The Bill provides that the National Commissioner of the SAPS, the Departments of Home Affairs and Labour and the National Director of Public Prosecutions must issue national instructions and directives which must be followed by their respective officials in dealing with trafficking in persons' matters. By means of these directives, critical issues may be addressed more practically. In terms of clause 36(1)(k), the National Commissioner of the SAPS must collect and analyse information on reported cases of trafficking for publication in an annual report to the Intersectoral Committee. Clause 36(3)(f) requires the Director-General of Home Affairs to similarly collect and analyse information on victims of trafficking who have been repatriated to the Republic for use of the Intersectoral Committee. The National Director of Public Prosecutions is also directed to collect information on trafficking prosecutions in terms of clause 36(7)(f). The Intersectoral Committee on Prevention and Combating of Trafficking in Persons, which is established in terms of clause 40 of the TIP Bill, consist of only government officials. Clause 40(5) states that the Committee may invite certain NGOs when necessary. It is submitted that most of the assistance to victims of trafficking, both cross-border and in-country, is provided by local and international NGOs, various faith-based organizations, and individual activists. These organisations encounter more trafficking victims than the Departments listed in clause 36 as not all victims are reported or participate in proceedings. As such, the involvement of civil society is crucial for not only the implementation of the TIP Bill, but the monitoring thereof. Their participation in the Committee must be encouraged. This function was explicitly inserted in the TVPA where consultation with NGOs regarding economic alternatives and awareness was made an imperative.⁴⁷ This jurisdiction should consider inserting a similar provision in the TIP Bill.

⁴⁶ See Chap 6 n255 *et seq.*

⁴⁷ See Chap 6 n61.

- **More effective cooperation among law enforcement agencies and NGOs**

Notwithstanding the problems inherent in using criminal law to tackle issues as contentious and complex as trafficking, there is potential room for the jurisdiction to improve awareness and cooperation among law enforcement agencies and NGOs. Even when the TIP Bill comes into force, trafficking cannot be solved by legislation alone. Trafficking results because of serious social problems and enabling conditions such as poverty. This cannot be eradicated merely by criminalization of conduct. National and international NGOs have made significant contributions towards the fight against human trafficking in South Africa, but there are still many challenges facing the jurisdiction in its efforts to respond adequately to human trafficking. In this regard, the country may follow the example of Germany where there is a high and effective level of coordination between law enforcement, state welfare agencies, NGOs and government agencies.⁴⁸

Various NGOs and religion-based agencies have already established several types of assistance for victims, such as trafficking hotlines. In this regard, the government needs to launch an anonymous national trafficking hotline to help victims but also coordinate the data of other available hotlines in the country. This hotline should be similar to those in the US,⁴⁹ and Germany.⁵⁰ The call-centre technology used by law enforcement and victim-centred services are modelled on similar strategies used in anti-domestic violence and child protection movements to promote self-identification of victims. It is further recommended that in terms of clause 36(3) of the TIP Bill, the Director-General of Home Affairs should issue directives in terms of which all immigration officers should become involved in the reporting of instances in which travel documents are illegally retained by third parties. Any corruption by Home Affairs officials should also be reported by making use of a hotline (which is, of course, already available). Corruption within law enforcement and/or judicial systems hinders effective combating of trafficking. As seen in the case of Nigeria, corruption causes people to become mistrustful of the judicial system as government officials may be corrupt or linked to the trafficking network.⁵¹

⁴⁸ See Chap 6 n458.

⁴⁹ See Chap 6 n235.

⁵⁰ See Chap 6 n380.

⁵¹ See Chap 6 n529.

- **Specialised anti-trafficking unit**

Similar to the TVPA's Office to Monitor and Combat Trafficking⁵² in the United States, the German *Bundeskriminalamt*⁵³ and the Nigerian NAPTIP Agency,⁵⁴ the TIP Bill has established the Intersectoral Committee in terms of clause 40. This Committee has as its function the development of a draft national policy framework and the establishment of an integrated information system to facilitate the effective monitoring and implementation of the TIP Bill. The Committee has as its members only senior officials of government departments. This is almost similar to the monitoring system provided in the TVPA; however the TVPA's Task Force creates the exercise of political will at the highest levels. It is chaired by the Secretary of State, also includes the National Security Advisor, the Attorney-General, CIA Director, US AID Administrator, and the Secretaries of Health and Human Services, Labour, Defence, and Treasury.⁵⁵ In South Africa, it would perhaps be better to have a committee of independent experts on the Intersectoral Committee, as found in the CoE's Convention against Human Trafficking. This Convention has two monitoring groups, the primary body consisting of the Group of Experts against Trafficking in Human Beings (GRETA) and its support unit, the Committee of the Parties.⁵⁶ These impartial groups supervise the state parties' implementation of the convention by sending out detailed questionnaires to the governments, and by visiting the state parties *in loco* to monitor their efforts.

Further functions of the Intersectoral Committee includes analysing information on trafficking sent to them by the National Commissioner of the SAPS, the Director-General of Home Affairs, the National Director of Public Prosecutions and the accredited organisations in order to recommend more effective trafficking policy and procedures. It is suggested that the collected information should be placed on a trafficking database for national and international use. In terms of prevention and prosecution of trafficking, the Committee could develop a strategy to publicise successful prosecutions of traffickers in source and transit countries. It is further recommended that the Committee work with NGOs to consider issues specific to trafficking for policy changes. It is a well-known fact that human-rights agencies and NGOs have as yet produced the largest body of literature on human trafficking.

⁵² See Chap 6 n65.

⁵³ See Chap 6 n280.

⁵⁴ See Chap 6 n606.

⁵⁵ See Chap 6 n65,

⁵⁶ See Chap 5 n94 –n95.

The jurisdiction should also consider extending the functions of the Committee beyond that of administration and bringing together a single, specialised agency dedicated to the combating of human trafficking, such as those found in the US, Germany and Nigeria, and suggested in ECOWAS.⁵⁷ For example, to assist the NAPTIP Agency in Nigeria in the exercise of its powers and functions, the NAPTIP Act also established an investigation unit, a legal unit, a public enlightenment unit, a counselling and rehabilitation unit, and other relevant units, technical committees and task forces, each with their specific duties.⁵⁸ The proposed TIP agency in South Africa may be composed of members of the SAPS, the NPA, the National Intelligence Agency, Home Affairs and Immigration services, amongst others. The agency could provide help and assistance to victims in the jurisdiction, as well as reintegration support for victims returning to their home countries. This organisation will also be in the best position to exchange best practice on anti-trafficking procedures with other regional and sub-regional neighbours. Regular training seminars should be conducted for persons who come into contact with trafficking victims such as lawyers, judges, doctors, social workers and counsellors through their various regulatory bodies. Information sessions should also be provided at the community level in rural and urban areas targeting adults, adolescents and children.

- **Specialised training and specialisation in prosecution**

Of significance is clause 26 of the TIP Bill which provides that the accredited organisation that assists trafficking victims must systematically collect detailed information on the number of victims of trafficking treated, their countries of origin, purpose of trafficking, trafficking methods and routes and the types of travel documents use in trafficking. As regards prevention initiatives, the Bill does not provide for the specialised training of persons at these organisations and also various other persons who are to assist victims of trafficking crimes. In this regard, the example set in the TVPA could be followed. Not only are border guards trained for the protection of victims of transnational trafficking and prevention of future smugglers, but survivors of trafficking in persons are trained to tutor border guards and other officials such as law enforcement authorities, prosecutors, and members of the judiciary, to identify traffickers and victims of severe forms of trafficking. The training includes the appropriate manner in which to treat such victims.⁵⁹ Specific training should also be

⁵⁷ See Chap 5 para 5.2.3.2.

⁵⁸ See Chap 6 n608.

⁵⁹ See Chap 6 n142.

available to prosecutors to enhance effective prosecution of traffickers and to equip them with necessary skills to communicate with the victims of trafficking.

Specialised training should also include training in modern technologies used for the combating of trafficking. In this regard, the jurisdiction can learn from technology employed in Germany where an electronic migration database which monitors movement both into and within EU borders has been implemented. This monitoring system has even been improved by adding surveillance through satellite monitoring. This European Border Surveillance System (EUROSUR) combines the latest intelligence and surveillance tools for cross-border observation and apprehension. It is obvious that training is required in order to utilise these tools which operate by means of a computerized communication network providing real-time information regarding incidents occurring at its borders.⁶⁰ Also, adequate funding for training should be provided by the jurisdiction. For example, the last TVPRA 2008 established a grant program totalling US\$50 million for states- and local law enforcement agencies for this purpose, amongst others.⁶¹

- **National database**

As South Africa does not have a centralized database on trafficking, this type of information is invaluable for further research and the prevention of the crime. There is also limited literature on the subject of human trafficking in South African, particularly a lack of qualitative and quantitative research-based publications. To respond more effectively to the problem, concrete data based on sound empirical data is crucial. The Intersectoral Committee is tasked in terms of the TIP Bill to collect and analyse information on trafficking from various governmental departments and organisations. However, the information will only be used for the implementation and monitoring of the Bill and for interventions. It is recommended that the information be placed in a national database and that a comprehensive regional report (similar to the German *Bundeskriminalamt*⁶² and TVPA's *Trafficking in Persons Report*⁶³) that examines the trafficking situation in the region as a whole be generated. These national reports must contain a reliable national trafficking estimate and a methodology to gauge results. In this regard, the jurisdiction must also cooperate with other regional and international

⁶⁰ See Chap 6 n472 – n473.

⁶¹ See Chap 6 n155.

⁶² See Chap 6 n280.

⁶³ See Chap 6 n62 *et seq.*

law enforcement and judicial institutions as well for intelligence-sharing. Germany's sharing of intelligence information with Interpol and Europol (the EU's criminal intelligence agency) can be emulated.⁶⁴

- **Root causes**

Apart from mentioning the root causes of trafficking in clause 9 of the Bill, these issues are not addressed anywhere else; thereby failing to bolster preventative measures. Any comprehensive counter-trafficking strategy should target the underlying conditions that make persons vulnerable to trafficking in the first place. However, governments – including the South African government – tend to deal with trafficking as a criminal-law problem which requires only criminal-law answers. The Bill also does not elaborate on the root causes of trafficking in the region or illustrate the nuances of South African forms of human trafficking. According to the UNODC, the primary factors that facilitate trafficking in persons – the “push” and “pull” factors - ultimately centres on poverty as the effect of poverty is that people are desperate to survive or to provide for their families.⁶⁵ It is this despair that human traffickers prey on. This means that the alleviation of poverty should be a priority in order to reduce the vulnerabilities of potential victims.

The TVPA acknowledges that economic deprivation is one of the primary reasons for victims falling prey to human trafficking. It is argued that with the altering of poverty issues, subsequent decrease of victims and consequently also traffickers could result. The Act has established possible economic alternatives or initiatives to alleviate poverty. These include micro-lending, giving the underprivileged job-training and counselling; providing programs that promote the possibility of women's input on economic decision making as well as programs to keep children, especially young girls, in school. Others include the development of a curriculum that will warn outsiders of the dangers of human trafficking, and the giving of grants to NGO's in order to advance the political, economic, social, and educational roles and capacities of women in their countries.⁶⁶ But, unfortunately, the draft TIP Bill fails to take into account any measures to prevent human trafficking in source countries and to reduce demand in destination countries. Although the elimination of root causes such as illiteracy, gender inequality and poverty seem utopian, the demand for trafficked persons and the root causes of

⁶⁴ See Chap 6 n470 – n471.

⁶⁵ See Chap 3 n4 *et seq.*

⁶⁶ See Chap 6 n59.

trafficking must be addressed by the jurisdiction through policies and programmes. It is suggested that the TIP Bill must follow the Ouagadougou Action Plan which not only focuses on efforts to improve the livelihood opportunities for youth and economic conditions of families, but also place particular emphasis on the protection and empowerment of girls and women.⁶⁷ Furthermore, additional policies should be implemented to monitor and support the execution of these programmes. Accordingly, it is recommended that in terms of clause 36 of the TIP Bill, the relevant Departments should formulate policies relating to socio-economic problems to eradicate the breeding ground for trafficking. Education and awareness-programmes of human rights are perhaps a starting point in this regard.

- **Promulgation of TIP Bill**

Lastly, it is recommended that the draft Bill be adopted as soon as possible in order to commence the combating of human trafficking in a comprehensive manner. The promulgation of the Bill will also give domestic legal effect to South Africa's international obligations under the Palermo Protocol. If any gaps or additional challenges are identified in the legislation after promulgation, the TIP Bill can still always be amended.

9.1.2 General recommendations

- **International and regional dimensions**

It was shown in the research that although South Africa has signed or ratified many international instruments that address the issue of trafficking, slavery, slave trade, slave-related practices, and forced labour, the jurisdiction has not given effect to the obligations of these instruments. It is therefore recommended that South Africa adhere to its obligations under these instruments. Regarding regional mechanisms, there is no agreement or convention focusing on the development of comprehensive, harmonized legislation and policies to address human trafficking in the Southern African region. This needs to be rectified. Following the UNODC's Resolution on Improving the Coordination of Efforts against Trafficking in Persons, the importance of bilateral, sub-regional and regional partnerships in counter-trafficking efforts cannot be overemphasized.⁶⁸ A sub-regional agreement or convention is important in order to

⁶⁷ See Chap 5 n283.

⁶⁸ See Chap 4 n106.

harmonize regional anti-trafficking legislation, and policies and procedures. The SADC 10-Year Strategic Plan of Action on Combating Trafficking in Persons is a step in the right direction as it establishes a framework for combating human trafficking in the SADC region and incorporates guidelines which are human rights-based and child- and gender-sensitive.⁶⁹ However, the SADC Plan contains some defects. For example, contrary to the Plan's objective of creating a harmonised regional framework, the Plan advances the conception of national policies, legislation and laws. But no specific legislative prototype is supplied which may create a situation where different countries interpret the various regional and international instruments in a dissimilar manner resulting in disparate laws.⁷⁰ This is also dissimilar to the UNODC's Resolution which states that member states should enact and enforce national legislation based on the regional legislation. The SADC Plan's call for the harmonisation of laws between the various domestic jurisdictions may also prove problematic as there are disparate legal systems in the region. Harmonisation may thus require some initial adjustments.⁷¹ Additionally, a single monitoring body made up of a panel of experts on human trafficking and related matters should be established in the SADC region. The two-stage monitoring mechanism provided for in the SADC Plan duplicates functions which is counter-productive in terms of time and costs factors, and there is no guarantee that these two bodies are specialists in human trafficking and related fields.⁷² This is probably one of the reasons why the SADC Plan has not as yet been successful. The proposed monitoring body should be solely mandated with monitoring the implementation of regional and national legislation and policies and programmes. In this regard, competent coordination amongst the various national, regional and local bodies is required. This has been the key to Germany's respectable record in the prevention of trafficking.⁷³

- **Reasons for disregard of human trafficking considered, especially in Africa**

This research has revealed that until recently human-trafficking transgressions have largely been ignored in Africa to date. It was also seen that the concepts of trafficking as it applies specifically in Africa operate differently in diverse cultural and political contexts. Therefore, it is important to identify local-specific vulnerability factors in order

⁶⁹ See Chap 5 n345.

⁷⁰ See Chap 5 n354 – n355.

⁷¹ See Chap 5 n360.

⁷² See Chap 5 n368 – n370.

⁷³ See Chap 6 n376.

to determine appropriate policy and programmatic interventions against trafficking. African states have the obligation to deepen their knowledge and understanding of the trafficking phenomenon and undertake prevention, education and awareness campaigns. It was shown that many cultural practices such as child fostering, *trokosi* and *ukuthwala* are abused by human traffickers to ply their trade. Although a country such as Nigeria has set out to monitor these types of situations more closely, it is suggested that in order to protect these vulnerable persons, there should be more and better collaboration between the state and other stakeholders such as community leaders. As provided in the Ouagadougou Action Plan to Combat Trafficking in Human Beings, it is suggested that the support of families, members of civil society and local communities ought to be mobilised to combat trafficking.⁷⁴ The direct involvement of traditional leaders is essential; religious leaders, youth organisations and civil society in general have a duty to protect especially African women and children, and to create awareness of human rights of such vulnerable groups. These are solutions exclusive to the African continent. It should be mentioned that even the humane treatment of traffickers are provided for in the SADC Action Plan in terms of which offenders also have to receive counselling and other rehabilitative services to ensure that they give up the practice of trafficking in persons.⁷⁵ It was indicated throughout this research that international instruments are mainly created by Western bodies which tend not to consider an African perspective to trafficking *per se*. Although this situation is slowly changing, it is recommended that an African response to the recognition and combating of human trafficking be included in international treaties. Africa has committed itself to promoting human rights across the continent in the form of bills of rights, declarations by intergovernmental organisations, and so forth, but the continent is still struggling with inherent tensions surrounding the particularities of African human rights.⁷⁶ The African Charter on Human and Peoples Rights (ACHPR), for example, attempts to create an African system for human rights by incorporating a concern for the protection of collective rights. Broad duties towards the community are likewise imposed on individuals. The ACHPR not only covers the traditional first and second generation rights, but also third generation rights such as the right to development, peace and a decent environment.⁷⁷ The African Court, established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African

⁷⁴ See Chap 5 n284.

⁷⁵ See Chap 5 n353.

⁷⁶ See Chap 5 n270.

⁷⁷ See Chap 5 n378 – n381.

Court on Human and People's Rights, is also unique in that it provides states with stronger dispute resolution and performance-regulation systems than some international agreements which do not include judicial mechanisms ensuring their implementation.⁷⁸ These African innovations may also provide additional guidance for additional provisions which ought to be included in the South African legislation.

- **Trafficking crisis in South Africa**

It was shown in this study that governments – also South Africa - are generally unable to effectively combat human trafficking and are failing to keep pace with its growth. The phenomenon's form, organisation and structure are continuously and dynamically changing and its extension is increasing dramatically. Trafficking in persons must be recognised as a multi-rooted problem that demands a comprehensive approach, and that it is linked to other crimes. However, the TIP Bill does not establish linkages between human trafficking and related crimes such as illegal migration. In order to counter this quandary more comprehensively, the trafficking crisis in South Africa must be investigated continuously to ascertain which aspects contribute to the current situation.

- **Human trafficker register**

Interpol's international sex offender register and the sex offender register created in terms of the Children's Act could perhaps provide a model for the creation of a national or regional trafficking register. South Africa and its regional neighbours could contribute to this registry as well as access it for information on alleged traffickers. This register would also increase public support for the prosecution of trafficking offenders and potentially deter sex trafficking on a global scale.

- **Long-term policy**

The eradication of human trafficking requires long-term commitment, the investment of dedicated financial and human resources as well as coordination and cooperation at an international, regional and national level. Counter-trafficking strategies must foster long-term solutions, or else risk being not only ineffective but also counter-productive. In this regard, prevention strategies should be given more attention in anti-trafficking legislation.

⁷⁸ See Chap 5 n415 – n419.

9.2 Conclusion

Various hypotheses have been formulated in the Introduction to this research:

- Human trafficking is a growing problem in South Africa.
- The history of slavery and the apartheid regime contributed to the modern slave trade in South Africa.
- The root causes of human trafficking are poverty; unemployment; lack of education and ingrained gender discrimination.
- Currently, the combating of human trafficking and related issues such as victim protection is not sufficiently addressed in South African law.
- South Africa needs to adopt specific and comprehensive anti-trafficking legislation that is based essentially on the provisions of the Palermo Protocol but that acknowledges the jurisdiction's local-specific vulnerability factors.
- Anti-trafficking efforts undertaken in other jurisdictions such as the US, Germany and Nigeria may contribute to a more comprehensive South African response to human trafficking.
- International, regional and sub-regional instruments on trafficking and related aspects of trafficking provide guidelines for developing effective strategies to deal with trafficking within the region.
- The Constitution provides human-rights protection to trafficked persons in South Africa.

It is submitted that the research has verified all of these hypotheses.

This research was aimed at evaluating the adequacy and effectiveness of the legal framework dealing with human trafficking in South Africa. To achieve this purpose, a comprehensive diachronic as well as contemporary overview of the punishment and prevention of human trafficking in South Africa as well as in the legal systems of the US, Germany and Nigeria was provided. The law of the jurisdictions considered on a comparative basis revealed some similarity in trends and concerns related to the prevention and prosecution of trafficking as well as victim protection. However, there are major differences in these various jurisdictions concerning the extent of commitment and the resources available to tackle these issues. The research has revealed that though concerted and systematic efforts to combat human trafficking are under way; the levels, strategies and approaches to address them vary considerably.

An overview of the history of slavery and an analysis of the modern conceptualisation of human trafficking have indicated that human trafficking is a highly complex concept, and that there are various approaches to the understanding of the concept of human trafficking. There are various definitions of trafficking found in international instruments of which the most important has been identified as that contained in the Palermo Protocol. The definitions vary also because trafficking is closely related to the phenomena of migration, slavery and smuggling of humans. The study further identified some significant root causes of trafficking generally as well as specific to the four selected regions. It was found that the root causes of trafficking are basically the same in all jurisdictions, depending on whether it is a country of origin; destination; or both. These root causes of human trafficking are mainly poverty; unemployment; lack of education and ingrained gender discrimination.

It was found that in South Africa – similar to the history of slavery in the jurisdictions of the US, Germany and Nigeria – colonisation and the institution of slavery and, more particularly in South Africa, the legacy of the apartheid regime have had an impact on modern human trafficking. It was observed that the combating of human trafficking and related issues such as victim protection is not sufficiently addressed in South African law. The research conceded that though common-law crimes and statutes can be utilized to challenge some trafficking elements, these offences are not comprehensive enough to amply deal with the crime's complexities and provide only a fragmented approach to combating the crime. Regarding the transitional legislation in place to prosecute trafficking offenders, it was noted that although the Sexual Offences Act 2007 and the Children's Act 2005 include the crime of trafficking, the crime appears in a limited manner in both Acts. Trafficking in the Sexual Offences Act 2007 is directed at both adults and children but the offence is limited to trafficking for sexual purposes, and the provisions in the Children's Act restricts trafficking offences to those committed against children.

The research has shown that South Africa needs to adopt specific and comprehensive anti-trafficking legislation that is based essentially on the provisions of the Palermo Protocol but that acknowledges the jurisdiction's local-specific vulnerability factors. The draft TIP Bill was analysed and its adequacy and possible efficacy to combat human trafficking considered. It was found that the TIP Bill is a major improvement on the provisions in the Palermo Protocol as well as on certain aspects of the anti-trafficking

legislation in the US, Germany and Nigeria. However, the Bill can still be improved, especially with regard to more effective victim assistance and the combating of local-specific vulnerability factors. Anti-trafficking efforts undertaken in the US, Germany and Nigeria which may be of value also for the adoption of anti-trafficking legislation, law enforcement and other strategies in South Africa, have been identified.

The research established also that international, regional and sub-regional instruments on trafficking and related aspects of trafficking provide guidelines for developing effective strategies to deal with trafficking within the region. The counter-trafficking strategies as found in treaties (including conventions), protocols, declarations and resolutions – those focussing specifically on combating trafficking and those with a human-rights focus – oblige states to prosecute traffickers, protect people vulnerable to trafficking as well as those already trafficked and create structures for prevention. Regional instruments specifically formulated to combat trafficking as well as instruments that make reference to the issue of trafficking in persons may further provide the basis for long-term strategies to combat human trafficking. However, it was found that although South Africa has adopted many cooperative mechanisms in the form of direct bilateral or multilateral agreements, as well as international and regional treaties and conventions, the jurisdiction has not as yet implemented comprehensive strategies to combat human trafficking. The introduction of legislation to combat human trafficking, and various other strategies envisaged in the TIP Bill and also suggested in this thesis, should be considered by parliament as a matter of priority. A comprehensive response to human trafficking which includes adequate protection of victims is required in terms of various constitutional imperatives identified in this research.

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